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A Symposium on International Environmental Law

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I. INTRODUCTION AND CONTEXT

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Critics argue that the complex and expensive legal efforts at the international level to improve environmental quality have been largely unsuccessful. They point to the loudly heralded but operationally weak Climate Change Convention to slow the greenhouse effect, continuing destruction of endangered species on all the continents, deforestation, desertification, and illegal dumping of hazardous materials in the global seas. These and numerous other examples of abuse of the planet go on in the face of hundreds of international treaties, protocols, conventions, and rules under customary law. But that body of law certainly has played a major role in protecting many resources, limiting the international circulation of dangerous substances, and slowing the destruction of global resources such as the ozone layer.

This Symposium selectively reviews the record of international efforts to use law to make the planet more livable. We analyze factors related to the success of international environmental institutions using an expert group that offers suggestions for improving the performance of international legal instruments. The Symposium results from a four-day invited conference held at the University of California, Irvine, in October 1999. The National Science Foundation Law and Social Science Program and the University of California Global Peace and Conflict Studies program funded the event.

II. BACKGROUND

We celebrate, at the millennium, the twenty-fifth anniversary of international environmental law. Viewed in one way, the contribution of the law is large. The proliferation of treaties, conventions, and protocols on environmental protection regionally, from a transboundary perspective, and globally has been dramatic. In the last quarter century over 250 international legal instruments have been adopted. Overall almost one thousand instruments have at least one provision addressing the environment. A modest customary environmental law has evolved, and the development of "soft" law (principles about how nation states should behave that do not have a binding effect) has accelerated in statements such as the Biodiversity Convention and the Statement of Forest Protection Principles.

The amount of law is truly impressive. So, too, is its evolution. What some scholars call the first generation of modern international environmental law began with the United Nations Stockholm Conference on the Human Environment in 1972. Early efforts were characterized by articulation of general principles and frameworks for further action and called for monitoring, research, and exchange of information. Later a second generation of law developed. These more recent instruments focus on emission reductions and technology changes and implementation and compliance, whether that be through dispute resolution and enforcement regimes (including even criminal sanctions) or innovative economic instruments or other forms of incentives. Strategies include central international environmental funds, emission trading techniques, and differentiation of responsibilities for rich and poor nations.

The law's growth has not been limited to industrialized nations of the West. All regions are represented and some of the most stringent treaties have involved the less developed countries. For example, the Organization of African Unity adopted the Bamako Convention that advocated criminal and even capital punishment for violations of hazardous waste transport law in Africa. Qualitatively as well many of these efforts have received the praise of both governmental and non-governmental organizations (NGOs), including in some instances, the most committed non-governmental environmental advocacy groups. The Montreal Protocol is a leading example of an international effort generally deemed successful and effective. Successes have been

based on different models. Some stress cooperation across boundaries. Some efforts go farther than encouraging cooperation, where law mandates action to punish nation state failure to comply with international norms.

Other products of international efforts, however, are weak, ambiguous, lacking realistic sanctions or incentives and/or aimed at promoting economic or geopolitical interests that are inconsistent with global or regional environmental improvement. For example, until very recently, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste has been a controversial treaty, especially in African nations that were the dumping grounds for hazardous waste. The potential effects of other efforts are unknown as we remain in sensitive periods of treaty development on subjects of immense significance to the health of the planet. Will we have a major effective means of preserving the world's forests? Will we create global means of limiting the toxic effects of the worldwide movement of pesticides and certain chemicals?

The Climate Change Convention is another leading example of uncertainty; parties have taken very different negotiating positions. The adoption of a framework treaty and the excitement and urgency of recent rounds on climate change (the Kyoto and Buenos Aires meetings) was followed by the universally disappointing Conference of the Parties-6 in the Hague in 2000. At Kyoto the euphoric last minute conclusion of the treaty had only temporarily postponed attention to the Herculean tasks that had to follow for meaningful implementation. Will a focus on differential responsibilities be the source of a coming together of the rich and poor nations? Will the treaty make a significant difference on the ground, i.e., in decreasing the rate of build up of temperature change and concomitant possibly disastrous regional effects?

Nation states, while making progress in assembling to discuss the environmental challenge, disagree deeply on how to structure international environmental instruments. Lack of consensus derives in part from the very different interests among potential parties to international environmental agreements – the North versus the South, industrialized versus developing nations, Europe versus the United States and Australia and New Zealand. The alliances are numerous and shifting. Part of the lack of consensus derives from different understandings of the goals of international environmental legal efforts: what is success when

effects may take decades to manifest themselves and will do so across billions of people throughout the globe, on land, in the seas and in the atmosphere? Finally there are both honest analytical and politically and ideologically driven differences around questions of what the major priority problems are. Once established, questions remain about the most efficacious ways of reaching goals. What kinds of legal and other institutional changes should the world community promote?

III. THE SYMPOSIUM

This Symposium aims to add to the policy discussion of efficacy of the international environmental law. It moves us a small step further in attempts to generate knowledge about institutional design. We offer case studies (Montreal Protocol, NAFTA's Environmental Side Agreement [NACEC], Persistent Organic Pollutants, the Mediterranean Protocol, the Forestry Regime, and the Climate Change Convention). We provide commentary that crosses individual instruments and regimes (What is the function of various types of sanctions including criminal sanctions? What is the appropriate role of ethics? What is the most meaningful use of soft law? Should we wait for science to be relatively certain about causes and effects of industrial activity or employ a more precautionary approach?). We address the nature of the problem. (Is there a problem? Are there many problems that could be considered environmental challenges but are relegated to lesser status? Is there truly a forest crisis? Is climate change critically important? To what extent are there several real crises and to what extent are the problems interconnected?) We identify indicators of effectiveness and some factors that appear to be linked to successful international environmental law efforts.

The contributors couch their work as seeking "the goodness of fit" between alternative legal institutional designs and particular environmental challenges. This approach is necessary because of the great range and variety of targeted international environmental problems. These may be attempts to control the decentralized non-malicious actions of millions of human beings simply living their consuming lives (global climate and atmospheric change, regional sea pollution). They may be actions of a few culprits who deliberately destroy natural resources in order to

achieve a financial or military advantage (destruction of oil fields and resulting air pollution, illegal trade in hazardous wastes).

IV. CONTENTS

The papers begin with the analytical and exhaustive overview of the place and function of one approach to achieving compliance with international environmental law: the criminal sanction. Professor Byung-Sun Cho describes how nation states differentially view the need to recognize international crime. He summarizes international efforts that go beyond nation state responses and presents a balanced view of the desirability of moving toward international initiatives, including those that seek enterprise entity liability. He addresses the challenges of harmonizing what is criminal across nation states when the victim is the environment. He asks about the desirability of having a supranational authority to promote compliance.

Elizabeth DeSombre then presents a masterful analysis of why the Montreal Protocol has been as successful as it has. She concludes that the regime has made fundamental changes in the way industrial activity takes place. She also identifies problems with implementation. These include development of a black market in ozone depleting substances and a mismatch in incentives for developing countries. But Professor DeSombre concludes that these obstacles to ultimate success may not be as serious as they may now appear. She also questions the extent to which the factors related to the Protocol's success (the creation of flexible instruments, adaptation to changing science and policy, use of innovative industrial incentives, precedent-setting ways of involving the developing countries) generalize to other international environmental legal efforts. She also addresses some possible weaknesses in the regime, which she concludes should not be serious impediments to the continued success of the ozone treaty.

Professor Ronnie Lipschutz chooses an environmental challenge with a very particular history, asking "Why Is There No International Forestry Law?" He inventories and critically analyzes both public and private international forestry regulations. Professor Lipschutz concludes that the absence of an interstate convention dealing with tropical and temperate deforestation and mandating sustainable forestry practices is not the result of a lack of effort. He finds the gap inherent in the political economy and history of national forestry programs, which pay little atten-

tion to larger environmental issues. The legacy of strong domestic interests which wish to keep logging obstructs progress on a global convention.

There are a number of initiatives in a semi-public private forestry regulation which have at their core market-based methods. Professor Lipschutz addresses the fundamental weaknesses of the approaches. [Christopher Stone gives a thoughtful response summarized in the last chapter.]

Albert Mumma from the Nairobi University then describes the challenges to the development of an African position at international environmental treaty negotiations, using the case of the Climate Change Convention. Africa, so far, has failed demonstrably to articulate any position unique to it and has, therefore, been largely marginal in the negotiations. Professor Mumma focuses on the absence of a common objective of African countries. However, more forcefully, he underscores the lack of resources for bringing Africans together to work out a position that could be meaningfully advanced in the international community. That position, for example, could address elements of the Convention which may be particularly suited to Africa's needs such as the Clean Development Mechanism. Professor Mumma suggests that there is, in fact, an African position: each country is entitled to an assignment of emissions units; that assignment should be based on the relative poverty or richness of a nation; and poor countries should benefit from liberal interpretations of the trade provision and emissions reduction credit approaches.

Peter Lallas, a senior lawyer in the international environmental division of the United States Environmental Protection Agency (U.S. EPA), then describes a work in progress. He lays out the background of and early activities in the development of a treaty on Persistent Organic Pollutants. He chronicles the beginning of an international agenda, both as he has studied it and as he has participated in international meetings. He then turns to the issue of the science that provided motivation for some to go forward vigorously, focusing on a relatively controversial work, *Our Stolen Future*.

Mr. Lallas comments at length about the role of the NGO and indigenous peoples communities in the development of the POP's treaty before turning his attention to key issues and decision points in the negotiating phase of the treaty. These include a need to focus on non-compliance mechanisms; the important role of framing obligations; consideration of policy tools which

might be put into place, including trade measures, technical assistance and technology sharing.

From regime specific analysis the Symposium then turns to a global evaluation. In a provocative paper Stefano Nespore asks whether the very strategy offered by environmentalists in pushing for ever more comprehensive new environmental treaties is wise. Mr. Nespore argues that, in focusing on the disasters which environmentalists identify or create or exaggerate, the environmental community and its law are steered away from more immediate and real problems. These include poverty and air and water pollution, which are presently plaguing the environments of millions of non-Western people. Among the effects of the disaster strategy are: distortion of environmental law and environmental policy; distortion of economic and financial budgets; and loss of public support. Mr. Nespore recognizes the reasons for adopting the strategy, including the need to gain entry into a world community organized on a Westphalian model of national sovereignty. However, he also notes that contemporary forces, including globalization, can be exploited in ways that suggest strategies that are new and more productive for both long-term environmental objectives and short to mid-term needs of the third world.

Tullio Scovazzi returns to a more circumscribed problem, a regional one, laying out the fundamental principles of international law that are part of the Mediterranean Protocol that addresses the transboundary movement of hazardous waste. He begins his analysis with the Seveso Drum incident and the case of "the waste that, having left Italy, returned to Italy." Taking a view not earlier shared by some international lawyers, he concludes that the problems described in those cases have been solved by the Basel Convention. Professor Scovazzi then moves to the analysis of regional agreements allowed under the Basel regime. He describes the innovations adopted in the Mediterranean Protocol and concludes that the Protocol strikes a good balance between the interests of navigation and those of protection of the marine and coastal environment. However, he recognizes that the regime does not go far enough, such as with regard to the assignment of liability and compensation.

Whether the problems of the international order regarding the environment fundamentally are linked to the absence of a proper environmental ethic is the question asked by Professor Prue Taylor. Her paper also uses the Global Climate Change regime as a

case. Professor Taylor describes the tools developed for addressing global problems of environmental degradation as little more than a weak patchwork of laws, covering narrow and segregated sectors of international activity. An ecological ethic is called for. She concludes that we must act as if there were scientific certainty; that a precautionary approach is required; and that ecological thresholds must replace economic ones. Ultimately Professor Taylor's aim is to transform the international environmental orientation from "the law of nations with respect to the biosphere" to the law of the biosphere with respect to nations. In a final section, Professor Taylor moves from global climate change to the application of her recommendations to other areas of environmental law.

The Symposium ends with a synthesis of themes generated by the papers and the dialogues. Here we underscore both the common threads in attempts to achieve environmental quality through international instruments and those elements that appear to be idiosyncratic to a regime's success.

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