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ENVIRONMENTAL POLICY AS A WORLD ORDER PROBLEM†

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Now I could accept the cutting of wood out of need, but why devastate the forests? The Russian forests are groaning under the ax, millions of trees are being destroyed, the dwellings of wild beasts and birds are deserted, rivers are subsiding, drying up, wonderful landscapes vanish never to return, and all because lazy man hasn't sense enough to stoop down and pick up fuel from the ground. . . . One would have to be a reckless barbarian to burn this beauty in his stove, to destroy what he cannot create. Man is endowed with reason and creative powers so that he may increase what has been given to him, but up to now he has not created but only destroyed. There are fewer and fewer forests, rivers are drying up, wild life is becoming extinct, the climate is ruined, and every day the earth gets poorer and uglier.

So speaks the visionary doctor, Mikhail Lvovich Astrov, in Anton Chekhov's *Uncle Vanya*, a play written sometime around the year 1900. Such a set of perceptions indicates an early appreciation of the destructive relationship between man and nature that has dominated the growth of industrial society. Only recently have we been becoming additionally aware that as men we are ourselves not apart from but rather a part of nature. Man is victim, as well as exploiter. This realization, however dim, generates a sense of urgency because it is accompanied by the further awareness that the extent of interference with natural process is becoming so great as to imperil the quality and even the very basis of life on earth. As we grow richer, we become poorer; as we gain more mastery over nature, we become more vulnerable to natural catastrophe. By these paradoxical rhythms the modern encounter between man and his environment can be measured. This article shall explore one aspect of this encounter—its international, or better, its global side, as interpreted from a legal angle of perception.

Only very recently have international lawyers conceived of environmental problems as falling within the province of their professional concern. The subject-matter remains largely over the horizon and reflects the more general neglect of the international side of the recent upsurge in emphasis upon environmental quality.

The United States government, too, reflects this tendency to conceive of environmental policy as a domestic question. Indeed, there

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has been a tendency to locate much of the work on this matter within the Department of the Interior and the first year's report of President Nixon's Environmental Quality Council was almost exclusively confined to domestic discussion. Of course, there is no doubt that the most manifest impacts of environmental problems are currently found on the domestic level, but these are not potentially the most serious for either the United States or for the world. The growth and spread of industrial society in a world of rising population and increasing GNP per capita places ever-increasing pressure on the life-support systems of the earth, air, and water that makes this planet habitable. Nothing less than the survival of life on earth is endangered by present patterns of land, water, and air use throughout the world, but especially in the rich, populous, high-GNP countries. The extent of danger and its immediacy are subject to controversy, but not the basic contention that we are using the earth in a manner that is threatening in numerous ways the delicate balance of natural forces that provides the climate, the oxygen, the food, and the energy we need for life. Also not subject to controversy is the assertion that the absence of global regulation results in a variety of damaging uses of the world environment, ranging from the continuing testing of nuclear weapons in the atmosphere and underground, to the large-scale spillage of oil into the oceans, to the increasing concentrations of DDT (and related compounds) in the bodies of all animal species, including man, to the disposal of highly toxic nerve gas in the oceans in containers that may or may not leak, and so on. The agenda of environmental issues with an international aspect is limited only by the knowledge and fortitude of the compiler.

The basic reorientation of the understanding that is needed involves an acceptance of what might be called "the ecological imperative." Franklin Frazer Darling has said that people are growing tired of the word "ecology" before they know what it means. And although one can find some encouragement in the fact that the DAR and other ultraconservative groups have started to attack the environmental movement as unamerican, there is still a real danger that the unquestionably faddish quality of the sudden upsurge of interest will draw attention away from the very real seriousness of the situation. For as Senator Gaylord Nelson put it so well ". . . it can't be a fad, because it becomes more difficult to breathe each day." Essentially, the ecological perspective emphasizes the delicate interdependence of natural processes at all levels of life activity, from a single organism, to a lake or stream, to the world itself. Such a perspective entails an emphasis on the wholeness of view and encourages those who pro-

pose interferences with life systems to comprehend and assess the whole set of displacements caused. Translated into political terms, the ecological imperative requires coherent and overall management of all systems of life activity, institutions with the knowledge and powers to uphold the balance of the ecosystems, and a reorientation of human loyalties and political priorities to entrust such institutions with the resources and respect that are needed to do their task. The international order, based above all on competing and unequal sovereign states, has a structure and a set of traditions that are peculiarly inimical to giving any effective reality to the ecological imperative. Very briefly the international order rests on an operative set of assumptions that presuppose the rationality of minimal encumbrance upon sovereign initiative:

The assumption that human and industrial activities carried on within national territory are not dangerous to the world community as a whole;

The assumption that the permissive use of the oceans and airspace serves the general interest of mankind;

The assumption that land use and ocean use are generally compatible;

The assumption that various ocean uses are compatible with one another;

The assumption that oceans and the atmosphere are so large that they can absorb all wastes of human endeavor;

The assumption that misuse of the environment is reversible and is, at worse, local in its impact;

The assumption that all governments have a shared equivalent interest in maintaining and restoring environmental quality.

In my judgment each of these assumptions is incompatible with the development of an adequate structure of control and guidance with respect to environmental subject-matter. The significance of this incompatibility is of very recent origin and has basically to do with the *scale* and *scope* of human activities pressing up against the tolerance limits of these basic life support systems and is, in this sense, different from the spiritual and aesthetic concerns evident to Chekhov's character, Dr. Astrov.

It is against this general background that I would like to address myself to the role of international law in this area. The capacity of international law to operate successfully in the world as now structured depends on its ability to develop norms, procedures, and regimes that serve the perceived interests of most governments on most occasions. In other words, there needs to be a *consensus of governments* that rests largely on the perception of *common* or

reciprocal interests. The accentuation of this *voluntaristic* basis of international legal order has been a byproduct of the declining utility of military power as a source of general order within international affairs. A combination of prudence, arising from the dangers of large-scale warfare, and of normative change, arising from the movement to eliminate colonialism and to outlaw intervention, has virtually eliminated the police role of the great powers in world affairs outside the realm of strategic geo-politics [*i.e.*, sphere of influence interventions]. Such a development, largely unnoticed but highly significant, can be illustrated by the unwillingness and inability of capital-exporting or investor countries to use force any longer to protect their investments from confiscatory expropriation or the inability of the United States to impose its will on Chile, Peru, or Ecuador with respect to the seizure of fishing vessels far from their shore. Rather than alienate these Latin American allies there has been an internal political compromise struck—the fines imposed on our fishing vessels are paid but reimbursed by the U.S. Government, that is, by taxpayers. The same change in world context was evident in the unexpectedly strenuous protest by African governments against the so-called Stanleyville Operation in 1964 when the United States, the United Kingdom, and Belgium cooperated to rescue approximately 1000 white hostages being held in the course of the Congo Civil War. The point, then, is that outside of high politics, international legal order depends for its effectiveness more than ever on its capacity to serve the *common interests* of mankind as these interests are understood and perceived by governmental leaders around the world.

In approaching environmental questions this issue is of great importance because perceived interests as of now are largely *antagonistic*. Leaders from poor countries see the environmental agenda as a subtle way to deprive them of the wealth and power that have accrued to the advanced industrial societies. Furthermore, these governments, regardless of vast differences in ideological outlook and domestic situation, all share an emphasis on maximum economic development in a minimum period of time. If environmental prudence will inhibit agricultural and industrial growth it will be seen as an interference with basic national aspirations. These governments also tend to define the environmental situation in light of its domestic impact, and therefore confronted by a hungry, expectant, and growing population their leaders agree that the immediate need is to generate pollution, so to speak, by stimulating growth, rather than protect the environment through costly anti-pollution procedures. From a Third World perspective, then, the problems associated with

environmental degradation, to the extent that they exist, should be dealt with in such a way as to avoid any interference with prospects of economic development. Such an attitude also has been evident in Third World reactions to proposals that hard pesticides such as DDT be banned; here, the situation is further complicated by the role of DDT in fighting tropical diseases such as malaria and in the need for massive reliance on pesticides to make viable "the Green Revolution." In sum, given the fantastic disparity in per capita GNP between rich and poor countries and the extraordinary pressures that exist to alleviate mass misery throughout Asia, Africa, and Latin America, there is no basis for concluding that common interests exist with respect to the new ecological agenda. Surely on high levels of abstraction—just as with human rights—rhetorical affirmation of environmental quality has been solicited and will be achieved, but such an affirmation does not produce the real structures of *regulation* and *control* that are so urgently needed.

Of course, it would be a grave distortion to pretend that the principal resistance to a rational policy on the international environment comes from Third World capitals and the diversity of perception that truly exists on these matters. More consequential by far are the competitive dynamics of the relations among the principal industrial states, relations that rest on rivalry and an overriding concern with self-interest. The emerging world trade war, the rebirth of protectionism, is but one dramatic indication of the extent to which the general welfare continues to be sacrificed on behalf of well-organized sub-national interest groups. Therefore, even though the interests among developed countries are convergent in relation to environmental quality, the prospect of an *implementing* (as distinct from a *pious*) *consensus* on action remains poor. Just as with disarmament, perhaps even to a greater extent, the dynamics of competition lead to an endless search for *relative advantage*, to distrust of rival proposals, and to a self-interested set of perceptions that induce contradictory assessments of what constitutes a reasonable adjustment. Surely environmental defense of any adequate sort requires that major economic burdens be shouldered. However, the extent of these burdens and their allocation is exceedingly difficult to agree about in a world system that exhibits such strong tendencies toward national egoism and nationalization of truth.

Let me restate the argument up to this point—international law works where perceived common interests stimulate voluntary action or where coercive pressures can promote the position of the stronger side in situations of adverse interests and impose an involuntary solution. Environmental use has been successfully regulated on an

international basis up to recent times by a reliance upon territorial sovereignty to regulate land use and permissive community arrangements to regulate ocean and airspace use. Such permissiveness has been accompanied by a legislative assertion of special claims ranging from the right to use the high seas to test nuclear weapons to the already mentioned claim of some Latin American countries to close off large portions of the high seas as territorial waters (that is, by assimilating the *permissive community* regime of the oceans into the *exclusive sovereign* regime of land territory). This kind of guidance setup cannot meet the emerging needs for regulation given the agenda of environmental problems. This agenda can be broken down into four categories of issues:

Category I: ultra-hazardous activity such as tanker collisions, radioactive and nerve gas waste disposal, nuclear testing;

Category II: cumulative hazards to climate and resource purity arising from sustained patterns of human activity such as burning of fossil fuels, discharge of mercury, lead, DDT, and oil;

Category III: mounting dangers of extinction to animal species arising from excessive exploitation, such as to the species of the great whale, the Arctic polar bear, and a variety of fish;

Category IV: allocating rights among incompatible uses such as between ocean mining and fishing or as between economic gain and aesthetic quality of nature.

Most environmental problems on an international level fall into one of these four categories of concern. Unregulated permissiveness poses the problem and therefore is not likely to lead to a solution. The world-order challenge for international law depends on the capacity of the system to generate *cooperative regimes* in situations of competitive use and inconsistent interests and priorities. These cooperative regimes can be of three broad types, each of which can be briefly illustrated: *Voluntary Special Purpose Regimes*, *Tradeoff Regimes*, and *General Purpose Regimes*.

A. *Voluntary Regimes*

These regimes depend for their viability on discovering and clarifying a common interest of a specific sort and imposing reasonable conditions for its fulfillment. They can be expected to work where the governments primarily involved do have a reasonably common position and a reasonably shared perception of interest. The United States has put forward recently a proposal at a NATO conference to ban all international ocean spillage of oil by the mid-1970's. Compliance would require new ship designs in which the mixture of oil and water in ballast was eliminated. Such actions would impose fairly

heavy additional operating costs on shipping interests and oil companies. Any one country has an incentive to get all the other countries to adopt such anti-pollution standards but not to burden its own operations. The dynamics of self-interest lead to the paradox of aggregation whereby the sum of separate assessments of self-interest produces a community disaster in which each actor shares in the loss. Such a situation also exists with respect to endangered ocean species of whale, seal, and bear; the *individual* incentive to maximize self-interest by earning the highest possible annual profit produces a lower and lower aggregate yield. Voluntary regimes of restraint have not operated very successfully where strong individual interests to violate exist. The regulatory weakness can also be illustrated by attempts to impose collective economic sanctions and by efforts to restrain the sale of arms to foreign countries. Whenever the costs of compliance seem merely to transfer the benefits of the market to a competitor, the incentive to violate is strong and can only be fully frustrated by a regime of uniform enforcement that treats all actors alike and makes them all bear equally the burden of serving the common interest. Therefore, it seems unrealistic to rely on the efficacy of *voluntarism* to serve the community concern in Category II or Category III situations, although such standard-setting regimes may work reasonably well in relations to Category I or Category IV situations. It is not surprising, therefore, that such halting progress has been made in securing ratification of the 1969 Amendments to the 1954 International Convention for Prevention of Pollution of the Sea by Oil. (Sixteen gallons per nautical mile; no ratifications to date.) Governments are reluctant to impose costly unilateral restraints under any conditions, but especially in the absence of assurance that they are not merely making more profitable the conditions of operation for rival governments.

B. Trade-off Regimes

In these regimes there is some acknowledgment of diverse interests and some conscious effort to create a uniform incentive by building explicit tradeoffs or positive payoffs for each set of interests into the structure of the agreements. The idea here is to replace the permissive consensus—that is, wherein each government can do as it likes—with a regulatory consensus in which stability of expectations and other gains are substituted for the loss of freedom. President Nixon's path-breaking seabed proposals for May 23, 1970, are an exceptionally interesting example of an attempt to establish a trade-off regime based on forging a new set of reciprocal interests. Mr. Nixon's language of presentation is worth quoting because it repre-

sents such an explicit attempt to meet the challenges of the ecological age with the resources of the present world-order system:

The nations of the world are now facing decisions of momentous importance to man's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be losers. The issue arises now—and with urgency—because nations have grown increasingly conscious of the wealth to be exploited from the seabeds and throughout the waters above, and because they are also becoming apprehensive about the ecological hazards of unregulated use of the oceans and seabeds.

The substance of the Nixon proposals are really beside the point here, but briefly they seek to establish three zones of control which provide: (1) special status to coastal interests up to an ocean depth of 200 meters; (2) a trusteeship regime for an intermediate zone to the edge of the seabed (the so-called "continental margins") in which coastal states, organized world community, and developing countries share the proceeds; and (3) an international community regime with complete authority over activity on the ocean floor.

Such an approach contrasts with the unilateralism and exclusivity of the series of claims, initiated by the Truman Proclamation of September 28, 1945, to exercise national jurisdiction over the resources of the continental shelf. (These claims were later given international recognition in the Geneva Convention of 1958.) Such a change in initiative is of profound significance in attempting to test the limits of the existing world-order system to sustain regimes of common interests in (a) situations where ecological management is needed; (b) situations where major economic resources are involved; and (c) situations where the interests of governments—because of access, capability to exploit, and distinct resource bases—are clearly diverse. The seabed solution—or its eventual failure—provides a major test-situation of the *reformist* capabilities of the international legal system. To quote Mr. Nixon once again ". . . the stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable." The preliminary problem, of course, is to secure some kind of consensus as to what is a reasonable tradeoff among the diverse interests and then to evolve the kind of international machinery that implements the consensus in reliable fashion. It remains to be seen whether rich countries and poor countries can

converge sufficiently on a common perception of reasonableness to bring tradeoff regimes of this sort into being by agreement and to sustain them thereafter. The failure to achieve such a consensus—and there are internal as well as international diversities of interest that block progress—will almost certainly intensify the destructive character of competition in all major arenas of international life and will accentuate the inequality of benefits deriving from the new frontiers of human technology.

C. General Purpose Regimes

The final reformist possibility is to establish a central guidance apparatus for environmental matters on a global level. There are proposals by George Kennan, U Thant, and Lynton Caldwell for a World Environmental Authority. In essence, the call is for a new international institution, probably loosely affiliated with the United Nations, to be given a comprehensive mission in relation to environmental policy. Although I think such a development is both desirable and likely to take shape in some form—perhaps as a result of recommendations to be put forward by the 1972 UN Conference on the Human Environment in Stockholm—it should be understood that it is not likely in the immediate future that such an institution will be given a strong independent role. Such an institution may be able to gather and disseminate information bearing on principal environmental concerns, thereby helping to clarify and sustain a common interest in taking various curative or preventive actions. But for reasons already indicated, the prevalence of competitive relations among the states and the traditions of self-interested decision-making make it highly implausible to expect a voluntary international association of governments to have more than nominal powers in an area of diverse interests and highly divergent perceptions as to the seriousness of the alleged problems. As with such other areas as human rights and disarmament, where abstract sentiments of agreement often obscure concrete divergencies, there is little prospect of moving the world community into a position to set environmental policy and bind governments to adhere. Yet, as argued at the outset, the interdependence of action and the paradox of aggregation make such a regulatory effort essential. The thrust of my argument is that a general purpose regime on environmental policy is helpful and may be established in the next few years, but that its capabilities are almost certain to be severely curtailed by the realities of the international setting, most especially by the absence of a consensus on policy and action that moves beyond a vague rhetoric of concern and aspiration. Therefore, the role to be played by such a general purpose

regime will be confined to information-gathering and monitoring, rather than extending to the restoration of balance and quality to the world environment. Such a conclusion prompts a certain despair because the problems are growing more serious at a far greater rate than is the emergence of a consciousness or a world structure of authority that would allow for their solution.

CONCLUSION

The analysis above leads inevitably to the conclusion that the present international legal system can generate, at best, stop-gap measures that will defer the day of ecological reckoning, but that there is no realistic prospect that the conditions giving rise to this dangerous situation can be eliminated by reforms of the sort described above that involve the establishment of new international law regimes. The fundamental environmental pressures are consequences of the way in which domestic societies are organized and interact with one another. Put more plainly, the world-order system is constituted by states in very different circumstances, each seeking to maximize its gross national product and competing with each other for as large a share of the gross global product as possible. The counter-structures of restraint and coordination are weak both within national bureaucracies and at the international level. The overriding need of mankind is to confront the reality of an organizational crisis in human affairs. The system organizing human loyalties, security, and material well-being under the institutional control of the sovereign state cannot cope successfully with the strains caused by the modern interplay between high technology and expanding population. Only a more centrally conceived and constituted world-order system can hope to deal with this new agenda of challenge. Whether such a central solution comes about primarily by consent or coercion, or as the alternative to rather than as the aftermath of catastrophe are among the great unanswered questions of our time. What is clear is that unless a world-order movement with this general vision emerges in the next few years in the principal portions of the world, the prospects for further ecological deterioration will become increasingly certain and the prospects for human survival will become increasingly uncertain. In Buckminster Fuller's apt summation, the choice is literally one of "utopia or oblivion." Such a world-order movement will have to struggle against the forces mobilized by entrenched interests and values; that is, it will be necessary to overcome the reaction of the DAR or the derision poured upon so-called "prophets of doomsday" by soft-headed optimists and dreamy-eyed technocrats who continue to believe that science can undo what

science has done. The main terrain of struggle is in the human spirit and in the accompanying effort to establish a new orientation toward the relationship between man and nature, and a new and realistic sense of the world as an isolated island space, and a new set of global institutions and values to sustain the new vision.

International law has two principal roles to play in this central drama of human experience:

First, international lawyers can clarify common interests in relation to regimes designed for environmental defense, whether these regimes are of the special purpose, tradeoff, or general purpose variety.

Second, international lawyers can establish models of future world-order systems that seem to meet the functional needs of the day without building a gigantic prison for the human spirit; the depiction of models and the specification of the transition strategies to move from here to there are part of the initial task of mobilizing popular support for the urgent need to recast the world-order system of sovereign states in the form of a community-oriented central guidance world-order system.

Of course, the task is far away, and that is why we have to begin now, like the retired French general who, when told by his gardener that an exotic Oriental fruit tree he wanted planted wouldn't take mature shape for thirty years or so (or long after his death), replied "in that case, don't wait until this afternoon to plant it."

But the task is broader, of course, than the skills of the lawyer; it needs to be informed by a positive vision of what the world could be like, nothing less than a rebirth of confidence in the future of mankind. I conclude where I began, with another quotation from *Uncle Vanya*, this time from a character who reflects upon Astrov's strange crusade for environmental quality:

Every year Mikhail Lvovich plants new forests; he's already received a bronze medal and a citation. He makes great efforts to prevent the old forest from being laid waste. If you listen to him, you'll fully agree with him. He says that the forests beautify the earth, that they teach man to understand beauty and induce in him a nobility of mind. Forests temper the severity of the climate. In countries where the climate is mild, less energy is wasted in the struggle with nature, so man is softer and more tender; in such countries the people are beautiful, flexible, easily stirred, their speech is elegant, their gestures graceful. Science and art flourish among them, their philosophy is not somber, and their attitude toward women is full of exquisite courtesy. . . .