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INTERNATIONAL ENVIRONMENTAL DEVELOPMENTS: PERCEPTIONS OF DEVELOPING AND DEVELOPED COUNTRIES*

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A divergence between the attitudes of developing countries on the one hand and developed countries on the other in approaching international environmental protection has been on the rise. This has been the situation ever since the scope of so-called "environmental" problems has been investigated to the point where public inter-governmental discussions attacked industrial and agricultural processes and raised international trade issues. This divergence naturally springs from different perceptions of national interests and national problems which have perhaps been most succinctly set out in the Founex report.[1]

The Founex report recorded the deliberations of a panel of twenty-seven experts from all regions of the world who were convened at Founex, Switzerland by the Secretary-General of the U.N. Conference on the Human Environment, Mr. Maurice Strong. The panel met June 4-12, 1971.[2] After referring to environmental problems of developed countries as "very largely the outcome of a high level of economic development,"[3] the report recognized that the environmental problems of developing countries are "predominantly problems that reflect poverty and the very lack of development of their societies. . . . In both the towns and in the countryside, not merely the 'quality of life,' but life itself is endangered by poor water, housing, sanitation and nutrition, by sickness and disease and by natural disasters."[4]

The report goes on to assert that the kind of environmental problem that exists in a given country depends on its relative level of development.[5] The report argues that no objective of the

*The opinions herein are the author's and are not necessarily the views of the Department of State.

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1. Reprinted in Annex I to U.N. Doc. A/CONF.48/10, December 22, 1971. Also reprinted (without chapter and paragraph references) in *Development and Environment*, International Conciliation, No. 586, at 7 (New York, 1972).

2. U.S. experts participating were M. F. Alexander, Professor, New York State College of Agriculture, Cornell University, Ithaca, New York, and H. H. Sandsberg, Resources for the Future, Inc., Washington, D.C. The Mexican expert participating was N. Castenada, Colegio de Economistas, Mexico City.

3. Annex I to U.N. Doc. A/CONF.48/10 (Dec. 22, 1971) ch. A, ¶ 2.

4. Annex I to U.N. Doc. A/CONF.48/10 (Dec. 22, 1971) ch. A, ¶ 4.

5. Annex I to U.N. Doc. A/CONF.48/10 (Dec. 22, 1971) ch. A, ¶ 8.

environmental protection policies of developed countries, as compared with the policies of developing countries, should be used as a basis for supporting protective trade measures.[6]

It seems to be widely believed in developed countries that developing countries will be unwilling to divert capital resources and trained personnel from environmentally harmful industry and development projects promising quick returns at lowest cost. This seems to be the case even if the same projects, in which environmentally protective equipment and practices might be incorporated, might thereby offer greater returns because these returns would only be in longer-term sales or cost savings. The truth of this belief is difficult to measure by criteria which inspire confidence. However, the sources of the belief are not hard to identify from the vantage point of one who sits in the foreign office of a developed country.[7]

When the resolution of the U.N. General Assembly accepting the invitation of the Government of Sweden to hold the U.N. Conference on the Human Environment in Stockholm was passed,[8] there was surprise, given opinions expressed at the time, that the effort to set a definite date for the Conference had not encountered greater opposition. It was reported that a significant part of the reason for the lack of opposition was that, in view of the "perfervid" attachment of developed countries to the proposal, the unenthusiastic might as well permit it. After all, if the developed countries were really serious about it, some form of gain for developing countries might be secured in return for developing country support or acquiescence.[9] If the developed countries were not serious, no harm could come.

Soon it became clear that the concerns of developed countries were not frivolous, certainly as far as their own domestic regulatory policies were concerned. Statements were reported that maintained that pollution was exclusively a problem created by developed countries, and that it was exclusively up to them to solve it. It was also asserted that the environment "problem" was no more than a gambit of the rich to provide a political umbrella under which to keep themselves rich, and the poor poor.

Now it is plain that the conduct of the developed countries is

6. Annex I to U.N. Doc. A/CONF.48/10 (Dec. 22, 1971) ch. A, ¶ 14.

7. *See, e.g.*, Time, May 22, 1972, at 73.

8. G.A. Res. 2581 (XXIV). The resolution was passed unanimously.

9. G.A. Res. 2657, 25 U.N. GAOR Supp. 28, at 51. U.N. Doc. A/8028 (1970). Principle 9, Draft Declaration on the Human Environment, U.N. Doc. A/CONF. 4814, Annex, at 3 (1972).

hardly above reproach, both in their past and existing industrial and agricultural practices, and in their seeming expectation that the same priority of concern can be aroused internationally. Even the most zealous environmentalist must admit that the truly poor person will give a higher priority to aspects of his own material well-being than to the preservation or conservation of natural phenomena from which he perceives only an indistinct or intangible benefit. An individual can adapt within limits to polluted air and polluted water, particularly when he has compensations, including those which enable him to protect his health and well-being. The descriptions of environmental problems as amounting to a crisis portending disaster for humankind, if credible, have not been made credible to the world at large. Additional development assistance does not appear to be forthcoming, at least under that identification, although it can be said that this is because it is widely believed that past expenditures for that purpose have not produced benefits, either in humanitarian or political terms, which are nearly commensurate with the costs.

The rhetoric assigning the environmental problem exclusively to developed countries might be dismissed as just rhetoric or, at any rate, be taken at much less than face value if it were not for the fact that developing countries' positions are consistent with it. I will draw examples from the differing public and private attitudes exhibited by the developing countries at the recent Inter-Governmental Meeting on Ocean Dumping in Reykjavik.[10] This meeting was composed of representatives of 29 countries of which 11 or 12 were developing countries. The purpose of the meeting was to continue work on a draft Convention which would require States party to it to institute regulatory systems under which ocean dumping and the transportation for dumping from the territory of each State would be prohibited or otherwise controlled. The developed countries, on the whole, had small measures of differences between their positions at the end of the time allotted for the meeting. The developing countries, as was

10. The meeting was held at the invitation of the Government of Iceland, Apr. 10-15, 1972. The meeting, although not technically part of the Stockholm Conference preparatory machinery, was undertaken as a result of the agreement of the Inter-Governmental Working Group on Marine Pollution (a Stockholm Conference preparatory body) that governments should consult further following the conclusion of the final session of the Working Group in Ottawa, November 8-12, 1971, in the hope that "agreement on concrete global action" could be reached before the Stockholm Conference.

Report of the Inter-Governmental Working Group on Marine Pollution on its Section Session, U.N. Doc. A/CONF.48/1GWMP II/F, ¶ 19.

their prerogative, insisted strongly on a number of positions, some of which were accepted, some of which could not be agreed upon, and upon some of which decision could only be postponed. It was the wish of the host Government and those countries supporting it in the decision to call the meeting, if possible, to complete the text of this Convention during this meeting so that it might be available for signature, not at the Stockholm Conference, but about the time of it. While there certainly can be no objection to countries insisting on important positions, the credibility of developing country positions was deeply undermined. This was due to the fact that, privately, their delegations were saying that they really had little or no interest in becoming party to the Convention; and, moreover, that they saw advantages to the industrialized countries of Western Europe, North America and the Pacific becoming bound by such a Convention as soon as possible with the developing countries outside it.[11]

Part of the regulatory system of the Convention is to be a special permit system. This means that certain substances will be identified which can only be dumped under terms and conditions stated in a "special" permit which would be issued to each person purporting to act pursuant to it. The special permit is to be distinguished from a general permit, which might in fact be a law or regulation permitting anyone to dump a specified or unspecified quantity of matter under conditions applicable generally. In the drafting group at the Reykjavik meeting it was suggested that the right of States to issue special permits for dumping should be subject to prior consultation with neighboring States before the issuance of each such permit. When the proposal was roundly objected to on the grounds of its impracticality, assertions were made on behalf of a developing country that if it were to be a party to this Convention, it would insist on this provision. It was immediately pointed out that in the negotiations leading to the text of the draft Declaration on the Human Environment,[12] which is being forwarded to the Stockholm Conference for adoption, that the same country had insisted on the deletion of a consultation principle hinged to action within a State which

11. There were also several public statements by these countries at the commencement of the meeting that no convention should presently be concluded. This effort to divert the meeting to a discussion of "principles" relating to marine pollution such as were discussed at Ottawa or to even more general marine pollution matters was allayed by reference to the invitation of Iceland convening the meeting to address work on a "convention."

12. U.N. Doc. A/CONF.48/4.

might damage the environment of other States.[13] This apparent inconsistency was explained on the grounds that in the case of activities encompassed by the proposed Declaration principle, that country saw itself as the offender, whereas in the context of ocean dumping, it saw itself as more likely to be the victim than the offender. It is not too much to say that this selective application of principles does not engender faith in the willingness to make the necessary compromises to reach international agreement.

If divergent attitudes of the developed and developing countries are to be brought together, some means must be found for doing it which appeals to the interests of each. The only issue upon which real legal action may be based and in which I have been able to identify common interests, is the issue of responsibility, in money, for pollution damages.

In November and December of 1971, the Inter-Governmental Maritime Consultative Organization convened the international conference on the Establishment of an International Compensation Fund for Oil Pollution Damage.[14] The purpose of this Conference was to negotiate a Convention supplementary to the 1969 International Convention on Civil Liability for Oil Pollution Damage.[15] The new Convention was, at a minimum, to provide sums for payment of compensation for oil pollution damage over and above the limits of liability in the 1969 Convention. The United States, Canada and a few other countries had, during the preparatory work for the 1971 Conference, advocated that the supplementary Convention should cover incidents of oil pollution damage which were outside the scope of the 1969 Convention.

This effort was by and large successful, and the United States, Canada and the developing countries tended to take a common position. Likewise, a feature of the 1971 Convention was to provide reinsurance of a part of a ship-owner's liability under the 1969 Convention. The United States and Canada wished to hinge the obligation to provide the reinsurance on compliance by the vessel owner with a number of existing IMCO Conventions whose requirements operated to have a pollution prevention

13. U.N. Doc. A/CONF.48/4, draft principle 20.

14. The Conference was held at Brussels Nov. 29-Dec. 18, 1971.

15. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, is set forth in Executive K, 92d Cong., 2d Sess., May 5, 1972, at 1. The 1969 Convention is in Executive G, 91st Cong., 2d Sess., May 20, 1970, at 19.

impact. Again, owing to the support generated among the developing countries for this proposal, its most important features were written into the text of the Convention.[16]

From the beginning of the work on the Declaration on the Human Environment, the United States had advocated a statement embodying elements of a principle[17] extrapolated from the Trail Smelter Arbitration under which the Government of Canada was held responsible, as a State, for air pollution damage in Washington State emanating from a smelter in British Columbia.[18] Some doubts about the chances of the survival of this principle were put forth. Nevertheless, it has survived to the point where it is being forwarded to the Stockholm Conference as part of the draft declaration. That stage having been reached before the commencement of the Reykjavik meeting, the U.S. proposed that a similar principle be embodied in the preamble to that Convention. As stated in the draft preamble, it amounted to a recognition that States have the responsibility to see to it that activities within their jurisdiction or control do not cause certain kinds of damage to the environment of other States or of areas beyond the limits of national jurisdiction. It is recognized on all sides that the instances of damage that fall within the rule, examples of permissible uses of national and common resources, problems of causation and obligations to regulate and compensate remain, almost entirely, to be identified and refined to begin to be usable. The U.S. delegation was pleased when the delegation of Mexico suggested that a recognition of the principle be embodied in the text of the Convention itself. As stated therein, an undertaking to develop procedures for the assessment of liability and the settlement of disputes was added.[19] To lawyers accustomed to the kind of law generated by legislatures and courts, the proposal to include such an undertaking in an international legal instrument may not seem to push matters very far. However, when large numbers of countries may be payors as well as claimants, quick movement from the recognition of a principle to an undertaking to devise ways to employ it would be heartening to say the least.

Indeed, both principle 19 of the draft Declaration on the Human Environment and Article 10 of the draft text produced by

16. Art. 2.1(b); Art. 5.
17. U.N. Doc. A/CONF.48/4 draft principles 18, 19 Annex, at 4.
18. 3 U.N.R. I.A.A.
19. U.N. Doc. IMOD/2 Art. X at 6.

the Reykjavik meeting recognized that the circumstances under which damages are payable by States must be the subject of further development in international law. It may be that support for the development of this principle is widespread enough that it can be used to elicit support for internationally agreed environment protective measures. This might involve the conditioning of the obligation to pay upon a claimant State's not only having recognized the principle of State responsibility but on its having adopted adequate regulatory practices to prohibit or control the kind of damage it complains of. There is here, obviously, great difficulty in developing law defining the adequacy of a regulatory system or the obligation of the plaintiff State to be innocent of the same failure as the defendent State. Moreover, at this stage at least, support for the basic principle is by no means unanimous.

It is, of course, true that on almost any given environmental issue, positions of developing countries are not in fact monolithic, just as positions of developed countries are not.[20] Nevertheless, the unfortunate habit has arisen of talking about these issues in a vocabulary which suggests a rather perfect cleavage between the attitudes of the two groups of countries.

Moreover, the Environment Committee of the OECD has adopted a draft of guiding principles concerning the international economic aspects of environmental policies to be forwarded to the OECD Council for adoption.[21] These principles recognize that differing national environmental policies are justified by a variety of factors including different pollution assimilative capacities of the environment in its present state, different social objectives and priorities attached to environmental protection and different degrees of industrialization and population density.[22] They provide that measures should be taken to protect the environment which will avoid the creation of non-tariff trade barriers as much as possible.[23] They reaffirm the principles of national treatment and non-discrimination for imported products as compared to similar domestic products.[24] They discourage

20. At the Reykjavik meeting, France, Ivory Coast and India specifically reserved on the State responsibility question. The principal antagonists of the United States, Canada, and the developing countries at the Compensation Fund Conference were the maritime powers of Western Europe and Liberia, but when it came to questions of vessel owner costs, the latter group was also often supported by India and Brazil.

21. U.N. Doc. C (72) 122 (May, 2, 1972).

22. *Id.*, principle 6, at 10.

23. *Id.*, principle 9, at 10.

24. *Id.*, principle 11, at 10.

compensating import levies and export rebates designed to offset the cost of environmental protective measures in international trade.[25] Surely, the endorsement of these principles will be seen as consistent with developing country interests although it may certainly be supposed that the developed countries who negotiated them among themselves had their own interests uppermost in their minds during the process of negotiation.

The Stockholm Conference paper on development and environment includes a recommendation that governments recognize that the burdens of the environmental policies of the industrialized countries should not be transferred either directly or indirectly to the developing countries.[26] As this recommendation is stated, it appears to go far beyond the statements in the process of adoption in the OECD. What is meant by the burden of an industrialized country's environmental policy is, perhaps by design, far from clear. If, for instance, the problems of solid waste disposal in the United States reach such dimensions that Congress forbids the transportation of beverages in non-returnable bottles in interstate and foreign commerce and Mexican breweries are compelled to change their packaging methods accordingly in order to retain access to U.S. markets, will some burden have been transferred from the United States to Mexico? What about the impact of industrial processes in Mexico or Canada or further away in the world environment? The Founex report contains the following statement in paragraph 55: "When the concern spreads from the quality of a product to the environment in which such a product was produced, the alarm bells should ring all over the world for it would be the beginning of the worst form of protectionism."[27] Whether the United States has a legitimate interest in the damage to the environment created by the production of a product in Mexico or in a State at the furthest reaches of the world from the United States, seems to depend upon the impact of the damage on the people and the territory of the United States. If the damage is indirect, but nevertheless real, to look to State responsibility would place much more optimism on the acceptance and elaboration of the principle than the process of international negotiation would seem to justify. Furthermore, the statement of the Founex report,

25. *Id.*, principle 13, at 11.
26. Rec. V-32, A/CONF.48/10, at 12.
27. U.N. Doc. A/CONF. 48/10, Annex I at 28.

taken at its broadest, may be at variance with that part of the Trail Smelter decision under which the abatement of the source of pollution was undertaken. It may be regrettable, but I can think of no more natural ally for a protectionist than an environmentalist, especially if countries stand aside from good faith efforts to resolve international environmental problems in a way that promotes the common good inside and outside their borders. It seems to me that there are too many countries, including the United States, which have had too many years of balance of payments and agricultural and industrial sector difficulties for free trade or GATT principles to survive invocation as a barrier to environmental protective trade measures. This includes those that strike at products produced by offensive methods, where the policies of the exporting country are significantly out of line with those of the importing country. It does not seem to me that the balance against these principles will be struck only when a crisis of survival appears, but it is likely to be struck where far more specific deterioration in the human environment can be identified. The public health exception in the GATT,[28] while not designed for all problems of this magnitude, will surely be pointed to, not only for those cases in which it obviously applies, but in those cases within its furthest reaches.

Hence, it appears that negotiations will have to take account of not only the priority assigned to development in the developing countries, but to the priorities given to environmental protection in the developed countries. If any substantiation is required of the existence of the latter priority, the quantity of domestic legislation and judicial activity in the United States and elsewhere devoted to this problem over the last few years should be looked at. In this respect, I would judge that the Founex report is badly deficient. It is replete with suggestions that the degree to which developing countries should take into account environmental considerations is entirely a matter for the developing countries themselves.[29] At the same time, the report in paragraph 62[30] refers to ". . . [an] emerging understanding of the indivisibility of earth's natural systems." If this understanding is emerging, it is curious that there is no suggestion that some means must be divined internationally to police the decisions of

28. G.A.T.T. 61(5) Stat. A3-2054. Art. XX (b).
29. *E.g., supra* note 27, ¶¶7, 46, 47, 66, at 5, 22, 22-23, and 32-33 respectively.
30. *Id.* at Annex I, at 30-31.

national units which may have serious impact on those indivisible systems. The development of acceptable methods for international review of national decisions is a formidable task indeed. It involves the deployment of knowledge of a great number of specific economic and physical circumstances which must then be taken account of politically at the international level. One may question whether the process of international negotiation is adequate to achieve the result the subtleties of these issues may require. At a minimum, it will surely require trust in the intentions of countries on both sides of the issues. In this regard, wise use ought to be made of the Environment Fund proposed by the U.S.[31] Proposals which demonstrate the willingness to invest the resources of the Fund in pressing environmental problems will surely induce donor States to increase their support for the Fund, but should have, perhaps, the more important side effect of diminishing the differences that each side now appears to perceive in the views of the other.

During the Conference in Brussels I spoke of before, after the United States had strongly supported a Ghanaian proposal for provision of oil pollution cleanup assistance at oil company cost, a businessman adviser to a European delegation came up to me quite purple in the face. After prematurely delivering his peroration to the effect that the U.S. was being more socialist than the Soviet Union, he comforted himself that, after all, environmental concerns were only a passing fancy. Americans were always getting involved in this or that. In the 50's, it was race relations; in the 60's, it was space exploration; and in the 70's, it would be the environment. The U.S. is still working on its racial problems, and it is still investing in space technology. I have no doubt that its interest in environmental questions will survive the seventies. In addition, many other developed countries without race problems or investments in space technology have governments and populations concerned about the environment. The Founex report has stated that for some, the question of development is not only a question of the quality of life, but of life itself.[32] It might have said the same about the environment. Full attention must be given by all to finding ways to forestall disasters both to development and the environment.

31. Report of the Preparatory Committee for the United Nations Conference on the Human Environment on its Fourth Session, U.N. Doc. A/CONF. 48/DC/17, Annex III (May 6-10, 1972).

32. Founex Report, *supra* note 3.