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Respecting Sovereignty

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RESPECTING SOVEREIGNTY

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The Oxford English Dictionary defines “compelling” as “demanding attention, respect.”¹ In this sense, the most compelling environmental issue facing the global community as the twentieth century closes is not a particular environmental threat. Rather, in my view, the environmental issue most deserving of attention (or respect) is a concept: national sovereignty. National sovereignty has been (and will continue to be) the greatest obstacle to attempts to respond to international environmental threats in a comprehensive and effective manner.

The concept of national sovereignty is, of course, the cornerstone of international law.² Under traditional notions of international law, each state is a co-equal sovereign, and each is the final authority within its territorial limits.³ Accordingly, one state may not dictate to another how the latter must regulate activities that produce pol-

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1. THE COMPACT OXFORD ENGLISH DICTIONARY 600 (2d ed. 1991).

2. For a detailed historical discussion of the relationship between national sovereignty and international law, see F. H. HINSLEY, SOVEREIGNTY 158-235 (2d ed. 1986).

3. *Id.* at 25-26. See also *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”); *Island of Palmas (U.S. v. Neth.)*, Hague Ct. Rep. 2d (Scott) 83, 92 (Perm. Ct. Arb. 1928) (“Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise there, to the exclusion of any other states, the function of a state.”); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 39, 43 (Alvarez, J., concurring) (“By sovereignty, we understand the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also its relations with other states.”).

lution or exploit natural resources in its jurisdiction. The international community has frequently recognized that each state has the sovereign right to develop in accordance with its own environmental policies.⁴

The implications of this regime for the global environment are obvious. The effects of significant environmental problems — whether air or water pollution, radioactive releases, or declining biodiversity — are seldom confined to the territory of one state; the effects transcend national boundaries. Consider, for example, the common problem of acid deposition. Frequently, acid deposition precursors (sulfur dioxide and nitrogen oxides) emitted in one nation migrate across boundaries and harm forests and aquatic ecosystems in other nations.⁵ Customary international law does provide that a nation may not permit activities within its jurisdiction to injure the territory of any other nation. Yet even where the cause of environmental damage is established with certainty, and a particular nation's failure to regulate its pollution-producing industries is apparent, the present system of international law cannot compel a state to take corrective action. A recalcitrant nation (while no doubt disputing the allegations and calling for further studies⁶) merely relies on its trump card, national

4. *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (1992) (Principle 2 proclaims that "states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies[.]"); *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. (1973) (Principle 21 proclaims that "states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies[.]").

5. See GARY C. BRYNER, *BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990* 68-71 (1993) (describing acid rain problems in North America); Daniel J. Dudek et al., *Environmental Policy for Eastern Europe: Technology-Based Versus Market-Based Approaches*, 17 *COLUM. J. ENVTL. L.* 1, 30 (1992) (reporting that acid rain is a "serious problem" in Europe); Paul J. Smith, *Free Trade and the Environment: Will Free Trade Save China's Environment?*, 1 *BUFF. J. INT'L* 27, 37-38 (1994) (characterizing effects of acid rain in Asia as "severe").

6. BRYNER, *supra* note 5, at 140 (responding to Canadian concerns about acid deposition, U.S. officials called for "more research . . . before making major

sovereignty.

The problem is exacerbated when the cumulative effect of actions threatens a global commons, an area or resource not subject to claims of sovereignty. The deterioration of the stratospheric ozone layer, which protects us from the sun's ultraviolet rays, is not attributable to the action (or inaction) of any one state. With hindsight, we know that the developed nations share primary responsibility for the production and consumption of ozone-depleting substances.⁷ These nations also reap the economic and social benefits of these chemicals.⁸ Looking forward, we assume that developing nations (such as China and India) must not use ozone-depleting substances to the same extent as developed nations; otherwise, the precarious condition of the ozone layer (and thus the world) would be subjected to even greater risk.⁹ Yet the international community cannot simply impose regulations or restrictions on developing nations. China and India may justifiably claim that a critical component of national sovereignty grants them the right to develop in accordance with their own environmental policies, regardless of the cumulative impact of these policies on a common area.

Although many academics have called for a reexamination and a rejection of traditional notions of national sovereignty,¹⁰ the real

investments in pollution control technologies"). See also Sam H. Verhovek, *A Diplomatic Haze Pervades Park's Air Pollution Dispute*, N.Y. TIMES, June 7, 1996, at A1 (responding to U.S. concerns about sulfur dioxide emissions from Mexican power plants, Mexican officials call for additional research).

7. RICHARD E. BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* (1991).

8. Chlorofluorocarbons ("CFCs"), for example, are used for refrigeration, plastic foams, and aerosols.

9. The huge populations of both China and India create a potential for demand of CFCs and other ozone-depleting substances that could make reductions by developed countries irrelevant. See David D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of Environmental Lawmaking*, 14 HASTINGS INT'L & COMP. L. REV. 755, 761 (1991) (noting concern about China and India's initial reluctance to become parties to the Montreal Protocol).

10. Susan H. Bragdon, *National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity*, 33 HARV. INT'L L.J. 381, 384 (1992). See also Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20

challenge for the world is to rethink how we approach international environmental issues within the confines of a system that rests upon national sovereignty. International law provides no formal, centralized enforcement mechanism; rather, nations must rely on their power to persuade their fellow states to comply with international norms. In the environmental context, the use of conditional assistance has proven to be successful.

Indeed, the London Amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer offered conditional assistance to encourage developing nations, including China and India, to accede to the treaty regime.¹¹ In exchange for becoming parties to the treaty, and therefore assuming the obligation to limit production and consumption of ozone-depleting substances, developing nations are eligible for financial assistance. The developed nations initially pledged \$240 million for a three-year period to help developing nations with their duty to comply with the treaty regime's requirements.¹² As a result of these provisions, China and India acceded to the treaty regime.

Conditional assistance has proven helpful in bilateral relationships as well. For example, the Enterprise for the Americas Initiative ("EAI") authorizes the United States to participate in debt-for-nature swaps with Latin American and Caribbean countries.¹³

CAN.- U.S. L.J. 9, 16 (1994) (noting Louis Henkin's call for a quixotic campaign "to extirpate the term [sovereignty] and forbid its uses in polite political or intellectual company or in international law"); Richard A. Falk, *Toward A World Order Respectful of the Global Ecosystem*, 19 B.C. ENVTL. AFF. L. REV. 711 (1992) (criticizing exploitation permitted by the present system of sovereignty and arguing for a new world order to deal with environmental problems); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293, 295 (1993) (observing that "some feminist thinkers argue that as between individuals, an ethic of care should apply to relations between states").

11. *Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 30 I.L.M. 537 (1990) (Article 10: Financial Mechanism).

12. *Working Together to Protect the Ozone Layer* (The Multilateral Fund for the Implementation of the Montreal Protocol, Montreal, Quebec, Canada), Dec. 1995 at 3 (stating that \$240 million was pledged for 1991-1993; an additional \$510 million has been budgeted for 1994-1996).

13. 7 U.S.C. § 1738c (1994) (authorizing President to reduce debt of eligible

Under the EAI, the United States agrees to cancel or restructure another nation's debt in exchange for that nation's promise to support certain environmental programs or activities.¹⁴

Conditional assistance provides a mechanism that deals with global environmental issues, yet avoids the problem of sovereignty. Of course, a state may be unwilling to accept conditional assistance and may even characterize such aid as an affront to its sovereignty. Such a characterization is simply wrong. Environmental conditions on foreign assistance do not constitute an infringement on the recipient nation's sovereignty. That nation enters into the relationship voluntarily; the element of consent vitiates any argument that the arrangement violates sovereign prerogatives.

As the century closes, we must continue to search for solutions to international environmental challenges that take into account the enduring reality of national sovereignty. To be effective, however, any such solution must also consider another critical fact: nations themselves are not static creatures. Nations must contend with centripetal and centrifugal forces, each of which have significant environmental ramifications. The integration of states, through the proliferation of trade agreements such as the North American Free Trade Agreement ("NAFTA") and the General Agreement on Tariffs and Trade ("GATT"), has made it more difficult for a state to impose unilateral trade sanctions designed to encourage environmentally sensitive behavior.¹⁵ Similarly, the disintegration of states, occurring when ancient prejudices are inflamed, results in

countries).

14. 22 U.S.C. § 2281 (1994) (defining debt-for-nature exchange). The United States has entered into EAI agreements with Argentina, Bolivia, Chile, Columbia, El Salvador, Jamaica, and Uruguay. *See generally* U.S. DEP'T OF TREASURY, REPORT TO 104TH CONG., THE OPERATION OF THE ENTERPRISE FOR THE AMERICAS FACILITY (1996).

15. *E.g.*, *General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (1991) (concluding that United States import restrictions authorized by the Marine Mammal Protection Act violate GATT). For articles discussing the intersection of global trade and the environment, see Symposium, *Greening the GATT Within the Existing Framework*, 27 CORNELL INT'L L.J. 447 (1994); Symposium, *Trade and the Environment*, 23 ENVTL. L. 387 (1993); Symposium, *Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict*, 49 WASH. & LEE L. REV. 1219 (1992).

adverse environmental impacts through the damage of warfare, the exodus of refugees, and the general breakdown of order.¹⁶ These are issues that will continue to demand attention and respect.

16. See Robert D. Kaplan, *The Coming Anarchy*, *ATLANTIC MONTHLY*, Feb. 1994, at 44 (describing how tribalism, overpopulation, and environmental problems are destroying the viability of West African states).