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ENVIRONMENTAL POLICY AND INTERNATIONAL INSTITUTIONAL ARRANGEMENTS: A PROPOSAL FOR REGIONAL AND GLOBAL ENVIRONMENTAL PROTECTION AGENCIES

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It is fair to say that present international arrangements for protecting the environment are inadequate.¹ The daily news headlines clearly indicate the problems. We are told of black snow falling in Sweden—snow which has been polluted presumably by industrial air pollution which has crossed Sweden's national frontier from some other nation. In this case, it is guessed that England is the culprit, and that the pollution may have emanated from its black industrial belt in the Midlands. On the Riviera—the Cote d'Azur—the French claim that Italian wastes are polluting their beaches.² Although the estimates differ, we are told that annually 1,000,000 metric tons of oil are spilled into the sea as a routine part of the sea transportation of this energy source.³ A recent study finds that the national regulation of coastal states controlling offshore drilling are uniformly inadequate, and that safeguards are nonexistent.⁴ The Santa Barbara spill and the Chevron Gulf spill supply dramatic corroboration of these inadequacies.

The inadequacy of international machinery is no better illustrated than the nerve gas dumping incident of August, 1970. The citizens of the Bahamas were just as interested as the citizens of Florida—in fact, the dumpsite was slightly closer to the Bahamas, but the Bahamas could act only through diplomatic channels; there was no international machinery through which the Bahamas could put their case and question. This undeniably was a matter of international concern, it was not a private matter, nor a national matter.⁵ Yet, there was no adequate international mechanism available for interested parties.

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1. For recent discussions, see Kennan, *To Prevent A World Wasteland: A Proposal*, 48 *Foreign Affairs* 401 (1970); Burke, *International Cooperation to Curb Fluvial and Maritime Pollution*, Proceedings, Colum. Univ. Conference on Int'l. & Intrastate Regulation of Water Pollution 73 (Mar. 12-13, 1970); R. Falk, *This Endangered Planet: Prospects for Human Survival* (1971).

2. *New York Times*, July 19, 1970, at 3, col. 5.

3. Schacter & Server, *Marine Pollution Problems and Remedies*, 6 *J. Am. Int'l. L.* 84, 89 (1971).

4. Utton, *A Survey of National Laws on the Control of Pollution From Oil & Gas Operations on the Continental Shelf*, 9 *Colum. J. Transnat'l. L.* 331 (1970).

5. See Brown, *International Law and Marine Pollution: Radioactive Waste and Other Hazardous Substances*, 11 *Natural Resources J.* 221, 249 (1971).

This is not to say that there are no international organizations or treaties, concerned with protecting the environment. For example, by 1970, there were at least 15 international organizations concerned with or having some obligation with regard to air pollution,⁶ and the Intergovernmental Maritime Consultative Organization has succeeded in establishing the 1969 Brussels convention, which imposes liability on ship owners for spills of oil and other hazardous materials into the ocean,⁷ but no one would disagree with the assessment that these are merely first steps, and that international machinery designed for protecting the environment is either non-existent at worst, or inadequate, at best.

As in the area of air pollution, where we have 15 international organizations dealing with the same problem, the major defect with international environmental efforts is that of divided authority; the authority is divided between national and international agencies, or between international agencies, or is divided between national and local agencies, and the usual rule of thumb is that divided authority leads to lack of action—paralysis. A recent example that can be cited is that of the city official of Genoa who closed the city beaches because of pollution, only to be overruled by a national official, who said the beaches were so badly polluted that only a national official could act.⁸ As Oscar Schacter recently said, “On the international level authority is not so much divided as non-existent.”⁹

We are at the threshold where we must ask the question, how do we organize institutionally on the international level to protect the environment against pollution which is no respecter of artificial national political boundaries? Do we organize globally, so that one all encompassing environmental protection agency has jurisdiction over all environmental threats for the entire globe? Or is that too ambitious, and should we organize regionally? Or should we organize functionally—that is, establish agencies according to the function they are to perform; an air pollution agency to control air pollution, and a marine pollution agency to control marine pollution, and a fluvial pollution agency for rivers, streams, and lakes. Or, there could be combinations of these various approaches. There could be a global air pollution agency, or a regional air pollution agency, or a global agency which was comprehensive in its jurisdiction and covered all

6. U.S. Dep't of Health, Educ. and Welfare, Profile Study of Air Pollution Control Administration in Foreign Countries, First Year Rep. 171 (1970).

7. International Convention for the Prevention of Pollution of the Sea by Oil, [1954] 12 U.S.T. 2989, 17 U.S.T. 1523, and I.M.C.O. Document A VI/Res. 175, 9 Int'o Legal Materials 1, 47, 48 (1970).

8. New York Times, July 17, 1970, at 3, col. 5.

9. Schacter and Server, *supra* note 4, at 104.

environmental considerations, or we could organize regionally and give each regional agency comprehensive jurisdiction. The options are many, the alternatives are numerous, but the agony of construction and decision is imperative.

Another question which must be faced in this effort, if, in fact, we do organize internationally, is what sort of power should the international organization have; should it have coercive power, or simply persuasive power? George Kennan argues for a blue ribbon international agency which would be a model of persuasiveness, and which would achieve its goals through persuasion, example, and prestige.¹⁰ Professor Kennan draws upon his long diplomatic experience to outline the political difficulties in establishing international machinery for environmental protection,¹¹ and there can be no doubt that any attempt to give coercive power to an international body will be met with strong national resistance; and that the usual pattern is for treaties simply to be the lowest common denominator to which various states can agree. Given the difficulties and uncertainties faced by policy makers in establishing machinery for the protection of the environment, nonetheless, the broad outlines of what we need are beginning to emerge.

1. The environmental protection agency should be environmental and not developmental in orientation. Those agencies, national or international, which have had as their tradition the development and exploitation of resources are not by professional conditioning the best ones to supervise and control these same developmental activities in order to protect the environment.

2. It needs to set limits of what is permissible and what is impermissible.

3. It needs to enforce those limits as a policeman for the environment, or, if its authority is only persuasive, it needs to serve as a conscience for the environment.

REGIONAL AND GLOBAL AGENCIES

The pivotal question then arises as to what the jurisdictional limits should be. What should the aerial limits be? A possible strategy would be to use two different institutional approaches simultaneously. One could establish regional agencies which would have comprehensive authority over environmental supervision within defined

10. "A third function would . . . extend advice and help to individual governments . . . It is not a question here of giving orders . . . the function is in part an advisory one and in part, no doubt, hortatory . . . Its responsibility should be . . . to exert itself, and use its influence with governments . . ." Kennan, *supra* note 1, at 404-05, 409.

11. *Id.* at 408.

regions. Possible regions might be the North Sea countries, the Mediterranean Sea countries, or a Western European region, a South American region, a North American region, a Southeast Asian region. At the same time, international agencies could be established over the great international media such as the high seas, the stratosphere, and perhaps the Arctic and Antarctic.

The regional agencies thus would be established in areas where there are existing national land bases with administrative and legislative machinery in being. The argument against such a regional approach is quite cogent and is to the effect that pollution does not recognize regional boundaries any more than it recognizes national boundaries. However, on the other hand, pragmatic political reality indicates that it may be easier to reach agreement on higher standards within a region with common problems and a common perspective than would be the case with an attempt at global approach. Also, the regional approach would bring government closer to the people it affected and, therefore, make the imposition of environmental standards more palatable and responsive to the people of that region.

INTERNATIONAL MEDIA

Those international media, such as the stratosphere and high seas, and perhaps the Arctic and Antarctic, would be more amenable to an international global approach, since the standards would not be imposed within existing international boundaries in most cases. The method of operation of the regional agency as opposed to the international agency would vary also. Since the regional agency would deal with the territory of sovereign nations, it probably would be most effective using a persuasive approach. It could be composed of prestigious members of the scientific community from the various countries of the region, as suggested by George Kennan,¹² and use its influence to encourage the nations within the region to bring their environmental quality standards up to those found to be technically feasible and advisable by the regional environmental protection agency. This would permit considerable flexibility since the regional environmental protection agency could constantly be upgrading the permissible standards as dictated by the "state of the art." The regional agency would be comprehensive in establishing the environmental standards for the entire spectrum of environmental concerns, such as air, and water, and pesticides. The world-wide environmental protection agency for the high seas, stratosphere, arctic-antarctic,

12. *Id.* at 411.

should have coercive power, since there is no legislative or administrative machinery in being to cover those areas. Therefore, this agency must have power to promulgate rules and enforce them in those areas. This should be possible, again, since there would be no sovereign states into which the international agency would be intervening. This dual approach calling for the establishment of two different types of environmental protection agencies at the same time, of course, would be merely a beginning, but it would be a large step over the almost nonexistent institutional situation we have at present. It would be more closely tailored to meet the political realities of the present world community, using existing administrative machinery where possible, and using new international machinery where possible. By establishing regional agencies closer to the disparate citizenries of different countries, with the different perspectives of different cultures, highest environmental quality standards possible could be developed region by region. Likewise, the agency concerned with the international media would not have its standards pulled down to the lowest common denominator that all regions could agree to.

Thus, rather than putting all our environmental eggs into one administrative basket, perhaps we should simultaneously pursue two distinct paths, one leading to a variety of regional agencies, and the other leading to international global agencies.