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THE SOVIET-U.S. ENVIRONMENTAL PROTECTION AGREEMENT

On May 23, 1972, the United States and the Soviet Union entered into a bilateral agreement concerning environmental protection,¹ which was signed on April 11, 1972. This Environmental Protection Agreement is one of the latest indications of an increasing awareness of the need for an international approach to environmental problems, but the field of environmental protection is still largely dominated by

... the two great *laissez-faire* principles of national sovereignty and freedom of the high seas.²

Basically, these principles allow nations

... to conduct such activities injurious to the environment as they please, up to the limits permitted ... by their own unilateral assessment of their political, economic, military, and other requirements.³

This general rule is not, of course, absolute. For instance, the *Trail Smelter Case*⁴ established the principle that

... no State has the right to use or permit the use of its territory in such a manner as to cause [significant] injury by fumes in or to the territory of another or the properties or persons therein. . . .⁵

International agreements on various subjects have also been entered into, modifying the general rule.⁶ The most comprehensive agreement to date, in terms of the number of nations involved, is the United Nations Declaration on the Human Environment [hereinafter, the Stockholm Declaration].⁷ While the Environmental Protection

1. Agreement on Cooperation in the Field of Environmental Protection with the Union of Soviet Socialist Republics, May 23, 1972, [1972] 23 U.S.T. 845, T.I.A.S. No. 7345 [hereinafter cited as EPA]; N.Y. Times, May 24, 1972, at 14, col. 1.

2. Law, Institutions, and the Global Environment 93, (J. Hargrove ed. 1972).

3. *Id.*; see also Falk, *Environmental Policy as a World Order Problem*, 12 Natural Resources J. 161, 163 (1972).

4. *Trail Smelter Case* (United States v. Canada) 3 U.N.R.I.A.A. 1905 (1935 [Special Agreement]), 1938 [Preliminary Decision], & 1941 [Final Decision]).

5. *Id.* at 1965.

6. See, e.g., Treaty with Great Britain [for Canada] Relating to Boundary Waters and Questions Arising along the Boundary between the United States and Canada, January 11, 1909, 36 Stat. 2448, T.S. No. 548; International Convention for the Prevention of Pollution of the Sea by Oil, opened for signature May 12, 1954, [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3; Agreement with Canada on Great Lakes Water Quality, April 15, 1972, [1972] 23 U.S.T. 301, T.I.A.S. No. 7312.

7. 67 U.S. Dep't of State Bull. No. 116 (1972); N.Y. Times, Jun. 17, 1972, at 1, col. 8; *id.* at 29, col. 1. For an excellent analysis see Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harv. Int'l L.J. 423 (1973).

Agreement is a bilateral, rather than a multilateral, agreement, it may have a greater potential effect on the human environment than even the Stockholm Declaration.⁸

The Environmental Protection Agreement is basically an agreement for joint study and will not necessarily lead to environmental improvement without further agreements. The agreement contains no definite commitment to apply the results of the study. It does, however, contain some indications of an intent to do more than merely study the problem. Specifically, the agreement provides, *inter alia*, that it “. . . will be devoted to working out measures to prevent pollution . . . and to develop the basis for controlling the impact of human activities on nature.”⁹

Eleven specific areas of implementation, covering various aspects of pollution and the environment, including protective measures, are covered by the agreement.¹⁰ Four specific means of cooperation, plus a comprehensive provision for “other forms of cooperation” are also provided.¹¹ Other important language in the agreement provides for annual meetings of a joint committee to be held alternately in Washington and Moscow.¹² Also included is a five year effective period, to be automatically extended for successive periods in the absence of specific termination by a party.¹³

Although an extended treatment of the legal effect of the Environmental Protection Agreement is beyond the scope of this Comment, a short treatment of its legal effect, from the viewpoint of United States law, is in order. Since there was no participation by the Senate in the approval of the agreement, it is not a “treaty” as that term is commonly understood in the United States, but rather it is an “executive agreement” which may have substantially the same status as a treaty.¹⁴ As pointed out by McDougal and Lans,

[a]greements with other governments made pursuant to the President's authority alone when within the scope of his independent powers, have . . . substantially the same status as treaties under both international law and the municipal law of the United States. . . .¹⁵

Regardless of whether the Environmental Protection Agreement

8. See N.Y. Times, May 24, 1972, at 46, col. 1; *id.*, Sep. 23, 1972, at 30, col. 1.

9. EPA, at art. 2.

10. *Id.*

11. *Id.*, at art. 3.

12. *Id.*, at art. 5.

13. *Id.*, at art. 7.

14. See Restatement (Second) of Foreign Relations Law, §§ 119-121 (1965).

15. McDougal & Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, in McDougal & Associates, *Studies in World Public Order* 404, 426-27 (1960).

could be said to fall within the scope of the President's independent powers, it is still an important gentlemen's agreement and the parties will likely voluntarily adhere to it. It could also lead, eventually, to a treaty or to "internationally prescribed municipal legislation."¹⁶

With the growing realization that "[p]ollution is not only oblivious to national boundaries, [but] . . . also no respecter or ideological niceties,"¹⁷ there is an increasing agreement that some sort of international approach to environmental problems is needed.¹⁸ In the words of Mr. Justice Douglas:

While we people of the earth divide it up into separate jurisdictional entities, the biosphere is unitary. If we are to protect and save the biosphere from dangerous pollution, the controls in large measure must be international.¹⁹

Aside from the fact that environmental problems are rarely, if ever, peculiar to one nation, there is another potential advantage to an international approach. Such an approach will allow the problems to be studied and acted upon from more than one economic, social or political viewpoint.²⁰

While there is a general consensus that an international approach of some sort is needed, there is little or no agreement as to exactly what type of approach is most feasible. At first consideration, a broad, multilateral agreement, such as the Stockholm Declaration, might appear to be a better approach, since environmental problems affect the entire world. But, because the Stockholm Declaration does involve so many nations, with widely differing political, economic and social systems, problems may result.²¹ For example, there may

16. Brown, *The Conventional Law of the Environment*, 13 *Natural Resources J.* 203 (1973).

17. Goldman, *Pollution: International Complications*, 2 *Environmental Affairs* 1, 4-5 (1972-73).

18. Burhenne & Schoenbaum, *European Community and Management of the Environment: A Dilemma*, 13 *Natural Resources J.* 494 (1973):

The need for cooperation on the international level has been felt because (1) disparate national environmental measures can disrupt patterns of international trade and competition; (2) common resources such as the oceans and the atmosphere demand common protective action; (3) activities taking place in one state can have an adverse effect on persons and property in another state; and (4) the similarity of the problems in most countries generates a cooperative search for similar solutions.

19. Douglas, *Pollution: An International Problem Needing International Solution*, 7 *Tex. Int'l L.J.* 1 (1971-72).

20. See EPA, at Preamble.

21. See Goldman, *supra* note 17; Utton, *Environmental Policy and International Institutional Arrangements: A Proposal for Regional and Global Environmental Protection Agencies*, 11 *Natural Resources J.* 513, 515-16 (1971). *N.Y. Times*, Jun. 17, 1972, at 29, col. 1.

be resistance from the "developing nations" to moving beyond the broad statements of the Stockholm Declaration to practical implementation. The reason for that resistance is well stated in a recent note:

International acceptance of broad policy statements furnishes no real solution to the world-wide pollution problem. Any modification of environmental policy that causes economic repercussions will generate intense reaction, particularly among developing nations. It may be that standards of pollution control, in any form, will be possible only in narrowly defined economic areas among a limited number of nations with similar interests.²² [Footnotes in original omitted.]

Even if there were no other drawbacks, the Stockholm Declaration might suffer from the fact that, with more nations involved, any meaningful action would require at least the tacit approval of many governments, which might delay action on important problems.

The Environmental Protection Agreement, being a bilateral agreement, has both advantages and disadvantages as compared to a multilateral agreement such as the Stockholm Declaration. One advantage is simply the reverse of the situation with a multilateral agreement—two governments should be able to reach agreement with less delay than several governments. Another is that both parties are at roughly similar stages of technology and development,²³ and they should be able to share both the work and the results on a fairly equal basis.²⁴ Perhaps the most important advantage is that, despite some loss of prestige, each party is still largely a leader on one side or the other of world alignment. Each party may, therefore, be able to influence its allies to adopt many of the technologies and techniques developed as a result of the initially bilateral cooperation.²⁵

22. Note, *International Trade Implications of Pollution Control*, 58 Cornell L. Rev. 368, 373-74 (1972-73).

23. Brown, *supra* note 16, at 204:

... [The Environmental Protection Agreement's] significance as a reflection of the improved relations between the two States should not detract from its value as a framework for useful cooperative work between *two of the world's most technologically advanced states*. [Emphasis added]

McWhinney, *Changing Science and Technology and International Law*, 6 Ind. L. Rev. 172, 176 (1972),

[T]he national interest—benefitting *two super-powers at roughly the same level of industrialization and of general scientific and technological development*—has usually been perceived in essentially identical terms. [Emphasis added]

24. See EPA, at art. 1.

25. See McWhinney, *supra* note 23, at 175-76:

The preferred operational methodology for international law-making in the era of Bipolarity, leading to the Bipolar . . . *detente*, has been direct bilateral negotiations between the two block leaders, preferably at Summit Meetings *a deux* far from the rhetorical exaggerations and the playing to the gallery so

Besides its advantages, the Environmental Protection Agreement has at least two potential disadvantages. First, despite the possibility that the parties will be able to use their positions as world leaders to influence some countries, the "Third World" will be more difficult to influence, because of their distrust of both the Soviet Union and the United States.²⁶ Second, there is the possibility that the Soviet Union and the United States, being rivals in international politics, will allow their rivalry to stand in the way of genuine cooperation.²⁷

The Environmental Protection Agreement certainly should not be looked upon as *the* answer to the environmental crisis. While it is reasonably comprehensive in the areas of implementation,²⁸ there are some areas which are not covered. For example, the agreement says nothing about population control, which many authorities consider to be the most important single factor in the environmental crisis.²⁹ One author has pointed out that:

... [i]f one were to single out that area of greatest promise in reducing environmental ills, it would undoubtedly focus on excessive rate of growth of population—whether in so-called development or developing countries.³⁰

often attendant upon the usual public arenas in the United Nations. These direct bilateral negotiations have invariably resulted in bilateral accords or formal agreements which have later been opened to adherence by the other, lesser or supporting, countries but usually without any possibility of modification or amendment . . .

EPA, art. 2 provides that:

The Parties . . . , upon mutual agreement, . . . will share the results of such cooperation with other countries.

26. Falk, *supra* note 3, at 164-65:

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. . . . From a Third World perspective, then, the problems associated with environmental degradation, to the extent they exist, should be dealt with in such a way as to avoid any interference with economic development.

27. Falk, *supra* note 3, at 165:

[E]ven though the interests among developed countries [e.g. the U.S. and the U.S.S.R.] are convergent in relation to environmental quality, the prospect of an *implementing* (as distinct from a *pious*) *consensus* on action remain poor. Just as with disarmament . . . 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. [Emphasis in the original]

28. EPA, at art. 2. See N.Y. Times, Sep. 19, 1972, at 8, col. 1.

29. See, e.g., P. Ehrlich, *The Population Bomb* (rev. ed. 1971); P. & A. Ehrlich, *Population, Resources, Environment: Issues in Human Ecology* (2d ed. 1972); *Population, Evolution, and Birth Control: A Collage of Controversial Ideas* (2d ed. G. Hardin 1969); U.S. Dep't of Int., *The Population Challenge: What it Means to America* (Conservation Yearbook #2, 1966).

30. Wolman, *Global Pollution and Human Rights*, 12 *Natural Resources J.* 195, 196 (1972).

Nevertheless, while it may not be the best possible approach to environmental problems, the Environmental Protection Agreement is one way to deal with them.

We should . . . not be sidetracked by shallow debate over the exclusive value of one pollutional-control approach over another when it is clear that we must proceed on *all* levels simultaneously.³¹
[Emphasis in the original]

Although the Environmental Protection Agreement does have its shortcomings, the advantages seem to outweigh the disadvantages. The agreement was implemented in detail within five months of its effective date, when the joint committee³² held its first meeting in Moscow, September 18-21, 1972.³³ Thirty projects

to benefit and protect the cities, farms, rivers, lakes and air of both countries³⁴ were agreed upon.

These projects, involving

air and water pollution, oil spills, seismic research, . . . urban environmental problems, pest management . . . , atmospheric pollution . . . [from] supersonic transportation, and . . . problems in permafrost regions³⁵

comprehensively cover each of the eleven areas of implementation of the agreement.³⁶

If further progress under the agreement is achieved, then the parties will be able to use their influence as world leaders to persuade other nations to use the results of the joint programs for their own environmental improvement. Other possibilities also exist. For example, the agreement, with its emphasis on "improving existing technologies and developing new technologies which do not pollute the environment,"³⁷ could eventually lead to a treaty that would require testing of products and technologies before they are marketed. Possibly, the parties could form the nucleus of an "Inter-

31. Grievs, *International Law and the Environmental Issue*, 1 *Environmental Affairs* 826, 833 (1971-72).

32. EPA, at art. 5.

33. Memorandum of Implementation of the Agreement with the Union of Soviet Socialist Republics on Cooperation in the Field of Environmental Protection of May 23, 1972, 67 U.S. Dep't State Bull. 451 (1972) (memo signed Sep. 21, 1972) [hereinafter cited as *Memo of Implementation*].

34. N.Y. Times, Sep. 22, 1972, at 1, col. 8. *Id.* at 13, cols. 1, 5.

35. *Id.* at 1, col. 8.

36. EPA, at art. 2. See *Memo of Implementation*, *supra* note 33.

37. EPA, at art. 2.

38. Dorsey, *A Proposed International Agreement to Anticipate and Avoid Environmental Damage*, 6 *Ind. L. Rev.* (1972).

national Environmental Agency,"³⁹ to consist of both communist and non-communist members from "leading industrial and maritime nations."⁴⁰ A more likely possibility is the potential of the Environmental Protection Agreement for providing an example for developing better patterns of international cooperation.⁴¹

Some of these possibilities are mere speculation and may never happen, but even if the Environmental Protection Agreement leads only to better communication about environmental matters, the Soviet Union and the United States will have achieved a significant goal.

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39. Kennan, *To Prevent a World Wasteland: A Proposal*, 48 Foreign Affairs 401, 411 (1969-70).

40. *Id.*, at 410. The author suggests the non-feasibility of involving the entire world community in such an organization:

Obviously no single government could stand as the patron for such an agency. To seek, on the other hand, the sanction of the entire international community for its inception and activity would scarcely be a promising undertaking. Aside from the fact that this would then necessitate procedures practically indistinguishable from those of the United Nations itself, it would mean involving in the control and operation of the entity to be established a host of smaller and less developed countries which could contribute very little to the solution of the problems at hand. It would also involve formidable delays and heavy problems of decision-making. Were this to be the course selected, one would do better to content one's self, throughout, with the existing facilities of the United Nations, which represent just about the limit of what can be accomplished on the basis of a universal, or near-universal, governmental consensus.

41. *See id.* at 413.