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ELEVENTH ANNUAL GROTIUS LECTURE RESPONSE

COMMENTARY ON ACHIM STEINER'S 2009 GROTIUS LECTURE

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I wish to express my gratitude to the American University Washington College of Law for inviting me to comment on the incredibly rich and challenging lecture delivered by Achim Steiner, Executive Director of the United Nations Environment Program (“UNEP”).¹ There were many lessons and themes contained therein, and I will not attempt to respond to them all. Moreover, because I agree with most of what the lecture contained, it is difficult not merely to echo what was presented in such a comprehensive and thoughtful way. However, I would like to highlight a couple of points and perhaps twist the kaleidoscope a quarter-turn to see the

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1. See generally Achim Steiner, *Focusing on the Good or the Bad: What Can International Environmental Law Do to Accelerate the Transition Towards a Green Economy?*, 25 AM. U. INT’L L. REV. 843 (2010) (arguing that at both national and international levels, governments should seize the financial crisis as an opportunity to promote sustainable development by using stimulus funds to invest in green technology and implementing regulations to ensure that the market takes environmental costs into consideration).

pieces in a somewhat different arrangement, perhaps with some aspects or colors a bit more prominent.

I would first like to reciprocate Dr. Steiner's reflection on the economist's need for law. If one thing comes through in his remarks, and in lessons from the Montreal Protocol,² it is the need for interdisciplinary efforts. Lawyers also need the economists to assess and inform of the costs associated with various proposals relating to the green economy—and both of us need scientists to elaborate the alternatives and the benefits from each choice.

My own remarks, though, begin with the lesson of Grotius: law can be a conduit for transformative economic change.³ Yes, for “good and for bad,” to refer back to the title of the lecture. It is true that international norms on freedom of the seas allowed maritime commerce and free trade to open up new worlds from the seventeenth century onwards and began the economic transformation that brought industrialization, with its vast improvements, to the lives of millions. But a host of less positive developments also followed: the transatlantic slave trade, colonialism, increased disparities between rich and poor, and the vast loss of biodiversity and other natural resources that continues today. I do not blame Grotius for these unintended consequences. My point is that legal norms and economic recovery must consider the people who are affected. The earlier, negative side of maritime freedom and trade required legal correctives that took centuries to achieve, and even now, we are struggling with the aftermaths.

Recalling these negative dimensions should allow us to focus attention on determining and seeking to achieve fundamental goals and values, whether we are talking about economic, political, or legal systems, nationally or internationally. All of these constructs ultimately are about—or should be about—protecting and improving human well-being, which means they must also be about the earth's

2. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10 (1987), 1522 U.N.T.S. 29, 34 [hereinafter Montreal Protocol] (committing signatories to reducing their consumption of chlorofluorocarbons in order to protect and restore the ozone layer).

3. See generally HUGO GROTIUS, MARE LIBERUM (Richard Hakluyt trans., Liberty Fund 2004) (1608) (arguing that nations are bound by a higher law and guided by God through human conscience, and concomitantly that international law protects the right of all persons to navigate the seas to engage in trade).

well-being; one cannot be separated from the other. In this respect, I hope that economic activities are seen as a means to those ends and not as goals in themselves.

Dr. Steiner points to the New Deal as a model of transformation during an economic crisis, one that may be modified to create a Global Green New Deal.⁴ This is an ambitious goal that I would like to see accomplished in the framework of another of President Roosevelt's landmark contributions: his Four Freedoms speech that emerged in the human rights language of the U.N. Charter and more than half a century of human rights law.⁵

We have to recognize that we are not only in a global economic crisis, as Dr. Steiner discussed, but we have global human security and environmental crises as well. The Millennium Ecosystem Assessment is stark. More than sixty percent of ecosystem services are degraded or unsustainably used.⁶ People living in severe poverty directly depend on the provisional services of these ecosystems and often also attach cultural and spiritual value to them. Many of these communities suffer from exclusionary practices such as the privatization of formerly common pool resources, which not only remove their access to the resources, but prevent them from exercising a role in protecting the ecosystems.

The consequences for human health and well-being are evident. Lack of clean and safe drinking water and sanitation has meant that "waterborne infections account for 80% of all infectious diseases worldwide."⁷ In many areas, industrial and household wastes are

4. See Steiner, *supra* note 1, at 848-51 (recognizing that, unlike Roosevelt's New Deal, the Global Green New Deal would require a strong international framework given the modern interconnectivity of the environment and global economic development).

5. See President Franklin D. Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966); *see also, e.g.*, William Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 74-75 (1999) (finding that the U.N. Charter incorporated the Four Freedoms' concept of a positive duty among governments to enforce rights).

6. See MILLENNIUM ECOSYSTEMS ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING SYNTHESIS 1 (José Sarukhán & Anne Whyte eds., 2005) (finding that the costs of this depletion are growing and are typically borne not by the agents of development, but by future generations and the poor).

7. David Pimentel et al., *Ecology of Increasing Disease: Population Growth and Environmental Degradation*, 48 BIOSCIENCE 817, 818 (Oct. 1998) (adding that

dumped directly into rivers and lakes. Air pollution adversely affects the health of four billion people.⁸ Some two and a half billion kilograms of pesticides are used worldwide each year—a fifty fold increase over the past fifty years—resulting in about three million cases of human pesticide poisonings annually.⁹

These human security and environmental crises, as well as the current economic crisis, are not equal opportunity disasters. At the beginning of the twenty-first century, the industrialized world, with twenty percent of the global population, generated more than eighty percent of the world's pollution and used about eighty percent of global energy and mineral resources.¹⁰ Yet, the consequences of environmental deterioration, especially anthropogenic climate change, have and will continue to have their most devastating impacts on poor and minority communities and countries, on those who are least responsible for creating the problem. The April 2007 Intergovernmental Panel on Climate Change report concerning climate change impacts, adaptation, and vulnerability confirmed what many already know: “[T]he poorest of the poor in the world, and this includes poor people even in prosperous societies, . . . are going to be the worst hit.”¹¹ They already have been hit. It has been noted that adaptation in the northern mountains means buying more snow-making machines for the ski resorts; in Bangladesh it means

this number increases to ninety percent in developing countries).

8. *See id.* at 820 (reporting that individual, open wood, and coal cooking fires in developing nations account for a significant portion of the total).

9. *See id.* at 821 (noting that the environmental harm from this increased pesticide use has been compounded by the fact that modern pesticides are ten times as toxic as they were in the 1950s).

10. *See, e.g.,* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTRUMENTS 364 (Oxford Univ. Press 1995) (“It is also demonstrable that the older industrial nations have been polluting disproportionately for much longer—at least since the industrial revolution—than the rest of the world.”); Elizabeth Dowdeswell, Executive Director, United Nations Environment Programme, Address at the United Nations International Conference on Population and Development (Sept. 6, 1994), *available at* [http://www.un.org/popin/icpd/conferenc e/una/940909162653.html](http://www.un.org/popin/icpd/conferenc/e/una/940909162653.html) (asserting that a child born in the United States has, on average, a consumption impact thirty times greater than a child born in India).

11. Rajendra Pachauri, *Climate Justice Facts*, NEW INTERNATIONALIST, Jan. 1, 2009, at 12; *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 813 (Martin Parry et al. eds., 2007) (detailing the myriad negative impacts of climate change on the world's poor).

teaching people to swim. Desmond Tutu refers to this in harsh terms that we should remember: adaptation apartheid.¹²

International law cannot afford to ignore this issue. According to the Red Cross, 1998 was the first year in which the number of refugees from environmental disasters exceeded those displaced as a result of war.¹³ Between 2000 and 2004, “262 million people were affected by climate disasters annually . . . , over 98 percent of them in the developing world.”¹⁴ Solving many of these problems is not simply a matter of a green economy or technology, but lies in political will and in law—not just environmental law, but trade law, investment law, intellectual property law, and human rights law. Indeed, achieving the fundamental goals of security and sustainable development touches nearly all areas of international and domestic law.

Social and environmental impacts have to be considered together and integrated in programs, projects, and policies in ways they have not been until now, especially in trade and finance institutions. To reaffirm Dr. Steiner’s definition of the Green Economy, it must be “an economic system that recognizes the properties of healthy ecosystems as the backbone of economic and social well-being and as a precondition for poverty reduction.”¹⁵ In other words, a green economy must also be a just economy, a means to improve security and well-being now and into the distant future. Environmental justice, including those “common but differentiated responsibilities” that are referred to in international environmental texts, needs to be taken seriously as a major part of future legal arrangements.

There has long been an imbalance in the global agenda, one that resulted in the creation of a World Trade Organization (“WTO”), but only an environmental “program” and a human rights “office.” Each of these areas of international concern needs the others; trade and investment can only be sustainable in the long run if those involved respect human rights and the environment. The environment in turn

12. KEVIN WATKINS ET AL., HUMAN DEVELOPMENT REPORT 2007/2008, at 13 (U.N. Dev. Programme 2007), available at http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf.

13. INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], ANNUAL REPORT (1999).

14. WATKINS ET AL., *supra* note 12, at 8.

15. Steiner, *supra* note 1, at 874.

can be better protected through respect for human rights, including non-discrimination and rights of information, public participation, and redress for environmental harm. Certainly, the panoply of internationally-guaranteed human rights cannot be effectively enjoyed without the underpinnings of a safe and healthy environment. As Dr. Steiner said, the necessary changes, including the integration of these heretofore separate values and institutions, nationally and internationally, will not occur solely through voluntary measures.¹⁶

The integration will not be easy and requires thinking through a host of difficult legal questions: how much environmental deterioration is permissible before it becomes a human rights violation? How much process is due in decision-making? When do affected communities not only have the right to participate, but the right to veto projects that would adversely affect them but benefit the society as a whole? How should the benefits and burdens be allocated equitably? And who decides? What is the role of international courts and tribunals, especially human rights bodies that increasingly examine these issues and struggle to determine questions of proportionality, deference, and balance or reconciliation of competing rights?

This brings me to a comment on what should be the central role of UNEP. UNEP is one of the younger parts of the U.N. system, geographically distant from U.N. headquarters, deliberately given a limited mandate, and, to some extent, undermined by the creation of the Commission on Sustainable Development following the 1992 Rio Conference.¹⁷ UNEP needs greater support from its Executive Council and the United Nations as a whole to make full use of its expertise and further promote its work. In the recent Executive Council discussion of UNEP's Montevideo IV Program, it is of some concern that several representatives "agreed that United Nations discussions on climate change, in particular legal approaches thereto, should be kept within the United Nations Framework Convention on Climate Change."¹⁸ This cannot be right: UNEP is the only part of

16. *Id.* at 15.

17. G.A. Res. 47/191, U.N. Doc. A/RES/47/191 (Jan. 29, 1993).

18. U.N. Env't'l. Programme [UNEP], *Report of the meeting of Senior Government Officials Expert in Environmental Law to Prepare a Fourth Programme for the Development and Periodic Review of Environmental Law*

the United Nations with the word “environment” in its name, and UNEP’s responsibilities include providing the secretariat for Multilateral Environmental Agreements whose implementation and effectiveness may be drastically affected by climate change. It has a legal program that has contributed enormously to the development of national and international environmental law. Yet the 2002 Johannesburg Summit similarly downplayed the role of UNEP by focusing on the WTO as the central forum for discussions on trade and the environment. This history makes me a little cautious when I hear UNEP’s prediction, quoted by Dr. Steiner, that the current environmental challenges and opportunities will propel the environment from a marginal issue to one at the center of political and economic determinations.¹⁹ It may be true, but not without a lot of effort by all those concerned, including UNEP.

UNEP has taken excellent steps in its Montevideo IV Program to integrate the Millennium Development Goals, poverty reduction, economic development and human rights. It co-organized with the Office of the High Commissioner for Human Rights the first joint expert meeting on the links between human rights and environmental protection, and in September 2008, organized the first meeting on ecosystem services and human well-being. In turn, the U.N. Human Rights Council has placed climate change on the human rights agenda,²⁰ as it did earlier with the topic of illicit transboundary movement of hazardous wastes and products. Further institutional and scholarly attention to these issues, especially in the efforts to address the current economic crisis, may help alleviate some of the lack of coherence Dr. Steiner referred to in his paper.²¹ Ultimately, I

(*Montevideo Programme IV*), ¶ 35, U.N. Doc. UNEP/Env.Law/MTV4/IG/2/2 (October 22, 2008).

19. See UNEP, *Medium-term Strategy 2010-2013: Environment for Development*, UNEP/GCSS.X/8, at 3 (Dec. 5, 2007) (positing that the irreversible harm posed by crossing environmental “tipping points” could force governments and international organizations to give greater consideration to sustainable development).

20. See U.N. Human Rights Council [UNHRC], Res. 7/23, U.N. Doc. A/HRC/7/78, at 65 (Mar. 28, 2008) (requesting a study of impact of climate change on human rights).

21. See Steiner, *supra* note 1, at 857-65 (arguing that the dearth of resources directed at climate change is partially the result of the confusion generated by the fragmentation of environmental concerns among multiple U.N. programs and conferences instead of a single comprehensive approach).

hope he is right and that environmental law will help in the transition to a green economy. I hope it will also contribute to achieving a just economic system respectful of the human rights of all persons and groups, those now and those to come.

Thank you for your attention.