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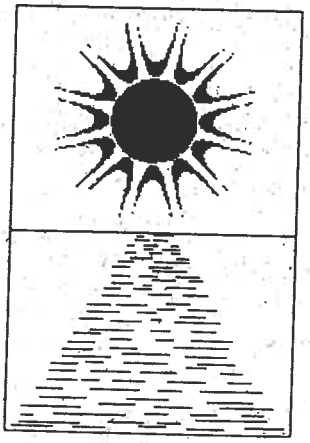

Thinking Globally and Acting Locally: The Internationalization of State and Local Environmental Law

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International environmental lawyers watched Florida's recent debate over whether to make polluters pay for restoring the Everglades with a mixture of curiosity and hope. Not only did the initiatives address a resource of international importance, but reliance on the so-called "Polluter Pays Principle" seemed to endorse international environmental law discourse in a way that is surprisingly rare in the United States. After the principle passed, international environmental lawyers wondered if this was a harbinger of things to come. Would there be an increased internationalization of U.S. environmental law and policy, particularly at the state and local level?

Current signals are mixed. In many respects international law has had relatively minor impact on the development of U.S. environmental laws. Our country's size and power in the global community, as well as the relatively advanced stage of our environmental laws, have meant that developments in international law have reflected rather than shaped the development of our environmental laws. The Rio and Stockholm Declarations, for example, have been cited only once (to my knowledge) in a U.S. federal court opinion and that decision was subsequently overturned. Likewise, the Montreal Protocol—widely regarded as the most well developed of multilateral environmental regimes—has only been cited once.

Against this background, however, several major trends suggest international law may play a greater role in future state and local environmental law-making. Some of these trends reflect changes internal to international environmental law, itself (Part I), while others are external trends, such as the rise of international trade regimes (Part II) and the globalization of the economy and environmental movements (Part III).

The Rise of International Environmental Law

The field of international environmental law is one of the most dynamic and growing fields of international law. By some estimates, more than eight hundred multilateral and bilateral agreements now contain provisions dealing with one or more aspects of the environment. In addition, several key decisions by international tribunals and arbitral panels have

recognized the existence of customary international environmental law.[1] "Soft law" principles and concepts, though by their nature non-binding, also occupy a prominent position in the emergence of international environmental law. Thus, for example, the Precautionary Principle and the Polluter Pays Principle help to fill gaps left by the treaties and cases. Over time some of these principles and concepts may become binding customary law, although most of them have probably yet to achieve this status. Finally, a growing number of international institutions, including the U.N. Environment Programme, the U.N. Commission on Sustainable Development, the World Health Organization, the U.N. Food and Agriculture Organization, the U.N. Development Programme and the multilateral development banks issue environmental standards and guidelines.

At least three trends in international environmental law suggest that the future may see an increasing internationalization of U.S. national and subnational environmental law: (1) a growing focus in international environmental law on implementation and compliance; (2) a change in the classification of which environmental issues are international; and (3) the development of international principles aimed directly at strengthening national environmental law.

Changing Focus to Implementation

The proliferation of international environmental treaties and other instruments has not necessarily been complemented by a parallel growth in implementation and compliance. As some observers have remarked, international environmental lawyers have been "happy drafters," content with creating more documents with little attention paid to their implementation on the ground. This may be changing; several environmental regimes have matured to the point where implementation is recognized as the only major challenge remaining. Thus, for example, parties to the Montreal Protocol recently created an "Implementation Committee" to help countries meet their objectives to eliminate ozone destroying substances. This growing emphasis could signal important changes in enforcement priorities at the national and subnational levels. For example, by most estimates, chlorofluorocarbons (imports of which are now banned by the Montreal Protocol) and endangered wildlife (controlled by the Convention on International Trade in Endangered Species) are two of the four most prevalent illegal imports into Miami and other ports (along with drugs and guns).[2]

Expanding from Global and Transboundary Issues to Local Issues

In part because of explicit shifts toward the goal of sustainable development, the classification of environmental issues that are addressed as international is changing. Traditionally, international environmental law has addressed: global commons, like the oceans, outer atmosphere, and other areas clearly beyond any country's jurisdiction; transboundary resources, like the Great Lakes or the Rio Grande; migratory wildlife, which

requires international cooperation for effective management; and a few international economic activities, such as trade in hazardous wastes or endangered species, which can not be regulated effectively by one country alone.

Except for a very few unique areas like the Everglades, Yellowstone or the Grand Canyon, which merited special international recognition,[3] most environmental resources were considered wholly the domain of domestic environmental policy-making. Now, however, international law-making is expanding its reach in ways that challenge traditional notions of state sovereignty. For example, the biodiversity convention seeks to conserve non-migratory biodiversity contained wholly within one country (or within a state, for that matter). The desertification convention addresses soil erosion and loss of arable land. Many international conferences have been held to discuss protection of fresh water resources or the conservation of forests. In the words of international lawyers, these local resources, formerly thought to be completely within a nation-state's sovereignty, are now considered part of our "common concern." This, more than any other trend, may result in the increased internationalization of national and subnational law.

Developing Stronger and Clearer Principles

Only recently has international environmental law become sufficiently rich and clear to provide guidance to the more well-developed legal systems like that of the United States. Most notably, the development of international environmental concepts and principles, like the polluter pays principle, can be used to strengthen national and subnational law. These concepts and principles have been endorsed in a number of different contexts, including both the Rio and Stockholm Declarations, Agenda 21, and most treaties or other instruments signed since the 1992 U.N. Conference on Environment and Development (UNCED).[4]

These concepts and principles serve a number of different functions in international environmental law. They add coherence and consistency to the field, guide governments in negotiating and implementing international instruments, provide background for interpreting and applying international law in specific cases or conventions, and assist in integrating international environmental law with other international law fields. In addition, a number of principles and concepts have developed explicitly to shape domestic laws, including subnational laws.

In the United States the international codification of these principles may not yet have had significant impact on the development of national or subnational laws. Florida's use of the "polluter pays principle" is thus somewhat an anomaly, but one that probably heralds things to come, as these principles are more fully developed and better understood. The following principles and concepts should have an increasingly visible role in future U.S. domestic environmental policymaking.

1. Sustainable Development. Sustainable development is perhaps the international concept with the most prevalent impact on domestic law-making. Historically relegated to the development of renewable resources (such as the sustained harvesting of forests or fisheries), sustainable development is now the goal of much international environmental policy-making.

Agenda 21, heralded as the blueprint for achieving sustainable development, provides a framework for evaluating the progress of different levels of government in achieving the integration of environment and development. Agenda 21 is replete with specific calls for national and local efforts to achieve sustainable development. Chapter 28, for example, is entirely focused on strengthening the role and capacities of local authorities, particularly cities, to achieve sustainable development. It calls on all localities to develop by 1996 a consensus through consultation with the public about how to implement a "Local Agenda 21" for the community. Some states such as Virginia and Indiana have been particularly active in using Agenda 21 as a policy framework. Agenda 21 also called for the U.N. system to create opportunities for greater international cooperation among subnational and local governments. In 1994, the U.N. convened an international forum of local governments to discuss the environment, and the U.S. Agency for International Development launched a "sustainable cities" program to spread local lessons of sustainability.

In the United States the mantle of implementing Agenda 21 was borne by the President's Council on Sustainable Development, which concluded this past year. This high profile effort aimed at identifying a national strategy to achieve sustainable development. The final report includes both broad national goals and local initiatives that move us toward sustainable development. Among the highlighted local initiatives, for example, was Florida's Jordan Commons—an initiative to design a low-income housing complex that promotes a stronger sense of community.[5]

2. Principle of Intergenerational Equity. International environmental law increasingly recognizes that States shall equitably meet the development and environment needs of present and future generations.[6] The principle of intergenerational equity affirms a commitment to long-term environmental protection and to giving a voice to future generations. The principle affirms each generation's responsibility to be fair to the next generation, by leaving an inheritance of wealth no less than they themselves inherited. At a minimum, the principle requires the sustainable use of natural resources and the avoidance of irreversible environmental damage. It would also require changes in economic discount rates and the extension of judicial standing to unborn generations. The principle can be seen in several national constitutions and the Philippines Supreme Court recently endorsed the principle in upholding the standing of unborn children to bring a lawsuit to protect the country's forests.

3. The Precautionary Principle. As set forth in Principle 15 of the Rio Declaration, the precautionary principle states that: "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[7] The precautionary principle evolved from the growing recognition that scientific certainty often comes too late to design effective legal and policy responses to potential environmental threats. In essence, it switches the burden of scientific proof necessary for triggering policy responses thus shortening the time period between when

a potential threat to the environment is identified; when the existence, causes and impacts of that threat are proven; and when consensus in support of a policy response can be achieved.

4. Pollution Prevention and Waste Minimization. The pollution prevention principle confirms that environmental protection is best achieved by preventing environmental harm rather than by attempting to remedy or compensate for such harm. The prevention principle can be implemented through clean production or waste minimization policies, improved environmental management including periodic audits, environmental impact assessments, and policies reflecting life-cycle analyses and extended product responsibility.

5. The Polluter and User Pays Principle. As set forth in Principle 16 of the Rio Declaration, "national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[8] The principle aims to integrate the full environmental and social costs (including costs associated with pollution, resource degradation, and environmental harm) into the ultimate market price for a good or service. Environmentally harmful or unsustainable goods will tend to cost more, and consumers will switch to less polluting substitutes. The principle is still highly controversial, particularly in developing countries where the burden of internalizing environmental costs is perceived as being too high.

6. Principle of Subsidiarity. Little known here in the U.S., the principle of subsidiarity is central to the structure of the European Union. According to the subsidiarity principle, decisions should be made at the lowest possible level of government where decisions can be made effectively. This provides an inherent preference for decentralizing to local and subnational governments. Because of the inherent advantage of addressing certain environment and development issues at the local level (for example, land use or water supply), the principle is now being promoted as important for achieving sustainable development.[9]

International Trade and Environmental Laws

Like the environment, economic capital does not honor political boundaries. The general trends of economic globalization have important implications for the internationalization of law, generally, as well as for environmental law. States and local governments have long recognized the general economic importance of international trade. Most states have trade offices abroad, and all have official standing at the World Trade Organization (WTO).

What is less understood is the impact that the WTO and NAFTA can have on environmental protection efforts. State and local authorities are, generally speaking, required to comply with the trade provisions of the WTO and NAFTA.[10] This puts many state and local environmental

laws potentially at risk from scrutiny by the WTO, if they violate the most favored nation and non-discrimination principles of the free trade regime. Although the WTO and its predecessor, the GATT, have not yet ruled a state or local environmental law incompatible, they have called into question a number of federal environmental statutes, including portions of the Clean Air Act and the Marine Mammal Protection Act.[11]

NAFTA. The NAFTA, particularly the NAFTA environmental side agreement, may also have significant influence on U.S. environmental law. The NAFTA Commission on Environmental Cooperation (CEC) has an active agenda to promote the harmonization and integration of a "continental" environmental law, and the petition processes available under the environmental side agreement provides citizens new opportunities to ask for improved enforcement of domestic environmental laws. Just this month, the CEC, in response to a citizen petition, has requested the United States to explain its failure to enforce the National Environmental Policy Act with respect to the U.S. Army's increased use of water from Arizona's San Pedro River. This is the first time a CEC citizen petition to the CEC has triggered an explanation from the U.S. government.[12]

ISO and Ecolabelling. In addition to formal trade policy, there are a number of informal or private sector initiatives that could have important future impacts on state regulatory efforts. Most significant is probably the effort to adopt environmental standards for environmental management through the International Organization for Standardization (ISO). ISO is an international body of national standards organizations. Some of these national organizations are governmental and some are a public-private mix. [13] After issuing a set of standards on quality management and assurance (ISO 9000 series), ISO turned to establishing a set of standards for environmental management (ISO 14000 series). Thus far the ISO 14000 series includes standards for environmental management systems (ISO 14001 and 14004) and environmental auditing (ISO 14010-14012). Through these standards ISO hopes to harmonize international environmental standards and to preempt the rise of differing ecolabelling systems or management standards.

ISO makes many environmentalists nervous. One potential problem is that the standards adopted through ISO 14000 are increasingly being viewed as appropriate standards for domestic regulation. Industry also expects to gain different forms of regulatory breaks if they comply with the ISO standards. Although this may be less of a threat in the United States, it presents a profound problem in developing countries that may adopt ISO standards as their formal regulations. ISO standards, however, are not meant to replace effective governmental regulation and are not necessarily aimed at ensuring adequate protection of public health. Moreover, the process for negotiating the ISO standards, although not formally closed, is so complicated and complex that civil society organizations, small businesses and developing country governments can not reasonably be expected to participate effectively.

The Rise of Non-State Actors and the Erosion of the Nation-State

In addition to changes in international environmental law and related areas such as international trade laws, general globalization trends will also have profound impact on the internationalization of environmental law. Under traditional views of international law, only nation-states have rights and responsibilities. Non-state actors, such as non-governmental organizations (NGOs), industry, and even subnational governments, are not allowed to participate in international law. The nation-state's predominance is eroding however.

As Jessica Tuchman Mathews recently observed:

> [T]he clash between the fixed geography of [nation]-states and the nonterritorial nature of today's problems and solutions, which is only likely to escalate, strongly suggests that the relative power of [nation]-states will continue to decline. Nation-states may simply no longer be the natural problem-solving unit. Local government addresses citizens' growing desire for a role in decision-making, while transnational, regional, and even global entities better fit the dimensions of trends in economics, resources, and security. [14]

Although the demise of the nation-State as the primary political international law-making authority can be overstated, the trends do seem unmistakable.

To some extent, states and local governments could benefit from this changing international landscape. In the environmental field, for example, states are increasingly making agreements with foreign governments.[15] For the most part, these agreements are designed to improve coordination and cooperation on border issues. Thus, for example, New York and Vermont have made agreements with Quebec to improve the management of Lake Champlain. Other agreements are intended to improve transnational participation in environmental assessments, emergency preparation and similar processes. Such international cooperation allows States to take the initiative with respect to transnational environmental management issues. For Florida, this may present interesting prospects for developing agreements to better manage the Gulf of Mexico and the Caribbean.

Ultimately, however, the big winners in the erosion of the nation-state's monopoly over international affairs are non-state actors, most notably multinational corporations and to a lesser extent citizen-based NGOs. Both multinational corporations and citizen activists now conduct their own foreign policy, gather their own information from informal and unofficial sources, and increasingly expect to participate directly in international law-making affairs.

This globalization of the environmental movement, particularly the growing international experience and strength of NGOs, may ultimately

prove to be the most important, albeit intangible, pressure toward internationalization of U.S. environmental law. Activists gain from experiences around the world, often as they travel to other countries to provide advice and assistance. Many of them return having learned as well about new ideas, principles and concepts for environmental protection that can be applied to the United States.

Perhaps most importantly we can now maintain and strengthen our contacts and build on our knowledge base, even without the expense or time of traveling. The virtual world created by the Internet and electronic communication provides a vast opportunity for sharing experiences and mobilizing environmentalists to push for stronger environmental policies. Not only do these electronic networks allow for effective lobbying on international institutions such as the World Bank, but they can also bring international pressure to bear on purely local issues. For example, last year the Environmental Law Alliance Worldwide (ELAW) network, which exists primarily to assist environmental lawyers in bringing environmental cases in developing countries, recently worked together to oppose a Korean company's destruction of riparian habitat in Eugene, Oregon (home of the ELAW-US office). Efforts like this are becoming almost routine as the Internet not only makes it easier to "think globally," but also to "act locally."

Endnotes

[1] Most famous among these is probably the Trail Smelter Arbitration, which found Canada responsible for environmental and agricultural damage in the United States caused by a Canadian smelter's sulfur dioxide emissions. This past year, the International Court of Justice in evaluating the legality of nuclear weapons ruled for the first time that a country may not harm the environment of another country. The Court is also expected to decide the Gabcikovo dam dispute soon, which will determine whether Slovakia can legally divert the Danube River's flow away from Hungary.

[2] *See, e.g.*, J. Vallette, *Deadly Complacency: US CFC Production, the Black Market and Ozone Depletion* (Ozone Action: Sept. 1995); *Allied Signal, Quimobasicos and the Frio Banditos: A Case Study of the Black Market in CFCs* (Ozone Action: Nov. 1996).

[3] *See, e.g.*, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, *entered into force* Dec. 17, 1975, *reprinted in* 11 I.L.M. 1358 (1985); the Convention on Wetlands of International Importance, *entered into force* Dec. 21, 1975, *reprinted in* 11 I.L.M. 963 (1972).

[4] D. Hunter, J. Sommer & S. Vaughan, *Concepts and Principles of International Environmental Law: An Introduction* (UNEP Environment and Trade Monograph No. 2, 1994); International Union for the Conservation of Nature's Commission on Environmental Law, *International Covenant on Environment and Development* (March, 1995); United Nations Environment Programme, *Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development*, UNEP/IEL/WS/S/

2 (Oct. 4, 1996); United Nations Department for Policy Coordination and Sustainable Development, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development,* Background Paper No. 3 (1996).

[5] The President's Council's full report can be found at http://www.whitehouse.gov/wh/EOP/PCSD.

[6] *See, e.g., Declaration of the U.N. Conference on Environment and Development,* at Principle 3, U.N. Doc. A/Conf.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 876 (1992) [hereinafter *"Rio Declaration"]*; *United Nations General Assembly Resolution on the Historical Responsibility of States for the Protection of Nature for the Benefit of Present and Future Generations,* U.N.G.A. Res. 35/8 (Oct. 30, 1980); *Declaration of the Hague,* Mar. 11, 1989, 28 I.L.M. 1308 (1989); *United Nations Framework Convention on Climate Change,* May 9, 1992, 31 I.L.M. 849 (1992) [hereinafter *"Climate Change Convention"*].

[7] *See, e.g., Rio Declaration, supra* note 6, at Principle 15. *World Charter for Nature,* Principle 11, G.A. Res. 37/7 (Oct. 28, 1982)]; *Convention on Biological Diversity,* Preamble, *reprinted in* 31 I.L.M. 818 (1992); *Climate Change Convention, supra* note 7, at Article 3.3; *London Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer; and Non-Compliance Procedure,* at Annex II, Article I.A.1 (amendment to 6th preambular paragraph), Decision IV/18, Nov. 25, 1992, UNEP/Oz.L.Pro.4/15; U.N. Economic Commission for Europe, *Convention on Protection and Use of Transboundary Watercourses and International Lakes,* Article 2(5)(a), Mar. 17, 1992, 31 I.L.M. 1312 (1992) (not yet in force); *Treaty Establishing the European Economic Community,* Mar. 25, 1957, 294 U.N.T.S. 17, U.K.T.S. 15 (1979) *as amended by Treaty on European Union,* Title XVI, Article 130r, Feb. 7, 1992.

[8] *See, e.g., Rio Declaration, supra* note 6, at Principle 16; *OECD Council Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies* (C(72)128) (May 26,1972); *OECD Council Recommendation on the Implementation of the Polluter-Pays Principle* (C(74)223) (November 1974); *European Charter on the Environment and Health,* WHO Doc. ICP/RUD 113/Conf.Doc./1, Oct. 12, 1989, *reprinted in* 20 ENVTL. POL. & LAW 57 (1990); *Agenda 21,* Paragraph 30.3 (governments should use "free market mechanisms in which the prices of goods and services should increasingly reflect the environmental costs"), Paragraph 2.14 (commodity prices should reflect environmental costs); *see also* Single European Act, Article 130R, Paragraph 2 (Feb. 27, 1986).

[9] *See, e.g.,* M. Bothe, *The Subsidiarity Principle,* in E. DOMMEN, FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT (1993).

[10] *See, e.g.,* NAFTA, Art. 105 ("Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments"); NAFTA, Art. 301:2 (requiring states and provinces to accord treatment "no less favorable