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# International Environmental Law: Boundaries, Landmarks, and Realities

Lakshman Guruswamy

**T**he tenth anniversary of *Natural Resources & Environment* is an auspicious occasion for reviewing U.S. environmental law. It also offers a felicitous opportunity to better understand that influential, sometimes awkward, cousin of U.S. environmental law: international environmental law (IEL). Once overshadowed by its prominent parents, national environmental laws (including those of the United States) and international law, this youthful and dynamic subject has come of age in its own right. IEL now patrols an increasingly interconnected and interdependent world of expanding legal boundaries and is firmly ensconced in the law school curriculum, even as practitioners and judges at all levels, come alive to its import and impact.

Historically, the United States believed that its domestic environmental laws could solve the problems of the environment, largely because assaults on the natural environment did not have or were not perceived as having much transnational impact or significance. The reality and perception have changed. Many environmental problems such as global warming, the endangered ozone layer, vanishing biodiversity, and acid rain have outstripped the jurisdiction, outreach, and grasp of the U.S. legal system, and require international solutions. Beginning with the Stockholm Conference on the Human Environment, in which the United States played a prominent role, the world has come alive to the importance of the new subject of international environmental law, boasting a corpus of nearly 300 multilateral treaties covering almost every environmental topic.

This article begins by defining IEL and tries to dispel some misconceptions about its jurisprudential nature. It then attempts to sketch the growth of IEL through three historic landmarks: the Stockholm Conference on the Human Environment, the World Commission on Environment and Development, and the United Nations Conference on Environment and Development, paying particular attention to the dominant chains of thinking that link these events. Finally, it considers one important treaty, The Convention on Biological Diversity, signed by 158 countries, that illuminates the challenges, responses, and limitations of IEL.

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## *Defining IEL*

Jurisprudentially and conceptually, IEL consists of international law dealing with the environment as found, primarily, in international agreements (also called treaties, conventions or pacts), together with the national and international mechanisms for implementing them; and secondarily, in international customary law (the common law of the international community). In other words IEL is located in international agreements or custom, rather than located in the statute books and case law created by 187 national legislatures and courts around the world. A study of the environmental laws of various nations that make up the international community falls within the jurisprudential realm of comparative environmental law (CEL). That subject, as distinct from IEL, subsumes laws governing environmental questions, including air and water pollution, land use or conservation that are common to most countries within the international legal system.

When faced with pollution problems it is, of course, eminently desirable for one country to understand and study the extent to which it confronts common problems shared by other countries. Uniformities of biophysical reactions are part of nature's writ that runs ubiquitously and universally, and the laws of nature can give rise to identical biophysical reactions. If, for example, the receiving medium is the same, discharges of wastes or residuals, whether in Los Angeles, Liverpool, Dusseldorf, or Auckland, lead to pollution. Common biophysical reactions take place regardless of where in the world the environment is abused. Where the necessary conditions exist, sulfur dioxide and nitrogen oxide will react and result in acidic deposition in the Ruhr, Northern England, or Ohio. Polychlorinated biphenyls (PCBs) act to cause cancers in West Virginia in the same way as they do in Newcastle upon Tyne, England, or Colombo, Sri Lanka.

While there is much to be learned from the common experiences of other countries, the miscellaneous national laws controlling sulphur dioxide emissions and acid rain or PCBs do not fall within the jurisprudential province of IEL. The problems of acid rain or any other pollutant enters the province of IEL only if it escapes from national boundaries and becomes a transfrontier problem by causing extraterritorial damage to another country.

It is important to appreciate at this point that IEL is a consensual law created by the freely exercised choice of nation states that are members of the international community. There is no law-making, law-altering legis-

lature, no law-implementing executive, and no system of courts with compulsory jurisdiction of the kinds found in national legal systems. Unlike the legal system of the United States, or almost any other nation in which laws are made, interpreted, and executed by legislatures, courts, and executives, IEL is a remarkably different "horizontal" or discretionary law. The creation of IEL is dependent upon the comity of parties, rather than dependent on "vertical" command and control of legislatures and courts to which national lawyers are accustomed.

The IEL invoked to deal with the transboundary effects of acid rain, for example, may be found in a treaty negotiated between the concerned parties, or sometimes in existing customary norms applicable to the issue. International treaties are like international contracts between states. Once party states have assumed an obligation or agreed to act in a specified manner in a treaty, they are bound to implement these provisions within their respective national jurisdictions. If a treaty dealing with acid rain required fitting scrubbers to remove sulfur from coal, the methods used to secure implementation of such an obligation are part of the architecture of IEL. They could range from national legislation and administrative enforcement to monitoring, reporting, and economic incentives.

### *The Stockholm Conference on the Human Environment*

The Stockholm Conference on the Human Environment, 1972 (Stockholm Conference), may well have been the cocoon from which the chrysalis of international environmental law emerged as a legal subject in its own right, and it is helpful to recall what was achieved at that international conference. Prior to the Stockholm Conference, international environmental problems had been dealt with in a sporadic and ad hoc manner, with a few, if varied, treaties dotting the landscape of international law. The development of IEL was influenced by the thinking, ideology, and culture of concern about the environment worldwide just as environmental law was influenced in the United States.

The themes articulated in Rachel Carson's *Silent Spring*, Barry Commoner's *Closing Circle*, and the Boulding's "spaceship earth," resonated internationally in the thinking of other industrial nations. Many of these themes, and then some, were melded and expressed with crusading cogency within an international context in *Limits to Growth*, a computer-modeled study sponsored by the Club of Rome, a private group of industrialists and world leaders. The authors, Meadows and Meadows, painted an apocalyptic picture of the exponential growth of population, pollution and exhaustion of natural resources leading to a breakdown of the carrying capacity of the earth. This book along with many other phenomena such as acid rain, and the poisoning of Japanese fisherman in Minimata bay, led to a realization of the frailty of the planet Earth and created a ferment of apprehension among a cross-section of common people, influential elites, and decisionmak-

ers in the developed industrial world.

In the face of these concerns, the United Nations (U.N.) was moved to convene a special international environmental conference in 1972 to discuss the human environment. Sweden, which had begun to experience transboundary acid rain, volunteered to host it in Stockholm. The overall sense of crisis crying out for global action was brilliantly captured in the book by Dubos and Ward, *Only One Earth: The Care and Maintenance of a Small Planet*, specially commissioned for the Stockholm Conference.

While concern about the environment motivated many rich, developed industrial countries (DCs), the poor less-developed countries (LDCs) did not share the view that environmental degradation was the biggest threat facing the planet. For the LDCs, poverty and the alleviation of misery remained a more poignant and real problem. And in the preparatory meetings leading to Stockholm, the LDCs, who called themselves the Group of 77 after their original number, used particularly sharp rhetoric to express the view that for them the greatest pollution was caused by poverty. LDCs believed that greater development, with its concomitant of resource use and pollution, was more important than environmental pollution. They were particularly scornful of the argument that DCs were solicitously trying to steer them away from the same pitfalls in which DCs had fallen. LDCs expressed resentment that the DCs, after consuming a great part of the earth's resources, devastatingly polluting the earth, and making themselves rich, were now asking the LDCs to remain poor, and more gallingly, to pay for the clean up, restoration, and conservation of the earth. Many LDCs feared, moreover, that new environmental standards adopted by DCs would effectively bar the entry of their goods into DC markets.

This ideological impasse presented a formidable challenge to international environmental diplomacy and the question was resolved, as best it might, by way of a compromise. The compromise worked out in a meeting at Founex, near Geneva, Switzerland, recognized that economic development was not necessarily incompatible with environmental protection, and that development could proceed provided it avoided damaging the environment. The essence of the understanding was summed up in the Preamble to the Stockholm Declaration. It stated that "... most of the environmental problems" of LDCs were caused by underdevelopment and that LDCs must direct their efforts to development, with due regard to the priority to safeguard and improve the environment. Similarly, the industrialized countries were exhorted to make efforts to reduce the gap between themselves and the developing countries. In sum, the LDCs successfully thwarted environmental laws and policies from damaging their efforts to develop and grow economically, whether by industrial progress or trade. They did not, however, obtain substantial bankrolling, or pledges thereof, to protect the global environment, nor did they meaningfully advance the doctrine of "differenti-

ated responsibility" that was later accepted at the Earth Summit held in Rio de Janeiro, Brazil.

The Stockholm Conference, under the direction of its dynamic Secretary-General Maurice Strong, is regarded as perhaps the best documented, best organized U.N. conference of its time. It may also be considered as the cocoon from which the chrysalis of IEL emerged for a number of reasons. First, the biosphere or the planet Earth was identified as an object and placed on the agenda of national and international policy and law in a way that had never been done before. The conference was widely attended by 114 of the then-U.N. membership of 131. The Soviet bloc abstained from attending not because it rejected the purpose or mission of the conference but because of the status accorded to East Germany. Second, the Stockholm Conference resulted in the creation of the United Nations Environment Program (UNEP), the first international organization with an exclusive environmental mandate. UNEP has been instrumental in drafting, facilitating and negotiating a number of environmental treaties. Third, the Stockholm Conference produced a conference declaration of twenty-six principles (Stockholm Declaration) that addressed the rights and obligations of citizens and governments with regard to the preservation and improvement of the environment. Apart from the Stockholm Declaration generally considered an instrument of IEL in that it either crystallized or generated customary law, the conference also created an action plan containing recommendations for future implementation.

A number of specific principles of the Stockholm Declaration bear mention. Principles 1, 2, and 5, addressing responsibilities to future generations, are undergirded by an obligation to conserve. Principle 1, albeit counterbalanced by Principle 11, recognized a nascent right to a quality environment. Principle 21 referred to the right of a state to exploit its resources pursuant to their environmental (*not* developmental) policies, and affirmed their obligation not to cause transboundary injury. This was followed by Principle 22 positing that states shall cooperate to develop international law regarding liability and compensation for extraterritorial harm.

These principles have been reinstitutionalized in many post-Stockholm agreements. For example, Principle 21 has been incorporated in a wide range of treaties including: the Convention on Biological Diversity, 1992; the Vienna Convention for the Protection of the Ozone Layer, 1985; the Convention on Long-Range Transboundary Air Pollution, 1979; the Agreement on the Conservation of Nature and Natural Resources, 1985; and the United Nations Convention on the Law of the Sea, 1982. Furthermore, the post-Stockholm world has spawned a prolific number of environmental treaties. Over one hundred post-Stockholm treaties mir-

ror almost every concern that has been the subject of U.S. law or regulation including acid rain, hazardous waste, ozone depletion, sea pollution from land and vessels, toxics, resource conservation, and global warming.

### *World Commission on Environment and Development*

Despite the uneasy truce at Founex, reflected in the Stockholm Declaration, the persistent clash of two cultures, environmental protection versus development, continued to obstruct the development of IEL. To resolve this problem the World Commission on Environment and Development (WCED or Brundtland Commission) was constituted by the U.N. General Assembly in 1983 and charged with proposing long-term environmental strategies for "sustainable development." That elusive term was not defined by the United Nations, and despite the efforts of the Brundtland Commission and the Earth Summit, still eludes satisfactory

definition. After four years of deliberation, worldwide consultation, and study, the Brundtland report, *Our Common Future*, articulated the paradigm on which the Earth Summit, and indeed IEL, has since been based. In essence, it rejected the despairing thesis that environmental problems were past repair, spiralling out of control, and could only be averted by "no growth" that arrested development and economic growth. Instead, it argued that economic growth was both desirable and possible within a context of sustainable development.

Although sustainable development was not clearly defined, key attributes are identifiable from the many descriptions of it. It calls for

developmental policies in which environmental protection constitutes an integral part, and for economic growth that can relieve the great poverty of the LDCs. Such development and growth should be based on policies that sustain and expand the environmental resource base in a manner that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. Brundtland Commission, 8. To draw up a global plan for sustainable development, the Brundtland Commission report called for an international conference that would act as the successor to the Stockholm Conference, and carry its legacy forward.

The U.N. General Assembly did so, and directed the United Nations Conference on Environment and Development (UNCED or Earth Summit) to take account, *inter alia*, of the Stockholm Declaration and further develop IEL. An ambitious agenda was drawn up for the Earth Summit that included (1) an Earth Charter that would be the successor to the Stockholm

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Declaration; (2) an action plan for the planet called Agenda 21; and (3) the ceremonial signing of two conventions addressing with climate change and biodiversity.

### *United Nations Conference on Environment and Development, 1992*

The Earth Summit, held in Rio de Janeiro in June 1992 and attended by over 180 countries and 100 heads of state, has been heralded as the greatest summit-level conference in history. It resulted in (1) the Rio Declaration on Environment and Development; (2) Agenda 21; (3) the Nonlegally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests; and (4) the ceremonial signing of the Climate Change and Biodiversity Conventions.

Post Earth Summit assessments have, for differing reasons, been generally favorable, while a few tend to be almost unreservedly laudatory, even euphoric. Later more considered evaluations are beginning to cast doubts on these reviews, and this article does not offer a studied and documented appraisal of that event. Instead, it very briefly advances some conclusions and then illustrates the extent to which these conclusions are borne out in the Biodiversity Convention.

In the view of this writer, the legal results of the Earth Summit were, at best, mottled. The Earth Summit undoubtedly was a great platform for environmental protection but its contribution to IEL was more apparent than real. While it did draw universal attention to environmental protection and raised many issues onto the global agenda, what was substantively achieved at the Earth Summit apart from the Climate Convention was unimpressive. To begin, the intended "Earth Charter" was replaced by the "Rio Declaration on Environment and Development" (Rio Declaration), a title that diminished the environmental resonance and status of that document. Second, the principles themselves set a dubious foundation for IEL, and effectively turned the clock back from Stockholm. For example, the nascent right to a wholesome environment embodied in the Stockholm Declaration was abandoned in favor of a right to development (Principle 2). The obligation not to cause transfrontier damage contained in Principle 21 of Stockholm was weakened in Principle 2 of the Rio Declaration by the addition of crucial language authorizing states "to exploit their own natural resources pursuant to their own environmental and *developmental* policies." (Emphasis added).

The obligation to *conserve* implied by the duty to protect the environment for the benefit of future generations found in Stockholm is replaced in the Rio Declaration by a right to *consume* or develop. The Rio formulation refers to "developmental and environmen-

tal needs of present and future generations" (Principle 3). Disappointingly, this reformulation impliedly negates or weakens the obligation to conserve expressed in Stockholm. Finally, the Rio Declaration frowns upon action such as that taken by the United States, under the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1362-1421h, to prevent the slaughter of dolphins by prohibiting imports of tuna caught in dolphin killing nets. Principle 12 of the Rio Declaration states that "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided." While the substantive shortcomings of the Rio Declaration do not necessarily restrict the further development of IEL, the damaging potential of the Rio Declaration is illustrated by one of the major treaties ceremoniously signed in Rio, and it is to that treaty that we now turn.

### *Convention on Biological Diversity*

A familiar, nonetheless frightening scenario, depicts the present as an age of mass extinction rivaling the Cretaceous extinction 66 million years ago when 12 percent of the species resident on earth disappeared in spasmodic catastrophe. This apocalyptic vision emerges within the context of exponential population growth, in which global population was 2.515 billion in 1950, exploded to 5.291 billion in 1990, and is estimated to rise to 6.251 by the year 2000. The figures refer to human beings who must be fed, clothed, and housed. In compounding this increase with the further stress placed on forests, wetlands, and coral reefs by an improved standard of living and continued economic growth, commentators have commonly arrived at one conclusion: biodiversity is being destroyed and extinctions are increasing inexorably.

The United Nations Convention on Biological Diversity (Convention), ceremoniously signed at the Earth Summit, is a much heralded chapter in international legislation directed at arresting this trend. Although envisioned as a comprehensive law that would remedy the fragmented and regional approach to biodiversity protection evident in earlier treaty making, the Convention has belied these expectations, and may halt the advance of IEL on three fronts.

First, it rejects the concept of sustainable development by prioritizing economic growth over environmental protection, and allows international resources earmarked for the protection of biodiversity to be expended on economic growth that could destroy biodiversity. Second, it denies state responsibility for damage to the global commons. Finally, it repudiates the idea that the plant, animal, insect and genetic resources of the world (our biodiversity) are the common heritage of humankind and that it is the responsibility of the community of nations to protect this heritage.

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Before embarking on this brief exegesis, it is important to point out that the Convention does not belong to the “soft” law genus of Agenda 21 and the Rio Declaration, or the “nonlegally binding” category of the Forestry Principles and should be judged on its own terms: as a species of “hard” treaty law. For the limited purpose of this piece the main difference between “hard” and “soft” law lies in the way norms, expectations, or consensus among the parties are expressed or articulated. Soft laws often express themselves as political statements, values, and exhortations as distinct from binding rules and clear standards that are justiciable. The very fact that such a distinction is recognized and acted upon is ground enough for asserting that hard law is distinguishable from soft law, and nonlegally binding documents. It is precisely because they were aware of these distinctions that the lawmakers at Rio created three different types of instruments.

If the distinction between nonlegally binding principles, hortatory declarations, and obligatory laws are to mean anything, however, hard treaty law protecting biodiversity, as distinct from soft law or nonlegally binding instruments, ought to embody legally recognizable duties, obligations, and rights pertaining to the protection of biodiversity. To say this is not to diminish or detract from other social forces that can act more effectively and efficiently than law to solve problems, or even avoid those problems *ex ante*. Increasing knowledge and awareness about the dangers of extinction, educational campaigns, appeals to ethics, equity, morals, economic incentives, and market mechanisms could preserve biodiversity without being institutionalized as law. But there may also be felt societal needs for establishing legal rights, duties, and obligations to complement, facilitate, empower, or harness the use of social mechanisms and techniques.

Once it is determined by lawmakers that they want to create hard treaty laws, it is essential that they carefully craft the substance, content, and form of such rights and duties. International laws, like all laws, reflect the minds and intentions of their lawmakers. The precision, extent, and force of legal prescriptions in treaties are the product of human design, not accident. The weight of a legal obligation, duty, or right will depend on the extent to which it commands or demands actions, and cures the perceived mischief by advancing a remedy. In assessing the Convention, therefore, it is useful to identify the main concerns and problems about biodiversity that the Convention was meant to address and then to inquire if the remedies offered by the Convention help solve these problems.

While the factors that influence and mold the mindset and intentions of lawmakers will continue to be the subject of perennial inquiry, there can be little debate that two critical questions faced the international community when forging the Convention. First,

what problems did they confront? And second, how willing were they to take legal measures—measures to the extent possible that are binding and enforceable in the international arena as statutes are under municipal law—to address these problems? While the Convention articulated the nature of the challenge caused by vanishing biodiversity, it set its face against remedying the problems and even turned the clock back on numerous developments in international environmental policy and law.

To begin, the Convention rejects the concept of sustainable development—the very groundnorm of the Earth Summit. Sustainable development has not been

authoritatively defined, but as we have seen, it seeks at its core to strike a balance between development and environmental protection, thus giving parity of status to economic growth and the environment. It rejects economic development and growth that is not environmentally sensitive or destroys the resource base, and is a new concept precisely because it embraces both development and environmental protection.

Despite this, the Convention states both in its preamble and in critical articles dealing with the financing of the Convention that

“economic and social development and the poverty eradication are the first and overriding priorities of developing countries.” Preamble and Article 20(4). The tenor and force of these provisions subdue, if not cancel, the weak clauses in the preamble “reaffirming conservation,” and the “use of “biological resources in a sustainable manner.” Not only is biodiversity subjected to the preeminence of development, but the interpretation of development is left to be determined subjectively by developing countries. By any analysis, this formulation elevates development and diminishes biodiversity and by doing so effectively disowns sustainable development.

This diminution of biodiversity and accentuation of development is confirmed by the financial provisions. To enable LDCs to implement the Convention, developed countries agree both to pay the “full incremental costs . . .” of such implementation, Article 20(2), and to transfer technology to LDCs, Article 16. An examination of the commitments of developing countries, in exchange for this transfer of money and technology, is revealing. Having earlier made the point that economic and social development and eradication of poverty are the first and overriding priorities of developing countries, the Convention develops a logical implementing structure. The institutional structures as well as the “policy, strategy, programme priorities and eligibility criteria relating to . . .” access to those transferred resources and technologies will be determined by the Conference of the Parties to the Convention. Article 21.

Where does this leave us? In the absence of an explicit commitment to protect biodiversity, any re-

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sources transferred under the Convention could be used by a small minority of zealous developing countries to advance their own concept of economic and social development. If, for example, they decide that road building, "reclamation" for beach development and marinas, or even the cutting down of tropical forests are necessary for economic and social development, they would be acting within the powers and privileges granted to them.

A somewhat foreboding omen of the future direction of the Convention is offered by its treatment of tropical rain forests. It is estimated that tropical forests are home to at least 50 percent of plant and insect diversity. Yet all references to tropical forests were systematically, and deliberately excised from the Convention. The World Conservation Union (IUCN) drafts attempted to protect tropical and rain forests by including the principle, carried right through to the Fifth Revised Draft Convention, that states are responsible "for the conservation and sustainable use of their biological resources." Article 3(2)(a) of the Fifth Revised Draft Convention on Biological Diversity, Feb. 20, 1992, UNEP/bio.div/N7-INC.5/2. This principle was excised from the Convention and replaced, instead, by one that asserts the sovereign right of states to exploit their own resources subject to the duty not to cause extraterritorial harm. Article 3. To summarize, the first flaw of the Convention is that it undermines the environmental emphasis found in the concept of "sustainable development."

Second, the Convention tilts against an emerging and developing pattern of regional customary and treaty laws, that has, in the last fifty or so years, sought to establish the common responsibility of humankind to protect biodiversity. They include for example: the Declaration of the United Nations Conference on the Human Environment, 1972, Preamble and Principles 1, 2, 4, 5; Convention for the Protection of the World Cultural and Natural Heritage, 1972, Articles 4 and 6; The Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1979, Preamble and Articles 3, 4, 5-9 and 13; the Apia Convention on the Conservation of Nature in the South Pacific, 1976; the ASEAN Convention on the Conservation of Nature and Natural Resources, 1985; the Protocol Concerning Specially Protected Areas, 1982; and the Protocol on the Conservation of Common Natural Resources, 1982. Many involved in the development of international environmental law hoped that the Biodiversity Convention would consolidate these endeavors, and provide an instrument that dealt comprehensively, globally, and more specifically with the nature of the obligation to protect biodiversity. Instead, the Convention contains no substantive obligation to protect biodiversity.

Although the collective obligation to protect biodiversity was seen by the UNEP, the IUCN, and numerous other nongovernmental organizations as constituting the foundations of the new treaty, the Convention rejects such an obligation and instead proclaims that states have the "sovereign right to exploit their own resources pursuant to their own environmental policies. . . ." Article 3. In similar vein, the convention rejects the principle that biodiversity is the natural heritage of humankind.

The natural heritage of humankind is to be distinguished from the common heritage of mankind (CHM) that has been applied to the deep-sea bed and the ocean floor beyond the limits of national jurisdiction by the U.N. Convention on the Law of the Sea, 1982, Articles 133, 136 and 156-169, and the outer space regime respectively, Agreement Governing the Activities of States on the Moon and to Other Celestial Bodies, Article 11(1). At its core the CHM involves inclusive enjoyment and sharing of the products of the common heritage, and its thrust remains redistribution not conservation. The essential feature of CHM, whether based on *res communis* or *res publica*, is the entitlement of the entire international community to exploit the sea bed and share the fruits of exploitation. CHM is not a conservationist principle because it is directed to maximizing resource exploitation and economic returns. Moreover, it is so suffused in traditional nonconservationist resource economics as to render it constitutionally incapable of nurturing a regime of sustainable development.

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The attempt in the Food and Agricultural Organization (FAO) to secure an International Undertaking on Plant Genetic Resources was based on genetic resources being accepted as "a heritage of mankind." If the FAO did attempt to bring plant genetic resources within that rubric, their attempt did not improve the conservationist credentials of CHM. The FAO undertaking involves the repudiation of property rights from all germplasm—both natural and improved—including genetically engineered plants, seed, and tissue culture. But it is clear that the thrust of the agreement is exploration and utilization rather than conservation. By contrast, the "natural heritage of humankind" refers to the biological necessities of the world, necessary for the existence and development of all humankind, that may fall within the national jurisdiction of states. Accepting biodiversity as our common natural heritage gives rise to the corollary obligation that we protect and preserve such a heritage. Instead the Convention settles for an effete and legally nonbinding recitation that biodiversity is the common "concern" of humankind. Furthermore, the attenuated affirmation that "biological

*(Continued on page 76)*

regulatory sphere is a policy matter to argue with Congress and not one to undo through statutory interpretation by the judiciary. The view that the perceived problems did not justify federal intrusion lost in Congress in 1977. Perhaps if revisited in Congress in 1995, the outcome would be different. Furthermore, to the extent that matters lie within the Administrator's discretion (as contrasted with a mandate from Congress), another avenue for change is available. That this is a viable process is illustrated by the changes the Secretary promulgated in 1988 and upheld in *National Coal As-*

*sociation v. Interior Department*, 39 Env't Rep. Cas. (BNA) 1624 (D.D.C. 1994). Although the Secretary rejected a request to repeal a regulation providing for federal notices of violation during state primacy, the Secretary in 1988, adopting several reforms suggested by the Mining Reclamation Council of America, made several important changes to the process for issuing those notices of violation. 53 Fed. Reg. 26,744 (1988), amending 30 C.F.R. § 843.12(a)(2).

Under *Chevron*, Congress and the Administrator are the preferred arenas. 

## International Environmental Law

(Continued from page 48)

diversity is the common concern of humankind" is found only in the Preamble, even though it ranked as a Fundamental Principle throughout the drafting process.

Even when the Convention attempts to protect biological diversity by in-situ conservation, ex-situ conservation and sustainable use in Article 6 through Article 14, it provides that every obligation assumed (except those related to research and training) yields to the caveat: "as far as possible and as appropriate." Furthermore, Article 7, addressing the key elements of identification and monitoring, allows each contracting party to make such identification. This contrasts with earlier expectations and drafts that provided for the establishment of Global Lists of Biogeographic Areas of Particular Importance for the Conservation of Biological Diversity and of Species Threatened with Extinction on a Global Scale to be internationally, not nationally, determined.

Any obligations to protect the common heritage of humankind need not fall disproportionately on the poor and the deprived. Given the enormous disparities of wealth among nations, equity, fairness, and efficiency require that discharging the burden of protection should fall differentially and more heavily on the richer nations. Biological diversity is a public good that is of critical importance to all humanity and ought to be protected by the entire international community. In the absence of a system of international government that can act to protect public goods for collective benefit, other mechanisms should be found. One fecund suggestion is to give areas of biodiversity a designated value and to pay the owner country an interest or financial allotment for the conservation or preservation of such areas. The burden of such payments should be proportionately heavier for the richer nations.

It is also clear that the duty to preserve huge extents of forest, marsh, or coral reefs rich in biological diversity could entail daunting opportunity costs to LDCs. For example, an obligation to protect rain forests placed on LDCs is tantamount to denying those LDCs the right to cut down and develop such forests, to provide land, housing, and food to their desperately poor populace. Accordingly, it becomes necessary to devise measures and mechanisms to ameliorate the costs borne by LDCs. Unfortunately, the Convention does

not confirm the responsibility of the community of nations to protect biodiversity, and it even appears to reject such a conclusion. This is a grievous defect, and the second flaw of the Convention.

Third, the challenge facing the Convention was to extend state responsibility for extraterritorial harm to damage caused to the global commons. As we have seen, the principle of state responsibility for extraterritorial harm has been accepted as international law since at least the Stockholm Declaration of 1972. It has subsequently been affirmed in numerous other treaties and instruments (e.g., U.N. Convention on the Law of the Sea (1982); Rio Declaration on Environment and Development (1992); and the World Charter for Nature (1982)). The global commons may include the critical habitats or homes of life forms physically located within the territorial jurisdiction of nation states. But such an extension of state responsibility was roundly rejected by the Convention, and its application has been strictly confined to extraterritorial damage. The Fifth Revised Draft Convention had asserted the principle that states are responsible "for the conservation and sustainable use of their biological resources." That statement has been banished from the Principles.

What emerges is a deeply flawed Convention that fails to live up to expectations: one that very nearly indicts the obligation to protect biodiversity, fails to institutionalize the principle of differentiated responsibility, and rejects sustainable development. The conclusion that the Convention flounders in holding the ring between the global need for biological diversity and the sovereign right of states to control and develop their own resources is a somber conclusion.

### *Rio and Beyond*

The fact that the Earth Summit may have been a step backward for IEL needs to be understood in the context of the inherent weaknesses of IEL. First, there is no foundational multilateral treaty that gives international environmental protection the character, weight, or force, for example, of free trade as established by the General Agreement on Tariffs and Trade (GATT). Nor is there any one international organization that supervises the application of international environmental



law similar to the World Trade Organization (WTO) that services and implements GATT. IEL is fragmented and uncoordinated, and UNEP does not possess the authority or the resources to act as the global environmental counterpart of WTO. Second, IEL is a consensual law that is created and implemented by the states it regulates. Third, there is no legislative body to create the law, no executive agency to implement it, and no judicial body to interpret or enforce the law.

These shortcomings give rise to the need for international environmental laws that are clear and precise. Given the competing and conflicting positions of the 187 nations of the world, it is apparent that nations will only feel legally bound by international environmental laws that create binding obligations, as distinct from exhortational and aspirational declarations. To say this is not to diminish, but only to distinguish from law, nonbinding declarations, codes of conduct, morality, ethics or religion, and other wellsprings of conduct. Lawmaking in the international legal system, just like any other, is the product of the underlying sociopolitical realities of ideology, politics, and self interest.

All these shortcomings do not necessarily imply that the future is a bleak one. It is reasonable to address the shortcomings of the Earth Summit on a case-by-case basis beginning with the Biodiversity Convention. It is still possible to reinvent that treaty if the United States were to play a critical role and questions arise as to the nature of the U.S. role and the strategies to be employed. These will be sparingly sketched. First, the primary aim of any strategy must remain a World Forestry Convention. Such a convention should protect old forests, particularly tropical forests, that are home to up to 50 percent of the plant and insect biological diversity of the world. The administration should use Senate approval as the mechanism for reaching accord on such a Convention.

Though the Bush administration rejected any attempts to bring U.S. old growth forests under the protective umbrella of a World Forestry Convention, the Clinton administration appears ready to do so. Using the new U.S. policy as a bargaining chip for a larger international commitment toward preserving biodiversity may also have the additional benefit of convincing a hostile new U.S. Congress that this is not another "sellout" to corrupt Third World countries. The United States should abandon its meaningless silence on the loss of tropical forests, and conduct a strong diplomatic and political campaign for a World Forestry Convention. Such a move may also be the only practical way of securing the approval of the U.S. Senate for the Convention. Doing so might invoke the ire of a minority of developing countries set on aggressive and mindless development, along with a few misdirected

environmental appeasers, who seem politically coded toward capitulating to ecological aggression. On the other hand, a blinkered U.S. Senate may still reject such an initiative. Nonetheless, they must be presented with a plan to save the world's tropical forests and be seen to repudiate a serious effort to conserve the gene banks of the planet.

Second, it is impossible to devise any strategy without a global financial commitment to sustainable development. A commitment to sustainable development will embrace precisely the kind of financial and technology transfers that the United States has eschewed until now. This is not an easy task for the Clinton administration that has signed the Convention but faces a hostile Congress. The administration must demonstrate that the real dollars invested in protecting biodiversity will result in real gains. To do so it must

convince a myopic U.S. Congress that resource transfers will be directed toward the protection of biodiversity, not some enterprise within the "developmental" discretion of the recipient nation. Given the confusing state of the financial arrangements under the Convention, this could only be accomplished if the United States directs its full diplomatic efforts toward transforming the procedures under the Convention, drafting separate protocols, or by reforming the manner of its implementation.

On a more general level, there is little one can do to deal with the constitutional weaknesses of IEL arising from the absence of lawmaking, law-changing, imple-

menting, and interpretive agencies. The process of treaty implementation has to proceed consensually, but the mechanisms and institutions from implementing IEL must remain its highest priority. In this context the restrictions imposed by GATT on environmental trade measures must cause concern. It is time for IEL to consider a single international environmental organization with the stature and power of the WTO. A new World Environmental Organization is surely necessary not only to countervail a trade organization that dominates international relations but more importantly to implement IEL. Concurrently, it is necessary to consider how to move the IEL disputes that intermesh with trade issues out of the dispute settlement procedures of GATT into a neutral forum, such as the International Court of Justice.

IEL is sufficiently mature to withstand the legal setbacks, yet act positively to harvest the psychological impetus and international goodwill sown by the Earth Summit. The next ten-year review of *Natural Resources & Environment* in 2005 may look back on the legal setbacks at Rio as a strategic retreat that spurred the international community, and its lawyers, to greater efforts and results.

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