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Lessons Learned

Joseph F.C. DiMento

The contributions in this volume focus in several different ways on effectiveness of international environmental law. Some look across problems of global environmental degradation to address overall strategies (Cho, Nespor). Some concern themselves with fundamental principles upon which international law is or should be based (Nespor, Taylor). Others address centrally the processes and politics of international law making (Lallas, Mumma, Nespor, Taylor). A few look to the tools that can be incorporated to achieve an effective law (Cho, DeSombre, Lipschutz). The papers by Mumma, Lipschutz, and Lallas address the proper sequencing of law making at the international level. Contributors DeSombre, Lallas, Lipschutz, and Scovazzi present treaty, media, or problem specific studies. Factors that explain results are the materials for DeSombre's, Mumma's, and Taylor's treatments.

These are the papers seen in their primary light. Commentary and written responses to the papers by Guiliana Bovaeva, Beatriz Bugeda, Pamela Doughman, Irina Krasnova, Richard Perry, Kilaparti Ramakrishna, Olga Razbash, Alberto Szekely, and Christopher Stone ranged widely. But several overarching themes dominated and are reflected in this summary chapter. These, which we couch here as questions, dominated the conference's exchanges. Many are similar to the themes that are central to other recent leading scholarship on international environmental law.[1] They provide a partial inventory of issues to be addressed in making the law more effective. The range of understandings offered in response to these questions is wide and reflects the status not so much of the relative youth of the law in

1. The literature on international environmental law is now immense. Some very recent contributions that address issues as in this volume are D. Victor, K. Raustiala and E. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments; Theory and Practice* (1988); E. Weiss and H. Jacobson (eds.). *Strengthening Compliance with International Environmental Accords* (1998); J. Carroll, *International Environmental Diplomacy* (1998) and A. Boyle and David Freestone, *International Law and Sustainable Development* (1999).

this area but of its mammoth scope and the complexity of its challenge.

Lawyers, political, and social scientists represented in the Symposium as in general are not like thinkers within their professions and across them. Although on several major issues the experts agree; on others there is considerable variation in view—even as to the most basic issues. Consideration of the questions that follow can make for better policy design in the next generation of international environmental law.

1. ULTIMATELY WHAT SHOULD BE THE GOALS OF AN INTERNATIONAL ENVIRONMENTAL LAW?

Several different answers are offered to this fundamental concern. They reflect a varying ambition and different assessments of what is desirable and feasible for environmental protection through legal instruments. Answers offered are not binary choices but indicate desirable emphases and contemporary commitment to the use of resources.

It is notable that even the most experienced international law observers differ as to this most basic question for a legal regime. Should the law aim to solve clear quantified selected present day environmental health challenges, such as water born deaths, and focus resources on those? Should world leaders in international environmental policy strive to create a sense of crisis and/or cooperation so that national governments otherwise not motivated to act for environmental goals respond positively? Or is the law's most important work in the environmental sphere to identify possibly catastrophic future manifestations of degradation and focus efforts on these? Some experts think it sufficient to structure instruments to foster cooperative environmental problem solving, while others are not satisfied unless quantitative limits on globally degrading activities are set.

Some experienced negotiators ask whether other international environmental law observers are being too ambitious in articulating the goals of international environmental law. In seeking quantitative parameters for reductions for example they may be articulating an unreasonable target. Achieving cooperation among nation states may itself be enough at this stage of the movement toward international solutions. Thus despite modest quantitative emissions limitations goals, some participants saw the Global Climate regime as impressively successful in bringing

parties to discuss a problem that was not even recognized until recently. Furthermore these efforts stimulate individual nation states and private sector actions that aim to stabilize the global environment, independent of a treaty.

These differences are manifest in analyses of the North American Agreement on Environmental Cooperation (NAAEC), the Environmental Side Agreement of the North American Free Trade Agreement. NAAEC's architecture is variously viewed as a model for other international environmental law efforts and a dangerous diversion from more effective nation state efforts to control transboundary pollution. A dialogue led by four of the participants (Bugeda and Szekely from Mexico, DiMento and Doughman from the United States) highlighted differing evaluations of this now seven year old innovation among Canada, Mexico and the United States. The Agreement created a Commission for Environmental Cooperation, a Joint Public Advisory Committee constituted by fifteen North American citizens, and a Secretariat. It established two means to challenge a Party's failure to enforce its own environmental law, one Party driven and the other accessible to private citizens and non governmental organizations (NGOs). But the Agreement had numerous other provisions, including those emphasizing the promotion of sustainable development, government enforcement action, and private access to remedies.

Assessments can focus on compliance with each term of an agreement—in which case the Side Agreement would be found lacking. Assessments may centrally be concerned with overall output; as Christopher Stone asks, "Have the air and water gotten cleaner? Biodiversity richer (or no sparser)?" If the most important element of the Agreement is the formal dispute resolution process, is increasing the number of submissions necessarily a good indicator that the Agreement's objectives are being met? Some of the responses to citizen submissions under Article 14 of the Agreement, as Beatriz Bugeda points out, have been extremely important to an evolving public participation. Developing greater cooperation among the environmental ministers of the three parties may be a very significant objective, more so than the specific actions taken to censure a NAFTA nation for failing to enforce its own environmental law. But is that enough when ministers change and overall national politics influence responsiveness to an environmental treaty?

2.
HOW IS EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW TO BE MEASURED?

Regardless of overall goals analysts also have varying views as to how to assess whether the goals are being reached; quite different benchmarks of success are employed. Thus, the Global Climate change regime can be measured by reference to quantitative limits set for the target years at Kyoto; by quantitative limits actually achieved; by the mobilization of private efforts, including those of Multinational Corporations, to voluntarily limit emissions; by the dynamics and processes energized by the Conference of the Parties; by the stated and underlying rationale for climate stabilization concern (consistent with economic growth as usual or reflective of a fundamental shift in the underpinnings of the international law).

As to Forestry, Christopher Stone wonders whether the most acute forest related problems may have already been addressed by other regimes. "A partial answer to Lipschutz's puzzle may be that we do have an international convention – in fact, several of them. They just go by other names." [Professor Stone gives a more positive assessment than Professor Lipschutz of the role of trade measures in addressing the problems not yet resolved. Nonetheless, he is more skeptical about certification programs and suggests that to the extent existing regimes have not addressed the forestry challenge, there may be other more effective ways of promoting good forest practice.]

What should be the measure of determining success of international efforts to stop the transboundary movement of hazardous waste? An effective ban on those wastes consensually understood as hazardous is one obvious indicator. But along the continuum of understandings of the goals of Basel and other regimes are less demanding indicators of success: agreement on definitions, commitment to policies that minimize the generation of waste, and others. For many years Basel was considered a less than successful international environmental effort but Professor Scovazzi now holds that it "is to be considered a major achievement in international environmental law. . .. [It] put an end to the previous NIMBY ("Not in my Backyard") and OSOM ("Out of Sight, Out of Mind") practices which seem hardly compatible with the principles of cooperation, transparency and good neighbourliness that should inspire international relations." Yet

"innovations" in the Mediterranean regional follow-on have not been seen by some nation states as improvements.

The number of actual cases successively prosecuted can measure effectiveness of the adoption of penal sanctions in international environmental law. Criminalization of an activity that degrades the international environment makes a symbolic statement that may promote deterrence. Even less "measurable" but critical to some is the philosophical recognition of the importance of global environmental stewardship.

The NAAEC aims to limit the environmental impacts of free trade. At this stage of its existence, although the CEC has commissioned some work to assess NAFTA's environmental effects, determining actual effects may be unrealistic. Cooperatively developing a framework for understanding some of the dynamics of a trade agreement on the environment of participating nations may by itself be a significant indicator of success. And this has been done.

3.
ARE PROMISING NEW COMPLIANCE PROMOTING STRATEGIES FOR INTERNATIONAL ENVIRONMENTAL LAW ADOPTED AT THE EXPENSE OF CREATING SOLID COMMITMENT TO BEHAVIOR CHANGE WITHIN PARTIES?

There is a wealth of new thinking that focuses on means of promoting compliance without resort to the creation of supranational institutions that will make and enforce rules [a strategy now quite widely rejected by leading scholars as politically unreachable, if not undesirable]. These include participatory strategies, transactive processes for generation of treaty obligations, "bottom up" treaty making, and economics based strategies that include resource transfers and monetary funds to assist developing nation compliance (such as under the Montreal Protocol).

As Christopher Stone points out it has become "common to structure framework environmental accords in ways that mitigate or defer financial impact on potentially hard hit impoverished countries. The prospect of heavy economic impact to LDCs need not derail an agreement; it may merely call for some adjustments in the terms to provide 'differentiated responsibilities,' or even as Multilateral Funds, as in the Montreal Protocol."

But these innovations also come with costs. Money transfers to Third World nations to encourage entering an agreement and then following it can also foster dependence contrary to the goal

of greater commitment by Third World nations to environmental stewardship. Furthermore, in certain international negotiations the use of financial incentives to promote compliance is not limited to LDCs. Disagreement over the extent of their use has been a major hurdle to agreement on implementing the Kyoto Protocol. There are the middle range cases, such as Russia, whose recent economic conditions have been challenging but whose resource base and social capital are extremely strong. Is it an essential price of successful international protection to subsidize activities of countries that claim not to be sources—at least major sources—of a problem?

4. HAS THE MOVEMENT TOWARD A SOFT LAW OF THE ENVIRONMENT ASSISTED IN THE CREATION OF AN EFFECTIVE ENVIRONMENTAL LAW?

Related to the discussion of goals and to innovative compliance promotion strategies is a commentary on how they are sought. Some look to the articulation of a powerful environmental preamble, a philosophical commitment to environmental improvement, and are less concerned with sequencing from overall objectives to specific operational requirements. They applaud the movement toward soft law. They see it not only as the most to be expected but the best that can be realized; supra sovereign institutions will not likely evolve and monitoring of progress toward and enforcement of specific standards is difficult.

There are extremely divergent views on this matter. Alberto Szekely provides a strong criticism of what he calls newer forms of soft environmental law. In his assessment, before the end of the Cold War soft law was a precursor to hard law, to conventions and treaties. Ambassador Szekely uses as examples the human rights instruments and the Law of the Sea. Today, he contends, soft law reflects a lack of willingness to commit to rules; it blocks hard law. Soft law is now a vehicle through which to make non-binding law. With new forms of soft law it is virtually impossible to know if a nation state is meeting the goals of an instrument, whether its principles are being carried out. The Biological Diversity Convention is an example. Some statements of soft law are so imprecise that to conclude that there is agreement on goals is to speak at only the highest level of abstraction. Sustainable forestry is another case addressed in the Symposium:

there are numerous, sometimes conflicting, meanings of that term.

Further, a soft law that looks to domestic law to make rules may face, as Ambassador Szekely concludes for his own Mexico, absence of a will to implement principles through national directives.

To the critics of soft law, Christopher Stone offers a "mild caveat:"

> *Given the fragile enforcement of obligations that are nominally "binding" under international "hard law," we should be cautious not to exaggerate the distinctions between formal binding conventions, such as the Convention on Biological Diversity (CBD) and so-called "non-legally binding obligations," such as the Forest Principles (FP). There are those who argue quite strongly that in some circumstances "softer" approaches can be more effective in changing national behavior. Moreover, anyone who compares the provisions of the CBD or the Convention to Combat Desertification with those of the FP may wonder how much "stiffer" the obligations of the one are than those of the other. Each seeks to advance government planning, inventorying, monitoring, and cooperative discussion, often in similar language. Each is rife with what come down, in the last analysis, to exhortations.*

5.
HOW CAN THE USE OF SCIENCE BE IMPROVED?

The quality and use of the science that drives some of the discussion of the need for international environmental law is a major concern. People use science in many ways and, often with great certainty, advocate one "essential legal" position or another. Yet politicizing of science is common.

Both good and bad science is used as rationale for treaties. Controversy surrounds some of the scientific information that provides part of the basis for acceptance of the POPs treaty. The quality of data that suggest that the disaster strategy follows from environmentalists' failure to accurately predict major trends in resource use and depletion is also a matter of some dispute.

Information was presented at the Symposium to suggest that data is not paramount in selecting priorities for the law. Others criticized the very data that was used to suggest that priorities were skewed. Here too science may serve what some countries feel are political or ideological ends. Science based positions fostered by Western NGOs about species decline under the Conven-

tion On the International Trade in Endangered Species [CITES] were rejected by some African environmentalists. The Third IPCC and other recent scientific analysis have further marginalized the position that global climate change is either not real or, if real is not human behavior forced. Nonetheless there remain numerous disagreements about the meanings of the sciences that are background to conclusions about what society should do about the problem.

6.
SHOULD INTERNATIONAL ENVIRONMENTAL LAW BE BUILT ON A NEW ETHICAL SYSTEM?

Fundamentally is there a need to define an ethic before effective environmental stewardship at the international level is possible? Is there a need for an overarching approach, a holistic approach, and an ecological based approach to overcome the fragmentation of the existing system?

Some analysts assert that, rather, the issue is a choice among ethics. Ethics already underpins international law. Within existing regimes there are competing ethical positions, as is the case of the Law of the Sea. Analysts also wonder whether international environmental law should set the ceiling or floor of ethics consideration.

Environmental law scholars debate the value of advocacy of a new ecological ethic. Whose ethical system should take precedence when historically varying regimes have received ethical foundations from groups as diverse as the church and the communist party? The ethical analysis touches again considerations of goals of an international environmental law: is it "more ethical" to worry about life for future generations or to concentrate on the suffering of those who now live in the most degraded environmental conditions? Positions differ as to questions of priority and concentration of existing resources.

A specific concern was with the ethics of using "the disaster strategy." Mr. Nespor's descriptive terms refer to the approach of emphasizing the most dire predictions of environmental outcomes if drastic action is not taken to stem environmental degradation. How can environmentalists rationalize exaggerating the confidence they have in predictions of global harm related to behaviors they are trying to control? Here too there is disagreement about whether the data are exaggerated or simply reflect different interpretations over different time horizons. From the

perspective of those advocating radical changes that are law driven, perhaps it does not matter whether the Earth depletes a particular reserve in ten years or a hundred.

7.
WHAT IS THE PROPER ROLE OF NONOFFICIAL ACTORS IN MAKING AND IMPLEMENTING INTERNATIONAL ENVIRONMENTAL LAW?

Many new approaches of international law-making emphasize participation by those with non-official roles. ENGOs [environmental non-governmental organizations] and industry now take active roles in treaty discussion and in providing technical information to negotiators.

a. *Is the contribution of the business sector crucial?*

Some of the assessment here is without controversy. JPAC under the NAFTA regime should include representatives of the business sector, environmental non-governmental groups, and academics. Policy and law for the forestry sector discussed by Professors Lipschutz and Stone need to be informed by very technical information in the possession of the industry. A sector may naturally take a leading role in a particular environmental law regime, as was the case with DuPont in the efforts to control ozone-depleting substances.

However, the business sector also may move precipitously toward privatization and deregulation when the costs of the alternative regimes have not been systematically understood and when the benefits of a changeover are not clear. Furthermore, the assumption that consumers will respond positively to more expensive environmentally sensitive processes, products, and services is a matter of some debate.

The larger context is that of green management and the continuing need for regulatory systems when business acts from several motivations to go beyond standards set by governments and works to achieve higher environmental goals. Assessments here vary in part based on degree of trust in corporate environmentalism versus the view that much of industry energy is "greenwash" or rhetorical only.

b. *Is a strong function for NGOs universally desirable?*

The range of views on the roles of NGOs is considerable. NGOS can be critical to achieving an outcome such as the ban on trade in ivory. But that conclusion relates again to goals; the ban itself is not favored by all environmental law analysts. In certain settings NGOs "do more harm than good." Who actually participates when NGOs are invited? The panelists bemoan the absence of indigenous people in some NGOs. In general, the imbalance among nation states in their capacities to provide NGO involvement is striking and raises questions about the extent to which certain ("Western environmental") values are being overly represented in international meetings.

Some of the differences in appreciation of NGO participation result from different histories of participation in the decision making process by non-official actors. In the Russian case for example Olga Razbash concludes that NGOs can be important watchdogs and valuable experts whose presence in international negotiations can guarantee consideration of a diversity of approaches. Thus she puts hope in the coming into force of the Aarhus convention, the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. She interprets the Convention as acknowledging that public authorities hold environmental information in the public interest—a position that some NGOs have not been able to have their own nation states adopt. The Russian environmental law scholar concluded:

> To be able to hear the public and to objectively reflect its needs and demands, to take the public as an equal partner—this is the test for all democratic states or those striving to build democracies in their countries.

8.
IS RESORT TO DOMESTIC SOURCES OF THE LAW ULTIMATELY AN IMPORTANT ELEMENT OF INTERNATIONAL SUCCESS?

Looking to domestic law for implementation allows potential treaty parties to agree more easily on overall goals. It circumvents the need to design, fund, and initiate functioning organizations that may, in fact, not function well. Domestic law may be the vehicle for imposing criminal sanctions under appropriate circumstances. It may be the means for choosing among doctrines

of liability in the civil sphere where they may be applied in ways that are more effective.

There are both positive and negative assessments of implementing international goals through domestic law. If one "downloads to a nation that does not enforce its own environmental laws" responsibility for effectuating international law, it is likely there will be no will to implement and no implementation. Yet if there is to be a meaningful element of criminal sanctioning for global environmental violations, it will need to come from nation states implementing the goals of an international treaty into the framework of its domestic environmental law, by various means as outlined in Professor Cho's paper. There remain a few calls for a World Criminal Court of the Environment (and there are interpretations that suggest that the newly adopted World Criminal Court can take up matters of egregious environmental damage), but for the most part penal sanctions will emanate from domestic institutions.