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PROSPECTS FOR THE 1992 CONFERENCE ON THE ENVIRONMENT AND DEVELOPMENT: A NEW WORLD ORDER

BY ELLIOT RICHARDSON*

I don't know how many people have really focused on the fact that there will be a Conference on Environment and Development in June, 1992. It's going to be held in Rio de Janeiro, and I ask you to try to extend your imagination to the point of developing some grasp for what this conference is going to be like. Imagination, after all, is the only tool we have with which to grasp reality, and without imagination one can not possibly begin to get a sense of what will be descending upon Rio de Janeiro in June, 1992. This conference will be the largest and most complex conference, fraught with the most exceedingly difficult and hard-fought issues of any international conference ever held. Nothing even close to it has ever been assembled before on the face of the earth. There will be representatives of every country in the world, including all the members of the United Nations, Switzerland, the Holy See, Vietnam, and North Korea. There will be at least 60 heads of government and heads of state present and as many more foreign secretaries, ministers of law, and secretaries of the environment. There will probably be a total of two or three thousand delegates representing their governments.

When I first assumed responsibility for the United States delegation to the Law of the Sea Conference, this delegation included approximately 110 professionals from 14 United States governmental agencies. There will be at least that many comprising the United States delegation in Rio de Janeiro. Some small countries will be able to afford to send only three or four people. However, in addition to the official representatives, there will be 15 to 20 thousand people attending the conference who belong to various nongovernmental organizations, such as Greenpeace, the World Wildlife Fund, and other environmental and conservation groups. Clustering around all the politicians, diplomats, delegates and NGO members will be a massive press core.

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The conference is charged with addressing exactly what its title implies: the environment and the relationship between environment and development, which involves the potential for sustained growth inflicting the least possible damage on the environment as population grows and individual consumption increases. The conference will last for only two weeks, and the preparation for it has been slow. An enormous amount of work still needs to be done in the remaining months. The conference's Secretary General is Maurice Strong, who also served as Secretary General for the conference on the environment held in Stockholm in 1972. The Stockholm Conference gave birth to the United Nations Conference on Environment and Development ("UNCED"). Mr. Strong headed UNCED during its first 10 years. No one is better qualified by knowledge, background, experience, energy or ambition than Maurice Strong. Unfortunately, however, the conference desparately needs funding. As a result of the shortage of funds, it has been difficult for Strong to recruit the people he needs to complete the necessary preparatory work.[1]

What does this have to do with the law? Why is this an appropriate subject for a lawyer to lecture on at a law school? And I do not take refuge behind the fact that I belong to three of the other most vilified professions: I'm a bureaucrat, a politician, and a diplomat, as well as a lawyer. But it is appropriate to approach the subject in a legal context. To explain, perhaps I should discuss the Law of the Sea Conference, because it was really that experience which explains why I am here. I spent four years, the longest term I have ever spent in any one job, as head of the United States delegation to the Law of the Sea Conference. Even though I had already been the head of four Cabinet departments, it was the toughest job I ever had. The Law of the Sea negotiations were extremely difficult and complex. I discovered that, despite my long bureaucratic political experience, I did not realize, until then, what negotiation was.

Upon hearing about the conference in Brazil, I thought my experience in the Law of the Sea Conference negotiations, which were by far the most ambitious international negotiations ever held up until that time, would be of significant relevance. Therefore, I wrote an article for the New York Times[2] discussing some of the implications of the Law of the Sea Conference and how those experiences might apply to the global environment.

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1. In Geneva, the second meeting of the preparatory committee for the conference was held. This was chaired by Ambassador Tommy T.B. Koh of Singapore, who was the President of the Law of the Sea Conference during its latter years, and who recently served as Singapore's Ambassador to the United States.

2. Elliot L. Richardson, *How to Fight Global Warming*, N.Y. TIMES, Feb. 7, 1990, at 25.

I then convened a small meeting of my own in May, 1990. Among the participants were Ambassador Koh, the chairman of the World Wildlife Fund U.S., Peter Thatcher, a senior assistant to Maurice Strong, the chairman of the Council on Environmental Quality in the United States, and Jessica Tuchman Matthews, the vice president and director of programs of the World Resources Institute. I volunteered to write a background paper for this meeting. The further I explored, the more obvious it became that the Law of the Sea Conference negotiations were of substantially *no* value to what is about to take place in the effort to develop some kind of agreement on how the world community should address the global environment.

The Law of the Sea Conference negotiators were able to draw on the highly developed body of customary international law that had evolved since the 1609 publication of Hugo Grotius' *Mare Liberum*.[3] Two previous United Nations Conferences on the Law of the Sea ("UNCLOS"), UNCLOS I and UNCLOS II, had already codified a large part of this body of customary international law.[4] The negotiators in UNCLOS III, beginning with the opening conference in Venezuela in 1973, were able to rely on this body of law to formulate the adaptations necessitated by recent changes in technology. For example, the capacity of distant-water factory ships which use modern technology to scoop up fish, was seriously threatening the ultimate destruction of fishery stocks.[5] Another example was that, as the ability to extract oil and gas from the continental margin progressively extended seaward, so did coastal-state jurisdiction. That was because, according to the Continental Shelf Convention negotiated in UNCLOS II, the line limiting coastal jurisdiction would be a line determined by the ability of existing technology to reach the resources of the shelf. Meanwhile, a third technological development emerged. This was the capacity to reach the potato-sized manganese nodules scattered throughout the world's ocean floor, at great depths of 4 or 5 miles below the surface of the sea. Thus, for the first time it was necessary to determine the location of the line between the coastal state's jurisdiction over oil

3. HUGO GROTIUS, THE FREEDOM OF THE SEAS (James B. Scott ed. & Ralph Van Deman Magoffin trans. 1916).

4. For the official text of the United Nations Convention on the Law of the Sea and a historical account of the proceedings, *see* U.N. CONVENTION ON THE LAW OF THE SEA, U.N. Sales No. E.78.II.C.1 (1983).

5. *See, e.g.*, Peter Gard, *A Battle Over Frozen Fish*, MACLEAN HUNTER LTD., Nov. 4, 1985, at 62 (discussing the potential threat to the Canadian northern cod stocks posed by the introduction of state of the art trawlers into the region); CRAIG WATERS, HARVESTING THE SEA 61 (Publishing Co., Inc. 1983) (discussing the devastating effect the introduction of new technology into the commercial fishing industry in the United States has had on fish stocks in the Atlantic coastal region).

and gas in the continental margin, and the jurisdiction exercised by somebody else, in the name of the world community as a whole, over the manganese nodules in the deep ocean.

The Law of the Sea Conference spent years working out compromises on issues such as these. One result was the development of the 200-mile exclusive economic zone, now universally recognized, within which the coastal state has sovereignty over living and non-living resources. The delegates to the Law of the Sea Conference viewed themselves essentially as legislators. We drafted a long statute enumerating rules and principles governing subjects such as those previously mentioned, as well as: marine scientific research, protection of the marine environment, marine mammals, submarine cables and pipelines. We then remitted this statute to the member states of the conference for ultimate ratification. We put a high minimum on ratifications to try to assure a broad base of support from the outset. The minimum ratification was 60 nations, and 44 nations have thus far ratified the convention.

The Preparatory Commission for the convention currently meets twice a year. However, the United States government refuses to participate in the convention because the government objects to provisions concerning deep-seabed mining. The Preparatory Commission is currently seeking accommodations that will eliminate this issue, thereby allowing the Law of the Sea Convention to enter into force with the support of the United States, as well as the United Kingdom and Germany, which are the other principal holdouts.

Unlike their predecessors at the Law of the Sea Conference, the delegates to the 1992 conference will not enjoy the opportunity to benefit from the same kind of understood principles. Customary international law on the environment is scanty, and existing multilateral agreements are narrow in scope.[6] Such agreements protect humans, animals, fish, plants, insects and other forms of life, from harm caused by toxic, radioactive, or disease-causing substances. However, these harms are almost universally recognized, even in the case of the Montreal Ozone Protocol, which addresses chlorofluorocarbons ("CFC"s), and is certainly the most future-oriented of the agreements thus far negotiated.[7] Moreover, *none* of

6. *See generally*, Mark A. Gray, *The United Nations Environmental Programme: An Assessment*, 20 ENVTL. L. 291 (1990) (discussing the fragmentary nature of most of the national and international environmental protection laws which have developed as a result of the efforts of UNEP).

7. Although the Montreal Ozone Protocol is considered at the forefront of the environmental multilateral agreements, the agreement dealt with a known harm. It is generally accepted that CFCs caused the ozone hole over the Antarctic, and that the destruction of the ozone layer will have serious health consequences, primarily skin cancer. For a further explanation of the Protocol, *see infra* note 10 and accompanying text.

the existing environmental agreements grant an international institution the power to set binding standards, issue and enforce regulations, or prescribe sanctions. Furthermore, few of the existing agreements provide for dispute settlement.

In contrast with the known harms addressed by the existing limited agreements, the harm that may eventually affect the global environment may have conseqences that cannot be seen or felt. This is true, for example, of climate change. The global warming that could result from the accumulation of carbon dioxide and other "greenhouse gases"[8] is not only distant in time, but fraught with uncertainty as to its probable extent and consequences. The enormous and astonishing variety of activities that cause damage to the global environment and contribute to global warming further complicates the negotiating process. For example, wood fires, dairy farming, rice growing, power generation, air travel, grass burning, and automobile travel are some of the contributors to the accumulation of "greenhouse gases." Moreover, the activities that cause deterioration of the global environment are important to every human being. Yet, even the most conservative and non-coercive means of reducing the risk of climate change will create large economic dislocations. These potential consequences contrast sharply with the Law of the Sea Conference, where there were major economic interests at stake but no prospect either of imposing significant cost burdens or sacrifices or the shifting of such burdens from one group of countries to another.

There are a number of desirable and inexpensive measures that can and should be done to protect the global environment. For example, plans for greater efficiency in electricity use, better protection of forests, and recycling of waste should go forward in the United States and other countries, regardless of the form of the agreement negotiated.

For better or worse, in any case, the world has embarked on a tremendous negotiating effort. I think it is for the better, given the seriousness of the prospective risks and the widespread visibility of

8. The "greenhouse gases," the most prominent of which are carbon dioxide (CO_2), nitrous oxide (N_2O), methane (CH_4), tropospheric ozone (O_3) and chlorofluorocarbons (CFC), are emitted into the earth's atmosphere as a direct result of the burning of fossil fuels (oil, gas and coal) for purposes of human energy consumption. Lewis D. Solomon & Bradley S. Freedberg, *The Greenhouse Effect: A Legal and Policy Analysis*, 20 ENVTL. L. 83, 84 (1990). These gases, which are not harmful in themselves, have physical properties that make them relatively transparent to solar radiation but relatively opaque to the earth's heat radiation. *Id.* The effect of the accumulation of these gases in the earth's atmosphere is to allow the sun to heat the earth's surface, while simultaneously preventing the heat from radiating out into space. *Id.* at 85. The ultimate result of this process is a gradual warming of the earth, much like the process which takes place in a greenhouse.

the environmental deterioration already in progress. The question remains what can, or should, the 1992 conference strive to accomplish if the state of preparation is inadequate, if no body of customary international law, comparable to that of the oceans exists, and if the elements of uncertainty are large while the potential burdens, costs, and sacrifices are also large? What can we realistically expect? What should the objectives of the 1992 conference be? What should be encouraged? How should the United States exercise its leadership?

The Preparatory Committee, encouraged by Secretary General Maurice Strong, recognized these concerns, and consequently limited its initial efforts to things that are "do-able." The committee is likely to propose a general declaratory statement of principles, called the Earth Charter. This Earth Charter would state principles for the conduct of peoples and nations toward each other and towards the earth, to ensure a sustainable common future.[9] In addition, the proposal includes "Agenda 21," which are measures to implement the principles of the Earth Charter through an internationally approved work program. Included within this idea is a general understanding as to the necessary measures for financing these actions.

The next, and more concrete step must be to build consensus on potential framework conventions for climate change, biodiversity, and forests. The focus of this step is, "What might a framework treaty look like?" It could take, in principle, any one of several possible forms. It could, for example, comprise one part of a charter for a global environmental protection agency ("EPA") with standard-setting, regulatory, and enforcement powers. Indeed, when I wrote my newspaper piece I thought a treaty on the global environment might do just that. A more realistic possibility is that a framework treaty could be part of a comprehensive code establishing the generalized obligation to do the right thing with the environment. This treaty would essentially be advancing the Earth Charter by fleshing it out with a comprehensive set of principles directed to various aspects of conservation and environmental protection. A framework treaty could also include an array of procedural devices designed to stimulate action, rather than prescribe it.

The first alternative, a treaty delegating regulatory functions to a multilateral organization empowered to override national environmental policies or practices, presents a number of difficulties.

9. A similar document was negotiated in Stockholm in 1972. Although useful, such a charter will not constitute a legally enforceable document. At best, the Earth Charter will reflect a consensus that the problems of the global environment are urgent and require a much larger measure of concerted transnational and international effort than ever before.

None of the limited environmental agreements presently in effect confer such authority. It is scarcely conceivable, therefore, that a consensus on the composition, decision making authority, and regulatory powers of a global EPA can emerge in Brazil. The effort to create such a consensus would inevitably take a considerable amount of time. An additional consideration, sufficient in itself to disqualify this approach, is its administrative unwieldiness. No one can imagine what would be required to impose uniform environmental prohibitions, constraints, controls and standards on approximately 150 sovereign states. This would inevitably provoke resistance and resentment in most sovereigns. To overcome this resistance, a global EPA would have no alternative but to deploy a legion of inspectors and enforcers. Such a step, rather than increasing compliance, could have the opposite effect.

The second approach, a comprehensive code of obligations, would avoid these pitfalls. Such a code would build a broad base of international acceptance on some important objectives. Within any given member state the code would serve as a vehicle for mobilizing domestic support for urgently needed environmental reforms. However, as a self-contained instrument, a comprehensive code of obligations would have serious limitations. Not being declaratory of well-established customary law, it would take a long time to bring state practice into conformity with it. Its necessary vague and general language would be subject to highly variable intepretations. This same vagueness could also be used to rationalize resistance to higher standards. So standing by itself, a code of obligations would lack a viable means of making something happen.

The third possible approach, an array of procedural devices to stimulate action, attacks from the opposite direction. Making something happen would be its primary goal, and its array of devices to accomplish this goal would include data collection, technical assistance, monitoring, reporting, and standard-setting. This approach could establish procedures for facilitating the adoption of supplementary agreements or protocols. These supplementary agreements would be negotiated later, and would contain concrete binding provisions like the Montreal Ozone Protocol agreement on CFCs, which establishes the goal of completely phasing out the use of CFCs by the year 2000.[10] This approach has the advantage of stimulating action, rather than prescribing it. The weakness of this approach is that it lacks any substantive content to which its proce-

10. Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, *reprinted in* 26 I.L.M. 1541 (1987). For a discussion of enactments similar to the Montreal Protocol, *see* Joan R. Goldfarb, *Extraterritorial Compliance with NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543, 582 n.349 (1990).

dural machinery could be connected, until more specific protocols are adopted.

Perhaps the second approach previously mentioned, the comprehensive code of obligations, and the third approach, various procedural measures, could be combined. These action-oriented mechanisms could be used to promote observance of the general principles. Thus, the sensible solution would be to merge the second and third approaches. The qualities of each offset the defects of the other.[11]

The 1992 conference faces difficult and complex problems. For example, while legal and technical experts have met to discuss the problems with our forests, not much has been accomplished. It is important to recall that forests are dynamic; they continuously evolve. If forests are supposed to be restored, to what stage should they be restored? How are forests to be maintained if they continually change? How do you manage forests for both nonquantifiable areas such as biodiversity,[12] and quantifiables like timber, watershed management and housing? These are just a few of the general questions that the negotiators in the 1992 conference must address.[13]

I noted that one of the objectives the Preparatory Committee agreed upon is the Earth Charter. There will then be one or more framework conventions with the elements I have described. The third major goal Maurice Strong has announced is "Agenda 21." In addition to these core elements of international cooperative action, there must be an agreement regarding the establishment of a multilateral body to administer, at a minimum, the procedural components linking the principles and the processes. There is no agreement yet as to who should do this. A possibility is for UNCEP to oversee the procedures. However, this is a very small body. The United States' contribution to UNCEP, which the Administration in recent years has consistently tried to reduce, and which Congress increased to some degree, remains less than $20 million. Thus, for UNCEP to undertake a role that seriously addresses steps to induce

11. A similar approach is being pursued. It got underway at a conference held near Washington in February, 1991. The representatives of about 70 countries met near Washington for two weeks to begin planning a framework treaty on climate change. That approach could also be adapted to the framework treaties on biodiversities and forests.

12. The term "biodiversity" describes particular regions which contain diverse habitat types, diverse ecological functions, and diverse species of plant and animal life. *See*, Gary D. Meyers, *Old Growth Forests, The Owls and Yew: Environmental Ethics Versus Traditional Dispute Resolution Under The Endangered Species Act and the Public Lands and Resources Laws*, 18 B.C. ENVTL. AFF. L. REV. 623, 632 (1990) (discussing the decreasing biodiversity of "old-growth" forests as a major environmental problem).

13. The 1992 Conference negotiators must address a similar set of issues in the context of biodiversity.

countries to comply with higher standards of national behavior toward the environment would require a substantial strengthening of UNCEP.

Another possibility would be an international body, modelled after the General Agreement on Tariffs and Trade ("GATT")[14] or the International Monetary Fund ("IMF")[15] to undertake the compliance enforcement responsibility. These bodies operate under very general principles, but then negotiate with individual countries for packages of agreements that are designed specifically to implement their general objectives. These international bodies also possess certain powers to adjudicate violations or, in the case of the IMF, to impose conditions on the availability of financial support. While it does not seem to me crucial whether UNCEP is strengthened or a new organization is brought into being, it is important that the 1992 conference agree on the charter of a multilateral body that can carry out the functions mandated by the conference.

Turning more concretely to the question of what a framework treaty might look like, let me give you an example which focuses on the subject of climate change.[16] In roughly ascending order of intrusiveness or, tendency to intervene in the internal affairs of member states, the Multilateral Environmental Agency ("MEA"), however constituted, must accomplish the following:

(1) Define targets for reducing carbon dioxide generation or stabilization. These targets could be set voluntarily on a country-by-country basis as a minimal element of agreement. The agreement could provide country-by-country strategies for reaching these targets.

(2) Require periodic progress reports to the MEA.

(3) Provide for monitoring of national performance by international observer teams recruited and trained by the MEA. This could include verification of nationally declared greenhouse gas emissions by remote-sensing systems.

(4) Publish reports assessing national performance.

(5) Authorize technical assistance to the developing countries enabling them to address the problems thus identified.

(6) Promulgate recommended standards differentiated by measurable stages of economic development.[17]

(7) Establish dispute-resolution procedures ranging from conciliation, through mediation to binding arbitration, drawing on the precedent of the Law of the Sea Convention. These procedures might be

14. General Agreement on Tariffs and Trade (GATT), *opened for formal signature* Oct. 30, 1947, 61 Stat. A-11.

15. International Monetary Fund (IMF), *opened for signature* Dec. 14, 1945, 60 Stat. 1401.

16. This subject is distinguishable from the other proposed framework convention, because the United Nations General Assembly has already adopted a resolution directing the 1992 conference to adopt a climate change convention.

17. That is, more advanced economies would have to meet tougher standards than those for developing countries.

> supplemented by the opportunity for private parties to seek injunctive and monetary relief in the administrative and civil courts of member states for non-compliance with generally accepted standards.[18]

Earlier, I mentioned the question of whether a framework treaty on climate change, as well as other framework treaties, should contain specific targets. In the February conference on climate change, the United States came forward with a proposal to stabilize the accumulation of greenhouse gases. Specifically, the United States proposed to allow carbon dioxide to increase between 1991 and the year 2000. However, measures already in effect in the Clean Air Act, plus the Montreal Protocol on CFC's, would result in the cutback of other greenhouse gases, so the aggregate accumulation originating in the United States could be stabilized. Thus, the United States would be reluctant, at this preliminary stage, to see written into the 1992 convention's framework treaty any provision for the stabilization of carbon dioxide accumulation, much less any reduction in it. Europe and Japan, on the other hand, are willing to hold carbon-dioxide emissions to 1990 levels.

In any event, the question of exactly what should be written into the framework treaty regarding climate change will undoubtedly be the subject of very intense negotiation. Likewise, if comparable kinds of enforceable targets are proposed for the preservation of forests or the limitation of deforestation, these targets will meet with some degree of resistance from developing countries, particularly Brazil. Such resistance would parallel that which the United States would devote to a proposal for reducing the carbon dioxide accumulations resulting from fossil-fuel combustion.

Beyond the questions regarding the substance of possible framework agreements, there will be much attention and debate focused on financial assistance available to developing countries to enable them to assimilate and apply the technology needed to bring about these reductions or stabilizations in environmental pollution. It is fair to say that the developed countries, led by the United States, are already feeling burdened by other demands for economic development assistance. These countries will go to the Brazil conference disposed to resist large economic claims by the developing countries. There is a need for a maximum feasible communication and coordination of technological knowledge between countries.

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18. The Law of the Sea Convention does do this. The Law of the Sea Convention is far reaching in terms of the capacity to induce national behavior to protect the environment. Provisions in the Law of the Sea Convention state that any action by any country which pollutes the ocean through the air or through streams flowing into the ocean is contrary to the convention. The provisions then allow anybody thus injured to come into the courts of the state from which this pollution originates and obtain damages in that country.

The involvement of broad-based international organizations will increase confidence.

Let me conclude with some general observations. Everything I mentioned with respect to the role of the 1992 conference and the framework treaty, whether pertaining to biodiversity, forestry, or climate change, is "soft law," in that these treaties do not contain any provisions for enforcement or sanctions. Yet one of the interesting things evolving in the environmental area, as in the human rights area, is the role of monitoring organizations that report both what is being done and the failures to maintain generally accepted international standards. The role of these monitoring agencies, or commissions, can be quite powerful, especially when reinforced by non-governmental organizations. At a conference on human rights in England about a year ago, I quoted the Holmes dictum: "A right without a remedy is a ghost in the law."[19] Professor Rosalyn Higgins of the University of Manchester, both a professor of international law and a member of the European Commission on Human Rights, pointed out that the role of publicity, the creation of embarrassment and the generation of a sense of shame, are in a sense a form of enforcement that, in its own way, creates an extrajudicial remedy.[20] Publicity makes it possible to go beyond the current enforcement of human rights and beyond the United Nations Declaration on Economic and Cultural Rights, and to begin to make these rights enforceable.

What I've just said about human rights can also apply to the environmental rights that will emerge from the 1992 conference. Therefore, the formulation of principles that will be invoked by monitoring processes and by governmental organizations could well be its most important result. It is important to emphasize that whatever happens in Brazil is only the beginning. The framework treaty is a first step toward future negotiations.

My last word is on the new world order. Defining it is a game anyone can play. The new world order can be perceived as embracing all the measures designed to create more adequate multilateral institutions dealing with those problems that individual nations states cannot effectively address. *The* most serious problems the world faces are beyond the capacity of individual nation-states. Yet there has been a significant lag in the evolution and development of the multilateral institutions required to address these problems. The lag is most clearly visible with respect to the global environ-

19. Ex Parte in the Matter of the United States, Owner of the Am. Steamship "Western Maid," 257 U.S. 419, 433 (1922) ("legal obligations that exist but cannot be enforced are ghosts that exist in the law, but that are elusive to the grasp").

20. *See generally*, ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963).

ment. Thus, whatever emerges from the 1992 conference in Brazil, and whatever is built upon those foundations thereafter, can be regarded as contributing to a new world order.