

Boston College Environmental Affairs Law Review

Volume 1 | Issue 4

Article 7

3-1-1972

International Law and the Environmental Issue

Forest Grieves

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/ealr>



Part of the [Environmental Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Forest Grieves, *International Law and the Environmental Issue*, 1 B.C. Env'tl. Aff. L. Rev. 826 (1972), <https://lawdigitalcommons.bc.edu/ealr/vol1/iss4/7>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact abraham.bauer@bc.edu.

INTERNATIONAL LAW AND THE ENVIRONMENTAL ISSUE

By Forest Griebes❖

VIABILITY OF INTERNATIONAL AGREEMENTS

Professional literature has generally stressed the fact that the terms of international legal attempts to control environmental abuse must be viable.¹ Such attempts must be based upon a realistic assessment of international and national politics—i.e., competing values, needs, fears and the like.

The thesis of one of the papers presented at a recent meeting of the Western Political Science Association directs our attention to the real and agonizing issues that must be considered if we are to evolve solid international controls in respect to our use of resources. It was suggested that “human beings, at least in so far as they are attentive to the problems of polluttional damage to their life-style, are ready, willing, and able to take necessary steps to correct the predicament in which they find themselves and to eliminate the adverse affect of polluttional hazards which they measure as probable.”²

If one accepts this optimistic view of man’s ability to triumph over the threat to his environment, he is as likely to do so out of desperation as out of conviction. The ground-swell of crisis literature concerning ecological doom (which is itself already reaching pollution proportions) has called attention to failure after failure in our attempt to control environmental abuse. Lest the crisis literature make us overly pessimistic, grasping vainly only for utopian solutions, or worse, make us numb, so that we ignore or deny the problem,³ we should regard the “political” nature of our world in sober perspective. Our ideals should not allow us to forget the realities of the world, but we should ignore neither.

The environmental issue has divided us as few other international problems have. Prior international problems have

generally been treated in the context of what Richard Falk calls the Westphalian System.⁴ The universal problem of nuclear holocaust and disarmament, for example, has been cast largely in terms of the nation-state system. Questions of environmental abuse, however, reach within the state. Disarmament negotiations pit state against state in the international political arena, a process that seldom clearly touches the lives of average citizens. On the other hand, the environmental issue has involved and divided us much more acutely.

Rather than viewing our world in abstract terms of "balance of power," "nuclear superiority," "graduated deterrence," or even "the Russians are ahead of us," we are being forced to consider international politics in terms of business corporation versus corporation (both on a national and international level), closing down a factory in a big city, or the man on Elm Street losing his job. As pressure to protect our environment increases, as it surely will, we will see new dimensions of international politics and greater agonizing over policy alternatives. Evolving international law concerning the environment, to indeed be viable, will have to take into account new political realities.

Some dimensions of these realities are already clear. Last year's Multi-national Conference in Washington, sponsored by the Atlantic Council of the United States and Battelle Memorial Institute, concluded that the nation that enforces pollution control against itself will suffer a competitive disadvantage.⁵ Further, the Chairman of the Board of a major US chemical firm expressed concern that US companies would be forced into an uncompetitive position in world trade should the US government enforce pollution controls against them.⁶

A related facet is the view suggested at the 64th annual meeting of the American Society of International Law. Ruth Russell noted that "governments would not support effective international measures before they even face realistically their own pollution problems."⁷ The impending national political struggle over the allocation of resources to combat domestic pollution should not be underestimated. The larger difficulties of international cooperation become then somewhat discouraging.⁸

If we cannot evolve rational policies for the use of our resources at the national level, is there any hope for internationalism? The answer must be "yes" *and* "no." In the process of establishing international legal control of the oceans and space

we are dealing with a "new frontier." This frontier represents a rare opportunity to establish controls and guidelines *before* vested interests become entrenched. In this regard, several international agreements already reached are encouraging (e.g., Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space; Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water; the 1958 Geneva Conventions on various aspects of sea law; and even the Antarctic Treaty).

On the other hand, the rapidly growing awareness of diminishing resources (combined with advancing technology that allows nations to exploit previously unobtainable resources) is fostering an Oklahoma land grab mentality. To prevent nation-states from extending jurisdictional claims out onto the ocean floor as their technology made it lucrative, Ambassador Arvid Pardo of Malta proposed demilitarization of the ocean floor "beyond the limits of present national jurisdiction" and internationalization of ocean "resources in the interest of mankind."⁹

"Unhappily," as Mrs. Clare Luce noted, "this genial initiative of Ambassador Pardo's had a most unhappy side effect. It started a pell-mell scramble into the seas in which each nation sought to stake out its sovereign claims to the unclaimed waters and the seabeds that lie below them."¹⁰ Professor Wolfgang Friedmann further notes: "We must not delude ourselves as to what is happening currently. There is presently an 'ocean bottom grab' doctrine being put forth."¹¹

The tenor of the foregoing discussion was not intended to preach gloom, but rather to emphasize the extreme complexity of issues to be encountered as an environmentally-threatened world attempts to build viable international law on a mass of far-reaching, conflicting interests.

ADEQUACY OF CURRENT INTERNATIONAL LAW

It is no secret that current international law is not adequate to control exploitation and abuse of the environment. Evaluating the current situation, however, is complicated by two factors: 1) a myriad of organizations are working simultaneously on selected facets of environmental pollution and 2) the dimensions of the pollution problem itself are not yet clear.¹²

In broad terms at least the international law potentially available to us to control pollution is either not in force or has "no teeth."

The two Brussels Conventions of November 29, 1969 (the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and the Convention on Civil Liability for Oil Pollution Damage), while no panacea, do indeed represent a constructive effort to get international pollution controls "off the ground."¹³ Unfortunately, neither is yet in force.

Articles 24 and 25 of the Geneva Convention on the High Seas (signed April 29, 1958)¹⁴ are frequently regarded with some hope.

Article 24

Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

Article 25

1. Every state shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

2. All states shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or airspace above, resulting from any activities with radioactive materials or other harmful agents.

Without trying to appear overly cynical or derogative of the efforts undertaken by some nations in good conscience in response to the spirit of these articles, the spectre of national practice vis-à-vis a similar type of admonition in Article 2 (4) of the U.N. Charter is all too painful a comparison. Article 2 (4) reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

One other hopeful precedent for controlling pollution in international law is the oft-cited *Trial Smelter Arbitration* (US-Canada) of March 11, 1941.¹⁵ Here it was asserted that under the principles of international law no state has the right to use its territory so as to cause injury by fumes (i.e., pollute) in or to the territory of another state or the property or persons therein. Another more pervasive principle of international law, however, is the philosophy embodied for example in Article 59 of the

I.C.J. Statute which denies effective international *stare decisis*.¹⁶

The foregoing points suggest strongly that, while solid international legal controls are being worked out (and in this regard, the forthcoming United Nations Conference on the Human Environment should be scrutinized closely), there will be a great deal of pressure on national governments to establish domestic controls over internal pollution. An illustrative example of the dimensions of this problem is the case of "international" pollution of the oceans.

In terms of the overall pollution of the ocean, one source notes that oil is the persistent pollutant that appears in the greatest quantities.¹⁷ About half of the oil in the ocean comes from natural sources (underwater seepage and animal/plant decay) and about a half is man-caused. The same source cites an estimate putting oil pollution from *seagoing* sources (including offshore wells) at 1.5 million tons per year and from *land-based* sources at no less than 3 million tons per year.¹⁸ Further, most of the other forms of oceanic pollution appear to be land-based in some fashion. These include chlorinated hydrocarbon pesticides (such as DDT) carried to the ocean via agricultural run-off or wind currents, wastes discharged from coasts, and even wastes discharged from vessels (which frequently are carried to international waters for the specific purpose of disposal—e.g., garbage, toxic chemicals, and sewage).¹⁹ The role, then, for national measures should be clear.

APPROACHES TO THE PROBLEM OF POLLUTION CONTROL

While oceanic pollution is clearly a *universal* problem, it is not uniform throughout the world.²⁰ This situation raises some very weighty questions about how to approach the problem of control.

Unfortunately, a trend in recent thinking seems to reflect an unhealthy dichotomy between what, for lack of a better label, can be called "universalists" and "regionalists." The debate between these two views is in part a hollow one, but it is nonetheless real. Because of the universal dimensions of the pollution problem, the "universalists" seem to believe the solution must be universal if it is to have any effectiveness at all. Perhaps that states the issue too harshly. A more moderate assessment might be that this approach believes regional, or at least less-than-universal approaches, to be largely inadequate or irrelevant. Professor Richard Gardner, for example, argued at the 64th

Annual Meeting of the American Society of International Law against anything but a universal approach.²¹ He cited approvingly President Kennedy's call for a global effort at controlling environmental abuse and was quite critical of George Kennan's proposal for action by a "club" of developed nations.²² He was further critical of the Nixon proposal urging environmental cooperation within the context of NATO.²³

Mrs. Elisabeth Mann Borgese notes that "aside from conservation (e.g., regional fishery arrangements), the ecologists point out that regional treaties for the most part are simply inapplicable to the control of pollution, or, in the case of wide-ranging species, to disruptions of the chain of life."²⁴

A currently prominent example of the regional approach is the proposal of Mr. George Kennan mentioned above.²⁵ While not arguing specifically for regionalism, his emphasis on a relatively small group of developed nations (those that also produce most of the pollution) really focuses particularly on the North Atlantic community. Mr. Kennan believes that only these nations, whatever the scope of the pollution problem, have the means to analyze the problem and correct it.²⁶

It would seem in our best interest not to let this debate proceed along mutually exclusive lines. Stress needs to be put on the idea that, not only does one approach not exclude the other, but that pollution should be attacked simultaneously at all levels. This point has been made elsewhere, but our attention might well be re-focused on it. The *Proceedings* of the 64th Meeting of the American Society of International Law reported the following:

Do we have a choice in proceeding on a multilateral level through the United Nations, a special agency or small groups of nations? Professor Friedmann believed that we must proceed on all levels at once, beginning soon by special arrangements between those states with immediate and shared interests.²⁷

There are at least four levels on which we could proceed, and past political experience suggests we try them all.

a) United Nations.—An important point made in recent literature is that world-wide coordination of the pollution fight is necessary.²⁸ This means a center for guiding 1) exploration and research, 2) identification of problems, 3) setting standards, and 4) monitoring compliance.²⁹ The U.N. is well-suited for these

roles. It has even been suggested that an environmental protection agency be made a major organ of the U.N., a proposal that deserves some consideration.³⁰ As noted above, the United Nations Conference on the Human Environment, to be held this June in Stockholm, should be watched closely for developments of this sort.

b) Regional Organizations.—Pollution control at this level could easily overlap to some extent with the anticipated role of the U.N. One could perhaps expect greater actual operational activity at this level—within NATO or the European Community for example. The provocative article by John Cornwell in the *Manchester Guardian* entitled “Is the Mediterranean Dying?” shows that effluents from surrounding countries feed the sea, the only outlet for which is the Strait of Gibraltar.³¹ Lacking sufficient input of clean water, the sea will die. Although it will pass on pollutants to the Atlantic (to the ultimate detriment of all nations), the problem itself seems ready-made for regional action. The same could be said for the Baltic Sea, Rhein River, Great Lakes and similar areas.

c) National Efforts.—The challenge of beginning pollution-control “at home” is clear. There is one dimension, however, that deserves comment—unilateral action against “international” pollution. This facet is evident in the recent Canadian extension of a pollution control zone into its Arctic areas.³²

While there are clearly some unsavory aspects of the Canadian move, it does serve to stimulate thinking on the proper role of unilateral action.³³ If, as not only the crisis literature reports, but also the more sober assessments, these are critical, even desperate, times, then surely the thought of a nation being prompted to bold or radical action is not excluded from the realm of contemplation!

The Canadian action signals at least three things to the world community. First, one nation (with perhaps others to follow) has grown weary of waiting for international action, has perceived the environmental threat in increasingly alarming terms, and has acted on its own. Second, it should be hoped that this warning sign will serve to move the international community off dead center into positive action. Finally, while *international* action is to be preferred, the Canadian action suggests that *unilateral* action might even be the most promising course to follow in forcing adherence to some form of pollution control (especially

given the tremendous clout wielded by a relatively few nations).³⁴ Examples that come to mind might be a nation refusing its ports to oil tankers failing to meet certain standards or refusing landing rights to SST-type aircraft.

d) Corporate Efforts.—Largely overlooked, it seems, in the context of pollution control are the national and multinational corporations—those entities most likely to be intimately involved with the operational aspects.³⁵

Overall policy concerning the environment will have to be made by governments and international organizations. Business (although regarded as the main villain in some quarters) should get credit for positive action taken to control environmental abuse and should not be overlooked as a future vehicle of action. An example of the former is the “clean seas” policies adopted by the major oil companies whereby “eighty percent of the world’s tanker fleet now conform to this [load-on-top] system, and it is conservatively estimated that two million tons of oil per year are now retained which once found their way to the sea.”³⁶ An example of the latter might be renewed interest in functionalism, especially with the multi-national corporations.

OBSERVATIONS

The foregoing discussion was intended not so much to make new points that have not been made elsewhere but, in light of some evidence that the debate over international law and the environmental issue is becoming blurred, to re-emphasize points that should not be overlooked or underestimated. We should 1) not lose touch with the political realities (some with new dimensions) of the milieu upon which international agreement must rest; 2) not have any illusions about the adequacy of current international law to control environmental abuse (especially in light of the tremendous internal national implications); and 3) not be sidetracked by shallow debate over the exclusive value of one pollutional-control approach over another when it is clear that we must proceed on *all* levels simultaneously.



FOOTNOTES

❖ Assistant Professor of Political Science, University of Montana.

¹ A few illustrative examples are Pardo, “Who Will Control the Seabed?” *Foreign Affairs*, XLVII, 1 (Oct. 1968), pp. 123–137; G.

Kennan, "To Prevent a World Wasteland," *Foreign Affairs*, XLVIII, 3 (Apr., 1970), pp. 401-413; D. Schachter and D. Serwer, "Marine Pollution Problems and Remedies," *American Journal of International Law*, LXV, 1 (Jan. 1971), pp. 84-111; and D. S. Cheever, "The Role of International Organization in Ocean Development," *International Organization*, XXII, 3 (Summer, 1968), pp. 629-648. The general literature is rapidly becoming too vast to cite. See for example the following bibliography on oil pollution alone. US, Congress, Senate, Committee on Public Works, *Oil Pollution of the Marine Environment—A Legal Bibliography*, by C. Q. Christol, Committee Print, Serial No. 92-1 (Washington, D.C.; Government Printing Office, 1971). See also the collection of documents in N. Padelford, *Public Policy for the Seas*. (Rev. Ed.) (Cambridge, Mass: MIT Press 1970).

² C. Q. Christol, "International Law and Oil Pollution of the Marine Environment," p. 5. The meeting was hosted by the University of New Mexico in Albuquerque (April 8-10, 1971). Chaired by Prof. Irwin White (Univ. of Oklahoma), the panel considered papers by Professors Christol (Univ. of Southern California), and W. B. Anderson (Utah State Univ.), "International Law and Organization for Environmental Protection Beyond the Limits of Exclusive National Jurisdiction." Prof. J. Lejniek (Univ. of Alberta) and I were discussants.

³ See the fascinating argument in a parallel context (man's reaction to the overwhelming atomic threat) of C. Osgood, *An Alternative to War or Surrender* (Urbana, University of Illinois Press, 1962) Ch. 2.

⁴ R. A. Falk, "Toward Equilibrium in the World Order System," *American Journal of International Law*, LXIV, 4 (Sept. 1970), pp. 217-224. See also his related comments in the same issue pp. 230-238, *passim*.

⁵ "Pollution Costs: Multinational Poser," *Chemical and Engineering News*, XLIX, 4 (Jan. 25, 1971), p. 9. It was, however, suggested that this would be only a "short run" disadvantage, because other countries (and their domestic firms) would have to catch up eventually.

⁶ *Id.*

⁷ See remarks by Miss Ruth Russell in *American Journal of International Law*, LXIV, 4 (Sep. 1970), p. 235.

⁸ This writer recalls reading somewhere a comment, in the context of international control of oceanic pollution, to the effect that: "the United Nations has not been able to solve our problems on land; how can we expect it to solve them underwater?"

⁹ See the extensive treatment of this proposal in Cheever, *supra* note 1.

¹⁰ *Saturday Review* (Sep. 26, 1970), p. 17.

¹¹ See his remarks in *American Journal of International Law*, LXIV, 4 (Sep., 1970), pp. 230-231.

¹² See for example the discussion of these points in M. M. Sibthorp,

Oceanic Pollution: A Survey and Some Suggestions for Control (London: David Davies Memorial Institute of International Studies, 1969).

¹³ The text of these conventions appears in *American Journal of International Law*, LXIV, 2 (Apr., 1970), pp. 471-490.

¹⁴ U.N. Doc. A/CONF. 13/L. 53.

¹⁵ See G. Hackworth, *Digest of International Law*, II (Washington: US Government Printing Office, 1940-1944), pp. 344-346. The tribunal's award is reprinted in full in *American Journal of International Law*, XXXV, 4 (Oct., 1941), pp. 684-736.

¹⁶ Article 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

¹⁷ Schachter and Serwer, *supra* note 1, pp. 88-89.

¹⁸ *Id.* at 89.

¹⁹ See *Id.* at 95-110.

²⁰ *Id.* at 84. For a treatment of some of the aspects involved in the environmental debate see R. L. Friedheim, *Understanding the Debate on Ocean Resources*, Monograph Series in World Affairs, Vol. 6 (Denver: Social Science Foundation and Graduate School of International Studies, University of Denver, 1969).

²¹ R. Gardner, "Can the U.N. Lead the Environmental Parade?" *American Journal of International Law*, LXIV, 4 (Sep., 1970), pp. 211-214.

²² *Id.*, pp. 211 and 214.

²³ *Id.*, pp. 213-214.

²⁴ E. M. Borgese, "The Prospects for Peace in the Oceans," *Saturday Review* (Sep. 26, 1970), p. 19. The thrust of the work done at the *Pacem in Maribus* Convocation in Malta and the Occasional Papers published by the Center for the Study of Democratic Institutions is very much in the "universal" vein.

²⁵ See G. Kennan, *supra* note 1.

²⁶ C. Q. Christol, in "International Law and Oil Pollution of the Marine Environment," pp. 8-11, demonstrates that in the context of oil pollution of the sea a few nations will likely be making the real decisions.

²⁷ *American Journal of International Law*, LXIV, 4 (Sep. 1970), p. 231. Professor W. B. Anderson, *supra* note 2, p. 26, called attention to the same point.

²⁸ See, e.g., C. Osgood, *supra* note 3.

²⁹ A. Wolman, in "Pollution as an International Issue," *Foreign Affairs*, XLVII, 1 (Oct., 1968), pp. 164-175, calls for a world intelligence agency in matters of ecology.

³⁰ Anderson, *supra* note 2, p. 26.

³¹ J. Cornwell, "Is the Mediterranean Dying?" *Manchester Guardian* (Jan. 2, 1971), p. 15.

³² A discussion of the Canadian action and citation of relevant

literature appears in L. Henkin, "Arctic Anti-Pollution: Does Canada Make-or-Break International Law?" *American Journal of International Law*, LXV, 1 (Jan. 1971), pp. 131-136.

³³ The march out onto the continental shelf, after all, owes no small degree of impetus to the Proclamation of President Truman Claiming Jurisdiction over Resources of the Continental Shelf (Sep. 28, 1945). *Federal Register*, Vol. X, p. 12303.

³⁴ See, e.g., G. Kennan, *supra* note 1; C. Q. Christol, "International Law and Oil Pollution of the Marine Environment" *supra* note 2; and O. Schachter and D. Serwer, *supra* note 1.

³⁵ See however for example the interesting Occasional Paper edited by E. Burnell and P. von Simson, *Pacem in Maribus: Ocean Enterprises* (Santa Barbara, Calif.: Center for the Study of Democratic Institutions).

³⁶ Cited by O. Schachter and D. Serwer, *supra* note 1, p. 93, n. 28.