

Review of European Community & International Environmental Law

Focus on: Hazardous Substances and Activities

International Control of Persistent Organic Pollutants: The UN Economic Commission for Europe Convention on Long-range Transboundary Air Pollution, and Beyond

Kirsten Hillman

The Shipment of Ultrahazardous Nuclear Materials in International Law

Duncan E.J. Currie and Jon M. Van Dyke

Transfer of Biological Resources under the Biodiversity Convention and the Biological Weapons Convention

R.V. Anuradha

Reconceptualizing Risk Assessment

Veerle Heyvaert

European Community Legislation on the Marketing and Use of Pesticides

Elizabeth Vogelesang-Stoute

Towards new EC rules on the Release of Genetically Modified Organisms

Wybe Th. Douma and Mariëlle Matthee

Decisions in the Desert: Report of the 10th Meeting of the Parties to the Montreal Protocol in Cairo

Kevin R. Gray

FIELD

Foundation for
International
Environmental
Law and
Development

Contents

Editorial	iii
Articles on: Hazardous Substances and Activities	
International Control of Persistent Organic Pollutants: The UN Economic Commission for Europe Convention on Long-range Transboundary Air Pollution, and Beyond <i>Kirsten Hillman</i>	105
The Shipment of Ultrahazardous Nuclear Materials in International Law <i>Duncan E.J. Currie and Jon M. Van Dyke</i>	113
Transfer of Biological Resources under the Biodiversity Convention and the Biological Weapons Convention <i>R.V. Anuradha</i>	125
Reconceptualizing Risk Assessment <i>Veerle Heyvaert</i>	135
European Community Legislation on the Marketing and Use of Pesticides <i>Elizabeth Vogelesang-Stoute</i>	144
Towards new EC rules on the Release of Genetically Modified Organisms <i>Wybe Th. Douma and Mariëlle Mathee</i>	152
Decisions in the Desert: Report of the 10 th Meeting of the Parties to the Montreal Protocol in Cairo <i>Kevin R. Gray</i>	160
General Articles	
Equity and Flexibility Mechanisms in the Climate Change Regime: Conceptual and Practical Issues <i>Philippe Cullet</i>	168
Contractual Architecture for the Kyoto Protocol: From Soft and Hard Laws to Concrete Commitments <i>Ibibia Lucky Worika, Thomas Wälde, Michael Brown and Sergei Vinogradov</i>	180
The European Community's Monitoring Mechanism for CO ₂ and other Greenhouse Gases: the Kyoto Protocol and other Recent Developments <i>Joy Hyvarinen</i>	191
North-South Aspects of the Climate Change Issue: Towards a Constructive Negotiating Package for Developing Countries <i>Joyeeta Gupta</i>	198
Environmental Laws as Expropriation under NAFTA <i>Juli A. Abouchar and Richard J. King</i>	209
Case Notes	
The ICJ <i>Canada—Spain Fishing Dispute</i> <i>Ana Paula Linhares</i>	215
The European Commission Decision on the Swedish Prohibition of Cyclamate and Certain Colours in Foodstuffs <i>Roda Verheyen</i>	218

Documents

- The 1998 Aarhus Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (POPs) (extracts) 224

Book Reviews

- Mostafa K. Tolba and Iwona Rummel-Bulska, *Global Environmental Diplomacy: Negotiating Environmental Agreements for the World, 1973-1992*; and Karen T. Liftin (ed), *The Greening of Sovereignty in World Politics* (Gordon Brent Ingram) 231
- Emmanuel Agius and Salvino Busuttil (with Tae-Chang Kim and Katsuhiko Yazaki) (eds), *Future Generations and International Law* (Axel Gosseries) 232
- Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Edward H.P. Brans) 232
- Jeremy Wilson, *Talk and Log: Wilderness Politics in British Columbia* (Gordon Brent Ingram) 235
- John A. Usher, *EC Institutions and Legislation* (Yvonne Schwab) 236
- Dorothy Gillies, *A Guide to EC Environmental Law* (Jürgen Lefevere) 236

Noticeboard

238

Book Reviews

Global Environmental Diplomacy: Negotiating Environmental Agreements for the World, 1973–1992 by *Mostafa K. Tolba and Iwona Rummel-Bulska*, published by MIT Press Ltd; 212pp.; £21.95, hardback.

The Greening of Sovereignty in World Politics, by *Karen T. Litfin* (ed.), published by MIT Press Ltd.; 212pp.; \$17.50, paperback.

One of the most significant inventions of the twentieth century may prove to be the international environmental accord. But what is the common essence of today's unresolved and partially implemented agreements? What kinds of generalizations, if any, can be made at this point in history about these nascent instruments to manage intensifying conflicts around water, air, soil and biota? One of the few conclusions that can be made at this early date is that the concept of nation state has been stretched and irrevocably transformed. More specifically, natural conceptions of sovereignty have been obliterated as states have been compelled to cooperate for the protection and management of transboundary resources and processes of planetary life support. But are the powers of the nation state actually being eroded and superseded by international agencies that administer and monitor various accords? This is infrequent even within the European Community. Is, in fact, the nation state actually being re-enforced through various forms of international co-operation around regulation of land use in increasingly globalized political economies? This is probably more often the case. Two books in the MIT Press environmental policy series provide divergent but curiously complementary assessments of today's tensions between nation states and international agencies in the wake of

several decades of transboundary environmental law.

Mostafa Tolba's slender reflections effectively argue that the United Nations Environment Programme has been the central force behind recent international environmental initiatives. This is a view that many in other United Nations, as well as non-governmental, organizations often refute. While a major achievement of UNEP has been in being one of the catalysts in the last quarter century of agreements, the narrative of this book is at times more occupied with UNEP trying, unsuccessfully, to attain a lead authority than with the history of the accords themselves. This book is published at a time when UNEP's roles and effectiveness are being increasingly questioned. His chronicle of the 1974 to 1992 period, while overly condensed, provides valuable reference material. What Tolba omits is as important as the details that are embellished. The beginning and end of this part chronicle and part institutional memoir are the 1972 United Nations Conference on the Human Environment in Stockholm and the 'Earth Summit', two decades later, in Rio de Janeiro. Tolba links the international initiatives across the two decades through a vacillating narrative articulating vaguely social democratic notions of 'sustainable development' followed by supply-side rationales for the inevitability of globalization. Within this playing field, the author outlines strategies for achieving international law such as 'selective incentives, differential obligations, regionalization, and promotion of overachievement by lead countries'. Perhaps it has been such strategies that have determined the contents of the accords and modes of implementation as much as the ecological and social imperatives. Tolba's discussion of 'soft law' in Chapter 2 rationalizes, rather convincingly, the thinking that allowed his office to gloat about a number of agreements that have lacked teeth and thus been poorly implemented.

The chapters on the major treaties, while premature, provide valuable historical material that will be re-evaluated periodically for some time to come. In this sense, Tolba's sparse notes and rationales become invaluable. 'Global Environmental Diplomacy' could almost have been used as an introductory text book if it was more reflexive of the often contradictory relations between international agencies and nation states.

Perhaps Tolba's recollections prefigure Karen Litfin's critical anthology, *The Greening of Sovereignty in World Politics*, where she initially argues that, 'We thus move away from the sterile question of whether efforts to cope with ecological problems erode or bolster some reified conception of sovereignty, to the more interesting question of how such efforts lead to reconfiguration of political space. The state is unlikely to be placed on the endangered species list anytime soon, but the state seems to be undergoing a transformation in response to a host of functional problems and interdependencies...' (p. 2). Problematically, law-making and legal interpretation in the subsequent theoretical framework for 'unbundling' sovereignty, into particular forms of autonomy, control, and authority, is sometimes sketchy. In the subsequent essays, it is typically the imperatives of ecosystem management, and not international agencies, that underlay any fundamental reconfigurations of sovereignty. Veronica Ward goes so far as to argue that 'the state, as a spatial unit, is [now] irrelevant' (p. 79). In contrast, implications of 'indigenous critiques', by a range of localized groups estranged from formally established nation states, are too numerous to lead to many conclusions. Towards the end of the volume, Sheldon Kamieniecki and Margaret Scully Granzeier outline a badly needed though unoriginal notion of 'eco-cultural security'. In examining regulation of whaling, Ronald Mitchell asks, 'Under what

conditions will *de jure* redefinitions of sovereignty alter the *de facto* practices of sovereignty that destroy the environment' (p. 141). Marian Miller provides a pessimistic assessment of the role of international accords in the continued disparities in North-South transfers of resources. Steeped in postmodern theory, Litfin argues in an essay on the implications of satellite technology, that international environmental conflicts are underlain by 'multiple struggles among contested knowledge claims' (p. 193). In one of the more forward-looking discussions, Joseph Henri Jupille explores the emergence of the principle of 'subsidiarity' in the environmental management strategies of the European Union. Based on notions of 'pooled sovereignty', subsidiarity is 'the idea that policies should be pursued at the level most appropriate to the problem being addressed' (p. 226). After various European examples, Jupille concludes that subsidiarity 'provides an intriguing alternative to sovereignty in imagining political responses to environmental needs' (p. 245).

Together *Global Environmental Diplomacy* and *The Greening of Sovereignty in World Politics* nearly comprise texts for a course. More careful case studies for the implementation for these accords and the meshing of an array of laws would provide the necessary complement.

Gordon Brent Ingram
University of California

Future Generations and International Law by Emmanuel Agius and Salvino Busuttil (with Tae-Chang Kim and Katsuhiko Yazaki) (eds.), published by Earthscan, London, 1998; 206pp.; \$18.95 paperback.

The concept of Future Generations raises all sorts of challenges for social scientists, be they philosophers (e.g. Parfit's non-identity problem), economists (e.g. defining an acceptable social discount rate), ... or lawyers. To a large extent environmental law deals with the future externalities of our present actions. And this is being done largely for the sake of our descendants. Still, future people don't exist yet (their existence depends on us), although many of our actions today will shape not only their environment, but also their identity, their

preferences and their number. How can the law take them into account? One issue is what substantive obligations does a concern for future generations require? Does it require preserving every single living species? Does it imply that we abandon activities with long term effects such as nuclear power generation? These are the sort of substantive issues that are discussed in the book. Moreover, the question as to whether the existing law already recognizes some obligations towards future people is also addressed.

The book's main purpose is to address the procedural side of the issue. In short, what type of institutions are required to give future people a voice? Would legal personification of future generations be sufficient? And can we already see the emergence of such a personification in international law today? What about the analogy with the use of proxies for incompetent people? The core focus of the book is on one procedural proposal: a guardian for future generations. The idea was initially proposed by the Maltese representative at the UNCED preparatory meeting. What is being examined in this respect is for instance what institutional form it should take: several or one guardian (discussed by Prof. C. Stone), a new international organization, a section or a department [...] constituted within the proposed pan-European Committee and the Mediterranean Commission for Sustainable Development (K. Aquilina), a UN office, the UN Trusteeship Council with a new role (Malta's proposal), a UN High Commissioner for Future Generations (Geping Rao's idea)? A more realistic road might consist in relying upon existing or new NGOs (an option advocated by R.St.J. Macdonald and Ph. Sands). Another question is: what powers would it have and what would its work consist of? (see e.g. pp. 11-12, 48-49).

While the overlap between some of the contributions is regrettable, this is, to my knowledge, the most comprehensive and thorough book on the 'guardian' proposal for future generations. Since Edith Brown Weiss' famous contribution to the debate on future generations and the law, jurists have not been as active on the intergenerational front as they have on other environmental issues. It is hoped that this volume might begin to alter this.

Axel Gosseries,
Aspirant FNRS, UCL, Belgium

International Environmental Law, Policy and Ethics by Alexander Gillespie, published by Clarendon Press, Oxford 1997; 217 pp.; \$35.

Following the growing awareness of current environmental problems, several remedies have been developed in the international environmental arena of law and policy. There are various, sometimes competing, motives why the international community felt it necessary to protect the environment and its natural resources. These motives have also had their impact on the types of remedies that have been chosen. Gillespie examines these motives and investigates how they are represented in international environmental law and policy. The central submission of the book is that some – if not all – of these intellectual perceptions are contradictory to the objective of fully protecting the environment. To prove this, many different theories are discussed, ranging from anthropocentric and utilitarian ideas to non-anthropocentric concepts and arguments in support of the preservation of the inherent value of nature.

The book consists of ten chapters describing various intellectual justifications for environmental protection and has one concluding chapter. The starting point of the book is an introduction to anthropocentrism, the ideas that have helped create the anthropocentric position and the way this position is reflected in international environmental law and policy. The central idea is that humanity is at the centre of environmental policy, and that everything non-human is to be regarded as a resource. Under this approach nature is not protected because of its own inherent value, but because of its instrumental or utilitarian value to people.

There are several justifications and arguments that exemplify this central idea. The first one described by the author is that of self-interest. This justification for environmental protection is based on the idea that the survival and prosperity of humanity is linked to the health of nature, and to the biosphere and its interdependent ecosystems. Humanity protects the environment, because the environment protects humanity. Self-interest has been recognized as a justification for