Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy

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I have just become emeritus so I still make people mention it. One thing about being emeritus at Harvard is that you do the same old thing. You teach law, at much reduced hourly rates of course, but you do it. (Laughter.)

One of the courses I teach is international environmental law. So I come here with a commitment to international environmental law that reminds me of what Professor T. R. Powell said in the 1930's when the loyalty oath controversy was acute. T. R. Powell, a great constitutional law professor, replied when asked whether he was prepared to take a loyalty oath to support the Constitution of the United States, "I don't see why I shouldn't, it has been supporting me all these years." (Laughter.)

I feel the same way about international environmental law, although I have been teaching the subject for only three or four years—which gives some indication of the novelty of the enterprise itself. Perhaps it is worthwhile just to say a word about where the international environmental law business lies. There are about 127, or 130 just to make it a round number, international treaties affecting the environment. Over half of these have been concluded since the Stockholm Conference in 1972.¹ Not all are global treaties; most, in fact, deal with shared boundary resources. One of the first was a remarkably successful treaty between the United States and Canada which covers all sorts of different environmental situations in relation to the U.S.-Canada boundary waters,² which stretch along 4000 miles.

So on the issue of centralization and decentralization, which Judge Randolph introduced, I think the clear message is that there is no single message: Not all environmental problems call for global solutions. Many problems are best dealt with in a regional context. Some environmental issues, like the issues surrounding Antarctica,

are regionally defined by the very resource that you are talking about. Other environmental issues can be dealt with at a national level, or even at the state and local level, as in this country where we do not necessarily impose national solutions across the board.

As I sat in the last session listening to the public versus private regulation debate, the speakers tended to distinguish between what they called ends and means. They seemed to agree that the ends (i.e., the level of environmental protection, the amenity to be protected, the use of environmental resources) have to be set publicly, but that the means involve a choice between public and private instruments. In the international field, the only thing that the international organization or treaty can determine is the first stage—the decision about the ends.

International environmental law or treaty making is very different from other kinds of international treaty making. With a nuclear test ban treaty, for example, the governments who sign that treaty are the ones who carry it out. That is, governments engage in nuclear testing or refrain from nuclear testing. All the treaty tries to do is to affect the activity, the behavior, of government. Indeed, every government has the capacity to carry out the terms of that treaty. Every government in the world, no matter how small, how poor, or how underdeveloped, has the capacity to not test nuclear weapons.

In the environmental field, however, the issues are entirely different. First, the behavior that we are trying to affect in an environmental treaty is not governmental behavior. The government is the conduit, and the treaty is designed to affect private behavior because the activity that creates the environmental problem is essentially private activity—driving cars, making power, or whatever. Secondly, it is very hard to use an international instrument to affect private behavior through national government. The choice of means in the international environmental law area is, therefore, necessarily a decentralized choice of means. Each country has its own choice of the means that it will use to achieve the result required by the treaty.

Even highly developed public systems are not very efficient in adjusting private behavior to environmental standards, regardless of whether they use the market or governmental regulation. In other parts of the world, the problems of bureaucratic capacity, available resources, and scientific and technical understanding of the problems are enormous. Many of the countries that we are calling upon to join us in this partnership have urgent priorities that may look different from our scheme of priorities.

These considerations lead me to the issue of the extraterritorial imposition of U.S. environmental standards. This is probably one of the few issues on which I come out more or less where people in this
audience, I expect, come out. I am highly skeptical about the propriety of unilateral imposition of U.S. standards to activities abroad. I think the development of international environmental law necessarily implies a multilateral decision on the ends. One country, no matter how powerful, cannot call the shots for other countries, nor try to fix things on its own.

As a teacher of international environmental law, my skepticism of unilateral action in this area is in defense of international environmental law. But since I do not want to be too general, let me identify three contexts which raise different issues. The first is when the environmental impact or the consequences occur within the United States. One of the important examples that we have been talking about in the last few months is pesticide residues. The United States regulates allowable pesticide residues on fruits and vegetables, which happened to be just low enough to exclude Mexican tomatoes. So Mexican tomatoes could not come into the United States because they did not meet the pesticide residue requirement. To meet the requirement, Mexican producers would have had to forego their comparative advantage, for they cannot sell at a competitive price if they have to spend to clean up the tomatoes.

I think that we must be able to set our own health and safety standards, whatever methods we use in setting those standards, and that we should protect our standard-setting ability. We get upset when the Europeans keep out U.S. hormone-fed beef because scientific data supposedly tells them, although it does not tell anybody else, that such beef is bad, or dangerous, or risky. I suppose there is a sort of floor since the General Agreement on Tariffs and Trade (GATT) provides that if a health standard or environmental standard is a disguised trade barrier, then it cannot be imposed. I would agree with that, but I would allow only a rather relaxed investigation into the motivations of why these standards are set.

The second area of concern is where the activity is carried out by U.S. entities, but the activity is carried out abroad, or the impact occurs abroad. Examples include U.S. investment and U.S. trade in foreign countries, U.S. ships in foreign waters or ports, and toxic chemicals or toxic wastes produced by U.S. companies in countries lacking regulatory standards as rigorous as ours. My opinion is that people living in other countries have the same right to set the rules for activity in their countries as we have to set the rules in our country.


For example, when I first got involved in the area of international environmental law some years ago, the big deal was DDT in India. Everybody knows that DDT is a poison and is bad for humans. In India, however, malaria-carrying mosquitos were a very bad problem, and DDT was by far the most effective malaria control agent. I do not think we could decide for India whether the life-saving possibilities of using DDT to control malaria did or did not offset the health risks created by the use of DDT. There is the problem that the information to make an effective choice may not be available in some countries. A country’s ability to act on information known to it may also be limited. In these cases, the application of our informational policies or even our regulatory policies abroad may be justified.

The third context, and the one that most interests me, is the use of American trade policy to impose standards on other countries’ activities conducted either within their borders or in international waters, although the environmental effects are not felt in the United States in any way. The classic case is the *Tuna/Dolphin Decision*.

The United States has rules that require the incidental catch of dolphins in the course of tuna fishing to be kept below a certain level. Our fishermen obey these rules. We also have a law which says that if foreign fishermen do not meet these limits on collateral dolphin deaths, we will bar the import of their tuna, and we did so in the case of Mexico. Now, these dolphins are not an endangered species, nor are they anywhere close to becoming an endangered species. There are millions of such dolphins in the oceans of the world. We love dolphins in this country. We love them for a variety of reasons; for instance, we go to marine parks and see them perform, and so we want to save dolphins.

Two legal things happened in response to our import ban on Mexican imports. The GATT Panel held that our restriction was an improper barrier to trade. The Ninth Circuit held, as they had to, that U.S. law requires the imposition of the trade sanction and upheld the sanction. Such extraterritorial extensions of regulatory jurisdiction seem to be the area where we are in the most trouble.

I leave you with the question of what to tell the children of a Mexican fisherman in some little fishing village on the west coast of Mexico.

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7. Id.
Mexico. Should we tell them to come to Marine World to look at the dolphins, while ignoring the problem of how they will get any dinner that night? Thank you.