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World Climate Change: The Role of International Law and Institutions edited by Ved P. Nanda

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BOOK REVIEW

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WORLD CLIMATE CHANGE: THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS. Edited by VED P. NANDA. Westview Press, 1983, 264 pp., selected bibliography, index, $20.00.

In July 1980, a group of eminent publicists, social scientists, and academicians met for two days in Denver, Colorado, to talk about the weather. Organized under the auspices of The Aspen Institute of Humanistic Studies and the International Legal Studies Program of the University of Denver College of Law, the conference addressed the international legal and institutional problems posed by inadvertent and deliberate weather modification. Recognizing the possibly severe transnational effects of weather modification, the conferees appraised several options for atmospheric management and discussed specific recommendations to ameliorate the adverse global effects of climate fluctuations and changes. An outgrowth of these deliberations is *World Climate Change*, a collection of 14 predominantly public policy essays. Its editor, Ved P. Nanda, touts the book as providing "a comprehensive discussion and analysis of the legal and institutional aspects of world climate change and weather-related activities and problems."[1]

As treated in this volume, climate change is understood to refer to alterations in the composition, behavior, or dynamics of the atmosphere caused (or suspected of being caused) by human activity. This modification of atmospheric conditions is produced either deliberately or inadvertently, though not accidentally. Deliberate weather modification conducted by nations for peaceful or hostile purposes is not, however, given adequate coverage in *World Climate*

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1. WORLD CLIMATE CHANGE: THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS at ix (V. Nanda ed. 1983). [All references to chapters in subsequent footnotes refer to chapters in this book]. Professor Nanda is Director of International Legal Studies Program, University of Denver College of Law. His publications in environmental law include: *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 DEN. L. J. 400 (1967); and *The Establishment of International Standards for Transnational Environmental Injury*, 60 IOWA L. REV. 1089 (1975).

Change.[2] To that extent, Nanda's claim to the work's comprehensiveness is slightly pretentious. On the other hand, the book may rightfully boast a solid and detailed discussion of atmospheric change brought about inadvertently through a host of human endeavors, such as deforestation, agriculture, soil degradation, urbanization, dust generation, transportation, and energy production. Recognizing the adverse effect of emission of gases and other effluents into the atmosphere, *World Climate Change* begins with an urgent appeal by Walter O. Roberts for societies to safeguard against increasing atmospheric carbon dioxide.[3]

The promotion of international social resilience to atmospheric changes is the key to understanding the content and structure of this book. Viewed as a subset of the much wider predicament facing the global environment, inadvertent weather modification must be dealt with at two levels: abatement of atmospheric pollution and international cooperation in atmospheric research, reporting, and management.[4] Many of the essays in this book address both of these pressing concerns. Robert S. Chen discusses the impact of climate on human society.[5] Stephen H. Schneider addresses the policy implications posed by the relationship between climate changes and the process of food production.[6] The evolution of international institutional approaches to climate research and reporting is discussed by William W. Kellogg[7] and John S. Perry[8] in separate essays. Robert Schware and Kellogg discuss the international strategies and institutions in dealing with climate change.[9] Nanda and Peter T. Moore investigate the issue of regional and multilateral initiatives toward global management of the environment.[10] George William Sherk explores the options and obstacles relative to unilateral actions to control inadvertent and, to a lesser extent, planned climate modification.[11] Two other essays are exceptionally well written. One is about a resource management approach to the problem of atmospheric carbon dioxide, by Edith Brown Weiss, a leading authority in the field.[12] The other article is an

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2. *See generally* McKenzie, *Weather Modification: A Review of the Science and the Law*, 6 ENVTL. L. 387 (1975); Mirfendereski, *An International Law of Weather Modification*, 2 FLETCHER F. 41 (1978).

3. V. Nanda, *Social Resiliency and Carbon Dioxide: Preliminary Remarks*, in WORLD CLIMATE CHANGE: THE ROLE OF INTERNATIONAL LAW AND INSTITUTIONS 1 (V. Nanda ed. 1983).

4. A distinction must be drawn between the *res communis* or *res publicae* and the concept of the common heritage of mankind. *See generally* Larschan & Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983).

5. Chen, Chapter 1, *Climate and Climate Impacts* at 13.

6. Schneider, Chapter 4, *Food and Climate: Basic Issues and Some Policy Implications* at 46.

7. Kellogg, Chapter 2, *International Climate Program Planning and Research* at 25.

8. Perry, Chapter 3, *International Climate Program Planning and Research* at 25.

9. Schware & Kellogg, Chapter 7, *International Strategies and Institutions for Coping with Climate Change* at 79.

10. Nanda & Moore, Chapter 8, *Global Management of the Environment: Regional and Multilateral Initiatives* at 93.

11. Sherk, Chapter 9, *Unilateral Actions to Control Planned and Inadvertent Climate Modification: Options and Obstacles* at 124.

12. Ms. Weiss' credits include: *International Responses to Weather Modification*, 29 INT'L ORG. 805 (1975).

investigation of options for public control of atmospheric management, by the dean of weather watchers, Ray Jay Davis.[13]

To most people the weather is not a subject for prolonged discussion. *World Climate Change*, however, contains five essays that should be of particular interest to students of international law. First is Armin Rosencranz's article titled "The International Law and Politics of Acid Rain." The length of the article does not do justice to the subject. A much more analytical piece on the subject is that of Jeffrey Maclure.[14] Nevertheless, brevity does not cause Rosencranz to miss the point. He denounces the fact that "[t]ransboundary air pollution is governed not by international law but by national self-interest,"[15] implying that truly effective measures to curb atmospheric pollution will not take place, until governments reach the conclusion that transboundary air pollution emanating from their territory is not in their own self-interest.

The issue of self-interest versus the common good is also addressed by Thomas W. Wilson, Jr., in "Global Climate, World Politics and National Security." Wilson argues successfully that "the possibility of man-made change in the world's climate is only one of a range of credible dangers that should lead to a major reappraisal and expansion of our basic concepts of national security."[16] The Earth, he argues, "is now threatened by a spectrum of non-military threats that call into question the very meaning of national defense."[17] In other words, it is no longer sufficient for States to be missile-proof; they must also seek their survival by becoming weather-proof. The distinction means being protected against nuclear genocide, but not inadvertent suicide. The thrust of Wilson's appeal is for nations to make the weather safe for humanity by abating and, indeed, reversing human activities that cause deterioration of the planet's biological systems.[18]

One suggestion is that developing and developed nations agree on, and then implement, a common agenda. This is the message urged by Schware and Edward Friedman in "Anthropogenic Climate Change: Assessing the Responsibility of Developed and Developing Countries." Schware and Friedman fail, however, to equitably apportion the responsibility for global environmental deterioration, including atmospheric pollution. The national self-interest of

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13. Mr. Davis' credits include: *State Regulation of Weather Modification*, 12 ARIZ. L. REV. 35 (1970); *Weather Warfare: Law and Policy*, 14 ARIZ. L. REV. 659 (1972); *The Law of Precipitation Enhancement in Victoria*, 7 LAND & WATER L. REV. 1 (1972); *Weather Modification Law Developments*, 27 OKLA. L. REV. 409 (1974); *Legal Response to Environmental Concerns about Weather Modification*, 14 J. APPLIED METEOROLOGY 681 (1975); *Weather Modification, Stream Flow Augmentation, and the Law*, 24 MIN. L. INST. 833 (1978); *WMO/UNEP Weather Modification International Law Proposals*, 12 J. WEATHER MODIFICATION 127 (1980).

14. Maclure, *North American Acid Rain and International Law*, 7 FLETCHER F. 121 (1983).

15. Chapter 12 at 202.

16. Chapter 6 at 71.

17. *Id.*

18. *Id.* at 76.

developing nations, however, is to urbanize and industrialize. These and other efforts are done at the expense of the environment, as they were in the development of industrialized nations. Now suddenly, the developing world is expected either to forego development or to achieve it by recourse to technologies that it can neither afford to produce domestically nor import from, ironically, the developed world. It would seem only equitable that the developed nations, which have polluted the environment for so long, share their pollution-abatement technology with the developing nations without charge.

The international legal context for cooperation and conflict resolution in matters related to climate change is the subject of two detailed articles: "The Atmosphere: Change, Politics and World Law," by Howard J. Taubenfeld,[19] and "Global Climate Change and International Law and Institutions," by Nanda. They alert the reader to the dangers of atmospheric change caused by pollution and outline the present international management of the problem. Institutions armed (albeit with little or no teeth) to tackle the problem include a host of regional groups and such international agencies as the United Nations Environmental Program, World Meteorological Organization, and others. Both writers agree that the primary responsibility of the international organizations is to foster cooperation between nations, suggest solutions, and encourage unilateral, bilateral, or multilateral actions. Such actions should include international agreements, leading to incremental change. The problem remains, however, within the realm of sovereign nations.

The more interesting contribution of Taubenfeld and Nanda, as well as brief remarks made by Rosencranz[20] and Sherk[21] elsewhere in the book, is an outline of the *substance* of the international law of climate change, which derives from the embryonic but broader international environmental law. Naturally, they both share a common principle, *sic utere tuo ut alienum non laedas* ("[u]se your own property in such a manner as not to injure that of another"[22]). The first international environmental law case which gave expression to this principle is the *Trail Smelter Arbitration*, which arose out of a suit by the United States claiming damage to property in the state of Washington by sulfur and other fumes drifting over the frontier from a smelter at Trail, British Columbia (Canada).[23]

In this often-cited decision the Arbitral Tribunal held that: [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein,

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19. Mr. Taubenfield's credits include: *Weather Modification and Control: Some International Legal Implications*, 35 CALIF. L. REV. 493 (1967); with Rita F. Taubenfield, *Some International Implications of Weather Modification Activities*, 23 INT'L ORG. 808 (1969); *International Environmental Law: Air and Outer Space*, 13 NAT. RESOURCES J. 315 (1973).

20. Rosencranz, Chapter 12, *The International Law and Politics of Acid Rain* at 196.

21. Sherk, *supra* note 11.

22. BLACK'S LAW DICTIONARY 1238 (5th ed. 1979).

23. Trail Smelter Arbitration (1938, 1941), 3 UNRIAA 1905; 9 ANN. DIG. 315 (1942).

when the case is of a serious consequence and the injury is established by clear and convincing evidence."[24]

Of interest to legal historians must be the dubious manner by which the Tribunal elevated this *sic utere tuo ut alienum non laedas* maxim to a principle of international law. The Tribunal simply declared its existence "under principles of international law, as well as of the law of the United States."[25] The fact of the matter is that the principle was "applicable *a priori* by virtue of the *compromis*,"[26] in which Canada accepted responsibility for the damages from the smelter on territory in Washington.[27] This point, lost to Sherk,[28] Taubenfeld[29] and Rosencranz,[30] is not overlooked by Nanda and Moore.[31]

Through repeated enumeration of the *Trail Smelter Arbitration* dictum in succeeding international law cases, the *sic utere tuo* maxim has emerged as an international legal principle. The contribution of cases such as the *Lake Lanoux Arbitration*[32] and the *Corfu Channel Case*[33] to the emergence of the *sic utere tuo* principle is noted by Nanda and Moore,[34] Sherk,[35] Taubenfeld,[36] Rosencranz,[37] and Nanda.[38] Insufficiently explored is the dissenting opinion of Judge de Castro in the *French Nuclear Test Case*.[39] In that dissenting opinion, Judge deCastro made specific reference to the principle of *sic utere tuo*, stating that it was now customary international law and thus would have been decisive in establishing France's responsibility for nuclear testing in the South Pacific had the case been considered on the merits.[40]

The principle of *sic utere tuo ut alienum non laedas* is opposed by the Roman law maxim *qui utitur jure suo alternum non laedit*[41] ("one who stands on his right cannot

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24. 3 UNRIAA at 1965.

25. *Id.*

26. Convention for the Final Settlement of the Difficulties Arising Through Complaints of Damage Done in the State of Washington by Fumes Discharged from the Smelter of the Consolidated Mining and Smelting Company, Trail, British Columbia, Apr. 15, 1935, United States-Canada, 162 L.N.T.S. 73 (1935-1936).

27. A.P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 261 (1971).

28. Chapter 9 at 128.

29. Chapter 10 at 156.

30. Chapter 12 at 197.

31. Chapter 8 at 94.

32. *Affaire du Lac Lanoux* (Fr. v. Spain), November 16, 1957, 12 UNRIAA 281. A summary of the case can be found in: 24 I.L.R. 101 (1961); MacCherney, *Judicial Decisions: Lake Lanoux Case*, 53 AM. J. INT'L L. 156 (1959).

33. The Corfu Channel Case, (Judgment of Apr. 9, 1949), 1949 I.C.J. REPORTS 4, 22 (19__).

34. Chapter 8 at 94.

35. Chapter 9 at 128.

36. Chapter 10 at 156.

37. Chapter 12 at 197.

38. Chapter 14 at 229.

39. Nuclear Tests Case (Australia v. France), (Judgment of December 20, 1974), 1974 I.C.J. REPORTS 253, 372 .

40. *Id.* at 388-90.

injure another").[41] International law is, by its essence, a regime of accommodation rather than one of absolute prohibitions, and it has long rejected this absolutist doctrine.[42]

Students of international riparian law will no doubt recognize the reiteration of this principle in the so-called "Harmon Doctrine."[43] Following a 15-year controversy between the United States and Mexico over the waters of the Rio Grande and its tributaries,[44] U.S. Attorney General Judson Harmon declared in 1895 that "the rules, principles, and precedents of international law impose no liability or obligation upon the United States" as to the utilization of the waters which flow into Mexico from Colorado and New Mexico.[45] The issue was ultimately resolved through bilateral agreement in 1906.[46]

The "Harmon Doctrine" was in effect an unsuccessful attempt by the United States to extend the concept of territorial sovereignty to a point where its physical power as an upper riparian to deprive the lower riparian of a continued flow of water, or to diminish its quality or quantity, be accepted as a legal right.[47] International riparian law rejects such absolutist views as to the utilization of commonly occurring resources such as air and water. While it is true that a nation has the sovereign right to alter the natural condition of its territory or objects found or occurring therein, including the corpus of the atmosphere, it is also true that such an exercise of sovereignty is not without State responsibility and liability when such alterations cause injury to other nations.[48] Where the *Trail Smelter Arbitration* stated so relative to international airborne pollution, the *Lake Lanoux Arbitration* affirmed a similar view with respect to the use of waters of Lake Lanoux. In that case, the tribunal found that France's diversion of waters entering the Lake was unobjectionable only insofar as the project did not deprive Spain of a flow normally occurring from the lake downstream into Spain.[49]

What the writers in *World Climate Change* stress is that the rights of nations to the atmosphere are merely usufructory, that is, State responsibility can attach to excesses which limit the reciprocal rights of other States. The *sic utere tuo ut*

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41. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, 295 (1933).

42. *Affaire de Portendik* (U.K. v. Fr.) (Nov. 30, 1843) in A. LAPRADELLE & N. POLITIS, 1 RECEUIL DES ARBITRAGES INTERNATIONAUX 512 (1905); *Affaire de la Fermeteure de Buenos-Ayres* (U.K. v. Arg.) (Aug. 1, 1870), in LAPRADELLE & POLITIS, 2 RECEUIL DES ARBITRAGES INTERNATIONAUX 637 (1923).

43. W. BISHOP, INTERNATIONAL LAW 454 (3rd ed. 1971). *Cf.* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 699-70 (1899).

44. *See generally* 1 MOORE, DIGEST OF INTERNATIONAL LAW 653 (1906); 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 584 (1940).

45. 21 Op. Att'y Gen. 274-83 (1898).

46. 34 Stat. 2953; 1 MALLOY, TREATIES, CONVENTIONS, INT'L ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1202-04 (1910); *See generally* 1 HACKWORTH, *supra* note 44 at 584; 1 MOORE, *supra* note 44 at 653 (1906).

47. *See* Mirfendereski, *supra* note 2 at 56.

48. OPPENHEIM'S INTERNATIONAL LAW 474-75 (8th ed. Lauterpacht 1955).

49. *Affaire du Lac Lanoux*, 12 UNRIAA at 315-16.

alienum non laedas principle, in weather or riparian law, places an obligation on States not to exercise their usufructory rights in a manner which deliberately or inadvertently injures other States or their rights in the same common resource.[50] In other words, one's absolute right to spit and spew in every direction stops where another's face begins. It is essentially this dilemma, both in its legal and socio-political dimensions, that *World Climate Change* successfully explores. I recommend *World Climate Change*, particularly its selected bibliography, to anyone interested in the weather beyond whether it rains or shines.

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50. *See generally* Mirfendereski *supra* note 2 at 58-63.