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Review of *International Law and Pollution* edited by Daniel Barstow Magraw

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International Law and Pollution, edited by Daniel Barstow Magraw, Philadelphia: University of Pennsylvania Press, 1991, Pp. 368.

It is now axiomatic that the law of the environment is among the most briskly expanding, innovative areas in the international legal system. While its rapidly changing character makes international environmental law an exciting area in which to work and practice, that same attribute poses a considerable challenge to editors of books like *International Law and Pollution*. This collection of sixteen essays by fourteen distinguished authors primarily from North America and Europe focuses on acid deposition on those two continents and pollution from nuclear accidents, with particular attention to the 1986 Chernobyl disaster. By concentrating on two issues that are both current yet sufficiently mature to warrant an extended treatment from which larger inferences can be drawn, Daniel Barstow Magraw has struck a workable balance between the potentially conflicting demands of timeliness and depth.

The extended period required to prepare such an ambitious undertaking for publication nonetheless has costs. Despite the book's 1991 copyright, most of the articles date from two 1988 symposia: the Tenth Sokol Colloquium on International Law held at the University of Virginia School of Law (USA) and the annual meeting of the American Bar Association held in Toronto, Canada that year. A number of authors have updated their presentations to reflect developments through late 1989. Even so, the book does not reflect major recent developments that have dramatically altered the law and policy governing acid rain, such as the enactment of a legislatively mandated emissions reduction program in the United States¹ or the new international agreement between the United States and Canada.² Although the more than ten percent of the book devoted to acid rain in North America is consequently out of date, those passages will retain legal and historical interest for scholars. The remainder of the pieces address subjects that, by contrast, have been characterized by a more gradual evolution and are, therefore, more current in their treatment.

By and large, the contributing authors solidly and clearly articulate the current state of law and scholarship with the support of uniformly thorough documentation. Günther Handl's case study of the Chernobyl accident, which draws on primary sources in no fewer than six languages, is particularly impressive in this regard. Those inclined to view European Community law as a swamp will particularly welcome Johan Lammers's lucid exposition of the law of acid rain in Europe. Apart from an unfortunate lapse through which the ill-fated Italian town of Seveso suffers the further indignity of repeated misspelling, the book appears accurate and well-researched.

On an analytical level, *International Law and Pollution* is fairly representative of current mainstream approaches to international environmental law. As such, it holds new insights for aficionado and novice alike, thereby augmenting scholarship in the field. Virtually all the authors attempt to analyze, integrate, and synthesize broad cross-cutting motifs. For example, in a chapter weaving themes of economic development and human rights with environment, Professor Magraw draws an interesting analogy between, on the one hand, the International Law Commission's highly controversial treatment of the

¹ Clean Air Act Amendments of 1990, § 401, Pub. L. No. 101-549, 104 Stat. 2399, 2584-2631 (1990), 42 U.S.C. §§ 7651-7651o (adding acid rain program to Clean Air Act as new §§ 401-416).

² Agreement on Air Quality, United States-Canada, March 13, 1991, reproduced in *IER* 701 (1991); 30 *ILM* 678 (1991).

questionably-entitled topic of international liability for injurious consequences arising out of acts not prohibited by international law and, on the other, the well-accepted law of state responsibility with respect to injuries to aliens.

Several of the contributors urge a necessary expansion in the scope of the discipline of international environmental law. Ian Brownlie and Paul Szasz, for instance, identify the indisputable need for a more effective interface with other fields of learning, and especially scientific disciplines, in making, enforcing, and adjudicating international environmental law. James Galloway responds with an article describing the underlying science of the acid deposition phenomenon. Professor Brownlie hints at the richness of inferences that could be drawn from a painstaking but revealing examination of actual state practice. Professor Handl responds by documenting the absence of state-to-state claims based on a theory of state responsibility after Chernobyl. Professor Magraw describes Canada's reluctance to resort to binding adjudication or arbitration to resolve its dispute with the United States over acid rain.

For the most part, however, these essays do not – and do not purport to – address thoroughgoing criticisms of the basic fabric of international environmental law. By contrast, a recent extended essay in the *Harvard Law Review*³ presents a most forceful articulation of the inadequacies of international environmental law. Among the charges leveled at the existing international law of the environment are the alleged ineffectiveness of the customary law of state responsibility as a tool for improving environmental quality,⁴ the supposed inconsequential role of state-to-state third party dispute resolution processes,⁵ and the asserted vagueness to the point of unenforceability of many of the substantive requirements that do exist.⁶ While those critics might themselves be accused of wielding meat cleavers instead of scalpels, their conclusions are fundamentally valid and demand a response. That the insights of the contributors to *International Law and Pollution* do not lead those authors to question the underlying structure of the law in this area is not so much a failing of the book itself as an indication of the broader state of the discipline of international environmental law.

That the entire treatment of the law on the environment in the current *Restatement*⁷ is cast in the analytical framework of international liability suggests that principles of state responsibility are well accepted in practice. Yet, concrete examples involving payment of claims based on the customary law of state responsibility are virtually unknown in the environmental area. Moreover, such examples as there are might well be taken to suggest that states do not recognize the existence of such a regime based on customary principles. At least one environmental agreement – the Convention on Long-Range Transboundary Air Pollution⁸ adopted under the auspices of the Economic Commission for Europe and discussed by Professor Lammers in his chapter – explicitly repudiates any implications of state responsibility. Professor Handl's study of the Chernobyl accident in *International Law and Pollution* asserts that that case was an aberrant, perhaps unique, failure of customary principles of state responsibility. However, a discriminating reader might well ask

³ "Developments in the Law – International Environmental Law," 104 *Harvard L.Rev.* 1484 (1991).

⁴ See, e.g., *id.* at 1492–1504 (criticizing "stillborn regime of international liability").

⁵ See, e.g., *id.* at 1561–63 (describing "failure of international adjudication").

⁶ See, e.g., *id.* at 1504–06.

⁷ 2 *Restatement (Third) of the Foreign Relations Law of the United States* §§ 601–604 (1987).

⁸ November 13, 1979, art.8, para.f, n.1, TIAS No. 10,541, reprinted in A. Kiss, *Selected Multilateral Treaties in the Field of the Environment* 519 (1983); 6 *EnvP&L* 37 (1980); *IER* 3001 (1991); 18 *ILM* 1442 (1979).

whether the Chernobyl experience is symptomatic of more pervasive structural weaknesses in the international law of the environment.

One might be excused for serious doubts about the adequacy of a state responsibility regime by itself for the task of global environmental protection. For one thing, customary standards of state conduct are often not sufficiently developed to enable a determination of liability. As in the domestic law of toxic torts, causation may be hard to establish. The magnitude of harm may be difficult or impossible to determine, and money damages may not be adequate compensation. Significant questions may arise as to whether a state is under an international obligation adequately to regulate the conduct of private parties under its jurisdiction and whether the actions of its citizens are attributable to that state for purposes of engaging responsibility. Perhaps most importantly, the case-by-case development of international environmental norms via a state responsibility approach is too slow, cumbersome, inexact, and insufficiently precautionary in nature to anticipate, prevent, and remedy the damage from the mammoth environmental risks facing the world today.

Likewise, a great deal of scholarly attention has centered around the role of compulsory dispute settlement mechanisms in international environmental law. But notwithstanding the famous language in the hoary *Trail Smelter*⁹ arbitration, whose legal force is not entirely without question,¹⁰ there have been astonishingly few contentious cases in international tribunals involving environmental disputes. To be sure, the International Court of Justice (ICJ) now has its fullest docket ever, and at least one case pending as of early 1992 may have environmental overtones.¹¹ On the other hand, the withdrawal by the United States of its consent to the compulsory jurisdiction of the ICJ in 1985¹² suggests that at least some states are less receptive to binding, third party processes than in the past.

Potential "plaintiff" states may be reluctant to initiate dispute resolution procedures against other states for a multiplicity of political reasons that may have nothing to do with the actual controversy. For example, as noted without explanation by Professor Magraw in his chapter on acid rain, until the recent agreement on air quality between the United States and Canada¹³ there was nothing to prevent Canada from urging an international adjudication or arbitration of the acid rain controversy. An unstated, but likely rationale for Canada's reluctance to request a binding, third-party process is concern that such a request with respect to this highly-charged domestic issue in the United States could jeopardize other mutually beneficial bilateral relationships that have nothing to do with

⁹ *Trail Smelter (U.S. v. Can.)*, 3 *UNRIAA* 1905, 1965 (1938 & 1941) ("under the principles of international law . . . no 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, when the case is of serious consequence and the injury is established by clear and convincing evidence").

¹⁰ See, e.g., Kirgis, "Technological Challenge to the Shared Environment: United States Practice," 66 *AJIL* 290, 293 (1972) (noting that "Canada did not actively contest its responsibility for the conduct of the smelter").

¹¹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (filed May 19, 1989) (seeking restitution or other appropriate reparation for alleged violation by Australia of trusteeship obligations and customary international law with respect to phosphate lands mined under Australian administration before Nauruan independence).

¹² Letter from George P. Shultz, Secretary of State of the United States, to Javier Perez de Cuellar, Secretary-General of the United Nations (Oct. 7, 1985) (terminating United States declaration of acceptance of compulsory jurisdiction of ICJ), *reprinted in* 24 *ILM* 1742 (1985).

¹³ See *supra* note 2.

the merits of the environmental dispute. Any number of other international environmental issues have similarly eluded resolution and, hence, solution. As in the case of state responsibility, compulsory dispute settlement mechanisms, while perhaps theoretically appealing, have largely failed to make a difference in the real world. Indeed, the reasons for the two phenomena may be related. To the extent the law of state responsibility is fuzzy or poorly developed, states may well be reluctant to submit to a determination by a third party as to the content of the law in that area.

Perhaps even more disturbing is the quibbling by United States government officials in their articles in *International Law and Pollution* over the application of the *Trail Smelter*¹⁴ rule and Principle 21 of the 1972 Stockholm Declaration¹⁵ to the bilateral acid rain dispute with Canada. Regardless of the legal merits of that debate, a discerning reader might well be left with the persistent, nagging impression – difficult to prove, but nonetheless plausible – that international law and even international politics played little if any role in the resolution of this decade-long standoff, which the United States regarded as an essentially domestic problem. The recent bilateral agreement on air quality¹⁶ offers no more in the way of emissions reductions than the previous year's amendments to the Clean Air Act¹⁷ and was concluded by the United States as an executive agreement because no additional statutory authority was necessary for its implementation. Indeed, its timing, form, and content tend to support the inference that a sense of international legal obligation was largely irrelevant to one of the most serious transboundary pollution problems of the century.

To serve as an effective vehicle for assuring the integrity of the global environment in the next century, international environmental law must come to grips with these deficiencies. Unfortunately, the gaps and holes are only too easy to identify. The task of crafting realistic, workable, real-world mechanisms acceptable to a wide variety of states for overcoming existing impediments in the structure of international environmental law is far more difficult. Forward-looking opportunities like the 1992 United Nations Conference on Environment and Development, self-consciously structured to accomplish nothing short of “mov[ing] environmental issues into the center of economic policy and decision making”¹⁸ but barely mentioned in *International Law and Pollution*, are occasions for facing these critical challenges squarely. It is interesting to speculate as to how the contributors to this book might respond if asked to address, in a subsequent volume, criticisms of international environmental law as a tool for averting environmental harm.

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¹⁴ See *supra* note 9.

¹⁵ Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 & Corr. 1 (1972), principle 21, reprinted in 11 *ILM* 1416 (1972) (“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”)

¹⁶ See *supra* note 2.

¹⁷ See *supra* note 1.

¹⁸ Strong, “ECO '92: Critical Challenges and Global Solutions,” 44 *JIntAff* 287, 290 (1991) (description by Secretary General of United Nations Conference on Environment and Development).

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