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## Remarks (as panelist) on "International Law: The Year in Review."

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## REMARKS BY DAVID A. WIRTH\*

In a year of very dramatic change worldwide, there was at least one major oversight in the environmental area. I am very sorry to report that no one ever thought to prepare an environmental impact statement before taking down the Berlin Wall.

Actually that statement is considerably less outlandish than it might seem at first blush. As old preoccupations have withered away, environmental issues have assumed a new prominence internationally. For example, there is now serious talk of environmental integrity as an essential component of national security. A global environmental awareness is simultaneously growing so quickly as to strain the ability of the international legal system to keep up. Indeed, developments in this area are so rapid that they may very well be a paradigm that illustrates the potential of international law generally well into the next century.

As a general matter, international legal standards in the environmental field are often less developed than in other areas of international law, including some that have been addressed by the previous panelists. The international community is now absorbed with the self-conscious process of creating environmental norms. Accordingly, the most important developments in recent years, including last year, have been in the creation of new law, as contrasted with the application of existing requirements. I would like to report on developments in the lawmaking process in two broad areas: (1) exports of hazardous substances; and (2) global atmospheric issues. While there were important policy developments in both areas in the past year, I hope to emphasize the significance of these developments for lawyers and the law.

International trade in hazardous wastes, toxic chemicals and dangerous pesticides consumed a great deal of attention during the past year. The UN Environment Programme (UNEP) sponsored a negotiation that led in March of last year to the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.<sup>1</sup> The negotiation of the Convention followed very quickly upon a number of well-publicized, serious incidents in which private firms headquartered in industrialized countries had shipped hazardous wastes to Third World countries that were ill-equipped to handle the problems associated with the treatment, storage and disposal of those wastes. Because of the heightened awareness of the magnitude of the underlying problem, as well as the trade implications involved in exports of hazardous wastes, the negotiations preceding adoption of the Convention were significantly more acrimonious than previous international treatment of this issue had been. As a result, the Basel Convention is substantially more than a simple codification of existing law in this area. Rather, it is a major departure from previously applicable law, both international and domestic. In fact, the Basel Convention establishes a stricter regime for management of international shipments of hazardous wastes than is in place in any one country.

The Basel Convention prohibits exports and imports of hazardous and other wastes by parties to the Convention to and from nonparty states. Second, the Convention bans shipments of hazardous and other wastes to parties that have prohibited imports. At least in theory, a party to the Convention is assured of not receiving imports of these substances from states of export that are also parties to the Convention merely

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<sup>1</sup>UN Doc. UNEP/IG.80/3 (1989), *reprinted in* 19 ENVTL. POL'Y & L. 68 (1989); [1990] INT'L ENV'T REP. (BNA) 21:3101; 28 ILM 657 (1989).

by stating a desire to that effect. Third, the Convention establishes a prior informed consent procedure for parties that have not prohibited waste imports. "Prior informed consent" has become international shorthand for a notification and consent procedure. In advance of shipment, the country of export notifies the receiving state, which then has an opportunity to reject the shipment simply by declining to receive it. Fourth, the Basel Convention requires that states of export prohibit shipments of hazardous and other wastes if there is reason to believe that the wastes will not be managed in an environmentally sound manner in the country of import. Last, the Convention articulates an obligation for states of export to ensure that international shipments of wastes are accepted for re-import if those shipments do not conform to the terms of export.

Despite the fact that the Basel Convention goes so much farther than the law of any one country, it has nonetheless been subject to severe criticism. One analytical perspective saw the Convention as legitimizing commerce in wastes, which should not be condoned by international law. Others identified gaps in the Convention's coverage, particularly in the areas of controlling trade and liability and compensation. Further, there was criticism of the Convention's failure to require minimum international waste management standards. As a result of these objections, no African country has signed the agreement despite the fact that it was the concerns of African countries that led to the agreement in the first place. The United States signed the Basel Convention exactly a week ago, on the last day the agreement was open for signature. Because of the lack of consensus surrounding it, the Basel Convention cannot truly be considered a success. While in time the Convention may come to be widely accepted as articulating an appropriate international legal standard, such a consensus does not now exist.

The past year also witnessed an important development in the regulation of international trade in domestically banned and restricted industrial chemicals and pesticides, such as DDT and Alar. Like the hazardous waste trade, exports of chemicals and pesticides have been a source of significant controversy for some time. Large exporting countries, such as the United States, the Federal Republic of Germany, the United Kingdom and Switzerland, have controlled the international debate until recently. The result has been a series of weak instruments adopted by UNEP, the Organization for Economic Cooperation and Development (OECD) and the UN Food and Agriculture Organization. Each of these earlier instruments confined the international standard to simple notification that these exported products were likely to leave the United States or another country of export. These notices were not especially informative and, in many cases, in fact did not arrive until after the shipment.

In February 1989 there was a major breakthrough on this issue in the form of new amendments to UNEP's London Guidelines for the Exchange of Information on Chemicals in International Trade.<sup>2</sup> The London Guidelines, like the Basel Convention, now set out a form of the principle of prior informed consent. The revised London Guidelines specify that each potential country of import should be notified of control actions with respect to banned and severely restricted chemicals and pesticides. In addition, those countries should be provided with the opportunity to state that they have decided (1) to permit use and importation of the chemical or pesticide; (2) to prohibit use and importation; (3) to permit imports only under specified conditions; (4) to request further information or assistance in evaluating the health and

<sup>2</sup>UN Doc. UNEP/WG.155/L.1 Annex I (1987), *adopted* GC Dec. 14/27, 42 UN GAOR Supp. (No. 25) at 79, UN Doc. A/42/25 (1987), *amended*, UN Doc. UNEP/PIC/WG.2/4 app. (1989), *adopted as amended* GC Dec. 15/30, 44 UN GAOR Supp. (No. 25) at 156, UN Doc. A/44/25 (1989), *reprinted in* 19 ENVTL. POL'Y & L. 125 (1989).

safety implications of the substance; or (5) to permit or prohibit importation, with or without conditions, on an interim basis until a final decision is made.

Unlike the Basel Convention, the London Guidelines constitute a nonbinding, precatory instrument. Hortatory principles like the London Guidelines—in contrast to binding multilateral treaties—are sometimes referred to as “soft”—as opposed to “hard”—law. There is, moreover, a serious gap in the document. It establishes a notification and consent procedure, but says nothing about what the proposed state of export should do should a government of a country of import express its wish not to receive particular chemicals or pesticides. There is an implied requirement that the state of export should prohibit shipments that have not been consented to by the country of import, but this standard is not stated explicitly in the text of the Guidelines. More than a year after their amendment, the revised Guidelines have not been implemented by UNEP or by any of its member countries, including the United States.

A second major area of activity in the past year has been global atmospheric pollution. Within this category of issues, stratospheric ozone depletion has been a top priority. The primary mechanism for addressing this serious problem is the Montreal Protocol on Substances That Deplete the Ozone Layer.<sup>3</sup> This instrument was adopted in 1987, again under the auspices of UNEP. The Montreal Protocol requires a 50-percent reduction in consumption of eight chemicals known as chlorofluorocarbons (CFCs), as well as another three chemicals called halons. That reduction is to be accomplished by the end of this century. The 1987 Montreal Protocol is a complicated and carefully structured regulatory regime, designed to deal with destruction of stratospheric ozone in a comprehensive manner. In addition to the reduction schedule, there are also trade incentives built into the agreement. Developing countries receive special treatment to encourage them to become parties to the agreement and ultimately implement its provisions. As an example of how delicate the balance is, negotiations on the agreement broke down in 1985 and were revitalized only with the discovery of the so-called ozone hole over Antarctica later in that year.

The Protocol is now widely viewed as insufficient to protect the ozone layer adequately. Without the virtual elimination of the eight chemicals that are already covered by the agreement, as well as major reductions in another class of chemicals, the ozone hole will persist perhaps well into the twenty-second century. As expressed at a meeting in London attended by representatives of 124 nations in March 1989 and a statement of eighty countries at the first meeting of the parties to the Protocol in May 1989,<sup>4</sup> the need for reassessment of the Protocol is now generally accepted. The revision process, currently scheduled to be completed this year, will address the question of accelerating the reduction schedule to eliminate emissions of the currently controlled eight chemicals by the end of the century, as well as the inclusion of at least two new chemicals: carbon tetrachloride and methyl chloroform. The reassessment of the Protocol will also deal with the question of funding mechanisms to assist developing countries with the costs of complying with the Protocol.

This situation raises interesting issues for lawyers. The agreement itself provides for periodic reviews, but does not precisely address the means of implementing the resulting revisions. Under customary international law, an amendment to a multilateral

<sup>3</sup>S. Doc. No. 10, 100th Cong., 1st Sess. (1987), *reprinted in* [1990] INT'L ENV'T REP. (BNA) 21:3151; 26 ILM 1550 (1987); 52 Fed. Reg. 47,515 (1987).

<sup>4</sup>Helsinki Declaration on the Protection of the Ozone Layer (statement from first meeting of parties to Vienna Convention on the Protection of the Ozone Layer and Montreal Protocol on Substances That Deplete the Ozone Layer, May 2, 1989), *reprinted in* 5 AM. U.J. INT'L L. & POL'Y 570 (1990); 12 INT'L ENV'T REP. (BNA) 268 (1989); 28 ILM 1335 (1989).

treaty is binding only on those nations that indicate their affirmative intent to accept those new obligations, ordinarily through ratification of the amendment. One could imagine that several of these iterations could result in the creation of different classes of parties, each bound by a different configuration of amendments. The Protocol departs from the ordinary rule by expressly specifying that “adjustments” to the agreement’s reduction schedule, which are binding on all states party to the instrument, may be adopted by a two-thirds majority instead of by consensus. The precise meaning of “adjustment” within the meaning of the Protocol, however, is not clear. It now looks as if the parties to the Protocol will adopt an interpretation worthy of Solomon, in which revisions to the reduction schedules for the eight chemicals now covered by the agreement are subject to the nonconsensus adjustment process, but the addition of new chemicals requires a full-blown amendment.

The equally compelling issue of global warming—the so-called greenhouse effect—has also been the subject of considerable activity in the past year. The first step toward international negotiations on a global climate treaty was taken with the establishment of the Intergovernmental Panel on Climate Change (IPCC), created under the auspices of UNEP and the World Meteorological Organization, which met for the first time in November 1988. The IPCC is now the principal ongoing multilateral vehicle for scientific and policy treatment of the greenhouse issue.

Although the original scope of the IPCC’s activities did not include preparation for the adoption of a formal treaty, a number of recent directives clearly authorize the negotiation of a multilateral greenhouse gas convention. These include the final statement of an international meeting hosted by the Government of Canada in mid-1988,<sup>5</sup> two UN General Assembly resolutions,<sup>6</sup> the conclusions of a group of international lawyers convened by the Government of Canada in February 1989,<sup>7</sup> the declaration of an international meeting attended by seventeen heads of state in the Hague in March 1989,<sup>8</sup> a decision of the UNEP Governing Council taken at its May 1989 meeting,<sup>9</sup> the communiqué of the Group of Seven industrialized countries from their mid-1989 gathering,<sup>10</sup> and the declaration of a ministerial conference hosted by the Dutch Government in November 1989.<sup>11</sup>

<sup>5</sup>The Changing Atmosphere: Implications for Global Security (statement from international meeting sponsored by Government of Canada in Toronto, June 27–30, 1988), *reprinted in* 5 AM. U.J. INT’L L. & POL’Y 515 (1990).

<sup>6</sup>GA Res. 207, 44 UN GAOR Supp. (No. 49) at 130, UN Doc. A/44/49 (1990), *reprinted in* 20 ENVTL. POL’Y & L. 43 (1990); GA Res. 53, 43 UN GAOR Supp. (No. 49) at 133, UN Doc. A/43/49 (1989), *reprinted in* 5 AM. U.J. INT’L L. & POL’Y 525 (1990); 19 ENVTL. POL’Y & L. 27 (1989); 28 ILM 1326 (1989).

<sup>7</sup>Protection of the Atmosphere: Statement of the Meeting of Legal and Policy Experts (statement from international meeting sponsored by Government of Canada in Ottawa, Feb. 20–22, 1989), *reprinted in* 5 AM. U.J. INT’L L. & POL’Y 529 (1990); 19 ENVTL. POL’Y & L. 78 (1989).

<sup>8</sup>Declaration of the Hague (statement from international meeting sponsored by Government of the Netherlands in the Hague, Mar. 11, 1989), *reprinted in* 5 AM. U.J. INT’L L. & POL’Y 567 (1990); 19 ENVTL. POL’Y & L. 78 (1989); 30 HARV. INT’L L.J. 417 (1989); 12 INT’L ENV’T REP. (BNA) 215 (1989); 28 ILM 1308 (1989).

<sup>9</sup>GC Dec. 15/36, 44 UN GAOR Supp. (No. 25) at 164, UN Doc. A/44/25 (1989), *reprinted in* 19 ENVTL. POL’Y & L. 118 (1989); 28 ILM 1330 (1989).

<sup>10</sup>Economic Declaration (statement of Group of Seven major industrialized nations in Paris, July 16, 1989), *reprinted in* 5 AM. U.J. INT’L L. & POL’Y 571 (1990); 19 ENVTL. POL’Y & L. 183 (1989); 28 ILM 1293 (1989); N.Y. Times, July 17, 1989, at A7, col. 1.

<sup>11</sup>Noordwijk Declaration on Atmospheric Pollution and Climatic Change (statement of ministerial conference sponsored by Government of the Netherlands in Noordwijk, Nov. 7, 1989), *reprinted in* 5 AM. U.J. INT’L L. & POL’Y 592 (1990); 19 ENVTL. POL’Y & L. 229 (1989); 12 INT’L ENV’T REP. (BNA) 624 (1989).

There has been a strong tendency to view the stratospheric ozone issue as a model for global warming, both because of the similarity of the underlying problem and the success of the Montreal Protocol. However, the recent international declarations of intent are confined by and large to a so-called framework convention on the global warming issue. This is a conscious reference not to the Montreal Protocol, but to the Vienna Convention for the Protection of the Ozone Layer.<sup>12</sup> In examining recent developments on the greenhouse issue, it is important to keep the Vienna-Montreal precedent in perspective, particularly with respect to the timing and content of protocols relative to the anticipated greenhouse gas convention.

States negotiating under UNEP auspices in the early 1980s to reduce threats to the stratospheric ozone layer made an explicit decision to undertake a two-component process. One product of this process was to be a "framework" multilateral convention establishing an institutional basis for cooperation in research, exchange of information and discussion of substantive policy measures. Protocols containing substantive regulatory measures would be appended to this convention. The ozone framework treaty evolved into the Vienna Convention concluded in March 1985. The Vienna Convention itself contains no substantive requirements for specific measures to protect stratospheric ozone. Instead, it embodies only a vague, unenforceable exhortation to protect the stratospheric ozone layer through the implementation of "appropriate measures."

Negotiations on a CFC protocol, which eventually became the Montreal Protocol, proceeded simultaneously with deliberations on the Convention up to the adoption of the Convention itself in early 1985. When negotiations on the CFC protocol broke down, the Convention alone was adopted. Renegotiation of the protocol after a scheduled one-year "cooling off" period coincided with an upsurge in public concern about the Antarctic ozone hole, which broke the deadlock and facilitated adoption of the Montreal Protocol in September 1987.

Assuming the IPCC process achieves its stated goals, to a large extent it will have established the "framework" mechanisms for exchange of information and cooperation in research analogous to those institutionalized by the Vienna Convention. The IPCC process will also have performed another function often ascribed to the Vienna Convention: laying the groundwork for substantive action through preliminary discussions. In addition, the IPCC process serves very much the same function as the one-year "cooling off" period that preceded renegotiation of the CFC protocol. These considerations suggest that a greenhouse gas convention could be much more aggressive than the Vienna Convention by, for instance, identifying global targets and deadlines for reducing emissions of greenhouse gases. Entirely consistent with the Vienna-Montreal precedent, negotiations on ancillary agreements analogous to the CFC protocol could proceed simultaneously with convention negotiations.

These two broad areas—exports of hazardous substances and global atmospheric pollution—are illustrative of some general trends in the area of international environmental law, as well as some challenges for us as lawyers. First is the increasing reliance upon multilateral forums for the resolution of international environmental problems. Many of these issues have been around for a long time. Both the export of hazardous chemicals and stratospheric ozone depletion were the subjects of domestic legislative and administrative activity in the late 1970s. Recently there have been a number of examples, including hazardous exports and stratospheric ozone depletion,

<sup>12</sup>S. Doc. No. 9, 99th Cong., 1st Sess. (1985), *reprinted in* [1990] INT'L ENV'T REP. (BNA) 21:3101; 26 ILM 1516 (1987).

of good-faith, serious attempts to transfer issues into a multilateral context to foster more effective and efficient international solutions to international problems.

A second trend is the increased emphasis on binding treaties in contrast to nonbinding, hortatory, "soft" law instruments. For example, in the early 1980s the OECD and UNEP adopted a series of nonbinding instruments on international traffic in hazardous wastes. The motivation for the Basel Convention on hazardous wastes included not only strong sentiment in favor of tightened standards for international commerce in wastes, but also a widespread desire to replace existing precatory standards with binding legal obligations. The stratospheric ozone issue has already produced a binding multilateral instrument, and the greenhouse problem is expected to do as well.

A third general development is the increasing reliance upon very specific and complex regulatory regimes that have measurable, crisp procedural and substantive standards for implementation by individual states. Although there have been some notable exceptions, the tendency until fairly recently in the international environmental area was to establish rather vague adjective standards. Now, however, the Montreal Protocol sets out a precise numerical reduction schedule with firm deadlines. Both the Basel Convention, dealing with hazardous wastes, and the amended London Guidelines, addressing chemicals and pesticides, describe detailed procedural requirements.

Environmental problems raise many new challenges for international law. One major issue, which nonetheless often goes unstated, concerns the ability of the international legal system to respond to environmental risks of such overwhelming magnitude and complexity as those presented by the greenhouse effect. Perhaps there is a need for new nonconsensus decision-making procedures that may require states to cede some of their sovereign prerogatives to some international institution. The Hague Declaration adopted a year ago by no fewer than seventeen heads of state advocates the creation of a new institution to exercise such powers. As already described, the Montreal Protocol articulates a nonconsensus process that is nonetheless binding on all parties for modifying some of that instrument's requirements.

Further, there are increasing demands for direct accountability to the public by international legal processes. International procedures are often much less open or transparent than corresponding domestic processes, at least in the United States. Often on an ad hoc basis, some scientists, businessmen and representatives of nongovernmental organizations have managed to carve out niches for themselves as observers or even advisers to multilateral processes. Nonetheless practice among various international organizations and forums in this area is still very erratic. Industry and trade unions have institutionalized roles in the OECD, but there is so far no opportunity for representatives of public interest environmental organizations to participate in their own right. Moreover, as issues such as hazardous exports and stratospheric ozone depletion that were previously treated in domestic forums move to the international arena, procedural rights of notice, an opportunity to comment and judicial review may be attenuated or foreclosed.

Last, there is an increasing concern for full compliance and adequate enforcement mechanisms. States undertaking major environmental obligations want to know that their partners in multilateral agreements are in fact implementing the same requirements. There may be an opportunity here for a "private attorney general" model, which has been very successful in the domestic environmental arena. Putting enforcement tools in the hands of the public may partially overcome some of the impediments

inherent in cumbersome, often ineffective, dispute settlement mechanisms that states may be reluctant to initiate.

REMARKS BY JOHN FRANKLIN HALL, JR.\*

I shall briefly discuss the changing face of Eastern Europe and the climate for Western business in the 1990s. Recent appeals by the leaders of Poland, Czechoslovakia and the Soviet Union suggest that, politically at least, the climate for Western business in the East is warm and inviting; but what are the legal and business realities for the Western investor in this enigmatic region?

Using Poland and the Soviet Union as examples, I would like to take a moment to highlight significant points in the host-country foreign investment laws. Poland and the Soviet Union, like most of the former Soviet bloc nations have redrafted their laws governing foreign investment during the past five years. In general, these laws guarantee the foreign investor's share against expropriation and encourage foreign investment and participation in a variety of industries. Regarding ownership and control, Poland allows outright foreign control of ventures, while the Soviet Union seeks to retain domestic control in practice, though its laws do not mandate such control. Tax holidays exist to varying degrees for many East European countries. In Poland, most companies receive a three-year tax holiday, while ventures in the agro-industrial, technology and tourism sectors are given tax exemptions for twice that period. The United States currently has no tax treaty with the Soviet Union, so tax holidays are generally limited to the three years provided in the Soviet Joint Venture Law, although treaty negotiations may soon be underway to avoid the double taxation of American ventures, and the withholding tax on dividends that other Western nations are exempt from.

Repatriation of the foreign investor's profit is usually subject to certain restrictions in East European countries. Upon ratification of the Trade and Business Treaty signed last Wednesday by President Bush and Prime Minister Mazowiecki, Poland will allow unfettered repatriation of hard currency profits. Similarly, the Polish Government has agreed to gradually eliminate all restrictions on zloty profit repatriation by the mid-1990s; currently, only 15 percent of zloty profits may be exported. Export of hard currency profit from the Soviet Union, however, is subject to two major restrictions: (1) the profit must derive from the company's export earnings; and (2) there remains a 20-percent withholding tax for U.S. partners.

In addition to the various laws that speak directly to foreign investment or joint ventures, Western investors must be aware of bureaucratic realities and legal infirmities that exist in almost all East European states. In many East European countries a dearth of available or understandable commercial and contract laws, to the extent they exist at all, presents unique challenges and potential pitfalls for Western investors accustomed to relatively straightforward and widely disseminated rules of the game. Additionally, bureaucratic reticence on many levels, a lack of basic comprehension of market and business fundamentals, and inefficient modes of distribution, communication and transportation can serve to frustrate the potential investor, or even his attorney.

Among the frustrating vagaries of trade with the nations of Eastern Europe are matters of currency convertibility and countertrade. As of 1990, the Polish zloty became internally "convertible," but this theoretical conversion will likely not translate into practical conversion for some time. Much has been reported about the efforts,

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