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South, North, International Environmental Law, and International Environmental Lawyers

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Global environmental trends have reached a dangerous crossroads as the new century begins, according to State of the World 2001, which was released today by the Worldwatch Institute, a Washington-based research organization. Signs of accelerated ecological decline have coincided with a loss of political momentum on environmental issues, as evidenced by the recent breakdown of global climate talks . . .

Global Environment Reaches Dangerous Crossroads, Worldwatch News Release, 13 January 2001[1]

The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight . . .

Walter Benjamin, *Theses on the Philosophy of History*[2]

Environmentalists are often accused of being doomsayers, warning about the possibility of ecological catastrophe. However, increasingly, it appears that their predictions are all too accurate. There are, in a wide variety of areas, unmistakable signs that the environmental devastation prophesied in the late 1960s is occurring. Species loss is estimated to be occurring at an unprecedented rate, and it is now generally accepted that anthropogenic climate change is underway. The Worldwatch Institute news release excerpted above goes on to state: "New scientific evidence indicates that many global ecosystems are reaching dangerous thresholds that raise the stakes for policymakers. The Arctic ice cap has already thinned by 42 per cent, and 27 per cent of the world's coral reefs have been lost, suggesting that some of the planet's key ecological systems are in decline . . . Environmental degradation is also leading to more severe natural disasters, which have cost the world $608 billion over the last decade—as much as in the previous four decades combined."[3]

What is troublesome, then, is not doomsaying;[4] rather, it is how little atten-

[1] *Global Environment Reaches Dangerous Crossroads*, Worldwatch News Release, 13 January 2001, <http://www.worldwatch.org/alerts/010113.html>.

[2] Walter Benjamin, *Theses on the Philosophy of History*, in Illuminations: Essays and Reflections, 253, at 257 (Hannah Arendt, ed., Harry Zohn, trans., 1968).

[3] *See Global Environment Reaches Dangerous Crossroads*, *supra* note 1.

[4] Though there may well be something to the view that such attitudes are counterproductive and that they are more likely to disempower than to galvanize. That, however, is a topic for another essay.

tion seems to be devoted to the fact that for many people these are already apocalyptic times. Famine, pestilence, war, and death—they reign supreme in all too many parts of the world. And one cannot help but wish that a bit more energy went into convincing people that what is happening now is just as catastrophic as what is being predicted. It is just that those in the North are not having to confront it—at least not yet. Consider other statistics. The 1999 United Nations Human Development report informs us that "[t]he income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960."[5] The same Worldwatch Institute news release cited above notes that 1.2 billion people lack access to clean water, while 1.1 billion are undernourished and underweight.

The fact that large numbers of people are living in misery does not mean that we should ignore environmental concerns. However, it should be obvious that those who are already living in catastrophic situations can hardly be expected to respond eagerly to appeals to stave off environmental catastrophe. For more than thirty years, the South has been attempting to convey the desperate circumstances in which many of its peoples exist and to convince the international community of the ways in which these circumstances are inextricably connected with environmental degradation.[6] Few have maintained that the South should simply sacrifice the environment in its rush to develop. Instead, the South has insisted that while environmental problems are among the most urgent facing the international community, they cannot be separated from other challenges that are equally as serious and as devastating. Environmental problems have to be addressed, but not in isolation from a host of other factors. They need to be understood in a broader economic, social, cultural, and historic context.

The premise for this article is that international environmental lawyers have failed to fully respond to that broader context and to confront the differing perspectives of the South and North as a central, if not *the* central, debate regarding the conceptual foundation of their discipline. What I seek to

[5] United Nations Development Programme, *Overview: Globalization with a Human Face*, <http://www.undp.org/hdro/overview.pdf>, at 3.

[6] To speak of a "Southern," "Third World," or "developing country" perspective on the highly complex set of issues that are lumped together under the environmental rubric may be problematic in and of itself. There are, of course, significant divisions between developing countries, which play out in different ways on different issues. One notable example is the diametrically opposed positions of the small island states, represented by the Alliance of Small Island States, on the one hand, and the oil-producing states, on the other, with respect to climate change. Nevertheless, there has tended to be considerable cohesion in regard to environmental issues in general. The Group of 77 and China, in particular, has played a significant role in presenting a more or less unified front in the context of multilateral negotiations. I would argue that one need not posit that the South is monolithic in order to speak meaningfully of its role in the development of international environmental law. *See also* Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse* 16 Wis. Int'l L.J. 353 (1998).

argue may well appear counterintuitive, if not outrageous, given the many ways in which the South–North dimension has influenced the development of international environmental law. Differentiated responsibilities, technology transfer provisions, and financial assistance mechanisms—these are woven into the very fabric of international environmental treaty regimes[7] and are an inescapable feature of international diplomacy. And few would deny that of the many challenges facing international environmental law and policy, the South–North divide is one of the most significant. Nevertheless, my thesis is that international environmental law *as a discipline* has failed to respond to Third World concerns in a meaningful fashion. Indeed, it has accommodated these concerns at the margins, as opposed to integrating them into the core of the discipline and its self-understanding.

In attempting to develop and defend this rather sweeping accusation, I propose to consider two aspects of the standard "accommodationist" approach. First, there is a tendency to provide an ahistorical account of the evolution of international environmental law. Second, the South is, implicitly or explicitly, portrayed as a grudging participant in environmental regimes rather than recognized as an active partner in an ongoing effort to identify the fundamental nature of environmental problems and the appropriate responses thereto. I proceed to explore the ramifications of the standard approach in the context of an examination of the principle of "common but differentiated responsibilities." I conclude by pleading in favour of an "integrationist" approach—one that brings the concerns of the South into the mainstream of the discipline.

I. AHISTORICISM

Consider the way in which the story of international environmental law is presented in four treatises on the subject: Patricia Birnie and Alan Boyle, *International Law and the Environment*;[8] Alexandre Kiss and Dinah Shelton, *International Environmental Law*,[9] Ved Nanda, *International Environmental Law and Policy*,[10] and Philippe Sands, *Principles of International Environmental Law I: Frameworks, Standards and Implementation*.[11] In most of these works, there appears to have been an effort to present an historical context for international environmental law. Sands, in fact, emphasizes the

[7] For a survey, see John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law* 14 Hastings Int'l & Comp. L. Rev. 905 (1991).

[8] Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (1992). The second edition of the work is planned for publication in 2001.

[9] Alexandre Kiss and Dinah Shelton, *International Environmental Law* (2nd edn., 2000). The first edition of the work was published in 1991.

[10] Ved P. Nanda, *International Environmental Law and Policy* (1995).

[11] Philippe Sands, *Principles of International Environmental Law I: Frameworks, Standards and Implementation* (1995).

importance of history, asserting that "although the current form and structure of the subject has only become recognisable within the past decade, a proper understanding of modern principles and rules requires a historic sense of earlier scientific, political and legal developments."[12] However, an examination of the historical dimension of these works reveals that the discussion tends to be limited to the ways in which concerns about issues such as species conservation and various forms of pollution predated the modern environmental era.[13] To a large extent, the early history of international environmental law is narrated as a series of agreements, strung along in chronological order, with perhaps a passing judgment as to their "progressiveness" (or lack thereof) from an environmental or ecological standpoint.[14] Little or no effort is made to portray the conditions to which these agreements were meant to respond or the broader political and economic backdrop against which they emerged. From there, a jump is usually made to the latter half of the twentieth century, particularly to the 1960s, when the "real story" of international environmental law is said to have begun with the emergence of ecological consciousness.

What might the history of international environmental law look like from the perspective of the South? The emergence of a truly global environmental consciousness might well be traced back considerably further. There are many potential entry points into this alternative perspective, but let us take one with specific legal content: the *Western Sahara* advisory opinion.[15] It will be recalled that the International Court of Justice (ICJ) rejected the application of the *terra nullius* doctrine to the territory of the Western Sahara because Spanish control over the territory at the time of colonization had

[12] *Id.*, at 25.

[13] For example, Birnie and Boyle provide almost no historical background in their introductory chapter, which is limited to a consideration of a series of preliminary questions such as "What is International Environmental Law?" followed by a survey of the sources of international environmental law; *supra* note 8, at 1–31. Kiss and Shelton have one chapter entitled "Origin and Evolution of International Environmental Law," which is divided into three sections, the first of which deals with international environmental law before the Stockholm Conference, *supra* note 9, at 55–63. The section surveys a series of conservation treaties and agreements dealing with water and marine pollution and goes on to discuss the emergence of fundamental principles in the area of transfrontier pollution, culminating in a discussion of the emergence of "the present ecological era" beginning at the end of the 1960s. Nanda has a chapter entitled "The Early Years," which briefly surveys international agreements and case law prior to the Stockholm Conference; *supra* note 10, at 73–82. Sands devotes an entire lengthy chapter to the history of international environmental law; *supra* note 11, at 25–62. While his treatment is the most comprehensive of those texts considered, it tends to remain quite narrow in its focus. In particular, his discussion of the period prior to the establishment of the United Nations ("[f]rom early fisheries conventions to the creation of the United Nations," *id.*, at 26–9) largely follows the same pattern of the other treatises in providing a survey of instruments and arbitral decisions. For a similar treatment, see also David Hunter, Jim Salzman, and Durwood Zaelke, International Environmental Law and Policy (1998), Chapter 6 of which is entitled "A Brief History from Stockholm to Rio."

[14] *See, for example*, Kiss and Shelton, *supra* note 9, at 55–7.

[15] *Western Sahara* advisory opinion, [1975] ICJ Rep. 12 [hereinafter *Western Sahara*].

been achieved through the conclusion of a series of agreements with local rulers. The ICJ asserted that the peoples of the Western Sahara had a right to self-determination. Many commentators have celebrated the *Western Sahara* opinion. Yet, I would argue that the most insightful analysis was not carried out by the court or by any of its members, but rather by Mohammed Bedjaoui in his statement on behalf of Algeria.[16] Bedjaoui engaged in a long and detailed analysis of the ways in which the *terra nullius* doctrine had been used throughout the period of colonial expansion in order to justify taking the territory of those individuals that did not satisfy the colonialists' definition of peoples capable of exercising sovereign jurisdiction. Implicitly inviting the ICJ to come to terms with how the colonial powers used international law to legitimate their expansionist activities, Bedjaoui insisted that it should be acknowledged that the Western Sahara had been treated as *terra nullius*, in fact, if not according to the strict legal definition of the term. Regardless of what agreements might have been concluded, Spain treated the Western Sahara as "appropriable" territory, which is, of course, precisely how *terra nullius* is defined.

The court declined Bedjaoui's invitation, but his insight, I would argue, can be applied on a broader scale. In effect, from the time when international law emerged in its classic form,[17] most of the globe has been treated as *terra nullius*, open to appropriation by any "civilized" state. And, to a remarkable extent, civilization itself was defined in terms of rational exploitation of resources for the purposes of economic development. John Stuart Mill, for example, wrote in 1848:

> These [outlying possessions of ours] are hardly to be looked upon as countries . . . but more properly as outlying agricultural or manufacturing estates belonging to a larger community. Our West Indian colonies, for example, cannot be regarded as countries with a productive capital of their own . . . [but are rather] the place where England finds it convenient to carry on the production of sugar, coffee and a few other tropical commodities.[18]

The drive to appropriate resources was not presented, and, arguably, not even understood, as being purely predatory. There was, in fact, no necessary contradiction between resource utilization and the humanitarian impulse. Instead, it could be said that both the colonizer and the colonized benefited from the arrangement. This notion received perhaps its clearest articulation

[16] ICJ Pleadings, *Western Sahara*, vol. 4, 448 (1982).

[17] For a compelling argument to the effect that the colonial encounter was central to the formation of international law, see Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law* 5 Soc. & Legal Stud. 321 (1996); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law* 40 Harv. Int'l L.J. 1 (1999).

[18] John Stuart Mill, *Principles of Political Economy*, 693 (J.M. Robson, ed., University of Toronto Press, vol. 3, 1965) (1848); as quoted in Edward W. Said, Culture and Imperialism 59 (1993).

in *The Dual Mandate in British Tropical Africa* by Sir Frederick Lugard,[19] who is widely regarded as being one of the foremost writers on colonialism. Margery Perham, his biographer and a well-known commentator on colonialism in her own right, asserts that the book was generally recognized as "an authoritative justification of Britain's annexation and government of tropical Africa."[20] Lugard writes: "For the civilised nations have at last recognised that while on the one hand the abounding wealth of the tropical regions of the earth must be developed and used for the benefit of mankind, on the other hand an obligation rests on the controlling Powers not only to safeguard the material rights of the natives, but to promote their moral and educational progress."[21]

That colonialism was in part justified through the dangling prospect of a new and seemingly inexhaustible source of resources is part of the history every schoolchild learns. What is perhaps less well known is that the awareness of the fact that those resources were in fact quite exhaustible can also be traced to the colonial era. Environmental historians, such as Richard Grove, have documented the close connections between scientific conservationism and colonialism.[22] As Grove notes, "the history of the colonial periphery is now emerging as vital to an understanding of perceptions of the global environment, both for historians and historians of science . . . [I]t was in the tropical colonies that scientists first came to a realisation of the extraordinary speed at which people, and Europeans in particular, could transform and destroy the natural environment."[23] Grove goes on to state:

> Current preoccupations with a "global" environmental crisis about pollution, climate change and resource over-use are now the problems of everyman and everywoman and of all states. But they were foreshadowed in the early days of empire by the dramatic globalisation of economic and natural transformations that was enabled during the colonial period. The often (although not always) grievous ecological impact of westernisation and empire, which took centuries to take effect, is now felt almost everywhere, and is probably irreversible. It is this fateful globalisation which has forced an environmental agenda upon historians, among many others. But it has, I think, also forced a new historical agenda upon the scientists.[24]

I would argue that this historical agenda has been forced upon international environmental lawyers as well, since it is against this historical backdrop that the emergence of international environmental law has to be understood.

To make such a statement is not simply to restate the obvious: that the colonial background of international law is one that international environmental

[19] Lord Lugard, *The Dual Mandate in British Tropical Africa* (Archon Books, 5th edn., 1965) (1922).

[20] Margery Perham, *Introduction*, *in ibid.*, at xxix.

[21] Lugard, *supra* note 19, at 18.

[22] *See* Richard H. Grove, Ecology, Climate and Empire: Colonialism and Global Environmental History, 1400–1940 (1997).

[23] *Id.*, at 1.

[24] *Id.*, at 4.

law shares. It is hardly as simple, or as innocent, as that. Take, for example, two of the early conservation treaties that international environmental law treatises mention, the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa[25] and the 1933 Convention on the Preservation of Flora and Fauna in Their Natural State.[26] As agreements that were entered into by a group of colonial powers with respect to Africa, they had the obvious flaw of failing to apply to their metropolitan territories. Charges of hypocrisy aside, however, the particular vision of conservation embodied in the treaties was both problematic and illuminating.

From an environmental standpoint, these treaties might even be said to have been ahead of their time. The 1900 convention was the result of a conference on game protection that has been characterized as the "first ever 'international' environmental conference."[27] It was a response to the concern over species that had already become extinct throughout the course of the previous century and the prospect of further extinctions.[28] Its aim, as set out in the preamble, was to prevent the uncontrolled massacre, and to ensure the conservation, of various species of wild animals in Africa. P. van Heijnsbergen notes that it was "the first multilateral convention to be concerned with the protection of a large number of species of land animals and it also was the first to make use at an international level of such techniques as the introduction of protected areas and export limitation."[29] While the instrument failed to gain the requisite number of ratifications and never entered into force, it had a significant effect within parts of Africa. The British, in particular, used this international instrument to justify a series of legislative efforts on conservation.[30] The most criticized aspect of the 1900 convention was that it listed not only protected species but also "noxious species" that were to be specifically targeted for eradication.[31] Van Heijnsbergen asserts that with this exception, "the Convention's approach is modern in its aim to protect habitats."[32]

[25] Convention for the Preservation of Wild Animals, Birds and Fish in Africa, 94 British and Foreign State Papers 715; a summary is available in International Protection of the Environment: Treaties and Related Documents 1607 (Bernd Rüster and Bruno Simma, eds., vol. 4, 1975).

[26] Convention on the Preservation of Flora and Fauna in Their Natural State, United Kingdom Treaty Series No. 27 (1930), *reprinted in* International Protection of the Environment: Treaties and Related Documents, *supra* note 25, at 1693. It is also available at <http://www.fletcher.tufts.edu/multi/texts/BH142.txt>. The treaty was concluded by Belgium, Egypt, France, Italy, Portugal, Spain, South Africa, Sudan, and the United Kingdom. France and Spain never ratified.

[27] Ramachandra Guha, Environmentalism: A Global History 45 (2000).

[28] P. van Heijnsbergen, International Legal Protection of Wild Fauna and Flora 13 (1997).

[29] *Id.*

[30] See John M. MacKenzie, The Empire of Nature: Hunting, Conservation and British Imperialism 208 (1988). *See also* van Heijnsbergen, *supra* note 28 at 14.

[31] The list, which included lions, leopards, and hyenas, was based on either these animals representing competition for hunting or their harmfulness to humans.

[32] van Heijnsbergen, *supra* note 28, at 14.

The 1933 convention went even further, recognizing the need for the protection of habitat in the form of national parks and strict nature reserves as well as the importance of buffer zones around such protected areas. It also discards the distinction between useful and harmful species.[33] Its broader significance led one commentator to characterize it as "the Magna Carta of wildlife preservation."[34] The text of the treaty contemplates its potential applicability outside of the African context,[35] and, in fact, India acceded to it in 1939. The convention was also intended to provide a framework for ongoing discussion regarding conservation problems not only in Africa but also in other parts of the colonial world.[36] The 1933 convention came into force in 1936, and it was only in 1968 that the framework that it had established was replaced by the African Convention on the Conservation of Nature and Natural Resources.[37]

It is unfortunate that the 1900 and 1933 conventions are usually cited only as examples of the small handful of treaties that could be said to reflect an awareness of the need for resource conservation. To imply that these documents are of "historical interest only" represents the loss of a unique opportunity to understand both the process of environmental degradation and the response thereto within a broader context. Environmental degradation does not arise in a vacuum. It frequently has certain benefits associated with it, and it obviously has certain costs. And all too frequently, some derive the benefits while others bear the costs. What discussions in the international environmental law treatises neglect to mention is that both conventions were largely a response to the threat to species that was posed by European expansion into the African continent, both directly through hunting and indirectly through the encroachment of habitat brought on by agricultural activities and settlement.[38] In the case of the 1933 convention, in particular, although its scope was quite broad, it was aimed primarily at controlling the activities of "natives." In other words, it impacted quite harshly on the lives of Africans who had not seriously contributed to the problem and who had no possibility of influencing how conservation would be undertaken. As one commentator notes in regard to Southern Africa,

[33] MacKenzie draws a distinction between "preservationist" and "conservationist" stages in this progression. *See* MacKenzie, *supra* note 30, Chapter 8, "From Preservation to Conservation: Legislation and the International Dimension," at 200.

[34] van Heijnsbergen, *supra* note 28, at 16.

[35] *Id.*, at 17.

[36] Thus, as van Heijnsbergen notes, "a second conference on Africa was held in 1938, at which a third meeting was foreseen to discuss the conservation problems of Asia and the Pacific. This conference was never held, owing to the political situation at the time." *Id.*, at 17.

[37] African Convention on the Conservation of Nature and Natural Resources, 15 September 1968, 1001 UNTS 3; also available at <http://fletcher.tufts.edu/multi/texts/african_convention.txt>.

[38] *See, generally*, MacKenzie, *supra* note 30. For an indication that this is not just a present-day characterization, see also S.S. Hayden, The International Protection of Wildlife 21–5 (1942).

[w]here did the African fit into all this? To be precise, nowhere. The white settler identified with the land but not with the men and women who had dwelt there long before their arrival . . . In game reserves Africans were barred from hunting, while in national parks they were excluded altogether, forcibly dispossessed of their land if it fell within the boundaries of a designated sanctuary. Conservation was even viewed as "part of the white man's necessary burden to save the nation's natural heritage from African despoilation." But this was a convenient ahistorical belief which glossed over the butchery of European hunting in the early decades of colonialism. If there was indeed a "crisis of African wildlife," this crisis had been created by the white man's gun and rifle, not the native spear and sling shot.[39]

II. WHAT IS THE ROLE OF THE SOUTH?

Supposing one were willing to concede, in response to the foregoing discussion, that there is a certain indifference to history in many accounts of the evolution of international environmental law. Many might argue that this does not by any means indicate a lack of attention to the concerns of the South in the treatment of the "current form and structure of the subject," as Philippe Sands puts it.[40] Indeed, to argue that these concerns have not been squarely addressed seems absurd, given the amount of attention that they have received. What account of international environmental law overlooks the South-North dimension? How can it plausibly be said that this topic has been ignored or neglected?

I should begin by conceding that a great deal of attention has been paid to the South. However, there is a difference between paying attention and paying heed. Much of the attention seems to have been focused on the question of how the South might be brought into environmental regimes, as opposed to how international environmental law and policy might be conceptualized in order to represent an inclusive framework that represents the interests and *perspectives* of the South and North alike. In other words, as noted previously, the South is portrayed as a grudging participant in environmental regimes rather than as an active partner in an ongoing discussion regarding what the fundamental nature of environmental problems is and what the appropriate responses should be. In order to illustrate this point, it is necessary to turn back to history, albeit of a more recent variety.

The United Nations Conference on the Human Environment, which was held in Stockholm in 1972, illustrates this tension all too clearly.[41] Stockholm is frequently depicted as the result of the North succeeding in persuading the South that the environmental crisis was in fact a common challenge. There is no doubt that there was resistance to the idea of the conference on the part of

[39] Guha, *supra* note 27, at 46.

[40] Sands, *supra* note 11, at 25.

[41] *See Report of the United Nations Conference on the Human Environment*, Stockholm, UN Doc. A/CONF.48/14/Rev. 1 (1973).

many Third World countries. This reluctance might be attributed to a lack of awareness of how serious a set of environmental problems the international community was facing. However, it is more plausible to argue that there was a great deal of awareness of the fact that environmental problems were largely being defined in terms of pollution and, since pollution was the result of industrialization, it did not represent an immediate concern for developing countries. While developing countries were aware that "pollution doesn't respect borders," they insisted that the "environmental" problems facing them had to be defined more broadly in order to encompass the negative effects of poverty as well as those of prosperity.

All of these arguments are clearly reflected in the *Founex Report on Development and Environment*, which was the outcome of a meeting of experts that was held in 1971 in Founex, Switzerland.[42] The meeting was convened by Maurice Strong, who was then secretary-general of the Stockholm Conference, in an attempt to promote developing country support for the conference. It has been characterized as not being particularly "environmental" in its focus,[43] and, in fact, most of the participants were either from developing countries or working in the development area, so the focus was squarely on the imperative of development. This overarching commitment did not prevent the panel from emphasizing the need to incorporate environmental concerns into an expanded understanding of development:

> While the concern with human environment in developing countries can only reinforce the commitment to development, it should serve . . . to provide new dimensions to the development concept itself. In the past, there has been a tendency to equate the development goal with the more narrowly conceived objective of economic growth as measured by the rise in gross national product. It is usually recognized today that high rates of economic growth, necessary and essential as they are, do not by themselves guarantee the easing of urgent social and human problems. Indeed in many countries high growth rates have been accompanied by increasing unemployment, rising disparities in income both between groups and between regions, and the deterioration of social and cultural conditions. A new emphasis is thus being placed on the attainment of social and cultural goals as part of the development process. The recognition of environmental issues in developing countries is an aspect of this widening of the development concept.[44]

From this perspective, the incorporation of environmental concerns had to be seen in a broader context. The panel went on to assert that "[t]he redefinition of development objectives must include greater stress on income distribution

[42] *Founex Report on Development and Environment*, submitted by a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment, 4–12 June 1971, Founex, Switzerland, International Conciliation no. 586, at 7 (January 1972) [hereinafter *Founex Report*].

[43] Peter Stone, Did We Save the Earth at Stockholm? 102–3 (1973) (describes the meeting as "long on economists but short on the ecological side").

[44] *Founex Report*, *supra* note 42, at 11.

and employment, more attention to social services and welfare-oriented public goods, and greater provision for political participation."[45] The report also stressed the need to meet the needs of the poorest members of society: "[T]he quality of life in a poor society should be defined in terms of a selective attack on the problems of mass poverty."[46] In short, the vision of development put forward in the Founex report cannot by any means be said to correspond to the vision of economic growth at all costs. In fact, it had many of the "motherhood" sentiments that came to be regarded as the mantras of sustainable development fifteen years or so later.

The report was, of course, intended to be a reassuring document and to address the concerns expressed by developing countries with respect to the emergence of global environmental protection. Thus, it also mentions some of the potential advantages, namely the ways in which measures of environmental protection might in fact promote development. It highlights the possibility of revitalizing the commitment to poverty alleviation:

> There is . . . the prospect that the global concern with the environment may reawaken the concern for elimination of poverty all over the globe. An emerging understanding of the indivisibility of the earth's natural systems on the part of the rich nations could help strengthen the vision of a human family, and even encourage an increase in aid to poor nations' efforts to improve and protect their part of the global household.[47]

What is striking, however, is that the document as a whole seems to be almost as much about expanding the First World view of the environmental crisis as the Third World view of the developmental one. On the latter front, it appears to have been a resounding success. The meeting and the report were crucial in terms of coalescing developing country support for the conference initiative and in ensuring their participation.[48] Many of the concerns that were highlighted in the report went on to become focal points of debate at the conference, as well as during the preparatory process, and were reflected in the final wording of the Stockholm Declaration.[49]

The importance of this point cannot be overemphasized. Stockholm is perhaps the single most significant event in the history of international environmental law. With the exception of the socialist states, which were not

[45] *Id.*, at 22. [46] *Id.* [47] *Id.*, at 30–1.

[48] *See, generally*, Stone, *supra* note 43, at 102–18.

[49] Declaration on the Human Environment, Stockholm Declaration, UN Doc. A/CONF.48/14 /Rev.1. 1973 (16 June 1972), 11 ILM 1416 (1972) [hereinafter Stockholm Declaration]. *See, in particular*, paragraph 4 of the preamble and Principles 8–12 of the declaration, which are also available at <http://www.tufts.edu/departments/fletcher/multi/texts/STOCKHOLM-DECL.txt>. Alexandre Timoshenko has asserted that "Principles 8–16 were to a large extent based on the conclusions of the Founex Report." *From Stockholm to Rio: The Institutionalization of Sustainable Development, in* Sustainable Development and International Law, 143, at 144 (Winfried Lang, ed., 1995). *See also* UN General Assembly Resolution on Environment and Development, GA Res. 2849 (XXVI) (adopted 20 December 1971), *reprinted in* 11 ILM 422 (1972).

represented at the conference,[50] it was a global gathering, while all previous multilateral conferences and the resulting agreements had been limited in their scope. It might be said that the story of *international* environmental law begins with the emergence of a sense of collective responsibility *vis-à-vis* the global environment, for which Stockholm becomes a convenient shorthand.[51] From this perspective, the conference, and the declaration, in particular, are clear starting points for tracing a new consciousness—a different way of thinking about a particular set of problems.[52] This new way of thinking involved an awareness of the environment/development interface from the very outset.[53]

Nonetheless, the achievements of Founex and Stockholm, with respect to expanding the First World understanding of global challenges, are somewhat more difficult to gauge. While the conference did emphasize the developmental aspects of environmental protection, there appears to have been a tendency to see this emphasis as reflecting, at least in part, a "concession" to the Third World—that is, a political compromise. However, as it happened, this was a time when the Third World was seeking fundamental change rather than concessions. The period following Stockholm displayed the peak of optimism regarding the possibility of bringing about a transformation of the international system. The 1974 Cocoyoc Declaration, which was adopted at the United Nations Environment Programme/United Nations Conference on Trade and Development Symposium on Resource Use, Environment, and Development Strategies,[54] exemplifies this shift in perspective. Less than three-and-a-half years separate Founex and Cocoyoc, but the difference in tone between them is striking. What Founex had hinted at, Cocoyoc underscored, in terms that were both direct and forceful:

> Much of the world has not yet emerged from the historical consequences of almost five centuries of colonial control which concentrated economic power so overwhelmingly in the hands of a small group of nations. To this day, at least three quarters of the world's income, investment, services and almost all of the world's research are in the hands of one quarter of its people . . .[55]

[50] This was a response to a decision, the effect of which was to exclude the German Democratic Republic from participation. *See* the discussion in Stone, *supra* note 43, at 89–95. It was not intended to represent an objection to the conference or to its goals (*id.*, at 94).

[51] Sands, for example, while identifying four distinct periods in the evolution of international environmental law, does acknowledge that the Stockholm Conference marked the beginning of global coordination and cooperation. Sands, *supra* note 11, at 25.

[52] In other words, the Stockholm Declaration would be the equivalent for international environmental law of what the Universal Declaration of Human Rights is for international human rights law. For an interesting discussion of this analogy as well as a comprehensive survey of the declaration, *see* Louis B. Sohn, *The Stockholm Declaration on the Human Environment* 14 Harv. Int'l L.J. 423 (1973).

[53] *See also* Timoshenko, *supra* note 49, at 143–4.

[54] Cocoyoc Declaration (adopted 8–23 October 1974), *reprinted in* The International Law of Development: Basic Documents, 1753 (A. Peter Mutharika, ed., 1979), at 1765–77 [hereinafter Cocoyoc Declaration].

[55] *Id.*, at 1766.

[P]re-emption by the rich of a disproportionate share of key resources conflicts directly with the longer-term interests of the poor by impairing their ultimate access to resources necessary for their development and by increasing their cost . . .[56]

The overall effect of such biased economic relationships can best be seen in the contrast in consumption. A North American or a European child, on average, consumes outrageously more that his Indian or African counterpart—a fact which makes it specious to attribute pressure on world resources entirely to the growth of third world population.[57]

The outrage regarding the injustice of the existing international system, however, was coupled with a commitment to rethinking mainstream models of development:

[W]e emphasize the need for pursuing many different roads of development. We reject the unilinear view which sees development essentially and inevitably as the effort to imitate the historical model of the countries that for various reasons happen to be rich today. For this reason, we reject the concept of "gaps" in development. The goal is not to "catch up," but to ensure the quality of life for all with a productive base compatible with the needs of future generations.[58]

Cocoyoc came in the midst of the drive for a new international economic order. In fact, it came immediately before the Charter of Economic Rights and Duties of States was adopted by the United Nations General Assembly.[59] It exemplified the optimism of that time: "We have faith in the future of [humankind] on this planet. We believe that ways of life and social systems can be evolved that are more just, less arrogant in their material demands, more respectful of the whole planetary environment."[60] This optimism was to dissipate all too quickly in the cold light of the 1980s and the debt crisis, although the concerns reflected in the declaration did not.

What these documents reveal is that from the time the environment emerged as an important item on the global agenda, there was a clear sense that the emergence of a truly "international" environmental law hinged on the acceptance of a broader definition of environmental concerns than might originally have been envisaged. Why, then, was there the resistance to incorporate this type of definition? Given the extent to which these issues were being discussed and debated, why did it take fifteen years to get these types of concerns brought into the mainstream of international environmental law and policy? One possible explanation is that at the time of the Stockholm conference, it was quite plausible to argue that the issues of greatest concern were those arising from so-called "over-development," of which oil pollution and the dumping of wastes at sea were notable examples. The concerns of devel-

[56] Cocoyoc Declaration, *supra* note 54, at 1767. [57] *Id.* [58] *Id.*, at 1770.
[59] Charter of Economic Rights and Duties of States, GA Res. A/3281 (XXIX) (12 December 1974), *reprinted in* 14 ILM 251 (1974).
[60] Cocoyoc Declaration, *supra* note 54, at 1776.

oping countries could be seen as being, to some extent, peripheral. As the focus shifted from such relatively narrow environmental issues to broad-based concerns, such as ozone depletion, and finally culminated in attempts to deal with global environmental problems, such as climate change and the loss of biological diversity, it became abundantly clear that the developmental aspect of international environmental law was critical.

However, I would argue that something more fundamental was involved: an unwillingness to acknowledge that "environmentalism" itself was open to varying interpretations. An analogy might be drawn to the argument advanced by Ramachandra Guha and Juan Martinez-Alier, the authors of a book entitled *Varieties of Environmentalism: Essays North and South.*[61] They question the conventional wisdom that holds that environmental concern is necessarily a "post-materialist" phenomenon—that is to say, that it arises after a certain basic level of material well-being has been achieved. As they note, "[t]he implication is that the poor are not green either because they lack awareness (with no taste for environmental amenities when faced with more immediate necessities), or because they have not enough money (yet) to invest in the environment, or both reasons together."[62] Guha and Martinez-Alier point out that a distinction can be drawn between an "environmentalism of the rich" and an "environmentalism of the poor." While the post-materialist explanation might well account for the former, it is totally inappropriate for the latter form: "The environmentalism of the poor originates as a clash over productive resources . . . In Southern movements, issues of ecology are often interlinked with questions of human rights, ethnicity and distributive justice."[63] Building on the premise of Guha and Martinez-Alier, one might argue that the environmentalism of the rich has the luxury of valuing the environment for its own sake quite apart from its value to humans. It then takes this idea one step further and defines environmentalism in those terms. Any perspective that focuses on the interrelationships between human beings and their environment then becomes suspect.[64]

By analogy, one might argue that the international system is also characterized by (at least) two different visions of environmentalism. This argument

[61] Ramachandra Guha and Juan Martinez-Alier, Varieties of Environmentalism: Essays North and South (1997).

[62] *Id.*, at xiv.

[63] *Id.*, at 18.

[64] Furthermore, environmentalism is then seen by definition as a phenomenon of post-industrial society. This definition, however, overlooks the fact that modern industrial society does not have a monopoly on ecological imbalance; human beings throughout history have had to respect ecological limitations as a matter of pragmatic adaptation to their particular circumstances. This is one of the basic points that Vice President Weeramantry of the International Court of Justice made in his separate opinion in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), (Judgment of 25 September 1997), *reprinted in* 37 ILM 162 at 215 (1998), available at <http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm>.

would certainly call into question the conventional understanding of international environmental law as being driven primarily by concerns for the environment (primarily on the part of the North) and having to respond to concerns about development (primarily on the part of the South). One might then argue that international environmental law has developed as an attempt to develop consensus around differing ways of interpreting the relationship between environment and development. Lest I be accused of ignoring the extent to which governments posture, it is worth recalling that much of the commentary on the role of non-governmental organizations (NGOs) at the United Nations Conference on Environment and Development (UNCED) highlighted the extent to which a South–North divide has also existed within the NGO community.[65] Southern NGOs were much more likely to define environmental problems as being linked with developmental problems, which was, of course, exactly what Southern governments were doing. It is, in any event, misleading to say that these differences are superficial or that they can be dismissed as bad faith.

It is perhaps understandable that one could fail to see an "alternative environmentalism" in stances taken by the South in regimes ranging from ozone depletion to global warming, in which it has sought and obtained different and often less rigorous obligations. What is disturbing is the unspoken assumption that the Third World would in fact always take a stand "against" the environment, always have to be coerced into such measures through incentives or disincentives of one form or another. Such a portrayal ignores issues with regard to which developing countries have taken a lead role in attempting to develop effective international regimes, such as the hazardous waste trade.[66] In this area, which is clearly analogous to the struggles of the environmental justice movement in the United States and elsewhere,[67] an "environmentalism of the poor" appears to be a plausible explanation.

International action in the hazardous wastes arena was spurred on by a series of incidents involving waste disposal in developing countries during the late 1980s, which resulted in widespread media coverage and in an increasing perception that the Third World was going to be used as a dumping ground for the wastes of the North.[68] From the outset, this was clearly an issue in which the developing countries, with strong support from environmental

[65] *See, for example,* Ann Doherty, *The Role of Nongovernmental Organizations in UNCED, in* Negotiating International Regimes: Lessons Learned from the United Nations Conference on Environment and Development, 199, at 211–12 (G. Sjöstedt *et al.*, eds., 1994). The main difference may be that the non-governmental organizations were more willing to listen to each other and to try to develop common positions.

[66] *See* the discussion in Marian A.L. Miller, The Third World in Global Environmental Politics 87–107 (1995).

[67] *See, for example,* Toxic Struggles: The Theory and Practice of Environmental Justice (Richard Hofrichter, ed., 1993).

[68] Miller, *supra* note 66, at 87.

NGOs, took the initiative. Their goal was an outright ban on the export of hazardous wastes from the North to the South. The NGOs supported this view, in part, because they were determined that the convention that they were developing should be not only about the regulation of the transport of hazardous wastes but also about their reduction at source.[69] The developed countries, on the other hand, were adamant about the need to maintain the freedom of movement. Not least among their arguments was the fact that importing states should be free to accept shipments of hazardous wastes "in exchange for financial or other benefits."[70] There was something paradoxical about this argument. As one writer notes in this context, "the developed countries were more concerned with the sovereign rights of receiving states than were the Third World countries themselves."[71]

The resulting Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)[72] was a compromise between these two positions. Realizing that some flexibility would have to be incorporated into the regime, the developing countries agreed that the convention would regulate, rather than ban, exports. However, the demands for a ban did not disappear. Instead, the developing countries promptly requested such a ban at the first Conference of the Parties. This request led to the adoption of a decision to ban exports from developed to developing countries at the second meeting in 1994.[73] This decision was formalized the following year through the adoption of an amendment to the Basel Convention.[74] The amendment, which requires ratification by three-quarters of those parties present at the time of its adoption, has yet to enter into force.[75] In the end, dissatisfaction with the Basel regime led many developing states to impose more stringent requirements, including unilateral or regional bans. For example, the African states negotiated a regional agreement that imposed a ban on the import of hazardous wastes onto the African continent.[76]

[69] *Id.*, at 96–7. *See, generally*, Jennifer Clapp, *The Toxic Waste Trade with Less-Industrialised Countries: Economic Linkages and Political Alliances* 15 Third World Quarterly 505 (1994).

[70] Miller, *supra* note 66, at 92. [71] *Id.*

[72] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS No. 28911 (5 May 1992) *reprinted in* 28 ILM 649 (1989), also available at <http://www.basel.int/text/text.html>.

[73] Decision II/12, *in* Decisions Adopted by the Second Conference of the Parties to the Basel Convention, Geneva, Switzerland, 25 March 1994, available at <http://www.basel.int/meetings/sbc/cop/cop-2.htm>.

[74] Decision III/1, *in* Decisions Adopted by the Third Conference of the Parties in Geneva, Switzerland, 18–22 September 1995, available at <http://www.basel.int/meetings/sbc/cop/cop3-b.htm>. To be specific, the amendment prohibits the export of hazardous waste from parties listed in a proposed Annex VII (members of the European Community and the Organization for Economic Cooperation and Development and Liechtenstein) to all other parties.

[75] The number of ratifications required is sixty-two. As of 12 January 2001, twenty-two states had ratified. More information is available at <http://www.basel.int/ratif/ratif.html>.

[76] Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention). 29

One wonders why the Basel Convention, as a clear instance of the South taking the initiative to develop an environmental regime despite the objections of the developed world, appears to be left out of the equation in many assessments of the South's commitment (or lack thereof) to international environmental law.[77] Perhaps it is because the leadership role in the hazardous waste context can be characterized as driven by self-interest, as is the lack of leadership on other issues. This, it would seem, is the crux of the problem. There appears to be no willingness to concede that environmental interests can be defined and understood in ways other than the dominant or mainstream approach. As long as the Third World is perceived as pursuing other interests, there is no real effort to define environmental problems from an alternative, more inclusive, perspective.

In the 1980s, the work of the World Commission on Environment and Development and, in particular, the publication of its report *Our Common Future* in 1987[78] went a long way towards mainstreaming many of the concerns that had been voiced by developing countries since the lead-up to Stockholm. It popularized the notion of sustainable development that has now become an inescapable aspect of international environmental law and policy. It also made it crystal clear that equity concerns had to be factored into the equation. The official confirmation of the new orthodoxy was supposed to come with UNCED, the so-called "Earth Summit." Stockholm had been about the "human environment"; Rio would be about "environment and development." On the surface, the juxtaposition of these two issues in the official title of the conference said it all. However, as was to become all too evident in the process leading up to the event, this facile conclusion hid a multitude of tensions and debates. José Goldemberg of the University of Saõ Paulo, a leading Brazilian negotiator, stated the conflict in the clearest possible terms:

> The principal tension during the UNCED preparatory process concerned its emphasis: would the Earth Summit emphasize development and poverty or environmental protection and sustainability? In my view, the idea that the Rio Conference could become a conference on development and not environment was a "midsummer night's dream"—nothing more than a naïve fantasy. Global environmental degradation, and, in particular, the greenhouse problem, is a consequence of affluence, principally the burning of oil and coal. Local environmental degradation, on the other hand, is intimately linked with poverty. The industrialized countries were not particularly interested in addressing the root causes of poverty, which had been the focus of North-

January 1991, 30 ILM 775 (1991), available through the Basel Convention website at <http://www.basel.int/Misclinks/bamako.html>.

[77] Occasionally the role of the South is even left out of specific discussions of the hazardous waste regime. *See, for example*, Kiss and Shelton, *supra* note 9, at 539–46 (whose sole reference to the South's role is a sentence stating that the African states did not consider the Basel Convention to be satisfactory).

[78] World Commission on Environment and Development, Our Common Future (1987).

South confrontation for the last thirty years. Limiting the outcome at UNCED to a much less ambitious target—reducing dangerous emissions of greenhouse gases at moderate cost—seemed to be the unspoken goal of most of the leading industrialized countries in Rio.[79]

While the latest generation of environmental agreements appear to be more responsive to developing country concerns, this fact might actually be seen as part of the problem. There is still a tendency to view international environmental law as having to "respond" to the Third World rather than viewing it as something that represents a common ground between South and North. The UN Framework Convention on Climate Change (UNFCCC)[80] and the Convention on Biological Diversity[81] are said to reflect a series of compromises, and criticism of these documents frequently focuses on precisely those aspects that are "developmental."[82] The role of the South, one might argue, is still viewed as that of the laggard, delaying the development of effective and meaningful responses to environmental degradation.

III. COMMON BUT DIFFERENTIATED RESPONSIBILITIES

At this point, some might wonder: How does this matter to us in what we do as international environmental lawyers? What difference does it make how commentators characterize the concerns of developing countries? As long as they recognize that it is essential to come to terms with what the developing countries want, surely that should suffice? I think it makes a great deal of difference. As an example, I would like to consider the notion of "common but differentiated responsibilities," which can be said to be a fundamental principle of international environmental law.[83] I would argue that the two aspects

[79] José Goldemberg, *The Road to Rio*, *in* Negotiating Climate Change: The Inside Story of the Rio Convention, 175, at 177 (Irving L. Mintzer and J. Amber Leonard, eds., 1994).

[80] United Nations Framework Convention on Climate Change, 9 May 1992, 31 ILM 849 (1992), available at <http://www.unfccc.de/resource/conv/conv.html> [hereinafter UNFCCC].

[81] Convention on Biological Diversity, 5 June 1992, *reprinted in* 31 ILM 818 (1992), also available at <http://www.biodiv.org/convention/articles.asp> [hereinafter CBD].

[82] For example, Alan Boyle, *The Rio Convention on Biological Diversity*, *in* International Law and the Conservation of Biological Diversity, 33, at 49 (Michael Bowman and Catherine Redgwell, eds., 1996) (mentions as one of the weaknesses of the CBD the fact that "[i]ts driving force is as much the allocation of economic benefits to the developing world and a reorientation of the world economy as it is a concern with conservation and sustainable use"). Similarly, Marc Pallemaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?* in Greening International Law, 1, at 6 (Philippe Sands, ed., 1993) (in regard to the UNFCCC, is critical of the "precedence of national economic development policies over national and international measures to check climate change").

[83] Certainly, it would have to be considered as such by the South. Nevertheless, there appears to be some uncertainty as to its actual status. Sands includes it among a number of "general rules and principles which have broad, if not necessarily universal, support and are frequently endorsed in practice." Sands, *supra* note 11, at 183, the principle's content is discussed at 217–20. Kiss and Shelton, on the other hand, include it in their discussion of the conceptual framework of international environmental law (that is, as one of the concepts on which international

of the accommodationist approach that have been discussed to this point coalesce in the context of the treatment of this principle and make it difficult if not impossible to understand its importance from a Southern perspective.

What is striking about the principle of common but differentiated responsibilities is that depending on the perspective brought to bear on it, it can reflect totally different ways of thinking about the respective roles of South and North in addressing environmental degradation. On the one hand, it can simply reflect a pragmatic acceptance of, and response to, the fact of differing levels of financial and technological resources available to countries in different economic circumstances. On the other hand, it can be said to reflect an acknowledgment of the historic, moral, and legal responsibility of the North to shoulder the burdens of environmental protection, just as it has enjoyed the benefits of economic and industrial development largely unconstrained by environmental concerns. Implicit in the latter view is a sense that the North has received a disproportionate share of the benefits of centuries of environmentally unsustainable development, and the underprivileged in the South have borne many of its costs. What is the proper interpretation? Is it a question of *ability* to pay or *responsibility* to pay?

To answer that question, it may be useful to consider the differences between Principle 7 of the Rio Declaration on Environment and Development and the original version that was proposed by the Group of 77 and China (G-77). Principle 7 provides:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystems. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[84]

The G-77 formulation read as follows:

> All States share a common but differentiated responsibility for containing, reducing, and eliminating global environmental damage and for restoring the ecological balance of the Earth, in accordance with their respective responsibilities and capabilities. The major cause of the continuing deterioration of the global environment is the unsustainable pattern of production and consumption, particularly in the developed countries. All countries, particularly developed ones, shall make commitments to address their unsustainable patterns of production and consumption. In view of their main historical and current responsibility for global environmental degradation and their

environmental law is based, along with sustainable development, the common heritage of mankind, the common concern of humanity, and the rights of future generations) rather than in their discussion of general legal principles. Kiss and Shelton, *supra* note 9, at 257–8.

[84] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5/Rev. 1 (Vol. I) 3, 4 (14 June 1992), *reprinted in* 31 ILM 874 (1992).

capability to address this common concern, developed countries shall provide adequate, new and additional financial resources and environmentally sound technologies on preferential and concessional terms to developing countries to enable them to achieve sustainable development.[85]

The two provisions reflect significant differences in perspective. The G-77 proposal is not merely premised on the notion of responsibility, it also sets out in the clearest possible terms what that responsibility rests upon. While Principle 7 does not evade the notion of responsibility altogether, it does exclude any references to historic contributions to environmental damage, and it is generally far less accusatory in its tone. As one commentator recently noted,

> [o]f particular significance is what developed States are responsible for; whereas in Principle 7, developed States acknowledge responsibility "that they bear in the international pursuit of sustainable development," in the G77 proposal, developed States have the "main responsibility . . . for global environmental degradation." This difference is not just semantics. Whereas in the G77 proposal, developed States are held responsible under international law for past and current acts of environmental degradation, in Principle 7, developed States tried to eliminate notions of legal responsibility, and replace them with the idea of future responsibility in achieving global sustainable development—largely based on their increased financial and technological resource base.[86]

Despite the softened language of Principle 7 (in a soft law instrument, no less), there was considerable concern regarding this provision.[87] The United States was particularly unhappy and felt compelled to issue an interpretative statement in which it asserted that the principle "highlights the special leadership role of developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities." It went on to assert that in the view of the United States Principle 7 does not "imply a recognition . . . of any international obligations . . . or any diminution in the responsibility of developing countries."[88] The commentator that is quoted above goes on to express some surprise regarding the US statement, both because he reads Principle 7 as clearly indicating that "developing countries have different, and to that extent, diminished obligations," and also because the stance taken appeared to be inconsistent with the US acceptance of the UNFCCC, in which developing states had less comprehensive obligations.[89] I would argue that the US

[85] Proposal submitted on behalf of the G77, UN Doc. A/CONF.151/PC/WG.III/L.20/Rev.1 (19 March 1992).

[86] Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities* 49 Int'l & Comp. L.Q. 35, at 37 (2000).

[87] *Id.*

[88] Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/5/Rev. 1 (Vol. II), Proceedings of the Conference, at 17.

[89] French, *supra* note 86, at 37.

position can only be understood in light of what it perceived to be at issue: whose perceptions of the nature of the global environmental crisis and which of the respective roles and responsibilities of the North and South would carry the day.[90] It is certainly arguable that the US position cannot be equated with that of the rest of the developed countries because it is so much more extreme.[91] Nevertheless, it does shed light on a certain uneasiness that surrounds this issue—a sense that the stakes are higher than they appear to be.

The issue of perspective is particularly relevant because, as various commentators have noted, it is not always easy to specify what the principle entails or what its scope encompasses. Consider, as an example, how the principle developed in the context of the ozone regime, which is widely regarded as a turning point in the evolution of international environmental law and a benchmark against which other regimes are measured. The Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol),[92] in particular, which came only thirty months after the conclusion of the framework Vienna Convention for the Protection of the Ozone Layer (Vienna Convention),[93] appeared to herald a new age of international environmental law and policy—one that entailed clear and rigorous obligations. In fact, the introduction of the Montreal Protocol may also be said to mark a significant turning point in the perception of the role of developing countries in international environmental negotiations.

The debate regarding ozone depletion began in the North, among and within the nations that were both the major producers and consumers of ozone-depleting substances. Most developing countries showed little interest until 1987 and, thus, played a limited role in the negotiations resulting in the Vienna Convention.[94] By the time of the negotiations of the Montreal Protocol, however, it was clear that developing countries would have to be involved in addressing the problem. The first stage in ensuring developing country participation was the negotiation of a different schedule for meeting phase-out requirements. Essentially, developing countries whose annual level of consumption of the substances controlled in the protocol was less than 0.3

[90] I do not consider it a coincidence that the other subject of the US interpretative statement was Principle 3 regarding the right to development. That right represents within the human rights context what the principle of common, but differentiated, responsibilities represents within the environmental context: a clear articulation of Third World aspirations and perspective.

[91] However, as a reviewer of this article has pointed out, "there is increasing evidence that the U.S. articulates what many other countries do not dare to, and the others often hide behind the U.S. position" (comments on file with the author).

[92] Montreal Protocol on Substances That Deplete the Ozone Layer, 16 September 1987, 26 ILM 154 (1987), also available at <http://www.unep.ch/ozone/treaties.shtml> [hereinafter Montreal Protocol].

[93] Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 26 ILM 1529 (1987) also available at <http://www.unep.ch/ozone/treaties.shtml>.

[94] See the discussion in Ian H. Rowlands, The Politics of Global Atmospheric Change 165–6 (1995).

kilograms per capita were allowed an additional ten years to meet their obligations.[95] The Montreal Protocol also encouraged parties to "facilitate access to environmentally safe alternative substances and technology" and to make funds available for such alternatives.[96]

The second stage was the provision of financial resources. Key states, such as India and China, made it clear that they would not join unless significant funding was made available. The desire to get these and other populous states on board was augmented by the fact that it had become clear even before the Montreal Protocol came into force that more drastic control measures were necessary. Thus, the practical need to give developing countries some leeway in meeting their obligations was counterbalanced by the need to ensure that the transition beyond ozone-depleting technologies was made as quickly as possible. The establishment of the Multilateral Fund was the result. While all the developed countries had certain reservations about the fund concept, resistance gradually diminished as it became clear that such a mechanism was essential to ensure key developing country participation.[97] However, certain members of the United States administration had grave concerns about the fund as a potential precedent, particularly for the climate change regime that was then under discussion. At the London meeting, US representatives insisted that the fund decision was "without prejudice to any future arrangements that may be developed with respect to other environmental issues."[98]

What, then, does the principle of common but differentiated responsibilities entail in the ozone regime? Richard Benedick, who was part of the US negotiating team for both the Vienna Convention and the Montreal Protocol, has presented a range of possibilities:

> It could represent a justifiable effort to achieve equity between richer and poorer states, as reflected by the framers of the original Montreal Protocol in their article 5 provision for a grace period before developing countries had to implement controls on ozone-depleting substances. It could represent a formula for balancing performance by developing countries with the technological and financial assistance made available to them, as articulated in the London Amendment. *Or it could represent an opportunity to extract the maximum possible transfer of wealth, without regard to the economics of the situation, as a precondition for accepting a share of responsibility in protecting the global environment.*[99]

[95] Montreal Protocol, *supra* note 92, Article 5(1).

[96] *Id.*, Article 5(2) and (3).

[97] Rowlands, *supra* note 94, at 173–4.

[98] Quoted in *id.* at 174. This view does not appear to have been limited to the United States. Writing in 1993, one commentator noted: "While [the fund] had been a successful ad hoc negotiating device in that it persuaded developing countries to actively participate in the instrument, the results soon came to haunt its inventors, as developing countries started to make the same arguments in all ongoing environmental negotiations, including those on climate change and biological diversity." Hugo M. Schally, *Forests: Toward an International Legal Regime?* 4 Y.B. Int'l Envtl. L. 30, at 42 (1993).

[99] Richard Elliot Benedick, Ozone Diplomacy: New Directions in Safeguarding the Planet 241 (enlarged edition, 1998) [emphasis added].

Which of these options one chooses, I would argue, is inextricably connected with the overall perspective one brings to bear on the principle in the first place. Do we see the differing commitments and the funding as the result of fairness or of expediency? What is required is attention to the historical dimension of the problem and its social, political, and economic context. In other words, one cannot answer this question without knowledge of the historic contributions to the problem that developing countries had made as well as the extent to which the ozone regime could be seen as being in part about meeting developmental aspirations (a perception that evolved between 1985 and 1990).

The complexity surrounding the notion of common but differentiated responsibilities in the ozone context pales by comparison with that of climate change. Perhaps no other area has inspired more debate and academic commentary regarding considerations of South–North equity[100] for at least two reasons. Like the ozone regime, this is clearly an area in which the historic contributions of the North far outweigh those of the South.[101] More importantly, it is an area in which the sources of the problem are distributed across the globe. According to one estimate, for example, the countries of the South "were responsible for just over 30 per cent of energy-related carbon dioxide emissions in the world" in 1990.[102] Furthermore, a significant proportion of greenhouse gas emissions come from agriculture and land conversion, in which the South's share is far from insignificant.[103] The G-77 has been adamant in its refusal to accept any limitation on carbon dioxide emissions, in particular, citing the need (and right) to increase emissions in the course of development. So far, it has been successful. The binding reduction commitments embodied in the Kyoto Protocol to the UNFCCC will apply only to Annex I countries (namely, industrialized economies and economies in transition).[104] This decision has proven to be an ongoing bone of contention. When the Bush administration made it clear that it did not support the protocol, in March 2001, it specifically mentioned that the protocol "exempts the developing nations around the world" in addition to the more widely cited assertion that "it is not in the United States' economic best interest."[105]

Would the principle of common but differentiated responsibilities provide guidance in this instance? Again, it would depend on one's perspective. Considered in the abstract—in some kind of game theory ether—the US posi-

[100] *See, for example*, Fair Weather? Equity Concerns in Climate Change (Ference L. Toth, ed., 1999).

[101] *See* text accompanying note 106.

[102] Rowlands, *supra* note 94, at 189.

[103] Rowlands, *id.*, notes that inclusion of such emissions could increase the South's share of overall greenhouse gas emissions to over 40 per cent.

[104] Article 3 of the Kyoto Protocol to the UNFCCC, 10 December 1997, 37 ILM 22 (1998), also available at <http://www.unfccc.de/resource/docs/convkp/kpeng.html>.

[105] See Press Briefing by Press Secretary Ari Fleischer, 28 March 2001, available at <http://www.whitehouse.gov/news/briefings/20010328.html>.

tion is not only understandable but defensible. The South cannot simply become a "free rider" on the system, so that all the positive changes and sacrifices the North makes are rendered meaningless. From the perspective of the South, the situation appears somewhat different. One could begin by considering the historic contribution to the problem. One study concluded that between 1800 and 1990 the developed countries cumulatively accounted for over 84 per cent of all carbon dioxide emissions caused by fossil-fuel burning and over 75 per cent of the carbon dioxide emissions associated with deforestation.[106] Given the enormous imbalance, is it really all that much of a stretch to say that the North has appropriated the lion's share of the carrying capacity of the planet? It is perhaps not surprising that many commentators argue that what the North owes the South in the climate change context, as in many other areas, is an enormous ecological debt.[107] To ask for an acknowledgment of centuries of unequal and inequitable relations between nations and peoples is not necessarily to demand some form of reparation or recompense, though it may be the fear of such an interpretation that led the United States to reject aspects of "common but differentiated responsibilities." What it does require is a serious commitment to viewing the global-warming crisis in proper historic context rather than dismissing invocations of history as so much rhetoric and hot air.

Similarly, the notion of meeting the developmental needs of the peoples of the South must be seen as a demand for equity rather than merely a bargaining strategy. This premise stands apart from the historical imbalance that was mentioned earlier. Per capita emissions in the present day are similarly skewed. It has been estimated that in relation to fossil carbon dioxide, for example, "per capita emissions are on average about 8 times those of the developing world."[108] The climate change challenge, therefore, cannot simply be seen as a matter of "reducing" greenhouse gas emissions but also, paradoxically, about *increasing* them. In other words, while global reductions are essential, the overall strategy pursued must reflect the developmental needs of the South, which should, of course, be met in the most energy efficient manner possible. As one commentator puts it, "[T]he north . . . has to reduce its projected consumption patterns, so as to allow the 'ecological space' for the south to develop, and the south should be allowed to develop along energy-efficient

[106] Richard A. Warrick and Atiq A. Rahman, *Future Sea Level Rise: Environmental and Socio-Political Considerations*, *in* Confronting Climate Change: Risks, Implications and Responses, 97, at 105 (Irving L. Mintzer, ed., 1992).

[107] Guha and Martinez-Alier, *supra* note 61, at 44–5 (define the notion of ecological debt as: "[c]laiming damages from rich countries on account of past excessive emissions (of carbon dioxide, for example) or for plundering of natural resources") [emphasis in original]. In relation to climate change, see Anil Agarwal and Sunita Narain, Global Warming in an Unequal World: A Case of Environmental Colonialism (1991).

[108] Michael Grubb *et al.*, *Sharing the Burden*, *in* Confronting Climate Change: Risks, Implications and Responses, *supra* note 106, at 330, 307–8.

and resource use minimizing pathways. For this to happen technology and financial transfers on a large scale will be required."[109] Thus, seeing this question in isolation from its developmental dimensions is fundamentally misleading and leads all too easily to the perception of the Southern stance as a form of "greenmail" or, in other words, a means of achieving through environmental threats what the South was unable to accomplish through persuasion. It reminds me of a question I once had posed to me by a student: At the end of the day, if the average Canadian's consumption of energy is thirty times that of the average Bangladeshi but there are thirty times as many Bangladeshis as there are Canadians, doesn't it balance out at about the same thing? Whatever the virtues of such an approach are in terms of simplicity, it leaves a great deal to be desired in terms of fairness.

There is no doubt that the language of historical responsibility and moral accountability has an old-fashioned air, perhaps even a whiff of staleness. And it is not only Northern commentators who find it so. José Goldemberg, for example, deplores what he refers to as the "rhetorical noise of the G-77, replete with the usual arguments on 'guilt,' 'historical responsibility,' 'compensation for past deeds' and the 'right' of the poor to 0.7 percent of the GNP of the rich in the form of ODA."[110] There is perhaps a sense that the same drum is being beaten in too many fora, that the Third World should just be pragmatic and get on with the business of saving the planet and getting as much as they can at the same time. As Goldemberg notes, "[t]he developing countries' goal of eliminating poverty will be achieved only if the motivation for international cooperation is based on a shared sense of enlightened self-interest, rather than on a vague appeal to moral virtue and humanitarian relief."[111]

Yet, the notions of historical responsibility and intra-generational equity that the G-77 have so steadfastly maintained continue to have value, even if only to niggle at the conscience of the more receptive in the North. After all, pragmatism is all very well and good, but how far does it take you? International environmental regimes may include provisions dealing with financing mechanisms and technology transfer, and there may be some degree of recognition that developing countries need support in order to be able to participate in those regimes and to fulfil their obligations. However, one must also consider how controversial technology transfer continues to be and how little is actually being put into those funding mechanisms.[112] These are merely

[109] Konrad von Moltke and Atiq Rahman, *External Perspectives on Climate Change: A View from the United States and the Third World, in* Politics of Climate Change: A European Perspective, 330, at 343 (Tim O'Riordan and Jill Jäger, eds., 1996).

[110] Goldemberg, *supra* note 79, at 179.

[111] *Id.*, at 185.

[112] Not to mention the extent to which the decision to leave control of financing, in the case of both the UNFCCC and the CBD, in the hands of the Global Environment Facility was hugely controversial. *See, generally*, Joyeeta Gupta, The Global Environment Facility in its North-South Context 4 Envtl. Pol. 19 (1995).

symptoms of an underlying malaise, one that reflects the ongoing difficulty in arriving at meaningful consensus.

At the present time, there appears to be a growing sense that humanity as a species has monumentally "messed up," that we have a collective—and urgent—responsibility to address what otherwise might be irreversible damage to the global environment. When I hear this type of analysis, I cannot help thinking of Murray Bookchin's description of an exhibit on environmental issues at the New York Museum of Natural History.[113] The very last item was a huge mirror with a sign over it that read "The Most Dangerous Animal on Earth." Bookchin recalls seeing an African-American child standing in front of the mirror while a schoolteacher tried to explain the exhibit's message. One can only imagine what a child from Mozambique, or Bolivia, or Bangladesh, would feel if confronted with a similar display.

The exhibit clearly was meant to make us acknowledge our collective responsibility as a species—something that may well be necessary given the complacency (or apathy) that still, incredibly, appears to be widespread. Yet Bookchin's point was that what was implicit in that exhibit was the assumption that differences of class, race, nationality, and gender do not matter—all of us are responsible for the current state of the environment. I would add that the exhibit implied that history does not matter, that no matter how we got here, we are all in this together. "Collective responsibility" is one thing if it is future-oriented and involves an acknowledgment that we all have a role to play in shifting towards a sustainable relationship with the natural world. It is quite another if it obscures both a historical and a contemporary reality of unequal contributions to global environmental problems and thus justifies the proffering of facile and inequitable solutions. To the extent that the principle of common but differentiated responsibilities encapsulates this message, it plays a valuable role in conveying the perspective of the South on global environmental problems. Stripped of its historic and equitable content, it is all but meaningless.

IV. TOWARDS INTEGRATING THE CONCERNS OF THE SOUTH

To this point, two aspects of what I have termed the "accommodationist" approach have been considered: the ahistoricism of many of the standard accounts of international environmental law and the tendency to think of the discipline as having to respond to the concerns of the South instead of seeing the South as an active participant in the ongoing evolution of the discipline. The implications of the failure to come to terms with the South–North dimension were examined in the context of a discussion of the principle of common but differentiated responsibilities. However, I would argue that the potential

[113] Murray Bookchin, Remaking Society: Pathways to a Green Future 23 (1990).

ramifications are much broader. What the accommodationist approach reveals, in fact, goes to the heart of our self-understanding as international environmental lawyers. We remain ensconced within our neat little disciplinary boundaries, deluding ourselves into thinking that the world somehow corresponds to them, that ecological integrity, basic human needs, and human rights can be meaningfully dealt with in isolation from each other. Some scholars do so tacitly; others are more straightforward. Sands, for example, makes it clear that international environmental law is only part of the international law of sustainable development: "The international law of sustainable development is . . . broader than international environmental law; apart from environmental issues, it includes the social and economic dimension of development, the participatory role of major groups, and financial and other means of implementation. International environmental law is part of the international law of sustainable development, but is narrower in scope."[114] Excluded from this definition, in fact, are not only many of the issues that the South regards as crucial but also the issues that, from almost any point of view, must be seen as critical to the possibility of providing a meaningful response to the environmental challenges that the international community currently faces.

We have failed, I suggest, to think ecologically about our own discipline and to realize how artificial these boundaries are. This failure, in my view, is most obvious when one attempts to debate and discuss the conceptual foundations of international environmental law in the classroom. No matter how hard one tries to get students to grapple with the artificiality of disciplinary boundaries, they seem to take them for granted; no matter how much we speak of interdisciplinarity, or multidisciplinarity, they seem to regard these terms as more "academicspeak." And why should they not? The implicit message that they receive in so much of the literature is that these boundaries are real. Of course, one can supplement the standard texts with material designed to present an alternate perspective. There is no dearth of such material: primary sources, such as the Founex report and the Cocoyoc Declaration; secondary literature from the South, such as R.P. Anand's "Environment and Development: The Case of the Developing Countries,"[115] *For Earth's Sake: A Report from the Commission on Developing Countries and Global Change*,[116] or *Environment and Development: Towards a Common Strategy of the South in the UNCED Negotiations and Beyond;*[117] secondary sources from the North, such as Günther Handl's "Environmental Protection and

[114] Sands, *supra* note 11, at 14.

[115] R.P. Anand, *Environment and Development: The Case of the Developing Countries* 24 Indian J. Int'l L. 1 (1980).

[116] Commission on Developing Countries and Global Change, For Earth's Sake: A Report from the Commission on Developing Countries and Global Change (1992).

[117] South Centre, Environment and Development: Towards a Common Strategy of the South in the UNCED Negotiations and Beyond (1991).

Development in Third World Countries: Common Destiny—Common Responsibility"[118] or Daniel Barstow Magraw's "Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms."[119] It is not the same, however, as having such perspectives fully integrated into the mainstream of the discipline.

Can international environmental law be defined or understood in such a way as to reflect these concerns? How do we go beyond the South–North impasse? To attempt to answer these questions requires turning to a consideration of *why* the accommodationist approach seems to inform so much of international environmental law. Perhaps it is because of an anxiety that a broadening of perspective, which would require integrating Third World concerns, would result in a dilution of those concerns directed at environmental protection strictly so-called. (Ironically, one of the concerns addressed in the Founex report was that the focus on the environment would dilute concern for development.) And perhaps there has also been fear that environmental issues would be "hijacked" in order to pursue a "Third World agenda." However, my own view is that there are two interrelated explanations.

The first explanation, in a nutshell, is that international environmental lawyers see themselves as advocates for the environment. At the 2000 Annual Meeting of the American Society of International Law, one panelist asserted that international lawyers are not respected by their non-internationalist peers because of their inability to distinguish analysis from advocacy.[120] While many of those individuals who were present found this claim absurd, it may indeed contain a kernel of truth. Most international human rights lawyers, after all, do not simply analyze human rights abuses, but actively work towards minimizing and eliminating them. Even those who do not identify themselves with any particular sub-discipline—a dwindling number given the increasing degree of specialization in the field—tend to see themselves as

[118] Günther Handl, *Environmental Protection and Development in Third World Countries: Common Destiny—Common Responsibility* 20 N.Y.U. J. Int'l L. & Pol. 603 (1988).

[119] Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms* 1 Colo. J. Int'l Envtl. L. & Pol'y 69 (1990).

[120] It may be worth quoting the relevant section of this somewhat inflammatory presentation in full:

> [T]he legal academy views international law scholarship, on average, as less successful than other legal scholarship by just about any measure, including clarity, insight, theoretical sophistication, persuasiveness and depth. This is related to the fact that international law scholars view themselves as a source of law. Advocacy and scholarship are often mixed up in the international law field, both in the pages of law reviews and (especially) in judicial proceedings. As a general matter, international law scholarship is characterized by normative rather than positive argument, and by idealism and advocacy rather than skepticism and detachment. These methodological commitments preclude international law scholarship from being taken seriously by lawyers, other legal scholars, and courts.

Panel on "Scholars in the Construction and Critique of International Law," remarks by Jack Goldsmith, 94 Am. Soc'y Int'l L. Proc. 318, at 319 (2000).

"internationalists," as opposed to those whose (parochial?) interests keep them focused squarely on the domestic sphere. And there is little doubt that the vast majority of those individuals who work in the environmental field are not disinterested observers but rather individuals who are passionately concerned about the state of the global environment. The panelist, of course, was denouncing this type of advocacy stance. I would celebrate it, with a proviso. International environmental lawyers *should* want to change the world. Yet, to acknowledge that one is engaged in advocacy requires an acknowledgment of where one stands as well as of the interest that one (perhaps only implicitly) represents. I would therefore argue that the first step towards integrating the concerns of the South is that international environmental lawyers acknowledge that their vision of international environmental law reflects one version of environmentalism. I was once accused of proposing the "dumbing down of advocacy" when I mentioned this possibility at a workshop.[121] In my view, however, advocacy that builds on, and perpetuates, existing power imbalances may be smart but it is also, quite simply, wrong.

The other explanation cannot be encapsulated quite so neatly. While in the process of writing this article, I came across a passage in a recent work by Michael Ignatieff. Writing about the relationship between Québec and the rest of Canada, he asserted: "The real issue is that we do not share the same vision of our country's history. The problem is not one of rights or powers, but of truth. We do not inhabit the same historical reality. And it is time we did."[122] This quote struck me as capturing the dilemma with which I was struggling. The gulf between South and North is not just one of privilege, but of perception.

Let me give an example. Many will recall the response of one delegate from a developing country to Maurice Strong's expressed desire for an Earth Charter that every child in the world could hang on his or her bedroom wall. He pointed out that most children in his part of the world do not have bedrooms.[123] I have told that anecdote in my class and have quoted it in my writing, as an example of the gulf of perception between South and North. Strong and other commentators had a genuine and legitimate interest in making the Earth Charter accessible and clear. Yet, for me, the response really got at the heart of the matter. As I understood it, the delegate was conveying in a simple and compelling fashion that the most wonderfully inspiring document in the world will not mean anything as long as there are these terrible disparities between those who have and those who have not. I was stunned when I read recently that one (Northern) journalist had characterized the delegate's

[121] I hasten to add that it was an international lawyer, but not an international environmental lawyer, who characterized my statement in this way.

[122] Michael Ignatieff, The Rights Revolution 134 (2000).

[123] Adam Rogers, The Earth Summit: A Planetary Reckoning 193 (1993).

response as "unhelpful."[124] The very fact that it could be perceived in such fundamentally different ways is quite telling. One begins to wonder whether there is any common ground at all.

The problem, of course, is that while we may not "inhabit the same historical reality," we do inhabit the same planet. We have no possibility of escaping from each other, no way of avoiding the problems that we share. The hope expressed thirty years ago in the Founex report, that "an emerging understanding of the indivisibility of the earth's natural systems on the part of the rich nations could help strengthen the vision of a human family" has yet to be fulfilled, but seems to be more pressing than ever.

To span this perceptual chasm is clearly a much more difficult task than simply acknowledging one's own perspectives and prejudices. An essential starting point is that scholars, activists, and practitioners *within* the discipline ask the types of questions that the Southern approach to international environmental law demands. And so I can only hope that this article will be read not as a denunciation but as a plea; not only for understanding, which is relatively painless, but also for a rethinking of how the discipline and those of us who research, teach, and work within it fit into a broader South–North context. Far from painless, this exercise is likely to be difficult and perhaps even distressing. However, it is one that the discipline desperately needs and from which it can only benefit.

[124] *Quoted in* Ranee K.L. Panjabi, The Earth Summit at Rio: Politics, Economics and the Environment 31 (1997).