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INTERNATIONAL LAW AND THE GLOBAL ENVIRONMENTAL CHALLENGE

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I. Introduction

It gives me enormous pleasure to speak at this auspicious Canterbury occasion in this wonderful Town Hall. I do feel familiar with this environment. This is the electorate of Christchurch Central of which I am the former MP.

Tonight's topic not a simple subject and it is not one to which an audience of engineers will necessarily warm. One of my foremost tutors on this subject, when I was Minister for the Environment, was Dr Roger Blakeley, Secretary for the Environment, who was an engineer. Engineers have a lot to offer in the area of environmental issues. However, they are not the only academic discipline with a lot to offer. The problems of the global environment require contributions from many academic disciplines. Virtually all the sciences are involved in this: chemistry, physics, biology and all varieties of those. Not only are the scientists involved, the economists are involved as well. And all of the social sciences.

It is a sad requirement of the human condition that we need laws. Those laws are drafted by lawyers. It is as a lawyer primarily that I am going to speak to you tonight. I am going to try and meld together a problematique of the environmental problems and an account of the international legal system, such as it is, which is available to deal with those problems.

I will state the conclusions at the beginning so you can see whether I prove them, or not. The conclusions are two. The first conclusion is that the range of international environmental problems which we face is wide and the problems are grave. The second conclusion is that the state of international law and institutions we have available to deal with the problems are manifestly insufficient. You might think that that is a rather bleak

conclusion. It is, however, difficult to be optimistic in this field.

I want to begin with something of an apology. I will be covering a lot of things lightly. People who are specialists in particular areas I am covering will feel unsatisfied. But I have come to the conclusion, after a considerable period of time of looking at these problems, that if they are examined together there is a better chance of understanding what the solutions should be.

For the last three years I have been working with two American Law Professors on a book entitled "International Environmental Law and World Order".⁽¹⁾ It is the first book published which is designed for a course in International Environmental Law in American Law Schools. I have taught from drafts of the materials three times now at the University of Iowa. The book is being published this month by the West Publishing Company. The authors feel that the book does have a certain message. What I want to do tonight is try and summarise that message.

II: The Global Environment Problematique

We begin by looking at the problems of the population. In Cairo in September 1994 there is going to be a United Nations Conference on the problems of population. That conference was one of the things to come out of the Earth Summit Conference at Rio in 1992. It is undoubtedly true that the magnitude of the world's population leads to a number of environmental problems. In 1650 we had only half a billion people on this planet. It was growing quite fast

(1) Lakshman Guruswamy, Geoffrey Palmer and Burns Weston, International Environmental Law and World Order - A Problem-Oriented Coursebook (West Publishing Co, 1994)

even then, but it took 250 years to double. By 1900 the population had reached 1.6 billion; by 1970 it was 3.6 billion. It has gone on increasing ever since with the result that in 1991 the world's population was 5.4 billion.(2)

One of the problems with population is what demographers call the "problem of exponential growth." Another of the problems with population is that there are profound differences between people who are called Malthusians, who believe that the problem is simply too many people. To them it is the bigger numbers and the mathematics of it which becomes so beguiling. Perhaps Paul Erhlich falls into that category.(3)

There are also the people, like Barry Commoner, who say that the problem is not actually the number of people.(4) The problem is the amount that they consume. More consumption has led to polluting technologies use of which have hastened environmental degradation. The problem Commoner says lies in the technologies of production. that is what is causing the environmental problems.

Undoubtedly industrialisation is part of the environmental problem. Rapid industrialisation produces a great diminution in non-renewable resources. It also produces pollution, which is another one of the international environmental problems. There is an issue also about whether we can feed all the people we have. It is possible that that problem will become more acute in years to come. In some parts of the world it is acute now.

(2) Donella Meadows, Dennis Meadows and Jorgen Rander, Beyond the Limits 23 (1992).

(3) P. Ehrlich and A. Ehrlich, The Population Explosion (1980).

(4) B. Commoner, Rapid Population Growth and Environmental Stress 21 International Journal of Health Services 199 (1991). Barry Commoner, Making Peace with the Planet (1990).

There is another group of analysts who say that we cannot go on depleting the resources we have at the rate that we are, because if we do we are going to face some sort of catastrophic collapse.⁽⁵⁾

We therefore reach the conclusion, and it is perhaps arguable, that there are limits to growth.

In New Zealand now we have a healthy economy. For the first time in many years we are growing at a significant rate. Perhaps as much as 5% of GNP per year. Everyone feels mildly positive about that, although they say the Asian economies are doing better.

From an environmental point of view we cannot tolerate increasing and unrestricted rates of growth in every economy on this planet. If we achieve it there will be disastrous consequences. The perceived wisdom now is that economic growth must be sustainable. About sustainability I will have a lot to say later.

You will recall the Club of Rome in 1972, which shocked the world with the proposition that there were limits to growth.⁽⁶⁾ The conclusions they then reached were that if the present growth trends in world population, industrialisation, pollution, food production and resource depletion continued unchanged, the limits to growth on this planet will be reached sometime within the next 100 years. The most probable result, they said, will be a sudden and uncontrollable decline in both population and industrial capacity.

(5) W.R. Catton Jr., Overshoot. The Ecological Basis of Revolutionary Change (1980).

(6) Donella H. Meadows et al., The Limits to Growth (1972).

Twenty years later the Massachusetts Institute of Technology scholars who produced the earlier study carried out their analysis again. They produced in 1992 a book called "Beyond the Limits". In that work they said,

1. "Human use of many resources and generation of many kinds of pollutants have already surpassed rates that are physically sustainable. Without significant reductions in material and energy flows there will be in the coming decades an uncontrolled decline in per capita food output, energy use and industrial production.
2. This decline is not inevitable. To avoid it, two changes are necessary. The first is a comprehensive revision of policies and practices that perpetuate growth in material consumption and in population. The second is rapid, drastic increase in the efficiency with which materials and energy are used." (7)

They were still optimistic. They said a sustainable society is still technically and economically possible.

If one digs a little deeper and takes some of the problems in groups, we may understand them better. There are a number of problems in the atmosphere. Climate change is a significant problem. The world is heating up. Scientists differ as to how fast and they differ as to the effects of carbon sinks, but it is clear that increased industrialisation and the use of fossil fuels is producing more CO_2 in the atmosphere and that those concentrations are

(7) Beyond the Limits XIV, supra note 2.

likely to change the climate. There is a high degree of scientific consensus about this. There is a much lower degree of agreement about what to do about it. The Framework Convention on Climate Change that was signed at Rio and which New Zealand has ratified, in time will produce some very significant obligations which New Zealand and other countries will have to observe.⁽⁸⁾ They are likely to change our lifestyles considerably and those changes will not be popular.

There is also a problem in the atmosphere with ozone. That is to say depletion of the ozone layer in the stratosphere. One of the international environmental legal success stories in recent years has been the efforts to halt the depletion of the ozone layer.⁽⁹⁾ The bans on CFCs which have been brought into law in recent years have been effective in the sense that many countries are now not using them. There is a phased programme of reduction of chloro-fluorocarbons and their use and halons as well, with the result that perhaps the assault on the ozone layer is lessening. The problem is that it takes a long time for the depleting substances to reach the stratosphere and we are not clear yet whether we got to the problem in time.

There is also the problem of acid rain. Fortunately not a problem in New Zealand. I was talking to the Japanese Minister for the Environment two years ago and he told me they were spending a lot of money in Japan to stop a lot of the pollution in China which was causing Japan's acid rain. That is typical of a whole range of problems of

(8) Framework Convention on Global Climate, opened for signature June 5 1992, 31 I.L.M. 849.

(9) Vienna Convention on the Protection of the Ozone Layer March 22, 1985 26 I.L.M. 1529 (1987); Protocol on Substances that Deplete the Ozone Layer Sept. 19, 1987, 28 I.L.M. 1335 (1989); Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer 30 I.L.M. 537 (1991).

international trans-boundary air pollution, from which New Zealand is fortunately spared, but which in other parts of the world is a serious problem.

So the atmosphere is not in good shape.

The lithosphere is not in good shape either.⁽¹⁰⁾ We have very serious problems with chemical deterioration of soils. Nutrients can be depleted or stripped when agriculture is practised on poor or moderately fertile soils without sufficient application of fertiliser or, in some cases, too much. There are problems of salinisation in some areas of the world, of acidification and pollution of the soils generally. In some parts of Africa there are serious problems with increasing desertification. So the soils of the world face threats which are not being solved.

Neither is the hydrosphere free from difficulty.⁽¹¹⁾ There is severe pollution of the seas in areas like the Mediterranean and, indeed, we have very serious problems with freshwater pollution in a number of parts of the world. In a number of countries it is not possible to get easy supplies of fresh, clean water. The world's supply of fresh water is not distributed evenly. It is frequently unreliable.

The biosphere, the layer that sustains us, is not in good shape either. We have got deforestation which is proceeding apace in some countries, particularly countries where the tropical rainforest is. That tropical rainforest supports more species per hectare than any other ecosystems on this planet. That is leading to increased problems of biodiversity. That is, loss of biodiversity; species loss,

(10) A Report by the World Resources Institute, World Resources 1992-93, 111 (1992).

(11) Id at 159.

extinction of species. That increasing loss of biodiversity has been called by Professor Edmund O. Wilson of Harvard the "fourth horseman of the environmental apocalypse"⁽¹²⁾. The loss of biodiversity is so serious that entire ecosystems could easily collapse as a result of there being only a few species in a particular ecosystem.

So when one looks at those problems one is not inclined to become an optimist.

III. The Paradigms

I want now to change focus. I want you to try and think about how to make sense of what I have said. It is one thing to recite a litany of facts which suggest we have serious problems. But the prime problem with the international environment is to characterise the problem effectively. That is not an easy thing to do. It is not an easy thing to do because there are many competing theories out there about what the problem really is. How can we construct a paradigm by which that problem might be addressed? I want to run through some of the paradigms which may be helpful.

I suppose one of the most influential contributions was Garrett Hardin's analysis in the 1968 *Science* magazine called "The Tragedy of the Commons".⁽¹³⁾ The tragedy of the commons of course is caused by freedom. Ruin is the destination to which all men rush. They rush there because they want to increase their wealth. "The Tragedy of the Commons" teaches that if you do not have property rights in a field where you are grazing sheep, for example, and it is

(12) E. Wilson, "Biodiversity, Prosperity and Value in Ecology, Economics, Ethics 4 (F. Bormann and S. Kellert eds. 1991).

(13) G. Hardin, The Tragedy of the Commons 162 *SCIENCE* 142 (1968).

common then ruin is inevitable. Farmer 1 puts 10 sheep there, farmer 2 puts 10 sheep there and so do a lot of other farmers. The question is, what is the carrying capacity of the common? It turns out, under Hardin's analysis, that it does not worry the farmers. They will increase their number of sheep because they do not have to pay for the degradation of the environment that over grazing costs.

There are certain difficulties with this analysis. After all, communities are capable of banding together and making rules for the use of commons. Nevertheless, the tragedy of the common is an influential paradigm in the environmental literature. Its best explication is perhaps to be found on the Continent of Antarctica. Antarctica was a classical common until the 1959 Antarctic Convention was agreed⁽¹⁴⁾, so now there is a form of governance for Antarctica. The Tragedy of the Commons can bring important insights to international environmental problems.

Economic analysis is also a very important way of looking at international environmental problems. Indeed, I will have a little bit to say later about our friends the economists and how wonderful and varied their contributions to this subject are. Like their contributions to other subjects, they are seldom in agreement.

There are another set of analysts who say that the central difficulty with the global environment is politics, and more particularly, security. That environmental⁽¹⁵⁾ issues in the 21st century raise basic issues of security. People will have wars over resources. Perhaps we have already had such. The argument is that these environmental issues will cause serious security problems.

(14) The Antarctic Treaty Dec 1 1959, 12 U.S.T. 794, 402 U.N.T.S. 71

(15) G. Porter and J. Brown, Global Environmental Politics 15-20 (1991).

There is another way of looking at this that says that really the problem is one of what one might call social ecology. Social ecologists, who are extremely worthy people, have a theory which says that humans and nature have to learn to live in harmony with each other. "Social Ecology is a comprehensive holistic conception of the self, society, and nature."⁽¹⁶⁾ Social systems have to be based on the theory that humans have to live in harmony with nature.

The deep ecologists, led by a Norwegian philosopher, Arne Naess basically take a much grimmer view of life⁽¹⁷⁾. They say that unless drastic changes are made to people's life styles we have no future. Furthermore, we do not deserve to have one unless we realise the stupidity of our own actions. Deep ecology has been quite an influential philosophical doctrine in terms of thinking about the problems of the global environment. The deep ecologists may yet turn out to be correct.

There are also other paradigms at work here. Indigenous peoples' perspectives are quite important. Increasingly important, I suggest. For example, the New Zealand Resource Management Act 1991 tries to take on board the Maori view of how to approach environmental problems. Dr John Peet, whom I see in the audience, wrote a very distinguished book that is much admired in the United States. This book has some very powerful things to say about the indigenous peoples' perspective of how to view environmental problems⁽¹⁸⁾. I would recommend that book to you as one of the best

(16) J. Clark "What is Social Ecology?" in Renewing the Earth: The Promise of Social Ecology 5 (T. Clark ed, 1990).

(17) - A. Naess, "The Deep Ecological Movement: Some Philosophical Aspects" 8 Philosophy Inquiry 10 (1986).

(18) John Peet, Energy and the Ecological Economics of Sustainability 253 (1992).

contributions that I have read from a New Zealander to the world thinking on these issues. It is very appropriate that New Zealand should reflect the indigenous peoples' perspective.

There is also the feminist perspective on the environment. The feminists' perspective is varied as well. We have liberal feminism, Marxist feminism and cultural feminism⁽¹⁹⁾. Some people might say it is a problem of patriarchy. Men got us into this mess. Men will not get us out of it. So women should take over. That is a simple characterisation of what turns out to be a complex and interesting message. There is not a lot of agreement between those schools of eco-feminism. The variety is quite remarkable.

Then there is the series of philosophical contributions which really say this is a problem of ethics. That we have to look at the international environmental problems as a set of ethical problems⁽²⁰⁾. In legal terms that turns out to be well expressed by a by Professor Chris Stone in his book *Should Trees Have Standing?*⁽²¹⁾ In other words, should a tree be able to get in front of a Court and say, "hey, don't cut me down."

That is quite a powerful legal idea. In some respects it is also linked to another legal idea developed by Professor Edith Brown Weiss of Georgetown. She says we have an ethical obligation to future generations⁽²²⁾. We cannot, in the situation we are in, mindlessly pursue our own self

(19) C. Merchant, Radical Ecology - The Search for a Livable World (1991)

(20) R. Nash, The Rights of Nature: A history of Environmental Ethics - (1989).

(21) C. Stone, *Should Trees have Standing? - Towards Legal Rights for Material Agents* 45 Southern California Law Review 450 (1972).

(22) E.B. Weiss, In Fairness to Future Generations (1989).

interest to the exclusion of our grandchildren's welfare. We have an ethical obligation, which leads to a legal obligation, to enforce wise use of depleting resources to ensure that those who come after us can live in dignity.

The last paradigm is the officially established paradigm. The paradigm of sustainability. Now, the paradigm of sustainability itself is not free from difficulty. The Rio Declaration tells us what it is⁽²³⁾. It came from the Brundland Report⁽²⁴⁾. Gro Harlem Brundland from that well known whaling nation of Norway, was able to Chair a World Commission on the Environment which provided an analysis which said, "We have got to stop poverty, but we have got to have economic growth. The economic growth has got to be sustainable from an environmental point of view. That is to say, it has got to be capable of being renewed and it has got to be compatible with environmental bottom lines. If we have that, we will be alright." As the Commission put it: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs"⁽²⁵⁾.

Sustainable development is a powerful political idea. The world could have its cake and eat it too. We could have growth and we could have a sound environment. We could have capitalism and environmentalists all living together in happy unity. What a wonderful idea. Let us have an international conference. So we had Rio.

Rio was the biggest diplomatic gathering in the history of the world. There were more Heads of State there than had

(23) The Rio Declaration on Environment and Development of the United Nations Conference on Environment and Development 31 I.L.M. 874 - (1992).

(24) World Commission on Environment and Development Our Common Future (1987).

(25) Id at 43.

ever been at one place before. Not all of them were in agreement. In political terms it was necessary to get good stuff out of Rio or the organisers would not have been able to get the people there. What we got out of Rio was the Rio Declaration. They also signed up for the Framework Convention on Climate Change there. There was another Convention on Biodiversity that was signed, but it is not of much use. As well there was the enormous Agenda 21, 800 pages of closely printed material about how countries should deal with various environmental issues. The document is not legally enforceable, but nevertheless contains good advice.

There was some good work done at Rio. The main point of principle that came out of Rio was the Rio Declaration which says "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature"⁽²⁶⁾. These international instruments are wonderful for the facility with which they can combine ideas which are actually in mutual opposition to each other. It is an art form all of its own which can only be learned at international conferences. "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of future generations"⁽²⁷⁾.

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of

(26) Rio Declaration, supra note 8, Principle 1.

(27) Id at Principle 3.

national jurisdiction." (28) In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it the Rio Declaration states. All States have to cooperate. They always have to do that, but they often do not.

There resides in the concept of sustainable development the possibility of an oxymoron. We can have sustainability or we can have development. It is not clear we can have both (29). We may be able to have both, but it will depend, I think, on the determination with which we pursue that goal. We will have to pursue it extremely rigorously, if we are going to achieve it. It is not possible to say we will embrace the paradigm of sustainable development and then go home and do nothing about it. It is two years since Rio now and not much has happened. The United Nations set up a Sustainability Commission which has done nothing and does not look as if it is going to do anything. I do not believe that embracing the paradigm was enough unless we have action. Leaving aside whether the intellectual quality of the paradigm and whether it will stand up to analysis, I think the longer we go on the harder it will be to get the lion to lie down with the lamb. We do not go in for sustainable development in New Zealand. The Resource Management Act 1991 does not enact sustainable development. It enacts sustainable management. There is a difference.

Now, even assuming that we are being covered and enveloped with the cloak of sustainability, we find that the economists have a lot to say about how we ought to be using

(28) - Id at Principle 2.

(29) Michael Redclift, "The Meaning of Sustainable Development" 23 *Geoforum* 395 (1992). W. Sachs, "Environment and Development: The Story of a Dangerous Liaison" 21 *Ecologist* 252 (1991).

resources. After all, economics is about the use of scarce resources. There are people called free market environmentalists who say, "Gee the market is good. It can do anything. If we run out of petrol, then we will have electric cars. But it is not economic yet, because we have got petrol. When the time comes, technology will find a way and the free market will produce. It is not a worry." (30) Analysts like Julian Simon say, "What a wonderful thing it is that we have all these people. All these people on the planet who have enough to eat. We are going to have free markets for everyone. It is all going to be tremendous." (31)

Then there are the welfare economics people who say, "Well, the trouble with the environmental issues and economics is about externalities. What we have to be able to do is to identify the externalities and we have to internalise them. Not externalise them." (32) It is the smoke coming out of the chimney. We all breathe the air, but how do we incorporate the cost of the air pollution into the cost of the polluter's product. One might argue that capitalism is better than communism when it comes to the environment because after all it does tend to internalise more costs than communism did. Take a look at some of the problems in the Soviet Union if proof is required.

Then there is the spaceship approach. Some economists think that the world is like a spaceship in environmental terms. (33) That there are limited resources. We have to

(30) T. Anderson and D. Leal, Free Market Environmentalism (1991).

(31) J. Simon, "There is no Environmental, Population or Resource Crisis" in an Introduction to Environmental Science (29-31 (1992)).

(32) R. Coase, The Problem of Social Cost 3 J. Law and Econ. 1 (1960).
- A Pigou The Economics of Welfare (1920).

(33) H. Daly, "Elements of Environmental Macroeconomics" in Ecological Economies: The Science and Management of Sustainability 32-40 (R. Costanza ed. 1991).

be very careful if we are going to stay up in space, otherwise we are going to come down and the result will be that we will perish.

Other economists think it is like the Wild West. When we have used up that little bit of land we just move West. Go West young man, start another farm, grow some more corn, nature is bountiful.

Is the planet like a spaceship, or like the Wild West?. These are competing ways of looking at it.

Then there is interesting work being done by Repetto and others who say, "The real trouble, from an economic point of view, is the way we draw up our accounts. If we put in our accounting system the ways that we are depleting our resources and the real costs of doing that, we wouldn't degrade the environment any more because it would be costing us so much."⁽³⁴⁾ After all gross national product accounting is pretty new and we are all obsessed by it now. We could easily incorporate this sort of accounting into our figures and we would then think differently about the use of resources than we do now. The approach offers promise in my view.

All I have proved so far is that there is a problem and there are many opinions on how one ought to examine that problem. If there is no consensus on how the problem is to be characterised, we are not going to develop any effective way of addressing it. We are far from having an international consensus on how to address the problem or series of problems which comprise the global environmental problematique.

(34) R. Repetto, "Balance Sheet - Incorporating Natural Resources in National Income Accounts" 34 Environment 13 (1992).

IV. International Law and the Environment

Now I want to take you into even gloomier territory than the global environment: the world of public international law. International law is not like domestic law. Domestic law, many New Zealanders would think, is order backed by threats. If you murder someone you will go to jail and the policeperson will come and get you. You will not like that prospect, so therefore you are deterred and do not murder. At least you think there is a legal system there. You think there is an enforcement mechanism there and you think that you are subject to it.

None of those things is present at international law. There is no international policeperson. There is no effective enforcement. The International Court of Justice has no compulsory jurisdiction⁽³⁵⁾. Nations can sign up for its compulsory jurisdiction if they want to, but most do not. People do not have that choice about New Zealand's laws. The Courts apply them whether they agree with the laws or not. A lot of the norms of international law are pretty fuzzy around the edges. International law develops in a way which is quite different from domestic law. Now do not think there is no such thing as international law; there is. I have a lot of problems with American law students who say "might is right - there is no international law. We are not subject to it. We are American". That is not correct. Most nations observe most principles of international law, most of the time. Of course the main subjects of international law are Nation states. To a large extent the Nation states make the rules.

(35) Statute of the International Court of Justice 1976 U.N. Y.B. 1052, Article 38.

The grave weakness of international law is, if a nation does not like the rule the nation will not be bound by it. That is true for much of international law. Most of international law is made by international conventions, or treaties, or agreements. At any international treaty drafting meeting there would probably be as many people at the meeting as there are present here, which is about 250.

The international law making process is cumbersome. It tends to be governed by the principles of the lowest common denominator⁽³⁶⁾. It takes a long time to get anywhere and some times even then nations will not ratify the agreement.

The United Nations Convention on the Law of the Sea is only coming into force this year although they finished drafting it in 1982. The negotiations took fourteen years to conduct. It takes a long time to make these norms. The International Law of the Sea Convention is well out of date before it goes into effect, especially in areas like fishing.

There is also customary international law. Customary international law is important because it is that law which nations follow in their dealings with each other which they think has juridical significance and they think they are bound by it. There is quite a lot of customary international law which has powerful effects. It can be something of the floor of the cathedral when there is nothing else. It can be a backstop.

(36) Geoffrey Palmer, New Ways to Make International Law 86 American Journal of International Law 295 (1992).

There is also in the international legal arena, the controversy about hard law versus soft law. This is particularly important for international environmental law. Hard law is customary law which is to be found in judicial decisions or the writing of the publicists. Conventions are hard law, that is Treaty Law. Nations have signed up. They have ratified. It is binding. Often though we cannot get agreement. We are sitting round the table at these international meetings and they say, "but we do not want to sign up to that", so we soften it down a bit. Then they say, "well, we might go along with that". Pretty soon we haven't got much left because we have to get 182 nations or as many of them as possible to sign up. Or as many nations as there are in the world this week, because it changes week by week. It is hard to get 182 nations to agree that the world is round, let alone to sign up to a complex set of international environmental rules that some of them will not know anything about, and others of which they are opposed to. Look at the fuss which is going on about the resumption of commercial whaling.

Therefore, when we cannot get a hard law convention, we go around, get a few Ministers together and make declarations. The Helsinki Declaration on Ozone is a good example⁽³⁷⁾. Have a meeting at Helsinki. Get as many Ministers of the Environment as we can, make an upbeat statement about ozone, sign it up and publish it. This is the Helsinki Declaration. Does it have legal status? No. Is it legally binding? No. Is it any use? Yes, because it softens nations up. It creates expectations in the minds of the international community. By the time there is a meeting in London a year later everyone is softened up, so the substitute of the Helsinki Declaration actually ended

(37) Helsinki Declaration on the Protection of the Ozone Layer May 2, 1989 28 I.L.M. 1335 (1989).

up a hard law Convention then. Often in international environmental law we get to hard law by developing a lot of soft law first. There is a lot of soft law in the international environmental area.

There is a trilogy of three international law cases on custom. First, the Corfu Channel Case⁽³⁸⁾. British warships are steaming up the Straits of Corfu "Bang". They hit some mines. Sailors die. There are international waters, the Corfu Channel and the ships are allowed to be there. Who set the mines? Albania is nearby. Albania say they do not know who set the mines. The case goes to the International Court of Justice. Britain says Albania is responsible. The International Court of Justice says they are because Albania did not set the mines it must have known who did. So a principle is established. If a national knows that harmful effects may occur to other nations from facts within its ken and fails to disclose them, it will be liable to the national that suffers damage. If we think about it, that is an interesting principle. It has got quite a lot of application to the environment, with a little bit of creativity.

There is the Trail Smelter Arbitration, a wonderful arbitration that took many years to determine between Canada and the United States⁽³⁹⁾. This was not the normal problem they have between Canada and the United States on acid rain problems. This was one on which the Trail Smelter was in Canada and it was giving the residents of up-State Washington a lot of trouble because the smelter was emitting dirty stuff which was coming right down on them. In the end the principles of good-neighbourliness was adopted. One nation cannot generate a whole lot of "gunk" and send it to another nation because the wind is blowing that way.

(38) Corfu Channel (UK v Alb.), 1949 ICJ Rep.4.

(39) Trail Smelter (US v Can.), 3 R Int'l Arb. Accords 1905 (1938 and 1941).

Then there was the New Zealand and Australian effort to go to the International Court of Justice on nuclear testing⁽⁴⁰⁾. Of course the French didn't turn up to argue the case. The case was not determined on its merits, it was rendered moot. The French Government said it was their policy to cease atmospheric testing over Mururoa Atoll. They made a press statement saying so. The International Court of Justice said they were bound by that press statement. The idea of having a Nation state bound by a press statement is rather novel and interesting and not without some significance.

That short excursion into international customary law would not give you much ground for thinking that we are going to be able to develop from it much in the way of solid protection for the global environment.

Conventions are much more important in the environmental area. We have had more than 150 of them since the Second World War. Some of them are bi-lateral, just between two countries. Some of them are regional. There is a very good regional convention attempting to clean up the Mediterranean seas. We have regional conventions in relation to environmental problems in the Pacific. But most of the potent international law comes from multi-lateral international conventions which have a large number of nations signing and negotiating. Those are conventions like the Vienna Convention on Substances which deplete the ozone layer, the Framework Convention on Climate Change, the Biodiversity Convention, the Law of the Sea Convention.

That is the stuff of international environment law.

(40) Nuclear Tests (Austral. v Fr.; NZ v Fr.), Interim Protection, 1973 ICJ Rep.99 and 135 (Orders of June 22) 1974 ICJ Rep.253 and 257 (Judgment of Dec 20).

International conventions is where it is at. If the problems are going to be solved they are going to be solved by conventions. The trouble with conventions is that they are very difficult to get. The transaction costs of negotiating them are very high. There are a lot of nations and they have to reach a common position. One of the problems that we set in this book is for students to negotiate a convention. I tried this out last year. It is hard to get agreement. You give the students each a set of negotiating instructions. It is very difficult. The problem is that international legal conventions tend to reflect the lowest common denominator. They tend to reflect the nation who is least interested in doing anything because that is the price to get that nation to sign up.

Domestic law is not like that. You may have been vehemently opposed to the law which Parliament passed. But when it was passed it was the law, whether you agreed with it or not.

There is no international legislature. A National state cannot be bound by an international convention it has not ratified. This is a legal system which tends to be based on the consent of the State. I want to suggest to you that we are considerably at peril so long as we have an international legal system that is based on the consent of each State for it to be effective. For some of these environmental problems hold-outs cannot be tolerated. What do we do if a nation decides it is not going to sign up for the Ozone Convention and it is going to develop a whole lot of CFCs and sell them on the blackmarket as fast as it can to make a lot of money. They say, "we are not bound. We did not sign up."

One of the principal weapons available in international legal system is the principle of shaming. We have to make nations ashamed. We have to bring pressure to bear on them

to conform. That can be done by pleasant means, and sometimes by means not so pleasant, but it can be done. But we have no juridical method, as things stand, to make binding rules upon Nation states that they all must follow whether they agree with them or not. That is the primary difference between domestic law and international law. And in that deficiency I think international law is badly served. It is my contention that we need to develop something like a legislature that can deal with some of these international environmental problems, otherwise the problems will engulf us.

What other methods of making international law are there which could be used? There are one or two signs that we are going to get there. The International Convention on the Ozone Layer has means of changing some of the rules by majority vote. It is a weighted formula, according to how big a user of these things the nation is. The International Convention on Climate Change has a similar formula. So it is possible that we will get to a point at some stage where we can make rules by majority rather than on the basis of consensus. By consensus I mean all nations having to agree. However, we are not getting there very fast. We may not get there fast enough.

Furthermore, there is no institutional home for negotiations of this sort. Every time we have a set of international negotiations we have to start again, as if it is the first time we ever had one. The United Nations does not have an environmental arm. It has the United Nations Environment Programme headquartered in Nairobi, which is actually a creature of a General Assembly resolution. It is not one of the 26 Institutions of the United Nations. It is not like the FAO or the WHO. It is a fairly weak and not well funded organisation which can act as a catalyst but which has no executive capacity whatsoever. It can only persuade. UNEP

did a great job with the ozone negotiations. So good that some of the people did not want it to manage the climate change negotiations and it did not. We have got the Sustainable Development Commission which was set up after Rio, which has done nothing of any note. We have also got a Global Environmental Facility that was set up at Rio that was supposed to provide some funding for the less developed countries to handle some of their serious international environmental problems. But basically we do not have any effective international institution charged with addressing the problems of the international environment. We have no enforcement capability for most of the Conventions that I have outlined to you. Enforcement for the most part depends on nations dealing with each other. Look at the problems they have got into in some of nuclear areas with North Korea.

The difficulty is that we simply do not have the law or the institutions for handling this serious problem. What Rio gave us, the Earth Summit two years ago, was Sustainable Development, the Rio Declaration and Agenda 21, but Rio was too little, too late. Rio was a failure of political vision. Rio is not enough to make the difference. That, I think, is very sad⁽⁴¹⁾.

What of the future? We can negotiate law and produce outcomes. Negotiation is pretty useful and there needs to be more of it. People making decisions in the private sector may have to act in ways which are environmentally sound. An educated population will demand that products that are sold are environmentally sound. We will have to overcome the need for international consensus at the international level before we can do anything. We can

(41) Geoffrey Palmer, The Earth Summit: What went wrong at Rio 70f Washington Law Quarterly 1005 (1992).

pressure nation states by the use of non-Governmental organisations. Some of the international environmental organisations have great resources and a lot of information. Sometimes they have more resources and information on particular matters than Nation states themselves have. Sometimes they can make themselves indispensable to the policy makers of the Nation states. Sometimes those NGOs can be influential, especially if they become part of the negotiating delegations at these international meetings of ensuring that the Government is kept upright by pressure from all sides.

In the end though, the central difficulty is the sovereignty of States. We have a geopolitical system based on Nation states which are, in theory, equal before international law and which can do anything they like inside their own territory. They are only bound by agreements they make outside it, plus a modest amount of customary international law.

The available tools are not sufficient. I do not know whether we will ever be able to develop the international legal system to the point where it can deal with these problems. What I do know though, is that if we do not do that I cannot see how we will deal with the environmental challenge. If we look, for example, at some of the most recent developments: the GATT negotiations took 7 years. The outcome was of vital importance to the trading future of New Zealand. Involved in those negotiations was the decision to set up a new international organisation, the International Trade Organisation, or ITO. One of the biggest problems that that organisation will face is the intersection of problems of the environment with international trade⁽⁴²⁾. Those problems are very difficult to solve. Take the American problem with Mexico over tuna. The American Congress passed a law which said, "we

are not having in America tuna imported which has been caught by means which are fatal to dolphins." The Mexicans caught a lot of tuna which was not dolphin friendly. The Americans refused to import it. The Mexicans said, "You have to under GATT". The GATT panel said, "Yes, the Mexicans are correct."

One of the most potent instruments in the weapons that New Zealand used in relation to stopping drift netting in this part of the world was the American Congress's law which says we cannot have tuna that is bad for dolphins. It is a very big disincentive for other nations to catch tuna by those means if they cannot sell them to the American market. Now, if those sorts of weapons are not going to be available then there will be some serious difficulties. I think the ITO may be able to sort those things out so we can distinguish genuine environmental protection from what is in fact protectionism under the guise of international environmental protection.

None of those problems is easy. It will be very interesting to see how the ITO goes.

V. Conclusion

In conclusion just let me say this. I have traversed a wide area and I have done it rather superficially. I have done that in order to introduce you to the range of the problems. My experience has been that people who work in this area get very interested in "their little neck of the woods" and cannot see the broad picture. It is a broad picture that has signs of thunderclouds coming, even though there are shafts of sunlight in some areas.

(42) Trade and the Environment Law, Economics and Policy (ed. D. Zaelke, P. Orbuch and R.F. Houseman, 1993).

New Zealand does occupy an important position in these debates. Although we are a small country, and one might think irrelevant, we nevertheless occupy a strategic position in these negotiations because we are an advanced country. In many respects what we rely on are the same things that the developing countries rely on, so we are listened to carefully by both sides. It is possible for New Zealand to have an influence in this area beyond its power. It is necessary though, if that is to happen, for the citizens of New Zealand to make sure, on a continuing basis, that the Government promotes progressive environmental policies internationally.