

1-1-1991

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### Recommended Citation

John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905 (1991).

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# The Developing Countries in the Evolution of an International Environmental Law

By JOHN NTAMBIWEKI\*

## I. INTRODUCTION

The debate over the role of developing countries in the conservation of the global environment predates the landmark United Nations Conference on the Human Environment (UNCHE), held in Stockholm in 1972 (Stockholm Conference).<sup>1</sup> The debate concerns the extent to which the developing countries should champion the cause of environmental management at the expense of their own development. Since 1972 despite the initial reluctance to convert to the banner of environmental conservation, the Third World states have continued to play a large role in the evolution of a new international law of the environment.

This Article attempts to assess the contribution of the Third World nations to the evolution of an international environmental law. It will consider the extent of the emerging law's consideration of the Third World states' peculiar concerns, and will attempt a prognosis of future developments in this area.

### A. The Stockholm Debate Revisited

At the Stockholm Conference, the developed countries generally championed the need to conserve the environment and ensure against any further degradation. Their views were illustrative of their experience with industrialization and massive economic development. The late Olof Palme, then Prime Minister of Sweden, characterized the developed countries' views of the urgency of environmental management:

The earth's resources are limited and our environment is vulnerable to

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1. REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT at 37, U.N. Doc A/Conf.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (1973) [hereinafter UNCHE REPORT].

the forces set in motion by technical and economic development. The amounts of air and water are restricted and so are sources of energy. Supplies of raw materials are exhaustible. Uncontrolled pollution of the seas and the atmosphere may permanently upset the processes upon which human life depends. The pressure on our limited resources is accentuated by population growth. Food production cannot feed the growing number of the world's inhabitants. What is ultimately at stake is the survival of mankind on our limited planet.<sup>2</sup>

The developed countries' enthusiasm was marred by the reluctance of some of the developing countries. The head of the Brazilian Delegation observed that:

It is economic growth that has allowed developed countries to make great advances in the eradication of mass poverty, ignorance, disease and as such to give a high priority to environmental consideration. Mankind has legitimate needs that are material, aesthetic and spiritual. A country that has not yet reached minimum satisfactory levels in the supply of essentials is not in a position to divert considerable resources to environmental protection.<sup>3</sup>

The late Shrimati Indira Gandhi, then Prime Minister of India, put forth forcefully this dilemma between conserving the environment and fulfilling the developmental needs of the third world:

We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Are not poverty and need the greatest polluters? How can we speak to those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at the source? The environment can not be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.<sup>4</sup>

These vocal concerns over the need for development do not indicate that the developing countries refuse to accept the need for environmental conservation. On the contrary, several delegations emphasized the fact that the developing countries would not ruthlessly exploit the environ-

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2. Palme, *Speech of Welcome by the Prime Minister of Sweden*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS: FROM STOCKHOLM TO NAIROBI* 51 (M. Tolba ed. 1988) [hereinafter *EVOLVING ENVIRONMENTAL PERCEPTIONS*].

3. *Statement by Head of Brazilian Delegation*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 135.

4. Gandhi, *Address by the Prime Minister of India*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 97; see also Anand, *Development and Environment: The Case of the Developing Countries*, 20 *INDIAN J. INT'L L.* 1, 10 (1980).

ment without regard for future generations.<sup>5</sup> The idea that development is not incompatible with environmental conservation had been advanced prior to the Stockholm Conference at the Seminar on Environment Development held in Founex, Switzerland, in 1971 (Founex seminar). At the Founex seminar, the notion was advanced that environmental concerns should not be a barrier to development, but part of the process; the goal was to achieve ecologically sound development, or ecodevelopment.<sup>6</sup> This notion eventually developed into the concept of sustainable development.

While the developing states have recognized that environmental considerations should form part of their development policies, they continue to emphasize that their environmental problems are different from those of the developed countries.<sup>7</sup> The gist of this concern can be found in the Ugandan Delegation leader's statement at Stockholm:

Developing countries face environmental problems different in degree from those encountered in developed countries of the world. Our fundamental problem is how to raise the material standard of life of our people to levels that are humanly decent. In other words, we are not confronted with an environment that has degenerated into pollution as a result of development. On the contrary, we are faced with an environment many of whose inherent aspects are prohibitive to development and injurious to human comfort.<sup>8</sup>

The Ugandan representative's assertion represents what the Kenyan representative categorized as the distinction between the "environmental problems of poverty," and environmental problems deriving from "the

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5. See, e.g., the statement of Shrimati Indira Gandhi:

Many of the advanced countries of today have reached their present affluence by their domination over other races and countries, the exploitation of their own masses and their own natural resources. They got a head start through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality or justice. The stirring of demands for the political [sic] rights of citizens and the economic rights of the toiler came after considerable advance had been made. . . . Now, as we struggle to create a better life for our people, it is in vastly different circumstances, for today we cannot indulge in such practices even for a worthwhile purpose.

Gandhi, *supra* note 4, at 97; see also *Statement by Head of Chinese Delegation*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 151.

6. See U.N. ENVIRONMENT PROGRAMME, *THE STATE OF THE ENVIRONMENT*, 1972-1982, at 6-7 (Nairobi 1982); see also *UNCHE REPORT*, *supra* note 1, at 38.

7. See *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 135-37, 163-69, 190-91, 241-43, 252, 264-65, 309-10, 342-43.

8. *Statement by Head of Ugandan Delegation*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 342.

excesses of affluence.”<sup>9</sup> According to this categorization, the environmental problems of poverty originate from lack of development, and the environmental problems deriving from the excesses of affluence result from industrialization and the creation of immense production capacities.

## B. The Impact of the Developing Countries on the Evolving International Environmental Law

The debates prior to the Stockholm Conference over the respective priority on the international agenda of environmental protection and industrial development, ensured that the concerns of Third World nations would be considered in the emerging law of the environment. It remained to be seen to what extent these concerns would be considered, and this was resolved by the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).<sup>10</sup>

The Stockholm Declaration recognizes that most of the environmental problems in developing countries are caused by underdevelopment and poverty, and thus those countries must place most of their efforts in development, emphasizing environmental factors.<sup>11</sup> This recognition is a factor in principles 8, 9, and 12 of the Declaration.<sup>12</sup> Principles 10 and 11 recognize the interaction of international economic

9. *Statement by Head of Kenyan Delegation*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 241.

10. *UNCHE REPORT*, *supra* note 1, at 3-5. Principles 8, 9, 10, 11 and 12 are especially relevant to the concerns of the developing nations.

11. *Id.* pt. 1, para. 4, at 3.

12. *Id.* at 4. Principle 8 provides: “Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.” *Id.*

Principle 9 provides:

Environmental deficiencies generated by the conditions of under-development and natural disasters [sic] ose [sic] grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

*Id.*

Principle 12 provides:

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

*Id.*

policies with environmental conservation, and recommend that the economic consequences of implementing environmental policies in the developing nations be met by the international community acting in concert.<sup>13</sup>

The Stockholm Declaration is merely the declaration of a conference and, since it lacks the formal requirements of a treaty, is not binding upon the signatory states. However, the norms it prescribes may be of greater import. The general acceptability of those norms by the international community, and especially their translation into national laws and subsequent treaties, makes tenable the argument that the prescriptions of the Stockholm Declaration are customary rules of international law.<sup>14</sup> Thus, it may be argued that the developing countries made an initial contribution to the emergence of the new international environmental law at its inception.

A pertinent issue is, thus, whether the influence gained by the developing countries in the formation of international environmental law, before and at the Stockholm Conference, still continues. This will be examined by evaluating the development of international environmental law since 1972. At the outset it is necessary to recognize that the international community has churned out a substantial number of international legal instruments, including treaties and "soft law," such as resolutions of international organizations and guidelines. The immense quantity of such instruments eliminates the possibility of considering them individually. Instead, this Article analyzes the emergent general themes of these instruments which empathize with the environmental

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13. *Id.* Principle 10 provides that: "For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management since economic factors as well as ecological processes must be taken into account." *Id.*

Principle 11 provides:

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living standards for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

*Id.*

14. On the question of the legal effect of resolutions of international organizations, see the opinions of Judges Lauterpacht and Klaested in *South West Africa—Voting Procedure*, 1955 I.C.J. 67 (Advisory Opinion of June 7), 84 (Klaested, J., sep. op.), 90 (Lauterpacht, J., sep. op.). See also *South West Africa, Second Phase, Judgment*, 1966 I.C.J. 6, 248 (Tanaka, J., dissenting); Bleicher, *Legal Significance of Recitation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 449-51 (1969); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 5 (1963); O. LISSITZYN, *INTERNATIONAL LAW, TODAY AND TOMORROW* (1965).

problems of the developing countries. These recurring themes in international legal instruments include the preferential treatment of developing countries, financial and technical assistance, and technology transfer. The Article concludes with a critique of the evolving international legal order on the basis of North-South divisions of common interests.

## II. PREFERENTIAL TREATMENT OF DEVELOPING COUNTRIES

In their submissions to the Stockholm Conference in 1972 and to the Nairobi Conference ten years later, the various developing countries made it clear that the needs of environmental conservation must be harmonized with those of development.<sup>15</sup> Indeed, at Stockholm, the Conference noted that developing countries could not afford to put the uncertain needs of the future ahead of their immediate needs for food, shelter, work, and health care.<sup>16</sup> Since the Stockholm Conference, the emerging international environmental law has been sensitive to this dilemma, and amenable to compromise.

The best illustration of this compromise is in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).<sup>17</sup> The Montreal Protocol, which lies within the framework of the 1985 Vienna Convention for the Protection of the Ozone Layer (Vienna Convention),<sup>18</sup> seeks to protect the stratospheric ozone layer through the control of deleterious emissions, especially chlorofluorocarbons (CFCs) and halons.<sup>19</sup> The Montreal Protocol provides for the developing countries' dilemma by allowing them to delay compliance with the mandated control measures for 10 years, so long as each country consumes less than 0.03 kilogrammes per capita.<sup>20</sup> This provision is meant to enable the developing countries to meet their basic domestic needs.

The sensitivity of the international community to their domestic needs has encouraged the developing countries to respond positively to

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15. These views have been compiled by Dr. Mostafa Tolba in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2.

16. *UNCHE REPORT*, *supra* note 1, para. 36, at 45.

17. Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, S. TREATY DOC. 10, 100th Cong., 2d Sess. (1987), *reprinted in* 26 I.L.M. 1550 (1987) [hereinafter *Montreal Protocol*].

18. Vienna Convention for the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, U.N. Doc. UNEP/IG.53/Rev.1, at 11 (1985), S. TREATY DOC. 9, 99th Cong., 1st Sess. (1985), *reprinted in* 26 I.L.M. 1529 (1987) [hereinafter *Vienna Convention*].

19. Montreal Protocol, *supra* note 17, art. 2, Annex A, *reprinted in* 26 I.L.M. at 1552, 1561.

20. *Id.* art. 5, *reprinted in* 26 I.L.M. at 1555.

the Vienna Convention and the Montreal Protocol by becoming parties to the two treaties.<sup>21</sup> Though some developing countries argue that under the municipal law principle of "the polluter pays," the ozone layer problem was not their doing, and that they should not be asked to pay for the repair,<sup>22</sup> the majority of the countries have recognized the danger which the depletion of the ozone layer portends to humanity, and have acted in solidarity with the rest of the world. The Montreal Protocol should serve as a model for future international action, and as a means of preserving the Stockholm compromise.

### III. ASSISTANCE TO IMPLEMENT INTERNATIONAL TREATIES AND OTHER STANDARDS IN THE FIELD OF THE ENVIRONMENT

Since 1972 international instruments concerning the environment have contained provisions offering assistance to developing countries, which will enable them to implement their international obligations. Two types of assistance, financial and technical, are normally provided for in recent international legal instruments.

#### A. Financial Assistance

The implementation of new international obligations requires funding. Yet, the developing countries generally have no excess funds to commit to conservation needs without impinging upon their development priorities. The choice of the developing countries was made clear by Gaafar Mohamed Nimeiri, then President of the Sudan, at the 1982 Nairobi Conference:

In the aftermath of the Stockholm Conference, two views emerged. One called for giving more attention to the development process and the other stressed attention to the environment. We in the developing countries have opted for development and rejected any measures that may impede its path. This is because development represents the only means to satisfy the basic needs of our people; food, shelter and a decent living. On the other hand, the developed countries have stressed the need to preserve the environment as a safeguard against the nega-

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21. In May 1990 the Vienna Convention had 64 Parties, of which 33 were developing countries, while the Montreal Protocol had 57 parties, of which 28 were developing countries. See U.N. Doc. UNEP/OzL.Pro.WG.111.2/Inf.6 (1990).

22. See, e.g., Schoon, *Defiant Gandhi Confronts the West Over Ozone Layer*, Independent, June 30, 1990, at 22; Wash. Post, June 27, 1990, at 34; Johnson, *India Wins Hardfought Pledge from Ozone Conference*, Reuters, June 30, 1990 (BC Cycle).



tive effects of the development process.<sup>23</sup>

The form of the provisions of various conventions for financial assistance differ. Some conventions provide for the establishment of funds for financial assistance, as well as for implementation of other objectives of the treaty or legal instrument. Others provide for mutual financial assistance among states, without providing specifically for a financial mechanism.

1. *Establishment of International Funds.* The establishment of funding mechanisms for the implementation of international environmental obligations has been deemed a necessity by the international community. Dr. Mustafa Tolba has noted:

What is at issue is an investment in the future. Nations of the World may not have a common past, but they certainly have a common future in the betterment or well being of which they have a stake. A new order of priorities based on global partnership is needed. It must be an order in which everyone, from all parts of the globe, pay their shares in a common pool of resources to combat environmental dangers."<sup>24</sup>

As far back as 1971 the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage<sup>25</sup> established a fund to ensure the payment of adequate compensation to persons suffering from oil pollution damage, and to indemnify ship owners for such liability.<sup>26</sup> Whereas this fund deals with the cure of deleterious environmental effects, without regard to whether a country is developing or not, there have also been attempts at creating funds directed at the needs of encouraging conservation. The World Heritage Fund, established under the Convention Concerning Protection of the World Cultural and Natural Heritage of 1972,<sup>27</sup> applies to the conservation of property containing cultural or natural heritage of outstanding value, situated in the territory of a party to the Convention, upon the application of the party.<sup>28</sup>

In recent years, the recognition of the needs of poorer nations has

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23. Nimeri, *Statement by the President of the Democratic Republic of the Sudan*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 84.

24. M. TOLBA, *TRANSFER OF TECHNOLOGY AND THE FINANCING OF GLOBAL ENVIRONMENTAL PROBLEMS: THE ROLE OF USERS FEES*, at 22-24, U.N. Doc. UNEP/OzL.Fin.1/2 (1990) [hereinafter M. TOLBA, *TRANSFER OF TECHNOLOGY*].

25. A.C. KISS, *SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENVIRONMENT*, at 255, U.N. Doc. UNEP/GC/INF/Z/Ser.A/43 (1983). Article 4 describes the Fund.

26. *Id.* arts. 2, 4, 5, at 256-57.

27. *Id.* art. 15, at 279-80.

28. *Id.* art. 19, at 280.

led to a multiplicity of proposals for the establishment of new funding mechanisms. The most recent achievement in this area is the financial mechanism contained in the 1990 Amendment to the Montreal Protocol.<sup>29</sup> This fund was established to provide financial transfers and technical cooperation to parties which are developing countries, which enables them to comply with the control measures of the Montreal Protocol.<sup>30</sup> The financial mechanism includes a multilateral fund which is operated under the authority of the Executive Committee and financed by contributions from the parties. The fund also acts as a "clearinghouse" mechanism for channeling bilateral and multilateral aid from other sources to the developing countries. At the first meeting of the Executive Committee of the Multilateral Fund, it was decided that the Fund Secretariat would have Montreal as its venue.<sup>31</sup>

The Montreal Protocol's multilateral fund indicates an emerging trend in the evolution of environmental relations between Northern and Southern nations. A financial mechanism is one of the acceptable elements for inclusion in the proposed Global Convention on the Conservation of Biological Diversity. At its second session, held in Geneva in February 1990, the ad hoc Working Group of Experts on Biological Diversity (Group of Experts) noted that:

On financial matters, there was a consensus that those who enjoy most the economic benefits of biological diversity should contribute equitably to its conservation and sustainable management. A new partnership should be developed and in this context funding for developing countries should be characterized as co-operation among countries. There was also general agreement that an international legal investment without firm commitments to funding to meet the conservation costs would be meaningless.<sup>32</sup>

The Group of Experts also insisted that the conservation funds must be "new and additional," that is to say such funds should not be subtracted from existing funds for other development assistance.<sup>33</sup>

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29. See *Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Environment Programme (Agenda Item 7), U.N. Doc. UNEP/OzL.Pro.2/3, Annex II (1990) [hereinafter *London Amendments*].

30. *Id.* art. 10.

31. See *Draft Report of the First Meeting of the Executive Committee of the Multilateral Fund Under the Montreal Protocol*, at 19-21, U.N. Doc. UNEP/OzL.Pro.Ex.Com.1/L2 (1990).

32. See *Report of the ad hoc Working Group of Experts on Biological Diversity on the Work of Its Second Session in Preparation for a Legal Instrument on Biological Diversity of the Planet*, at 6, U.N. Doc. UNEP/Bio.Div.2/3 (1990) [hereinafter *Report on Biological Diversity*].

33. *Id.*

"Additionality," as this process of providing new funds has been called, has spread beyond mere sectoral and limited concerns. What is envisaged is wider coverage, provided by new funding, of all aspects of the environmental relations between North and South. In a recent speech to the Preparatory Committee for the 1992 United Nations Conference on Environment and Development, the Secretary General for the conference, Mr. Maurice Strong, described the provisions for additional funding and for access to technologies which will enable developing countries to integrate environmental concerns into their development strategies, and therefore to participate fully in international environmental cooperation, as "the principal challenge we face."<sup>34</sup> He further emphasized the importance of additionality:

Additionality is no mere political slogan. It reflects the stark reality that however much developing countries may recognize that investment in sustainable development makes sense in terms of their long term economic and environmental interests, they simply cannot afford the additional funds this will often require in the short term. It is in everyone's interest that they have access to these additional funds and to the most environmentally sound technologies. The sooner this is done, the less it will cost, environmentally and economically.<sup>35</sup>

The recognition of the need for funding for environmental causes in developing countries has led the international community to look towards a general fund for this purpose. The World Bank has taken the most positive initiative by establishing a Global Environmental Facility (GEF), which was originally suggested by the governments of France and Germany.<sup>36</sup> The GEF is intended to assist developing countries implement programs which protect the global environment, and which could not otherwise be supported by existing development assistance or environmental programs.<sup>37</sup> The GEF would make funds available on a grant basis.<sup>38</sup> The GEF will begin as a pilot program only in the area of ozone layer protection, where it will be used to assist developing countries make the transition from the use and production of CFCs to available substitutes, thus limiting the emissions of greenhouse gases, and protecting biodiversity and international waters.<sup>39</sup> The GEF will be im-

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34. M.F. Strong, Remarks at the Opening of the First Meeting of the Preparatory Committee for the 1992 United Nations Conference on Environment and Development (1992).

35. *Id.* at 11.

36. See The World Bank, Funding for the Global Environment: The Global Environmental Facility (Nov. 1990) (internal discussion paper).

37. *Id.* at 2.

38. *Id.* at 17.

39. *Id.* at 1.

plemented by the World Bank, United Nations Environment Programme (UNEP) and United Nations Development Programme (UNDP); the World Bank will act as the administrator of a trust fund, while UNEP and UNDP act as strategic planners, ensuring that GEF projects are carried out, and harmonizing the respective needs of environmental conservation and economic development.<sup>40</sup>

2. *Other Modalities for Financial Assistance Within Legal Frameworks.* Not all international instruments specifically lay out the financial assistance mechanisms necessary for their implementation in developing countries. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), defers the establishment of a revolving fund, which would assist the movement of hazardous wastes in emergency situations, to future consideration by the parties.<sup>41</sup> The same position is taken on voluntary funding mechanisms for the transfer of technologies, and for training in the management and generation of hazardous wastes.<sup>42</sup>

Despite the fact that some international conventions do not even mention financial mechanisms,<sup>43</sup> necessity has led to innovations which provide them, since the provisions of most such instruments require finances to be implemented. For example, within various conventions for which the Executive Director of UNEP serves as Secretariat, United Nations Trust Funds, which include provisions for technical assistance to developing countries which are parties, have been set up to ensure the convention's implementation.<sup>44</sup>

3. *Financial Assistance Outside the Legal Frameworks of International Cooperation.* Aside from funds required to implement international programs, vast funds are committed to developing countries by the industrial nations through bilateral cooperation schemes and informal procedures, such as the Committee of International Development Institutions on Environment (CIDIE). CIDIE is composed of sixteen multi-

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40. *Id.* at 11.

41. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, U.N. Environment Programme (Agenda Item 3), art. 14., para. 2 U.N. Doc. UNEP/IG.80/3 (1989), *reprinted in* 28 I.L.M. 657, 670 (1989) [hereinafter *Basel Convention*].

42. *Id.* art. 14, para. 1, *reprinted in* 28 I.L.M. at 670.

43. See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 245; Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, *reprinted in* 19 I.L.M. 15 (1980).

44. See U.N. ENVIRONMENT PROGRAMME, ENVIRONMENTAL LAW IN THE UNITED NATIONS ENVIRONMENT PROGRAMME 4 (Nairobi 1990).

lateral financing institutions which meet annually to discuss the implementation of CIDIE objectives. One main objective is the amelioration of environmental concerns through providing financial assistance to development programs in developing countries.<sup>45</sup>

Bilateral assistance is also provided through "clearinghouse" mechanisms of international organizations such as the UNEP.<sup>46</sup>

## B. Technical Assistance

The term "technical assistance," as used here, is intended to refer to all forms of international cooperation and collaboration, other than purely commercial relations, between North and South, in which the nations of the South gain from the technical prowess of the North. Thus, the concept of technical assistance differs from one legal instrument to the other. Under the Basel Convention, technical assistance is used to promote public awareness in developing countries of low-waste technologies, as well as sound management of hazardous and other wastes.<sup>47</sup>

Under the Vienna Convention, the parties are required to cooperate, either directly or through competent international bodies, in the conducting of research and scientific assessments of the ozone layer, its properties, and the effects of its depletion,<sup>48</sup> and to exchange information relevant to the Vienna Convention.<sup>49</sup> While developing nations are not specifically mentioned in the Vienna Convention, they would most likely benefit from such cooperation. The Montreal Protocol, on the other hand, originally provided for technical assistance to developing countries in order to facilitate their participation in the Montreal Protocol.<sup>50</sup> This provision has since been replaced by financial mechanisms to the

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45. The author is grateful here to the work of Thomas P. Ehrnman, Intern in the Office of the Executive Director of UNEP in July 1990, and student at the Nairobi International Law Institute, who wrote an inspiring term paper titled *Sustainable Development: Perspectives for the Future and the Objectives and Impact of CIDIE* (unpublished). See also UNEP Governing Council Dec. 13/16, 40 U.N. GAOR Supp. (No. 25) at 49, U.N. Doc. A/40/25 (1985); UNEP Governing Council Dec. 14/7, 42 U.N. GAOR Supp. (No. 25) at 38, U.N. Doc. A/42/25 (1987).

46. UNEP Governing Council Dec. 10/4, 37 U.N. GAOR Supp. (No. 25) at 90, U.N. Doc. A/37/25 (1982); UNEP Governing Council Dec. 10/25, 37 U.N. GAOR Supp. (No. 25) at 110, U.N. Doc. A/37/25 (1982); UNEP Governing Council Dec. 12/4, 39 U.N. GAOR Supp. (No. 25) at 26, U.N. Doc. A/39/25 (1984); UNEP Governing Council Dec. 14/6, 42 U.N. GAOR Supp. (No. 25) at 67, U.N. Doc. A/42/25 (1987); UNEP Governing Council Dec. 15/14, 44 U.N. GAOR Supp. (No. 25) at 131, U.N. Doc. A/44/25 (1989).

47. Basel Convention, *supra* note 41, art. 10, para. 4, *reprinted* in 28 I.L.M. at 668.

48. Vienna Convention, *supra* note 18, art. 3, at 21-22, *reprinted* in 26 I.L.M. at 1530.

49. *Id.* art. 4, at 14-15, *reprinted* in 26 I.L.M. at 1530-31.

50. Montreal Protocol, *supra* note 17, art. 10, *reprinted* in 26 I.L.M. at 1557.

same end.<sup>51</sup>

The London Guidelines for the Exchange of Information on Chemicals in International Trade (the Guidelines)<sup>52</sup> goes further than the treaties, and provides for detailed aspects of international cooperation.<sup>53</sup> The Guidelines provide for the exchange of scientific information and assistance in order to ensure sound management of dangerous chemicals.<sup>54</sup> They also call upon states to provide financial assistance, develop regulatory schemes for control of chemicals, strengthen existing legal infrastructure and institutions, and provide training for chemical experts in developing countries.<sup>55</sup>

Such provisions for technical assistance may also be found in other legal instruments developed within UNEP.<sup>56</sup>

#### IV. TECHNOLOGY TRANSFER

At the same time that the emergence of environmental consciousness has made the environment a major global issue, a consciousness of the global division of wealth between the rich and the poor nations, and the developed and developing nations along the North-South divide, has also emerged. The rejection of colonialism and imperialism in general, and the consequent independence of colonized people around the world, has urged the creation of a new, more just and equitable world economic order. The early debates on the issue of development and environmental protection stemmed from the suspicions of the less developed countries that the new Northern environmental movement would undermine their struggle for a more equitable international economic balance. The essence of those suspicions was expressed by the developing countries at the Stockholm Conference.<sup>57</sup>

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51. *London Amendments*, *supra* note 29, art. 10A, at 14.

52. See U.N. Environment Programme, *Environmental Law Guidelines and Principles No. 10: Exchange of Information on Chemicals in International Trade* [London Guidelines], adopted by UNEP Governing Council Dec. 15/30, 44 U.N. GAOR Supp. (No. 25) at 157, U.N. Doc. A/44/25 (1989).

53. *Id.* pt. III.

54. *Id.* art. 13.

55. *Id.* art. 15.

56. See, e.g., U.N. Environment Programme, *Environmental Law Guidelines and Principles No. 7: Marine Pollution From Land-Based Source* [Montreal Guidelines], art. 9, adopted by UNEP Governing Council Dec. 13/18, 40 U.N. GAOR Supp. (No. 25) at 51, U.N. Doc. A/40/25 (1985); U.N. Environment Programme, *Environmental Law Guidelines and Principles No. 8: Environmentally Sound Management of Hazardous Wastes* [Cairo Guidelines], arts. 5, 6, 28, adopted by UNEP Governing Council Dec. 14/30, 44 U.N. GAOR Supp. (No. 25) at 83, U.N. Doc. A/42/25 (1987).

57. See generally EVOLVING ENVIRONMENTAL PERCEPTIONS, *supra* note 2.

One of the keystone requirements of a new international economic order is the transfer of technology from North to South.<sup>58</sup> In the Charter of Economic Rights and Duties of States,<sup>59</sup> the United Nations General Assembly stated its desire, in order to bridge the gap between the developing and developed nations, to contribute to the acceleration of economic growth in developing countries.<sup>60</sup> It also enunciated the right of all states to benefit from the advances of science and technology in achieving economic and social development, through the promotion, development, and transfer of technology.<sup>61</sup> In its Declaration of the Establishment of a New International Economic Order,<sup>62</sup> the General Assembly also reemphasized technology transfer as one of the principles upon which a new economic order would be based.<sup>63</sup>

Thus, it is not surprising that technology transfer is always a component in international instruments concerning the environment.<sup>64</sup> In the instruments negotiated under the auspices of UNEP, however, a different

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58. See the Statement of Kuwait at the Stockholm Conference:

Development versus pollution is a vexing problem. The rich countries got to where they are now by relying on a technology that was largely polluting. This is the technology available at present for development. In my opinion the most important way the rich and industrialized countries can help developing nations is by conducting research to find non-polluting development methods. The developing countries would welcome non-polluting technology offered at a reasonable price. No one has any special wish to pollute the environment. But if we cannot get a clean technology development will continue to cause environmental pollution. No developing country can seriously be expected to adopt a strategy of zero development. If we cannot offer a non-polluting technology to developing countries most of the recommendations arrived at here will go largely unheeded.

*Statement by Head of Kuwaiti Delegation*, in *EVOLVING ENVIRONMENTAL PERCEPTIONS*, *supra* note 2, at 252.

59. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 51, U.N. Doc. A/9631 (1974), *reprinted* in 14 I.L.M. 251 (1975).

60. *Id.* at 51, *reprinted* in 14 I.L.M. at 253.

61. *Id.* art. 13, at 53, *reprinted* in 14 I.L.M. at 257.

62. G.A. Res. 3201, 29 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/3201 (1974), *reprinted* in 13 I.L.M. 715 (1974).

63. *Id.* art. 4(p), at 4, *reprinted* in 13 I.L.M. at 718.

64. See, e.g., Basel Convention, *supra* note 41, art. 10, para. 2(d), *reprinted* in 28 I.L.M. at 668; Vienna Convention, *supra* note 18, art. 4, para. 2, at 15, *reprinted* in 28 I.L.M. at 1531. Technology transfer is also envisaged in the proposed Convention on the Conservation of Biological Diversity. See *Report on Biological Diversity*, *supra* note 32, at 12. See also *Report of the Ad Hoc Working Group of Experts on Biological Diversity on the Work of Its Third Session in Preparation of a Legal Instrument on Biological Diversity of the Planet*, at 8-11 (1990); *Elements For Inclusion in a Global Framework Legal Instrument on Biological Diversity*, at 15-17 (Nov. 19-23, 1990) (paper submitted to the Meeting of the ad hoc Working Group of Legal and Technical Experts on Biological Diversity) [hereinafter *Legal Instrument on Biological Diversity*]. Of the UNEP Guidelines and Principles, see *Cairo Guidelines*, *supra* note 56, art. 5; *London Guidelines*, *supra* note 52, art. 13.

approach is taken from that of the General Assembly. In the 1970s the General Assembly took the position that developing countries possessed a right to be given technology by the developed countries, on the basis of appeals to higher metaphysical ideals. UNEP took a more realistic approach, summarized by its Executive Director, Dr. Mostafa Tolba, thus:

The challenge is to find technology transfer mechanisms as innovative as the technologies themselves. A balance among development objectives, environmental protection and patent rights must be struck. Owners of industrial property cannot be expected to surrender hard-won technological advantages freely. Innovative thinking is needed to resolve private claims on patents, trademarks and industrial property rights and a code of conduct for the transfer of environmentally-benign technologies.<sup>65</sup>

One solution championed by UNEP is the creation of financial mechanisms under international treaties to assist developing countries in the purchase of technology, if the continued use of older technologies would lead to deleterious results on the global environment.<sup>66</sup> Dr. Tolba has stated that:

It would appear, however, that in the last analysis success in effecting a meaningful transfer of technology will depend upon finding new approaches and modalities for ensuring an enhanced flow of financial resources to make the sharing of technological options a viable objective.<sup>67</sup>

Following the UNEP approach, recent amendments to the Montreal Protocol go as far as providing funds for the acquisition of technology by developing countries.<sup>68</sup>

Another approach taken by UNEP is to posit the transfer of technology to developing countries as a value against the access to their resources by developed countries. In one UNEP Governing Council decision, where the Council empowered the Executive Director to commence negotiations for an international instrument on biological diversity, the council noted that:

... the economic dimension, including *inter alia*, the question of ade-

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65. Tolba, *Sustainable Industrial Development*, INDUS. & ENV'T, July-Dec. 1989, at 2.

66. In its decision of June 18, 1987, the Governing Council of UNEP called upon "[g]overnments to promote the commercial exchange and transfer of environmental protection technology, and direct industrial contacts in the field of environmental protection technology." UNEP Governing Council Dec. 14/16, 42 U.N. GAOR Supp. (No. 25) at 67, U.N. Doc. A/42/25 (1987).

67. M. TOLBA, TRANSFER OF TECHNOLOGY, *supra* note 24, para. 3, at 1.

68. *London Amendments*, *supra* note 29, arts. 10, 10A, at 12-14.



quate machinery for financial transfers from those who benefit from the exploitation of biological diversity, including through the use of genetic resources in biotechnology development, to the owners and managers of biological resources, and appropriate measures to facilitate the transfer of technical means of utilizing biological diversity for human benefit, will need to be properly considered in the negotiations of any future legal instrument for the conservation of biological diversity.<sup>69</sup>

The issue of technology transfer, and the financial mechanisms for that purpose, have been discussed extensively in the ongoing negotiations leading to the Biological Diversity Convention.<sup>70</sup> Hopefully, the financial mechanisms adopted for that proposed convention will provide funds for technology transfer, thus following the trend set by the multilateral fund established under the Montreal Protocol.

## V. A CRITIQUE OF THE EVOLVING INTERNATIONAL ENVIRONMENTAL LAW

The current direction of development in international environmental law has been encouraging. The acrimony and climate of suspicion and confrontation of the past has given way to an era of cooperation between the developing and the developed nations. The sensitivity shown in environmental legal instruments to the needs of developing countries has encouraged these nations to recognize the global nature of environmental problems.<sup>71</sup> Thus, the developing nations now freely participate in international treaties and arrangements aimed at safeguarding the global environment.

Nevertheless, the emergence of this common purpose of global environmental problem solving cannot blind a serious student of international law and policy to some serious issues. Considering what has been called the "severe dualism of the human species,"<sup>72</sup> a condition wrought upon the international society by different needs, levels of development and aspirations, and evidenced in the divide between the affluent North

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69. See UNEP Governing Council Dec. 15/34, 44 U.N. GAOR Supp. (No. 25) at 162, U.N. Doc. A/44/25 (1989).

70. See Legal Instrument on Biological Diversity, *supra* note 64.

71. See, e.g., *Statement by Head of Kenyan Delegation*, *supra* note 19, at 243 ("Many have spoken of the grave dangers of pollution to our very existence. Pollution knows no boundaries, colour or creed. It is all pervasive. It is inescapable if man in his folly does not use his faculties to the full for his own salvation.").

72. Kothari, *Environment and Development in Asia and the Pacific: Experience and Prospects*, UNEP REPORTS & PROCEEDINGS (Series 6) at 31 (1982).

and the poor South, it is pertinent to query whose substantive interests the current international legislative record and agenda favor.

#### A. The Current International Legislative Agenda

Within UNEP, the current legislative agenda on environmental law was established at the Conference of Senior Government Officials Expert in Environmental Law.<sup>73</sup> The Experts agreed on the Program for the Development and Periodic Review of Environmental Law, otherwise known as the Montevideo Program.<sup>74</sup>

The main elements of this program consist of major areas of concern, such as marine pollution from land-based sources, protection of the stratospheric ozone layer, and the transport, handling, and disposal of toxic and dangerous wastes.<sup>75</sup> The experts recommended that guidelines, principles, and agreements should be developed in these major areas.<sup>76</sup> The program also identified other subject areas which called for action.<sup>77</sup> These included international cooperation in environmental emergencies, coastal zone management, soil conservation, transboundary air pollution, ozone protection, climate change, international trade in potentially harmful chemicals, protection of rivers and other inland waters against pollution, legal and administrative mechanisms for the prevention and redress of pollution damage, and environmental impact assessment.<sup>78</sup>

Since 1981 UNEP has registered fundamental successes in the development of law in these areas of environmental concern. Three global treaties have been achieved. The Vienna Convention and the Montreal Protocol have both entered into force and govern in the area of ozone layer protection. The progressive development of the Montreal Protocol has led to its 1990 Amendment.<sup>79</sup> In the field of hazardous wastes, the Basel Convention is controlling. Nonbinding international guidelines of global scope have been adopted in the field of marine pollution from land-based sources.<sup>80</sup> Meanwhile, regional protocols within the frame-

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73. Convened by the Executive Director at Montevideo, Uruguay from October 28 to November 6, 1981. See U.N. ENVIRONMENT PROGRAMME, THE MONTEVIDEO PROGRAMME FOR THE DEVELOPMENT AND PERIODIC REVIEW OF ENVIRONMENTAL LAW (Nairobi, 1982).

74. The Program was adopted by the UNEP Governing Council at its Tenth Session in May 1982. See UNEP Governing Council Dec. 10/21, 37 U.N. GAOR Supp. (No. 25) at 108, U.N. Doc. A/37/25 (1982).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *London Amendments*, *supra* note 29.

80. See *Montreal Guidelines*, *supra* note 56.

work of the regional seas conventions<sup>81</sup> have been adopted or are being developed.<sup>82</sup>

Legal instruments have also been developed in the other subject areas identified at Montevideo. A global climate change convention is under preparation,<sup>83</sup> and regional seas conventions have been developed to cover the area of coastal zone management.<sup>84</sup> International guidelines

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81. See *infra* note 84.

82. See Protocol for the Protection of the Mediterranean Sea Pollution from Land-Based Sources, May 17, 1990 (unpublished); Protocol for the Protection of the South-East Pacific Against Pollution from Land-Based Sources, done July 22, 1983, reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA, Doc. J. 18, at 25 (K.R. Simmonds loose-leaf ed. Sept. 1984).

83. See UNEP Governing Council Dec. 15/36, 44 U.N. GAOR Supp. (No. 25) at 167, U.N. Doc. A/44/25 (1989), in which the Executive Director of UNEP and the Secretary General of the World Meteorological Organization were requested to begin preparations for negotiations on a framework Convention on Climate.

84. Conventions have been developed on the basis of eight action plans as follows:

- (1) Mediterranean Action Plan: Convention for the Protection of the Mediterranean Sea Against Pollution, done Feb. 16, 1976, reprinted in 15 I.L.M. 290 (1976); Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, Feb. 16, 1976, reprinted in 15 I.L.M. 300 (1976); Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency, Feb. 16, 1976, reprinted in 15 I.L.M. 306 (1976); Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, done May 10, 1980, reprinted in 19 I.L.M. 896 (1980); Protocol concerning Mediterranean Specially Protected Areas, done Apr. 3, 1982, reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA, Doc. J. 20, at 3 (K.R. Simmonds Loose-leaf ed. Sept. 1984).
- (2) Kuwait Action Plan: Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, Apr. 24, 1978, reprinted in 17 I.L.M. 511 (1978); Protocol Concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency, done Apr. 24, 1978, reprinted in 17 I.L.M. 526 (1978).
- (3) West and Central African Action Plan: Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, done Mar. 23, 1981, U.N. Doc. UNEP/IG.22/7 (1981), reprinted in 20 I.L.M. 746 (1981); Protocol concerning Co-operation in Combating Pollution in Cases of Emergency, Mar. 23, 1981, U.N. Doc. UNEP/IG.22/7 (1981), reprinted in 20 I.L.M. 756 (1981).
- (4) South-East Pacific Action Plan: Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, done Nov. 12, 1981, reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA, Doc. J. 18, at 3 (K.R. Simmonds loose-leaf ed. Sept. 1984); Agreement on Regional Co-operation in Combating Pollution of the South-East Pacific by Hydrocarbons or Other Harmful Substances in Cases of Emergency, Nov. 12, 1981, reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA, Doc. J. 18, at 13 (K.R. Simmonds loose-leaf ed. Sept. 1984); Supplementary Protocol to the Agreement on Regional Co-operation in Combating Pollution of the South-East Pacific by Hydrocarbons or Other Harmful Substances, done July 22, 1983, reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA, Doc. J. 18, at 19 (K.R. Simmonds loose-leaf ed. Sept. 1984); Protocol for the Protection of the South-East Pacific against Pollution from Land-Based Sources, done July 22, 1983, reprinted in 2 NEW DIRECTIONS IN THE LAW OF THE SEA, Doc. J. 18, at 25 (K.R. Simmonds loose-leaf ed. Sept. 1984); Protocol for the Conservation and Man-

and principles have been developed in the areas of international trade in potentially harmful chemicals<sup>85</sup> and environmental impact assessments.<sup>86</sup> Work in the protection of rivers and inland waters has led to one notable agreement concerning the river Zambezi.<sup>87</sup> Beyond the Montevideo Program, work is continuing on the proposed Convention on the Conservation of Biological Diversity.

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agement of Protected Marine and Coastal Areas of the South-East Pacific, *done* Sept. 21, 1989, *reprinted in* United Nations, *LAW OF THE SEA BULL.*, May 1990, at 47, and in 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 35, at 3 (K.R. Simmonds loose-leaf ed. Sept. 1990); Protocol for the Protection of the South-East Pacific against Radioactive Contamination, Sept. 21, 1989, *reprinted in* United Nations, *LAW OF THE SEA BULL.*, May 1990, at 47, and in 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 34, at 3 (K.R. Simmonds loose-leaf ed. Sept. 1990).

- (5) Red Sea and Gulf of Aden Action Plan: Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, Feb. 14, 1982, *reprinted in* 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 19, at 3 (K.R. Simmonds loose-leaf ed. Sept. 1984); Protocol concerning Regional Co-operation in Combating Pollution by Oil and Other Harmful Substances in Cases of Emergency, Feb. 14, 1982, *reprinted in* 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 19, at 17 (K.R. Simmonds loose-leaf ed. Sept. 1984).
  - (6) Caribbean Action Plan: Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, *done* Mar. 24, 1983, *reprinted in* 22 *I.L.M.* 227 (1983); Protocol concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region, Mar. 24, 1983, *reprinted in* 22 *I.L.M.* 240 (1983); Protocol concerning Specially Protected Areas and Wildlife, Jan. 18, 1990, *reprinted in* 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 36, at 3 (K.R. Simmonds loose-leaf ed. Sept. 1990).
  - (7) East African Action Plan: Convention for the Protection, Management and Development of the Eastern African Region, June 21, 1985, *reprinted in* 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 26, at 3 (K.R. Simmonds loose-leaf ed. Sept. 1986); Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, June 21, 1985, *reprinted in* 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 26, at 17 (K.R. Simmonds loose-leaf ed. Sept. 1986); Protocol concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region, June 21, 1985, *reprinted in* 2 *NEW DIRECTIONS IN THE LAW OF THE SEA*, Doc. J. 26, at 29 (K.R. Simmonds loose-leaf ed. Sept. 1986).
  - (8) South Pacific Regional Environment Program: Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, *reprinted in* 26 *I.L.M.* 38 (1987); Protocol concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region, Nov. 25, 1986, *reprinted in* 26 *I.L.M.* 59 (1987); Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, Nov. 25, 1986, *reprinted in* 26 *I.L.M.* 65 (1987). Note also that Conventions are being developed in the action programs for South Asian Seas and the South East Asian Seas.
85. *London Guidelines*, *supra* note 52.
86. U.N. Environment Programme, *Environmental Law Guidelines and Principles No. 9: Environmental Impact Assessment*, adopted by UNEP Governing Council Dec. 14/25, 42 U.N. GAOR Supp. (No. 25) at 78, U.N. Doc. A/42/25 (1987).
87. Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, *done* May 28, 1987, *reprinted in* 27 *I.L.M.* 1109.

While these successes are of great import, an observer cannot fail to notice that they mainly address the fields and areas which are chiefly the concern of the developed countries. The protection of the ozone layer, global climate change, marine pollution, and the trade and movement of hazardous wastes are issues which generally excite the interest of Northern environmentalists. Southern environmental interests are of a more realistic nature, and deal with the day to day interests of humankind. Thus, in the area of hazardous wastes, the salient issue is the management of wastes generated within a state, rather than trade in extraterritorial wastes. Instead of concerns over global climate change, the hunger and poverty at a Southern nation's doorstep would command its greater attention, along with the provision of safe drinking water, improvement of rural areas, and problems associated with rapid urbanization.

This does not suggest, however, the repudiation by the developing nations of the global nature of the environmental problems addressed by international law. Nor is it a rejection of efforts to preserve the environment for future generations by redressing these problems. It is the rejection of a myopic world view in which part of humanity has the impunity to consider remedying the future problems of humankind, while rejecting the realities of the present, in which a substantial part of humanity has no future prospects. It is presumptuous to speak of intergenerational equity when there is no intragenerational equity.<sup>88</sup>

There could be no greater disservice to the human species than the passing of present intragenerational inequities to future generations. This disservice lies not in the morality of the deed, but rather in the fact that the earth's single environment is crucial to the survival of humanity as a whole. Without righting the wrongs of today, and extinguishing present inequalities, there will remain nothing to bequeath to the future.

In a recent speech calling for a "just Global Society," Dr. Tolba has stated that:

A global society is taking shape. One whose commerce is geared to the contours of the global marketplace. One whose foundation rests upon the gifts of the global environment. But if the global society is to have any meaning, it must exceed definition limited to geography and scale alone. It must embody a common ideal and a cohesive philosophy. It must be defined by the ethical and moral principles it embraces. The global society must be strong enough to propel widely divergent na-

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88. For a very Western vision of an environmental order which advocates improving and conserving the world for the future, see Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495 (1984).

tional histories, suspicions and aspirations towards a common future.<sup>89</sup>

A just global society cannot be founded upon a common ideal and a comprehensive philosophy if these are divorced from economic realities. Indeed, if a just global order were founded on the contours of the present global marketplace, it would be an aberration of justice. The present world order is inimical to the conservation of the gifts of the environment, because its inherent inequalities are conducive to the despoliation of those gifts.

The philosophy of a common ideal, and vague promises of a common future are not founded on any common present, and thus cannot help us achieve current goals. A new environmental order is necessary which is comprehensive enough to address the problems of dualism between rich and poor in the existing order. This order must incorporate the lofty aspirations of an international economic order, which would ensure global equity and, in turn, a comprehensive global approach towards environmental conservation.

#### **B. Evolving A New Environmental Order: Redressing the Environmental Afflictions of the South**

A new and realistic international environmental order should, as a basic necessity, ensure equal attention to the environmental problems of both North and South. The current philosophy, summarized in the old adage, "he who pays the piper calls the tune," must be abandoned, and globalism must replace the drive for national benefit and advantage. Dualism must be replaced by interdependence in a world order which calls for "Co-operation instead of confrontation, [and] the great concern for the poor and underprivileged of the world."<sup>90</sup> The politics of interdependence in the context of a new international environmental order is not a pious hope, it is becoming a given. The threatening buildup of greenhouse gases, and expectations of a resultant global climate change, have already led to a greater affinity between the people of metropolitan North America and the denizens in Central Africa and Equatorial America. The disappearance of rain forests has raised Northern concerns for survival. The felling of each tree reduces the size of what has been aptly called "our earth's lungs,"<sup>91</sup> and represents a countdown to the extinction of life. The rising anger against those who harvest trees, however,

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89. See M. Tolba, Global Environmental Justice, UNEP Information Green Paper No. 1, at 1 (Aug. 1990) (speech delivered at Kenyatta University, Nairobi, Kenya).

90. Kothari, *supra* note 72, at 33.

91. M. Tolba, *supra* note 89, at 6.

will not save the planet. Rather, we must understand the economic pressures which lead to them to harvest the rain forests. In their eyes, there is no moral wrong in this act, since it is necessary to their own survival. The international community must act in concert to provide alternative modes of survival to the harvesting of rain forests. This could be achieved through economic development of these regions, which, in turn, would lead to the saving of a common necessity, one of the earth's sinks for carbon dioxide.

In examining the direction of the current international legislative agenda, an inescapable conclusion is that certain important environmental issues have not been given the emphasis they deserve. These unaddressed issues are mostly those dearest to the developing countries: desertification and soils, shelter and urbanization, management of wastes, food security and sustainable agriculture, environmental emergencies, and other problems arising from poverty. While some recent international policy documents dwell on these issues,<sup>92</sup> they remain in the realm of pure policy and have not become a part of the legislative agenda. Concrete steps must be taken to translate these policies into legal obligations.

## VI. CONCLUSIONS: RAISING THE ISSUES OF THE SOUTH

One notable factor in the lack of predominance of Southern concerns in the international environmental agenda is the lack of a champion of those issues. In this way, the South has been its own greatest enemy. International fora have not off-handedly rejected redressing the environmental problems of poverty. Rather, these issues have not been raised with the urgency they require, by the parties most concerned.

Thus, certain of the Executive Director of UNEP's initiatives have not received the support necessary to make them international conventions. One such failed initiative was a proposed convention on notification and assistance in case of industrial accidents, which was initiated in the aftermath of the explosion of the Union Carbide plant in Bhopal, India. The UNEP Governing Council degraded this effort from the development of global conventions to a program of "Awareness and

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92. See, e.g., *The Environmental Perspective to the Year 2000 and Beyond*, UNEP Governing Council Dec. 14/13, 42 U.N. GAOR (Supp. No. 25) at 54, U.N. Doc. A/42/25 (1987), adopted by G.A. Res 42/186, 42 U.N. GAOR Supp. (No. 49) at 141, U.N. Doc. A/42/49 (1987). See also World Comm'n on Env't and Dev., *Our Common Future*, U.N. Doc. UNEP/GC.14/13 (1987), reprinted in 10 Int'l Env't Rep. (BNA) 201 (1987), adopted by G.A. Res. 42/187, 42 U.N. GAOR Supp. (No. 29) at 154, U.N. Doc. A/42/49 (1987).

Preparedness for Industrial Accidents at the Local Level" (APELL).<sup>93</sup> The Governing Council also called upon the Executive Director to facilitate the exchange of information and technology necessary for the prevention of industrial accidents, and to provide assistance in case of emergencies through the establishment of a network of organizations and experts.<sup>94</sup>

The failure of the developing countries to insist upon a convention in a matter of such great importance to them, especially in view of the Bophal disaster and in view of the fact that the obsolete technologies used by multinational companies in the developing countries are often lethal to humanity and the environment, exemplifies the lack of environmental activism in their governments, and speaks volumes about missed opportunities. This lack of will and zeal in the South to champion their own environmental problems in the global arena is saddening when compared with the reaction of the developed countries to the meltdown at the Chernobyl nuclear power plant in the USSR. Under the auspices of the International Atomic Energy Agency (IAEA), two conventions on assistance and notification in case of a nuclear accident were developed and adopted, and have since entered into force.<sup>95</sup>

Other missed opportunities for concrete action on environmental issues of importance to the South abound.<sup>96</sup> But one lesson is clear: the search for a new, more just international environmental order must emphasize a concerted assertion of the South's environment problems. The developing world's environmental problems are as global as those of the industrialized North. The key solution to such global problems lies in worldwide cooperation and understanding.

With such a realistic interdependence, concerted action would ensure that the wealth and affluence of the North trickle slowly into the South, and the poverty of the South, with its attendant environmental

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93. See UNEP Governing Council Dec. 15/39, 44 U.N. GAOR Supp. (No. 25) at 170, U.N. Doc. A/44/25 (1989).

94. *Id.*

95. Convention on Early Notification of a Nuclear Accident, *done* Sept. 26, 1986, *reprinted* in 25 I.L.M. 1370 (1986); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, *done* Sept. 26, 1986, *reprinted* in 25 I.L.M. 1377 (1986).

96. The best example of this is the case of the environmental impact assessment. In spite of the Executive Director's recommendation that a Convention be developed on the subject, the Governing Council at its Fifteenth Session showed no interest, and instead "[c]all[ed] upon Governments to intensify the use of Goals and Principles of Environmental Impact Assessment, [and] [a]uthorize[d] the Executive Director to continue [consultations with] Governments and relevant international organizations on modes of further development in this field." UNEP Governing Council Dec. 15/41, 44 U.N. GAOR Supp. (No. 25) at 171, U.N. Doc. A/44/25 (1989).



problems, is vanquished. As long as the South fails to articulate its problems, however, it is a duty, born out of a common humanity, for the North to champion the cause of a better world in a holistic sense.