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In this symposium essay, I intend to explore the origins and influence of international environmental norms. I believe I can identify twenty norms as either prevailing or rising norms of global environmental law.

Norm One: *Sic Utere Tuo*

The first norm is the Roman maxim *sic utere tuo ut alienum non laedas,* which means use your property so that the property of others is not damaged.[1] This was rearticulated in Principle 21 of the Stockholm Declaration, which states, "Nations have the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other states."[2] The same principle was pronounced in the conclusion to the *Trail Smelter* arbitration between the United States and Canada. This case arose in the 1920s, when citizens of the State of Washington complained that emissions from a smelter in Trail, British Columbia were harming apple orchards and crops in nearby northern Washington. The *Trail Smelter* arbitration panel said that states are responsible for transboundary environmental harm that originates in the actions of their private citizens or corporations.[3]

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1. BLACK'S LAW DICTIONARY 1690 (Bryan A. Garner ed., 7th ed. 1999).

2. Stockholm Declaration of the United Nations Conference on the Human Environment, G.A. Res. 2997, U.N. GAOR, 27th Sess., U.N. Doc. A/Conf.48/14/Rev/1, *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

3. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1938).

Norm Two: Subsidiarity

The second norm is *subsidiarity*.[4] Subsidiarity dictates that whatever decisions can be undertaken locally, should be, whether they involve local ownership, local political authority or local economic self reliance. Subsidiarity does not necessarily advocate local action but the lowest appropriate level of action. For example, subsidiarity would dictate local control of urban air pollution; regional control of transboundary air pollution, as in the Acid Rain Convention;[5] and global control of global atmospheric pollution as in the Global Climate Change Regime and the Stratospheric Ozone Layer Regime. Subsidiarity goes back at least to the U.S. Constitution, 10th Amendment: *All power not given to the federal government is reserved for the states and the people.* This norm is woven into the fabric of constitutional government in the United States.

Norm Three: Cultural Diversity

My third norm is the norm of *cultural diversity* and the right of indigenous people to retain a separate cultural identity. Mahatma Gandhi, in the 1930s, observed, "I want the culture of all lands to be blown about my house as freely as possible." The U.N. Convention on Biological Diversity contains these words in its preamble: "[T]he Contracting Parties recognize the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources . . . ."[6]

Norm Four: The Environment is a Human Right

My fourth norm is the broadly-held belief that *the environment is a human right.* Just after the United Nations was created in 1945, the United Nations adopted its Universal Declaration of Human Rights,[7] articulating "rights" that have an environmental resonance. The

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4. *See generally*, INT'L FORUM ON GLOBALIZATION, ALTERNATIVES TO ECONOMIC GLOBALIZATION 60-61, (Berrett-Koehler 2002) [hereinafter IFG].

5. Convention on Long Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217, available at <www.unece.org/env/lrtap> (visited Sept. 23, 2003) [hereinafter UNECE Convention].

6. U.N. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, available at <www.biodiv.org>.

7. Universal Declaration of Human Rights, G.A. Res. 217 A, U.N. Doc. A/810 (1948).

Universal Declaration of Human Rights says that people should be assured a standard of living adequate for their health and well-being, including food, clothing, housing, medical care and necessary social services.[8] In our frequent attempts to link the environment with human rights, we cite and try to apply the Universal Declaration of Human Rights to indigenous people, to refugees, and to the protection of the environment in times of armed conflict, such as the consequences of burning oil fields during the Persian Gulf War of 1991.

Norm Five: Common Heritage of Humankind

The fifth norm is *the common heritage of humankind.* It made its first strong emergence in the Antarctic Treaty of 1959.[9] Until that point, it seemed that whoever expended the money and effort to exploit global commons resources, such as fish in the high seas, could reap the resulting benefits. The Antarctic Treaty was a sea change in the erstwhile belief that water, air, land beyond the limits of national jurisdiction, fisheries, plant genetic resources and indigenous knowledge were common property. The treaty's objectives were to demilitarize Antarctica, establishing it as a zone free of nuclear tests and the disposal of radioactive waste, and ensuring that it is used for peaceful purposes only; to promote international scientific cooperation in Antarctica; and to set aside disputes over territorial sovereignty.

This Antarctic Treaty principle of protecting the global commons was further articulated in Principles 21 and 22 of the Stockholm Declaration:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.... States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas

8. *Id.*

9. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71, available at <www.antarctic.ac.uk/About_Antarctica/Treaty/index.html> (visited Sept. 29, 2003).

beyond their jurisdiction.[10]

Again, in the U.N. Convention on the Law of the Sea,[11] the idea of *common heritage* was brought to the negotiation by the "Group of 77" representing the developing countries. The main dispute in the Law of the Sea negotiations was over deep seabed mining. The United States and Japan had targeted manganese nodules in the deep seabed for extraction, and thought they had the technology to extract those minerals and should reap the economic benefits from such extraction. The Group of 77 argued that the deep seabed was part of the global commons—the common heritage of humankind. Thus, any economic benefits must be shared among all countries. This principle was adopted, causing the United States to withdraw from the convention although the United States has continued to observe the convention's other provisions.[12] By treaty and general agreement, the moon, other heavenly bodies and outer space are also regarded as part of the global commons and thus part of the common heritage of humankind.[13]

Norm Six: Environmental Impact Assessment

My sixth norm is *environmental impact assessment* (EIA). This norm has been widely adopted around the world. The United States was the first country to require EIA in the National Environmental Policy Act of 1969. The idea is to weigh a public project's environmental costs against its economic benefits before launching the project. Some countries will not proceed with a public project unless the economic benefits outweigh the environmental costs by 50 or 100 percent. A secondary benefit of environmental impact assessment is that it generally requires public bodies to listen to the local people who are likely to be affected by the proposed project.

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10. Stockholm Declaration, *supra* note 2.

11. U.N. Convention on the Law of the Sea, Dec. 10, 1982, G.A. Res. A/RES/37/7, 48th Sess., U.N. Doc. A/CONF.62/122 (1982), available at <www.un.org/Depts/los> (visited Oct. 15, 2003).

12. I believe that deep seabed mining has not yet proven to be cost effective, and has not yet occurred.

13. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, available at <www.oosa.unvienna.org> (visited Sept. 29, 2003).

Norm Seven: Intergenerational Equity

The seventh norm, *intergenerational equity,* has a number of antecedents.[14] Native Americans have always valued nature for its own sake. Chief Seattle reportedly remarked in 1854, "Teach your children . . . that the earth is our mother."[15] Designating the Grand Canyon National Monument in 1908, President Theodore Roosevelt declared, "keep it for your children and your children's children, and for all who come after you, as one of the great sights which every American . . . should see."[16]

John Rawls's *A Theory of Justice*, published in 1971, brought the concept of intergenerational equity into common parlance. The principle of intergenerational equity requires that we treat our environment in a way that does not harm the environment of future generations. The corollaries of this are not to cut down trees faster than they grow back; not to farm lands in ways that reduce the lands' regenerative capacity; not to pollute water so severely that the water body cannot purify itself. The principle of intergenerational equity is invoked by the supreme court of India in the *Coastal Regulation Zone Notification* case of 1996.[17] The *Oposa* case in the Philippines[18] also discusses intergenerational equity and says future generations have standing to sue, and people can bring cases on their behalf. *Our Common Future*, the 1987 report of the World Commission on Environment and Development, also talks implicitly about intergenerational equity.

Norm Eight: State Sovereignty

An eighth norm, *state sovereignty,* derives again from Principle 21 of the Stockholm Declaration of 1972, which declares at the outset, "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

14. *See* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS (1992).

15. Chief Seattle's Thoughts, available at <www.webcom.com/duane/seattle.html> (visited Oct. 1, 2003).

16. American Indian Literature, available at <www.utexas.edu/utpress/excerpts/exandame.html> (visited Oct. 1, 2003).

17. Coastal Regulation Zone Notification Case, (1996) 5 S.C.C. 281 (India).

18. Oposa v. Factoran, 224 S.C.R. 792 (1993) (Phil.), *reprinted in* 33 I.L.M. 173 (1994).

policies. . . ."[19] This has been interpreted by the international community to confirm the right of states to exploit in-country resources without restriction. At the 1992 Rio Earth Summit, developing countries seized upon this principle to decry President George H.W. Bush's assertion that tropical forests and their abundant biodiversity were part of the common heritage of humankind. They also declared state sovereignty over all plant genetic resources.[20]

Norm Nine: The Polluter Pays Principle

Arguably, the ninth norm, the *polluter pays principle,* derives implicitly from the U.S. Clean Air Act of 1970, which attacks pollution at its source.[21] But the use of the term "polluter pays" seems to have first emerged in 1972 in the Organization for Economic Cooperation and Development's (OECD) Guiding Principles Concerning International Economic Aspects of Environmental Policies.[22] Two years later, the OECD formally recommended the implementation of the polluter pays principle.[23] The European Union moved toward the formal adoption of the polluter pays principle in June 2003.

Norm Ten: Active Role of Civil Society and NGOs

A tenth environmental norm is the principle that civil society, represented by non-governmental organizations (NGOs), should have an active role in global environmental management. The 1973 Convention on the International Trade in Endangered Species (CITES) specifically enlists NGOs in monitoring and implementing that environmental agreement. NGOs have demanded, at least, observer status at most international meetings on the environment, and the *right of NGOs to participate*, on behalf of the public, at the

19. Stockholm Declaration, *supra* note 2.

20. *See generally* John H. Barton, Biodiversity at Rio, 42 BIOSCIENCE 773, 773-776 (Nov. 1992).

21. 42 U.S.C. §§ 7401-7642 (2002).

22. Guiding Principles Concerning the International Economic Aspects of Environmental Policies, Org. for Econ. Cooperation and Dev., Doc. C(72)128 (May 26, 1972), available at <http://sedac.ciesin.rg/pidb/texts/oecd/OECD-4.01.html> (visited Sept. 23, 2003). The OECD consists of the western industrialized countries.

23. The Implementation of the Polluter-Pays Principle, Org. for Econ. Cooperation and Dev., Doc. C(74)223 (Nov. 14, 1974), available at <http://sedac.ciesin.rg/pidb/texts/oecd/OECD-4.09.html> (visited Sept. 23, 2003).

international negotiations that arise from those meetings.

Norm Eleven: Notification and Consultation

The early 1970s was a fertile period for the gestation of environmental norms. In 1974, the OECD promulgated my eleventh norm of *notification and consultation,*[24] making it the duty of all OECD member states to cooperate with neighboring member states and to notify and consult with them about any new projects that might harm the neighboring state's environment. The norm of *notification* led to the principle of "prior informed consent"[25] in the Basel Convention on Hazardous Waste.[26]

Norm Twelve: Equal Access to Justice

Norm twelve, *equal access to justice and non-discrimination,* emerged most definitively in the Nordic Environmental Protection Convention of 1974, in which four Nordic states—Denmark, Norway, Sweden and Finland—articulated the principle that all people in the Nordic nations could have access to each other's courts and administrative proceedings on the same footing as a citizen of the forum state.

Norm Thirteen: Monitoring, Reporting and Disclosure

Norm thirteen, *environmental monitoring, reporting and disclosure,* derives initially from CITES, but CITES has no solid vehicle for reporting and disclosure. The Acid Rain Convention of 1979[27] set up the European Monitoring and Evaluation Program with not only systematic monitoring of acid deposition at different sites around Europe, but also required reporting of the data to a Secretariat, which in turn has a duty to make such data publicly available and comprehensible. This norm is consistent with the

24. Procedure for Notification and Consultation on Measures for Control of Substances Affecting Man and His Environment, Org. for Econ. Cooperation & Dev., Doc. C(71)73 (May 18, 1971).

25. "Prior informed consent" means that importers of hazardous materials must be aware of the hazards and of the possible consequences of importing and handling such materials. The receiving country or official must be able to read and understand the language of any warning label or manifest.

26. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 23, 1989, U.N. Doc. EP/IG.80/3, *reprinted in* 28 I.L.M. 649 (1989).

27. UNECE Convention, *supra* note 5.

prevalence of domestic "right to know" or "right to information" laws, as well as the increasing demand by civil society groups that proceedings of international bodies should be open and transparent.

Norm Fourteen: Sustainable Development

Moving into the 1980s, the fourteenth norm, *sustainable development,* is strongly articulated in *Our Common Future*, the 1987 Report of the World Commission on Environment and Development. Five years earlier, the World Charter for Nature[28] first used the term "sustainable development"—that nations have the right to develop their resources and their economy, but need to do so in an environmentally sustainable way. *Our Common Future* talks of providing for current needs without compromising the ability of future generations to meet their own needs,[29] and without diminishing the planet's life support systems—air, water, soil, forests, and biodiversity.

Norm Fifteen: The Precautionary Principle

My fifteenth norm is the *precautionary principle*, which has become probably the most often-cited and strongly-held environmental norm among judges.[30] The precautionary principle was first introduced at the International Conference on the Protection of the North Sea in 1984.[31] It was incorporated in the Rio Declaration on Environment and Development of 1992, also known as Agenda 21.[32] Although some judges and laypeople often equate

28. World Charter for Nature, Oct. 28, 1982, G.A. Res. 37/7, U.N. GAOR, 37th Sess., U.N. Doc. A/RES/37/7, *available at* 1982 WL 184343.

29. *See* WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE (1987).

30. Andhra Pradesh Pollution Control Board v. Nayudu, (1999) 2 S.C.C. 71 (India). In this case, the Supreme Court of India traced the development of the precautionary principle and concluded that when the probability of a catastrophe–such as a dam bursting or a chemical plant spilling into a public water supply–was small but not insignificant, the precautionary principle dictates that preventive action must be taken by the responsible party–here, the dam authorities or the chemical plant owners.

31. *See* JOEL TICKNER ET AL., THE PRECAUTIONARY PRINCIPLE IN ACTION: A HANDBOOK 1 (1998).

32. "In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. When there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." U.N. Conference on Environment and Development, U.N. GAOR A/CONF.125/126 (1992).

the principle to simply being cautious, the principle requires the taking of precautionary action, either preventive or anticipatory, before scientific certainty of cause and effect is established. For example, in the area of climate change, we are not sure that there will be devastating consequences, but that should not prevent us from taking preventive action, such as reducing fossil fuel consumption, before the suspected harm occurs. The principle does not specify how much anticipatory or preventive action one needs to take, but it does suggest that one must foresee and assess environmental risks, warn potential victims of these risks, and behave in ways that mitigate the risks.

The European Union has actually promulgated the precautionary principle as a binding principle of their environmental policy.[33] On genetically modified organisms, the United States says that research has not suggested they are harmful, while the European Union says, in effect, "We believe they are harmful; we are continuing to search for hard evidence; while we are searching, we are not going to use them and we are not going to import goods or products that are genetically modified." This is a major trade dispute between the United States and the European Union before the World Trade Organization. California's Proposition 65 is another example of the precautionary principle.[34] Prop. 65 requires the state to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm.[35]

Norm Sixteen: North-South Equity

Norm sixteen is the principle of *North-South equity.* The first major recognition of North-South equity is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[36] This protocol recognized the needs of developing countries to modernize, and gave developing countries ten years longer than industrialized countries to phase out ozone-depleting chemicals. The same principle

33. *See* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, TEACHER'S MANUAL 103 (2003).

34. Prop. 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, is codified at CAL. HEALTH & SAFETY CODE § 25249.5 et seq. (Deering 2003).

35. Office of Environmental Health Hazard Assessment, available at <www.oehha.org/prop65/background/p65plain.html> (visited Oct. 1, 2003).

36. Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, 1522 U.N.T.S. 451, available at <www.unep.org/ozone/montreal.shtml> (visited Oct. 1, 2003), *reprinted in* 26 I.L.M 1541 (1987).

of North-South equity is evident in the dual-majority voting scheme of the Global Environmental Facility (GEF). GEF projects are approved by two bodies, one consisting of donor countries and the other consisting of all countries.[37] Thus, the community of nations has recognized that the inequities between northern industrialized and southern developing countries must be recognized and overcome. Southern countries must get help and support from the North in raising their standard of living, relieving poverty, developing their economies, protecting their environment and sharing in the protection of the global environment.

Norm Seventeen: Constitutional Right to a Decent Environment

My seventeenth norm is the *constitutional right to a decent (or healthful) environment.* Beginning in the late 1980s, but really taking hold in the early 1990s, several countries, mostly in the South, either amended their constitutions to include this right or their courts interpreted the "right to life" to include the right to a decent or healthful environment. A leading example is India, whose courts developed this constitutional right through a number of cases beginning in 1987, which had become firmly imbedded in Indian constitutional law by 1991.[38]

Norm Eighteen: Common but Differentiated Responsibility

Norm eighteen, articulated forcefully at the Rio Earth Summit in 1992, is the principle of *common but differentiated responsibility.* It is in the Rio Declaration, Principle 7:

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

37. Charlotte Streck, *The Network Structure of the Global Environment Facility*, available at <www.gppi.net> (visited Oct. 1, 2003).

38. *See* Armin Rosencranz & Shiraz Rustomjee, *The Right to a Healthful Environment Under the Constitution of India* (Sept. 1995) (unpublished manuscript, on file with author).

financial resources they command.[39]

All countries have a shared responsibility to protect the global environment, but richer countries have a special responsibility to undertake and pay for preventive and remedial action, such as in the Global Climate Change and Stratospheric Ozone Layer regimes. Abatement of marine pollution, persistent organic pollutants and biodiversity loss are other such areas of common but differentiated responsibility. The United States' repudiation of the Kyoto Protocol in March 2001 was, *inter alia*, a repudiation of this principle of common, but differentiated responsibility.

Norm Nineteen: Common Concern of Humankind

Norm nineteen is the principle of *common concern of humankind.* This is a vague norm that seems to be a catchall for anything not included in the other norms already discussed.

It obviously overlaps with the *common heritage of humankind* principle, but seems to have gained its own separate status by virtue of its mention in the Preamble to the Convention on Biological Diversity: "The Contracting parties . . . [affirm] that the conservation of biological diversity is a common concern of humankind . . . ."[40] This principle is also prominently featured in the IUCN's Draft International Covenant on Environment and Development, which states rather generally that "the global environment is the common concern of humanity."[41] This norm seems to cover global commons subjects that might not be fully addressed by other norms: biodiversity; the oceans and global fisheries; and climate change and energy production.

My colleagues David Hunter, James Salzman and Durwood Zaelke observe that "the principle of common concern is the conceptual framework for international cooperation with regard to environmental protection."[42] Until the Rio Earth Summit in 1992, they note, all international cooperation on environmental matters

39. Rio Declaration on Environment and Development, U.N. GAOR, 4th Sess, U.N. Doc. A/CONF.151/PC/WG.III/L.33/rev.1 (1992), *reprinted in* 31 I.L.M. 874 (1992).

40. Preamble to the Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

41. Draft International Covenant on Environment and Development, Principle 13, available at <www.eldis.org/static/DOC2227.htm> (visited Oct. 1, 2003).

42. *See* Hunter, *supra* note 33, at 97.

were subject specific, and some of those subjects, like the regulation of biological diversity and energy production, were regarded as falling under the exclusive authority of individual states. The main virtue of the "common concern" norm may be that it helps the international community to justify collective action, and to overcome the presumption that a particular issue should be addressed domestically.[43]

Norm Twenty: Domestic Enforcement

Paradoxically, my twentieth and final norm is the *domestic enforcement of international environmental agreements and norms.* All international environmental law and agreements are voluntary and consensual. They are neither enforceable nor self-enforcing. The International Court of Justice (ICJ) is of little help because only states—not private entities or corporations—can be sued in the ICJ, and states must voluntarily submit to the ICJ's jurisdiction. States with weak cases simply will refuse the ICJ's jurisdiction. Accordingly, all international environmental law, including the norms and principles reviewed in this article, must be given force and substance through domestic law.

43. *Id.* at 98.