

◆ NEW DIRECTIONS ◆

THE CASE FOR A LAW OF THE ATMOSPHERE

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International policies for managing the global atmosphere have evolved in an ad hoc and piecemeal manner. It may now be time to adopt a more thought-out and holistic approach. While some might consider it outrageous heresy, there is a case to be made for moving towards a comprehensive "Law of the Atmosphere" (LoA).

◆ A LEGACY OF AD HOCISM ◆

The atmosphere is one of the very few examples of a true global commons in that it is a "domain that is beyond the exclusive jurisdiction of any one nation but one that all nations may use for their own purposes" [M.S. Soroos, 'The Thin Blue Line: Preserving the Atmosphere as a Global Commons,' *Environment*, 40(March 1998): 7-13, 32-35]. According to Garrett Hardin's now famous postulate ['The Tragedy of the Commons,' *Science* 162(1968): 1234], commons need to be regulated because they have a perverse tendency to degenerate into ruin and 'tragedy' since everyone has an incentive for exploiting them while no one has the incentive, or responsibility, for maintaining their integrity. Much of global environmental policy is intellectually premised on the desire to avert Hardin's foretold tragedy.

The Law of the Sea (LOS; which came into force in 1994) was underpinned, in part, by this concern. Although wrought out of long drawn, painstaking and often acrimonious negotiation and still mired in debate, it declared the seabed a 'common heritage of mankind'. Proposals to apply this phrase--which has significant legal implications about jurisdiction and responsibility--to the atmosphere have been repelled and the best that international policymakers have to offer is to recognize that climate change is a subject of "common concern for humankind" (*UN Framework Convention on Climate Change*). Instead, they have adopted an approach of individually and reactively applying 'Band-Aid' solutions to each problem

(acid rain, stratospheric ozone depletion, climate change, etc.) as it arises, with little--or belated--attention to how it might relate to other issues. Instead of focussing on the global atmosphere as a vital planetary organ, we are reduced to 'fire-fighting' skirmishes that, vital as they are, are ultimately symptomatic of more fundamental threats to the essential services provided by the atmosphere.

This legacy of ad hocism [*also see* A. Najam and A. Sagar, 'Avoiding a COP-out: Moving Towards Systematic Decision-Making Under the Climate Convention', *Climatic Change*, 39(4), 1998] has its basis in certain substantive and procedural conveniences. Substantively, the atmosphere is an extremely complex system; and one that is still much less than well understood. Trying to tackle sub-systems that relate to long-range air pollution, stratospheric ozone or global climate--and all the myriad scientific uncertainties associated with them--is difficult enough by itself. Expanding the scope of global negotiations to the entire atmospheric system, it is argued, would simply be too complex to handle. There is a prevailing sense that "the ad hoc, problem-specific approach to regulating pollution and protecting the atmosphere has proven to be quite flexible and adaptable" and therefore pursuing a comprehensive treaty would be "an ill-advised use of limited diplomatic resources" (M. Soroos, *The Endangered Atmosphere: Preserving a Global Commons*, p. 281-2, Columbia: University of South Carolina Press, 1997).

The root of such fears, however, is not just substantive complexity but the procedural nightmare it would entail. This is brought into sharp relief by the history of the Law of the Sea which took nearly a decade of intense international bickering to negotiate and another decade to be ratified. The scars of this traumatic experience run deep--particularly in the United States. These are compounded by fears that such a comprehensive treaty will somehow impinge upon the almighty principle of territorial sovereignty that national policymakers hold so dear.

◆ TOWARD A LAW OF THE ATMOSPHERE ◆

Valid as these concerns are, they can be addressed by adopting an incremental (as opposed to ad hoc) approach. Such an approach would begin with a general 'framework' law that deals with basic declaratory principles. Marvin Soroos (1998: 34) suggests thinking about taking "the first step toward developing a comprehensive law of the atmosphere" based on "a declaration on the atmosphere... couched in terms of general principles rather than specific obligations." However, to have a meaningful impact, one would need to do more. We will also have to take the subsequent steps towards treaty harmonization by imbedding existing agreements and ongoing negotiations--such as those on transboundary air pollution, ozone depletion, and climate change--within the umbrella of the principles espoused in the framework Law. The proposed incremental approach would, over time, systematically mature into binding legal

provisions encompassing the general declaratory principles as well as any imbedded Conventions. Where necessary, new issue-specific agreements would be negotiated as imbedded Conventions to the LoA.

The ultimate goal is more than simply putting existing agreements under one umbrella. It is to consciously move towards an internally consistent Law of the Atmosphere focussed on the challenge of maintaining the health and vitality of the atmosphere as a whole rather than the management of a few selected pollutants. There are important reasons--both substantive and procedural--why doing so is a good idea.

Substantively, science clearly calls for a comprehensive policy response. It is evident to anyone who regularly reads this journal that the science of ozone depletion and the science of climate change do NOT simply add up to become the science of the atmospheric environment. The science of the atmosphere is much more than just the sum of its parts. Integral is how these parts interact. The existing approach to atmospheric policy provides little space for dealing with these interactions. Consider, for example, that many ozone depleting substances are also greenhouse gasses, and some substances with comparatively low ozone depleting potentials might have high greenhouse potentials. Already, much of the discussion at recent negotiations on the Vienna Convention (on ozone depletion) revolved around climate change issues while some of the more spirited debates on ozone depleting substances are now happening at meetings related to the Climate Convention. There remains insufficient interaction between these two treaties--and therefore between the scientists or the policymakers working on them. A comprehensive approach would provide the common forum where such interaction can be nurtured, where early warning of potential problems can be sounded, and where links between the different components of the atmosphere can be dealt with.

Procedurally, the proposed approach provides for significant gains in negotiation efficiency. Currently there is a serious negotiation glut with simply too many negotiations, on too many issues, in too many places. Policymakers have a near impossible task in keeping track of how all the other negotiations impact their sub-issue and how their myriad provisions might fit together. The problem is even more confounding for developing countries, with their much more limited human and financial resources [A. Najam, 'International Environmental Negotiation: A Strategy for the South', *International Environmental Affairs*, 7(2): 249-87, 1995]. Placing all agreements related to the atmosphere within one umbrella LoA would go a long way in streamlining the process by building on synergies and reducing the level of negotiation fatigue, particularly for developing countries.

Even more importantly, a harmonized platform for negotiating atmospheric policy would allow negotiators to 'trade across differences' (see L. Susskind, *Environmental Diplomacy: Negotiating More Effective Global Agreements*, New York: Oxford University Press, 1994). This famous dictum of negotiation theory postulates that where different parties value different issues differently, the net negotiation gain will be higher if they trade across these differences. Assume that country **A** holds issue x as its most important priority but is not particularly interested in issue y . Assume, also, that country **B** considers y to be extremely important but is less interested in x . If issues x and y were to be negotiated separately, the likely result would be a sub-optimal, if not a stalemate. However, if both issues are negotiated together, it is possible that a more optimal 'trade' can be made with country **A** giving in on issue y in return for country **B** doing so on issue x . Presently there are significant barriers to such trades (particularly between developing and industrialized countries) because different atmospheric issues are negotiated separately. In negotiation parlance, we continue to leave value on the table.

Finally, to the Law of the Sea experience which has been certainly less than savory because of long delays and high levels of acrimony. Let it be recalled, however, that this was a factor not of the issue or format but of the larger politics of the time: solidarity tactics by the developing world in the 1970s and the US White House's environmental pullback in the 1980s. As to the sovereignty argument, that remains a scepter over all global environmental policy but one which is already being confronted by the Kyoto Protocol which, to some, is already assigning de facto property rights to the global atmosphere [A. Najam and T. Page, 'The Climate Convention: Deciphering the Kyoto Convention', *Environmental Conservation*, 25(3): 187-94, 1998].

Having said the above, it is not surprising that national decision-makers, still mired in traditional notions of territorial sovereignty, remain hesitant to declare and treat the Earth's atmosphere as a global commons. More worrisome is that environmental activists and scholars seem equally lukewarm to the idea. Activists seem afraid that negotiating such a comprehensive treaty would take too long, and many scholars are themselves so specialized in minute elements that they lose focus on the larger atmospheric challenge. The single biggest hurdle, however, are the forces of inertia. Inertia, after all, is a principle that is even more potent in politics than in physics. Inefficient as the current approach is, no one has the incentive to invest the effort in a better approach. The Law of the Atmosphere is an idea whose time has come. What is needed now is a champion. Where better to seek the leadership than in the ranks of scholars and scientists who study the atmospheric environment.