

The Law of the Environment: A Symbolic Step of Modest Value

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The original 1965 *Restatement of Foreign Relations Law* contains two reporters' notes on the environment.¹ By contrast, the *Third Restatement*² devotes all of Part VI to this increasingly important area of the law and foreign relations. Unfortunately, the resulting product constitutes only a modest step toward presenting the foreign relations law of the United States pertaining to the environment. Part VI takes a narrow view of the law of the environment, limiting itself to transfrontier pollution and, even then, relegates most of the discussion of conventional law to reporters' notes.³ This brief review assesses the structure and substance of Part VI.

As a symbolic step, Part VI is to be applauded. As a restatement of the foreign relations law of the United States pertaining to the environment, it oversimplifies and sometimes muddies the waterways of the law.

I. The *Restatement* Takes a Narrow View of the Scope of the Law of the Environment

Part VI is entitled "The Law of the Environment," but in fact its scope is considerably more narrow. A more accurate title would have been "The Law of Transfrontier Pollution with a Particular Emphasis on Marine Pollution."

Humanity has long known of its ability to change its environment. Woodlands have been pushed back and rivers have been tamed for thousands of years. Likewise, the *local* environmental costs of such development—such as polluted rivers—have been recognized for a long

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1. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18 reporters' note 3, 23 reporters' note 3 (1965).

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)].

3. This narrow scope is reflected in the modest bulk of Part VI, by far the shortest Part of the *Restatement* in terms of pages or sections.

time. Only recently, however, have we come to appreciate that there is little wilderness left to be pushed back, that some waterways have suffered very long lasting damage, and that the often wasteful way we live threatens all our futures.

In this sense, the law of the environment is not concerned solely with transfrontier pollution, but rather more generally with the preservation and optimum use of the carrying capacity of this planet. In legal discourse, this evolution has been reflected in an expanding notion of what is perceived to be at stake. For example, in the *Trail Smelter* arbitration in the first half of this century, damages were awarded for commercial losses suffered by U.S. nationals.⁴ Although the losses claimed were the result of damage to the environment, the suit was not aimed at environmental protection. Rather, the suit involved a traditional action in tort complicated by the presence of an international boundary. The arbitration focused on the immediate economic damage and not on the more diffuse harm to the environment that would manifest itself only after much time or at the end of a trail of causation that legal processes would find difficult to follow.⁵ However, the limited focus on the environment in this case was as much a result of the priorities of the parties as the limits of judicial process. By contrast, the settlements by Sandoz Chemical for its December, 1986 spill of chemicals into the Rhine included payment for the cost of restoring the environment.⁶ Indeed, as humanity believes increasingly that in a theoretical sense the planet belongs to all and that in a real sense it will someday belong to its children, the notion of legitimate interests seems to extend far beyond traditional notions of harm. Consequently, there is a perception that all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources.⁷ These concerns have become part of a

4. *Trail Smelter Arbitration (U.S. v. Canada)*, 3 R. INT'L ARB. AWARDS 1911 (1938); 3 R. INT'L ARB. AWARDS 1938 (1941).

5. See, e.g., Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 ORE. L. REV. 259, 273-74 (1971).

6. See Schwabach, *The Sandoz Spill: Failure of the Rhine Treaty Regime*, 16 ECOLOGY L.Q. (forthcoming 1989) ("17 million francs will be spent on programs to study and restore the ecosystem of the Rhine").

7. The new Antarctic Minerals Treaty, for example, accords substantial value to the preservation of the Antarctic environment. Convention on the Regulation of Antarctic Mineral Resource Activities, art. 4(2), done at Wellington, June 2, 1988, reprinted in 27 I.L.M. 868 (1988).

legal discourse of sustainable development⁸ and intergenerational equity.⁹

Yet Part VI sets for itself a task that is factually and philosophically much narrower. As the introductory note to Part VI explains, the section "addresses primarily transfrontier and marine pollution."¹⁰ Thus there is no mention, for example, of the Convention on International Trade in Endangered Species,¹¹ the World Heritage Convention,¹² or the Convention for the Protection of Wetlands.¹³

The tone of Part VI is that of a government legal advisor concerned with a State's rights and duties in the event of significant transfrontier pollution. It misses the broader shared desire of many peoples to manage the planet's resources in a sustainable manner. This governmental view emerges in Part VI's emphasis on *State* obligations and responsibility for transfrontier pollution, an emphasis taken despite the fact that many international environmental conventions channel such obligations toward private parties. In this sense, international environmental law often has attempted to make the membrane of sovereignty as porous to private legal and administrative action as it is to pollution. Certainly, States have a very important role in such efforts because they give force to the treaties through enabling legislation and enforcement. But it is the substantive transnational law created by such treaties that is the hope of international environmental law, not the extremely remote chance that a

8. See, e.g., THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

9. See, e.g., Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984).

10. RESTATEMENT (THIRD) pt. VI introductory note. The introductory notes acknowledge that much is unaddressed, stating:

Environmental harm may be caused by activities other than pollution: a dam may cause erosion, or irrigation may increase the salinity of a river. Other environmental problems of international concern include the need to improve habitat and human settlements; to protect archaeological treasures, cultural monuments, nature sanctuaries, endangered fauna and flora, and migratory birds; to lessen the consequences of deforestation, overfishing, and weather modification. Where activities in one state cause environmental injuries in another state, the principles of this Part generally apply.

Id. I do not know why a problem such as increased salinity of a river is not regarded as pollution. A few of the above-listed concerns, such as weather modification, are treated in the reporters' notes.

11. Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, reprinted in 12 I.L.M. 1085 (1973).

12. Convention Concerning the Protection of the World Cultural and Natural Heritage, done at Paris Nov. 23, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226. See Magraw, *International Law and Park Protection: A Global Responsibility*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 143, 147-49, 162-63 (D. Simon ed. 1988).

13. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar Feb. 2, 1971, reprinted in 11 I.L.M. 963 (1972).

state would be held internationally responsible for failing to adequately legislate and enforce.

Part VI is also statist in its presumption that international law is not concerned with degradation of the environment within a country but rather only the degradation of the environment of other countries.¹⁴ The *Restatement* gives the impression that a State may allow pollution of its own territory as long as it somehow stops the pollution from crossing the border. In fact, international conventional law increasingly limits the range of possibilities of internal environmental policy. The nitrogen oxide protocol to the Long Range Air Pollution Convention speaks not only of percentage reductions of emissions, but rather may lead to specific emission limitations for specific nitrogen oxide sources.¹⁵ Similarly, the draft work of the International Law Commission on the law of non-navigational uses of international watercourses implicitly recognizes the shared interest of the watercourse states in several aspects of the internal watercourse policy of any one of them.¹⁶ Indeed, the increasing internal focus suggests that international environmental law will come to be regarded not only as a subset of international law but also as an aspect of general environmental law and policy that differs from domestic environmental law primarily in that the process of its formulation is horizontal rather than vertical.

In this sense Part VI is to international environmental law as state responsibility for injuries to aliens is to human rights law. It is the difference between a homeowner concerned about neighbors who may pose a nuisance and a community articulating land-use policies.

II. The *Restatement* Takes a Narrow View of the Scope of the Law of Transfrontier Pollution

The *Restatement* defines the foreign relations law of the United States as:

- (a) international law as it applies to the United States; and
- (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.¹⁷

14. RESTATEMENT (THIRD) § 601 comment c ("International law does not address internal pollution . . .").

15. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, arts. 2(3) and 6, done at Sofia Oct. 31, 1988, reprinted in 28 I.L.M. 212 (1989).

16. See, e.g., *Report of the International Law Commission on the Work of its Fortieth Session*, 43 U.N. GAOR Supp. (No. 10) at 45 (1988).

17. RESTATEMENT (THIRD) § 1.

The law of transfrontier pollution should, therefore, encompass customary international law, numerous regional and global conventions to which the United States is a party, and U.S. statutes regarding protection of the environment that have substantial international implications.¹⁸ To restate this law is a formidable task. This is particularly so given the black letter style of the *Restatement*, although room for innovation appears to have been possible in this regard.¹⁹

The difficulty of this task is complicated by the fact that conventional law regarding transfrontier pollution, like domestic environmental law, has developed by type of pollution rather than in some comprehensive fashion. Thus there is a treaty regime specific to oil pollution from vessels and a regime specific to sulfur dioxide air emissions. This specificity is in part a reflection of the variety of activities that lead to transfrontier pollution. It is also a natural consequence of specialized agencies structuring negotiations in a way that makes such discussions manageable and increases the likelihood of any resulting treaty later entering into force.

The multiplicity of regimes is compounded further by the fact that treaties for any given problem area often address only one of four functional areas of policy-making regarding transfrontier pollution: (1) development of institutional frameworks to facilitate cooperation; (2) prevention of the occurrence of pollution; (3) response to and mitigation of the damage of pollution which has occurred; and (4) compensation and restoration. This tendency toward specificity in treaty regimes both as to the pollution source involved and functional concern addressed consequently yields an array through which each problem area can be analyzed.²⁰

Part VI largely avoids the challenge of restating this diverse and extensive set of conventional regimes, unlike other Parts of the *Restatement*

18. Presumably, these statutes would include not only those relating to the environment outside the United States, but also those addressing the environment within the United States so long as there are substantial international implications.

19. See RESTATEMENT (THIRD) pt. VI introductory note ("As the previous Restatement recognized, the form of a restatement of foreign relations law might well be different from that of other restatements.")

20. An example of representative conventional instruments forming such an array for oil pollution from vessels with would be:

- Cooperation: Convention on the Protection of the Mediterranean Sea against Pollution and the Protocols thereto, done Feb. 13, 1976, *reprinted in* 15 I.L.M. 285 (1976).
- Prevention: International Convention on the Prevention of Pollution from Ships, done at London, Nov. 2, 1973, *reprinted in* 12 I.L.M. 1319 (1973).
- Response: Intervention on the High Seas in Cases of Oil Pollution Casualties, done at Brussels Nov. 29, 1969, *reprinted in* 9 I.L.M. 25 (1970).
- Compensation: International Convention on Civil Liability of Oil Pollution Damage, done at Brussels Nov. 29, 1969, *reprinted in* 9 I.L.M. 45 (1970).

which attempt to handle areas that are primarily conventional. The black letter sections of Part III on the law of treaties, Part V on the law of the sea, and the portion of Part VIII addressing trade law all draw heavily upon conventions.²¹ Unlike the law of transfrontier pollution, however, these other Parts generally draw upon only one convention.²² In this sense, a restatement of the law of the environment that included the conventional law would not only be difficult to produce but also very lengthy. Perhaps it is thus appropriate in this first effort that Part VI assumes a more modest challenge. Unfortunately, even other less burdensome steps are not taken. For example, Part VI did not follow the innovative approach used in the introductory note to Part VII dealing with human rights. The introductory note to that Part compiles in a table all the major human rights treaties, noting those to which the United States is a party.²³ This list provides a good indication of the scope and status of the field and serves as a valuable reference. Although the decision of the drafters to limit the scope of Part VI is somewhat understandable, the decision not to restate the conventional law of the environment led to a major loss in substantive provisions.²⁴

Part VI is brief. It restates the environmental obligations of States in section 601 and the remedies available for the violation of obligations in section 602. Sections 603 and 604 essentially repeat the structure of the first two sections, but with a particular focus on the marine environment. Even in sections 603 and 604, the black letter clauses only restate the general umbrella provisions of the 1982 Law of the Sea Convention and not the many more substantive marine environmental protection conventions. Only subsection 604(3) breaks new ground. In that subsection, the most substantive marine environmental protection provisions of the 1982 Convention on the Law of the Sea, those dealing with coastal state and port state jurisdiction, are restated. Section 604(3), by far the longest black letter portion of Part VI, is an example of the approach that Part VI could have taken for other important conventional provisions.

21. See, e.g., RESTATEMENT (THIRD) §§ 321, 322, 323 and the source notes following each section.

22. See 1976 Vienna Convention on the Law of Treaties for Part III; 1982 United Nations Convention on the Law of the Sea for Part V; General Agreement on Tariffs and Trade for Part VIII, Chapter 1.

23. RESTATEMENT (THIRD) pt. VII introductory note, at 148.

24. This great loss of substance is apparent in the fact that Part VI of the *Restatement* is the only Part in the cross reference to "Key Numbers" and ALR annotations to have no cross references.

III. The Restatement of the Law of Transfrontier Pollution is Too Certain and Occasionally Incorrect

Part VI excludes significant aspects of the law of the environment and, even in its primary area of focus, transfrontier pollution, it eschews tackling the extensive and diverse conventional law on the subject. Instead, Part VI packs essentially everything into sections 601 and 602. The legal propositions in these sections are sometimes conservative, sometimes progressive, and almost always stated with too much conviction. The recurring certainty with which propositions are stated in Part VI gives an impression of overall stability to this area of law that is unwarranted, if not inappropriate. While the black letter rules of a section may perhaps need to be definite, the aspirational law and "soft law" of the environment should have been discussed in the comments and reporters' notes.

Basically, subsection 601(1) provides that each State has certain obligations to avoid injury to the environment of another State or common areas; sections 601(2) and (3) specify to whom and for what a State is responsible when obligations under subsection 601(1) have been violated; and section 602 describes very generally the public and private remedies available to injured parties.²⁵ The following brief analysis focuses on a particularly important subsection of Part VI—subsection 601(1). This subsection defines the extent of a State's obligation to prevent trans-

25. Given the brevity of sections 601 and 602, it is appropriate to reproduce them in full:
 § 601. State Obligations with Respect to Environment of Other States and the Common Environment

(1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and

(b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

(2) A state is responsible to all other states

(a) for any violation of its obligations under Sub-section (1)(a), and

(b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.

(3) A state is responsible for any significant injury, resulting from a violation of its obligations under Sub-section (1), to the environment of another state or to its property, or to persons or property within that state's territory or under its jurisdiction or control.
 § 602. Remedies for Violations of Environmental Obligations

(1) A state responsible to another state for violation of § 601 is subject to general interstate remedies (§ 902) to prevent, reduce, or terminate the activity threatening or causing the violation, and to pay reparation for injury caused.

(2) Where pollution originating in a state has caused significant injury to persons outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state.

boundary environmental injury resulting from activities within its jurisdiction.

Subsection 601(1) begins clearly enough: "A state is obligated to take such measures as may be necessary. . . ." However, this obligation then is limited by the phrase "to the extent practicable under the circumstances." Although this qualification points to a standard defined by customary practice, the comments and reporters' notes do little to explain the phrase.²⁶ The phrase renders the obligation contextual;²⁷ that is, the obligation is not absolute but rather is dependent upon the circumstances present and the limits of practicality.²⁸ The State's obligation to take measures applies only to "activities within its jurisdiction or control." The added notion of "control" makes clear that the obligations of a State under subsection 601(2) extend to "activities on ships flying its flag or on installations on the high seas operating under its authority."²⁹

The balance of subsection 601(1) provides that the measures should ensure that the activities (a) "conform to generally accepted international rules and standards for the prevention, reduction, and control of injury" to the environment of another state or of the common environment, and (b) "are conducted so as not to cause significant injury" to the environment of another state or of the common environment.

26. See RESTATEMENT (THIRD) § 601(1) comment d ("In general, the applicable international rules and standards do not hold a State responsible when it has taken the necessary and practicable measures. . . .").

27. See D. Magraw, Existing Legal Regime: The New International Economic Order and Other Bases for Special or Contextual Treatment of Developing Countries (presented at Nicholas R. Dorman Colloquium on International Law, University of Colorado, Boulder, CO, Feb. 2, 1989).

28. Part VI appears to borrow heavily from the language of the 1982 Law of the Sea Convention. That Convention, like almost all other major environmental treaties or resolutions, explicitly recognizes that the obligation of a State is dependent upon the capabilities of the State, and that special consideration consequently must be given to developing countries. Part VI, like the Law of Sea Convention, provides that a State is only obliged to do what is "practicable under the circumstances." Although this phrase could encompass the notion that developing countries may have less stringent obligations, see PROCEEDINGS OF THE 60TH ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE 1983 518-19 (1984) [hereinafter PROCEEDINGS], Part VI does not repeat the specific references of many conventions to developing countries nor is the special position of developing countries alluded to in any comment or reporters' note. Although Part VI refers many times to Principle 21 of the Stockholm Declaration and its recognition of a State's duty to not cause transboundary environmental damage, it does not mention Principle 23's recognition of the special position of developing countries.

One response to these omissions might be that Part VI is a restatement of U.S. foreign relations law and thus the special position of developing States need not be discussed. This is correct, however, only if the United States is the defendant. The special position of developing countries will be of central concern to U.S. plaintiffs seeking compensation for injuries resulting from activities under the jurisdiction or control of, for example, Mexico.

29. RESTATEMENT (THIRD) § 601 comment c; see also Handl, *State Liability for Accidental Transnational Environmental Damage by Private Persons*, 74 AM. J. INT'L L. 525 (1980).

Although section 601 can be described generally in this way, specific questions concerning it are not easily answered. For example, subsections 601(2) and (3) provide that a State is responsible for violations of its obligations in subsection 601(1). Subsection 601(1) sets forth two distinct obligations in subparagraphs (a) and (b). Interpreting either of these obligations, however, presents difficulties.

Subsection 601(1)(b) is the traditional branch of a State's environmental obligation. The obligation is to prevent a certain result, namely, significant transboundary environmental injury. The obligation is absolute in that it requires measures to "ensure" that significant transboundary environmental injury does not occur. It is contextual in that the measures need only be those practicable under the circumstances. Whether measures practicable under the circumstances are more or less exacting than reasonable measures is unclear. To the extent that the phrase "practicable under the circumstances" leads subsection 601(1) in effect to require a standard of care akin to due diligence, the section adopts a conservative view of the environmental obligation of States. Indeed, the black letter provisions make no mention of the possibility of strict liability for certain ultrahazardous activities such as nuclear power generation. Instead, the possibility of strict liability is relegated to a brief discussion in comments d and f. Comment d appears to adopt the similarly conservative view that strict liability of States may be provided for in conventional law but does not exist customarily.³⁰ Comment f, meanwhile, without reference to a specific treaty, states that under "international law, a state engaged in weather modification activities is responsible for any significant injuries . . . even if the injury was neither intended nor due to negligence, and even if the state took all necessary measures to prevent or reduce injury."³¹

I do not take issue here with these conservative positions, but rather object to the certainty with which they are stated. No mention is made of the extensive scholarly literature on strict liability under customary law or the discussions of the International Law Commission on the issue.³² The certainty with which comment f states that a State is strictly

30. RESTATEMENT (THIRD) § 601 comment d ("In general, the applicable international rules and standards do not hold a State responsible when it has taken the necessary and practicable measures; some international agreements provide also for responsibility regardless of fault . . .").

31. RESTATEMENT (THIRD) § 601 comment f. The comment then suggests that the reader compare this provision with the rule on abnormally dangerous activities in comment d.

32. See generally J. SCHNEIDER, *WORLD PUBLIC ORDER OF THE ENVIRONMENT* ch. 6 (1979); Jenks, *Liability for Ultra-hazardous Activities in International Law*, 117 *RECUEIL DES COURS* 99 (1966); Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 *INT'L & COMP. L.Q.* 1189 (1965); Goldie, *International Principles of Respon-*

liable for weather modification is doubly troubling because the reporters' note offers only contrary evidence.³³

The second obligation is set out in subsection 601(1)(a): each State shall take measures to ensure that its activities conform to "generally accepted international rules and standards." Unlike the requirement in subsection 601(1)(b), this obligation requires States to ensure that activities are conducted in a certain manner rather than that such activities do not result in transboundary injury. Unfortunately, the *Restatement* does not define the parameters of the required conduct: what is encompassed in the phrase "generally accepted international rules and standards"?³⁴ The phrase could refer only to rules and standards that international law considers part of customary law or that are directly applicable because the parties accepted them.³⁵ Comment b does not appear to support this interpretation, however. It provides that in addition to applicable treaty rules and standards, the obligation in subsection 601(1)(a) encompasses "both general rules of customary international law . . . and those derived from international conventions, and from standards adopted by interna-

bility for Pollution, 9 COLUM. J. TRANSNAT'L L. 283 (1970); Quentin-Baxter, *Third Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, U.N. Doc. No. A/CN.4/360, 2 Y.B. INT'L L. COMM'N. 51 (1982), UN Doc. No. A/CN.4/SER.A/1982/Add. 1 (pt. 1).

33. The conventions cited in reporters' note 7 do not support the existence of a strict liability principle. In the 1977 Convention on the Prohibition of Military Use or Any Other Hostile Use of Environmental Modification Techniques, done May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614, the State Parties undertake not to engage in hostile uses of weather modification techniques as a means of injury to other State Parties. This convention thus has little to do with strict liability because it addresses a situation where the injury is precisely the intended result.

The second source cited, World Meteorological Organization/United Nations Environmental Program Informal Meeting of Experts on Legal Aspects of Weather Modification, *Draft Principles of Conduct for the Guidance of States Concerning Weather Modification*, [1978] DIGEST OF U.S. PRACTICE IN INT'L L. 1204-05, does not establish a strict liability principle either. Article VI requires that "all reasonable steps" be taken to ensure that a state's weather modification activities do not cause outside adverse environmental affects. *Id.* at 1205. This suggests the same general standard described in comment d of section 601, that a State which has taken such preventive measures is not responsible for unintended effects.

As for the third convention cited, the 1975 United States-Canada Agreement Relating to the Exchange of Information on Weather Modification Activities, 26 U.S.T. 540, T.I.A.S. No. 8056, reprinted in 14 I.L.M. 589 (1975), it explicitly states in article VII: "Nothing herein relates to or shall be construed to affect the question of responsibility or liability for weather modification activities, or to imply the existence of any generally applicable rule of international law."

34. RESTATEMENT (THIRD) § 601(1)(a).

35. The phrase also could be read to require a lower standard of conduct than that consented to by a State in an international agreement when the rules and standards agreed to by the State are not generally accepted. This possible interpretation is negated by comment b which provides that a "State is also obligated to comply with an environmental rule or standard that has been accepted by both it and an injured state, even if that rule or standard has not been generally accepted." *Id.* § 601 comment b.

tional organizations."³⁶ Discussions regarding this phrase on the floor of the American Law Institute only confirm the language's lack of precision.³⁷ The suggestion that a State should be bound by rules and standards that are neither customarily nor conventionally applicable is unusual to say the least. This confusing phrase apparently was adopted because of its use elsewhere: "This phrase is adopted from the law of the sea."³⁸ Indeed, the phrase appears a number of times in the 1982 Law of the Sea Convention. For example, article 211(2) of the Law of the Sea Convention provides:

States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.³⁹

36. *Id.* (emphasis added).

37. See PROCEEDINGS, *supra* note 28, at 520-21:

PROFESSOR OSCAR S. GRAY (Md.): [A]re we suggesting that the United States would in some way be subject to liability for having permitted emissions according to standards which were acceptable under American environmental control legislation but were not acceptable under something called generally accepted standards?

PROFESSOR HENKIN: . . . "Generally accepted" to me means accepted by the United States as well. If the United States dissents from it, it is no longer generally accepted. . . .

PROFESSOR SOHN: Yes. "Generally accepted" means accepted by a preponderant majority of the world, including the United States.

PROFESSOR GRAY: Including the United States.

PROFESSOR SOHN: Yes. If the United States or Soviet Union or several important countries in other parts of the world do not accept it, then it is not generally accepted.

PROFESSOR GRAY: Then, by the same token, what about the Third World Country which is attempting to industrialize . . .? Are we suggesting that we would claim that the individual country which had refused to accept the generally accepted standards is subject to some liability? . . .

PROFESSOR SOHN: It might be liable if damage occurred to some other country.

PROFESSOR GRAY: In other words, "generally accepted" does not necessarily mean accepted by the country against which the claim is made unless that country is the United States.

PROFESSOR HENKIN: Or some other big power. . . .

PROFESSOR SOHN: As far as Third World countries are concerned, they rely on solidarity. If one of them objects to something, usually the others object together on it. . . . In such a case also the standard would not be "generally acceptable."

This lengthy quote should not be taken to suggest that there was extensive debate on Part VI. To the contrary, the official record is quite brief.

38. RESTATEMENT (THIRD) § 601 comment b. Likewise, as Professor Henkin pointed out during the Institute's discussions, the phrase "originates in the marine field" was taken from the law of sea. PROCEEDINGS, *supra* note 28, at 521.

39. 21 I.L.M. 1261, 1310. The phrase appears in other provisions, but not always with such force. See *id.* arts. 207-10, 212.

A study of the phrases used in that Convention, however, suggests that transfer of this provision to a general restatement of international environmental law is problematic at best.

First, it is unclear whether article 211(2) is codifying or progressively developing international law. If the Convention is attempting the latter, then by agreeing to the Law of the Sea Convention, States consent to the application of generally accepted rules and standards that would not otherwise be customarily or conventionally applicable.⁴⁰ Second, even if article 211(2), relating to vessel source pollution, reflects custom, the Law of the Sea Convention does not require conformity with generally accepted rules and standards for all sources of marine pollution. In particular, in the cases of atmospheric and land-based pollution of the marine environment, the Convention only requires that States "take account of" internationally accepted rules and standards.⁴¹ Third, neither the meaning nor the use of the language in the Law of the Sea Convention is without controversy.⁴²

Finally, both the 601(a) and (b) obligations are progressive in that they extend not only to the environment of other States but also to areas beyond the territorial limits of national jurisdiction. The comments and reporters' notes neither adequately support this proposition nor note what is arguably contrary conventional practice. For example, reporters' note 9, entitled "Impact Abroad or Upon the Global Commons," is devoted almost entirely to whether the U.S. National Environmental Policy Act of 1969 has extraterritorial effect. As to arguably contrary conventional practice, the reporters' notes fail to mention, for example, that the Civil Liability Convention for Oil Pollution from Vessels, despite its

40. See Nanda, *Protection of the Internationally Shared Environment and the United Nations Convention on the Law of the Sea*, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 403, 412 (J. van Dyke ed. 1985).

41. 21 I.L.M. 1261, 1310, 1311 at arts. 207(1), 212(1).

42. See, e.g., Clingan, *Vessel-Source Pollution, Problems of Hazardous Cargo, and Port State Jurisdiction*, in INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? 273 (J. Van Dyke, L. Alexander & J. Morgan eds. 1988).

First, there is bound to be confusion regarding standard setting. The treaty, in various provisions, uses on the one hand the term "generally accepted" international standards, and on the other the term "applicable" international standards. It is not clear what the distinction is. Furthermore, it is certainly not clear what makes an international standard "generally acceptable." Certainly there is an implication that these standards should arise from international agreement. But how widespread should that agreement be and must a state be a party to those agreements before being bound? Presumably, these questions will require further considerations in an approximate forum, probably the IMO.

Id. at 275.

broad title, applies only to damage occurring in the territory or in the territorial waters of contracting parties.⁴³

Similarly troubling ambiguities, if not inaccuracies, exist elsewhere in Part VI. Subsection 601(2), for example, provides that a State is responsible "to all other States" for violations of its obligations under subsection 601(1)(a). Is this provision to be read as implying that the obligation in subsection 601(1)(a) is *erga omnes*, or is the reference in subsection 601(2) to "all other states" to be read as "potentially affected States"? If for no other reason, ambiguities are virtually inevitable given that the compactness of Part VI easily allows multiple interpretations. For all these reasons, scholarly or judicial reference to Part VI of the *Restatement* must be made with great care.

Conclusion

Part VI of the *Restatement* is an important symbolic step, but unfortunately, one of quite modest substantive value. It does not address the full scope of the law of the environment, but rather only one major portion, the law of transfrontier pollution. Even in addressing this aspect of the law of the environment, Part VI does not take on fully the challenge of restating the law embodied in the many conventions addressing the diverse sources and types of transfrontier pollution. The more modest efforts to restate all of the law of transfrontier pollution in sections 601 and 602 unfortunately yielded overly certain and occasionally incorrect statements. Overall, the resulting product is too general for the specialist and too confusing for the novice.

In reviewing Part VI, I came to question generally the value of a restatement effort when the majority of the law would be statutory or, as in this case, conventional. The value of an effort of course turns upon its objective. The style of writing and organization suggests that the *Restatement* was intended to aid the specialist, not to inform the generalist. The difficulty is that if the *Restatement* is to aid judges, government officials and practitioners, why should such persons refer to a black letter restatement of conventional law when they could go directly to the primary document? If the *Restatement* were more in the form of a narrative survey, however, it could guide such specialists to the relevant primary

43. International Convention on Civil Liability for Oil Pollution Damage, art. 2, done at Brussels Nov. 29, 1969, 26 U.S.T. 765, T.I.A.S. No. 8068, *reprinted in* 9 I.L.M. 45 (1970). *See also* Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, art. 2(b), done at London May 1, 1977, *reprinted in* 16 I.L.M. 1451 (1977).

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documents of conventional law and simultaneously help set a research and legislative agenda for international environmental law.⁴⁴

The task of restating the law of the environment is both important and formidable. The Institute is to be congratulated for taking the first step toward such a restatement. But the waterways of this law have many more branches than Part VI of the *Restatement* suggests, and many of those branches may be shifting. Although Part VI of the *Restatement* provides the first general chart, navigators are well advised to use it with caution. In time, there will be more detailed and accurate charts. Part VI's honor lies in its distinction of being the first edition.

44. A survey of the law addressing the carriage of hazardous chemicals at sea, for example, could describe the effort to encourage prevention through packaging and strategic loading requirements, clarify expectations regarding response through the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil, done at London Nov. 2, 1973, reprinted in 13 I.L.M. 605 (1974), and most importantly, point out the continuing reliance on general state and private remedies for injury, since unlike the area of oil pollution from vessels, there is not yet a liability convention in this area. For a recent example of such an analytic effort, see, e.g., Handl, *Transboundary Nuclear Accidents: The Post-Chernobyl Multilateral Legislative Agenda*, 15 *ECOLOGY L.Q.* 203 (1988).