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The Law and Politics of Transboundary

Air Pollution: The European Experience

*By Armin Rosencranz**

I. INTRODUCTION

The thesis of my talk this afternoon is that in the field of transboundary air pollution, notwithstanding the Trail Smelter case, Principle 21 of the Stockholm Convention, or any other general principles of international law, international law is ineffective and invariably gives way to considerations of national and international politics. Nations control pollution only when it is in their national interest to do so, not because they have obligations under international law to do so.

I'd like to compare the North American acid rain experience with that of Europe. There are at least four similarities. Scientific uncertainty prevails in both regions. Those responsible for the production of electric power, whether private or public authorities, have carped at the absence of complete proof of the causes and effects of acid rain.

Secondly, in both regions, with the exceptions of Canada, Norway and Sweden, public apathy about the problem is prevalent. Recent polls have indicated that while in Canada three out of four citizens are aware of acid rain, in the United States the ratio is only one in five. Similar divergences exist between Norway and Sweden on the one hand and the rest of Europe on the other.

Thirdly, no economic interests are yet seriously harmed, with the exceptions of sport fishing and tourism. These, however, aren't politically powerful economic interests like the agricultural or timber industries.

Finally, in neither region is there any willingness to invest the necessary capital to take remedial action through control technologies.

The two regions differ strikingly in air pollution control strategies. Unlike the United States which relies heavily on regulation, new source performance standards, and the best available control technology, Europe relies primarily on low-cost sulphur reduction strategies such as dispersion through tall stacks, use of low sulphur oil and coal, and an increasing reliance on nuclear power.

I have gained some expertise about an international agreement called the ECE Convention on Long-Range Transboundary Air Pollution. Both

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Canada and the United States were signatories to that convention. Let me tell you how that agreement came about and what it signifies.

II. THE ECE CONVENTION

At the 1975 East-West meeting of the Conference on Security and Cooperation in Europe, held in Helsinki, President Leonid Brezhnev of the Soviet Union challenged his fellow conferees to reach multilateral solutions on three pressing problems affecting all of Europe: energy, transport and the environment.

In the ensuing months, there seemed little likelihood that anyone would pick up Brezhnev's cue. The energy issue is, of course, fraught with economic and political considerations. Each country has always looked to its own needs, and, if those needs were not met domestically, they have struck the necessary bargains bilaterally with oil-producing nations. Moreover, it was widely believed that any East-West accord on energy could put the Western European nations at a serious disadvantage. While western nations would conscientiously endeavor to adhere to the terms of any accord, including disclosure of national energy production and consumption data, the Eastern European nations were expected to withhold such useful information.

The Rhine-Main-Danube Canal relates to the issue of transport. It is a canal wholly within and built by West Germany connecting two international rivers, the Rhine and the Danube. Placing the transport issue on the agenda of any East-West meeting would have given the socialist nations an opportunity to assert that such an important inter-European trade and transportation resource should be internationalized. Accordingly, the West German government declined to offer any such opportunity.

Of Brezhnev's three agenda items, the environment was by far the most innocuous. But, Swedish and Norwegian environmental officials saw in Brezhnev's Helsinki speech an opportunity for international discussion, negotiation and perhaps resolution of a problem very important to them: the long-range transport of air pollutants.

Three years earlier, at the 1972 Conference on the Human Environment, in Stockholm, the Swedish delegation focused international attention on the problem of lake acidification from airborne pollutants. This phenomenon had first been discovered in the early 1950's and its unchecked increase had begun to alarm Scandinavian environmentalists. Airborne pollutants, especially sulphur oxides, were being imported into the Scandinavian atmosphere from elsewhere in Europe. In Norway, as much as 90 percent of the sulphur in the atmosphere originated outside the country.

At the time of the Brezhnev initiative, only one international organization had shown any interest in acid rain. This was the Organization for Economic Cooperation and Development (OECD) in Paris, whose mem-

bers include Western and Southern Europe, Canada, the United States, Australia, New Zealand, and Japan. Since 1972, the OECD had engaged in numerous studies and produced several volumes on transfrontier pollution. The OECD was, in diplomatic parlance, a talking shop. Its policy pronouncements were merely recommendations to member countries. Norway and Sweden recognized that the OECD had never had and never would be given power to enforce its recommendations.

The European Economic Community, consisting of the nine Western European members of the Common Market—West Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Ireland, Britain and Denmark—had considered various measures to control and abate sulphur dioxide, the precursor of acid rain. But these nine countries were all heavy producers of SO₂ and were unlikely to subscribe to any measure that would compromise their industrial productivity. Moreover, Norway and Sweden, which were not members of the Community, held no strong bargaining position.

Having decided to seize upon the Brezhnev initiative, Scandinavian diplomats next had to find an appropriate forum. They settled on the U.N. Economic Commission for Europe (ECE), housed in the old Palais des Nations in Geneva. All European nations, East and West, are members of the ECE and anachronistically, so are Canada and the United States. The ECE, however, was also thought by some to be just another talking shop. Finally it was decided to use the ECE because Swedish scientists had determined that up to one-third of the sulfur compounds in Sweden's atmosphere originated in Eastern Europe—primarily East Germany, Poland and Czechoslovakia. This is especially the case in the winter months when winds tend to blow northwestward. Accordingly, any hope for a substantial control of acid precipitation in Scandinavia would depend on Eastern European cooperation.

Serious negotiations were undertaken at the ECE in 1977. Delegates from Sweden and Norway pressed for a tough agreement to hold the line against further SO₂ increases. This came to be known as the "standstill" clause. In addition, SO₂ pollution levels were to be abated by fixed, across-the-board percentages. This latter provision was called the "rollback" clause. Together, they became the Nordic Proposal.

The main resistance to the Nordic Proposal came not from the Eastern European polluting nations, but from the large polluters of Western Europe, especially West Germany and Great Britain. They talked with one voice through the European community. West Germany was skeptical of the entire enterprise and especially of any attempt to empower the ECE Secretariat to make troublesome inquiries of signatory nations.

Britain discharges more sulphur oxides into the air than any other country in Europe. British scientists grant that the Scandinavians are troubled by acidified lakes and soils, but question whether the 3.2 million tons of sulphur dioxide discharged by Britain's power plants are to blame. They are not even convinced that there is such a phenomenon as acid

rain. In the words of Britain's former Minister of the Environment, "Britain is not willing to pay the high costs of large-scale reduction until its share of the responsibility for sulphur fallout is firmly established." Privately, some British environmental officials concede that up to 25 percent of Norway's problem may originate in Britain, but argue that more research is needed before action is taken.

As negotiations proceeded at the ECE through 1978, the British and German positions began to harden, especially against the standstill and rollback provisions of the Nordic Proposal.

The United States' role in these negotiations was both ambivalent and ambiguous. Several U.S. representatives tried to mediate between the Community and the Scandinavians, although the United States was no less ready than the Community to accept a standstill or rollback provision. The United States could not agree to any such change in existing policies without new Congressional authority.

At the beginning of 1979, a high level meeting of ECE member states was set for November, at which time it was hoped that an agreement on transboundary air pollution would be presented and signed. In the early months of 1979, negotiations over the terms of the draft convention became tense. The West Germans successfully resisted the standstill and rollback positions. They also required that the words "economically feasible" be added to the Nordic provision that sulphur reduction be achieved with the best available technology. Even so, the West Germans still felt uncomfortable with any agreement, and it took the intervention of the Prime Minister of Sweden, the Foreign Minister of Norway and former French President Giscard D'Estaing, representing the then-president country of the Community, to bring Germany to agreement.

The British eventually agreed to go along with the Convention, supposing that their planned increased reliance on sulphur-free North Sea oil and sulphur-free nuclear energy to generate electric power would bring about a net reduction in their own sulphur emissions. They felt they could adhere to the terms of the Convention without changing their existing energy program.

Most ECE countries sent their senior minister responsible for environmental matters to the meeting in Geneva, November 13th through 16th, 1979. It was the first time that senior environmental ministers had gathered for such a common purpose.

The ECE convention was and is the first and only international multilateral accord on air pollution. It was the first time that a multilateral convention was signed by an overwhelming majority of ECE member states at the very meeting at which it was presented, and it was the first time that the ECE had performed such a significant and constructive function. The ECE treaty is at best, however, only a very modest step forward. It depends exclusively on exchanges of information and collaborative research and monitoring of air pollution and rain. Its terms also provide ample room for evasion.

Signatories agreed to "endeavor to limit, and as far as possible, gradually reduce" transboundary air pollution (Article 2) by using "the best available technology economically feasible" (Article 6). Upwind nations are required to notify and consult with downwind nations if any planned facilities, such as power plants, are likely to "significantly" increase long-range transboundary air pollution (Article 8). There are no numerical goals, no standards, limits, timetables or enforcement provisions. Principle 21 of the Stockholm Declaration on the Human Environment proclaims that, "States have the responsibility to ensure that activities within their jurisdictional control do not cause damage to the environment of other states." This principle is incorporated in the Convention's Preamble but not in its text, and West German representatives noted that their government did not feel bound by any provisions in any preamble.

Have the Scandinavians gained anything with the signing of the ECE Convention? First, they have gained international recognition of the acid rain problem. Second, they have gained a commitment of the ECE Secretariat and bureaucracy to develop policies and strategies to deal with transboundary air pollution. Finally, they have achieved the principle of prior consultation and notification, however difficult it may be to effectuate.

Erik Lykke, Norway's principal ECE negotiator, concluded somewhat philosophically, "We don't expect a 50 percent reduction in Europe's sulphur emissions. We merely expect to slow the increase in those emissions."

Unlike the United States which relies heavily on regulation, new source performance standards, and the best available control technology, Europe relies primarily on low-cost sulphur reduction strategies such as dispersion through tall stacks, use of low sulphur oil and coal, and an increasing reliance on nuclear power.

Worth mentioning are two other international pollution control instruments that have come out of Europe. The Nordic Convention of 1974, signed by Norway, Sweden, Denmark and Finland, which guarantees equal access to courts and nondiscrimination, but no case dealing with acid rain has yet come under the Nordic Convention. The European Economic Community, whose nine member States include Western Europe's major polluters, enacted on June 30, 1980 its long-awaited SO₂ directive. The resolution incorporates the ECE formula "to endeavor to limit and as far as possible gradually reduce air pollution." The SO₂ directive of the EEC is so weak that at least two environmentally progressive countries, the Netherlands and Denmark, were reluctant to approve it.

III. PROGNOSIS: LIMITED ABATEMENT BUT INCREASED AWARENESS

The new ECE Convention, backed by general principles of international law, will not abate SO₂ emissions sufficiently to remedy the trans-

boundary acid rain problem. Numerous control strategies, policies and technologies are available, and could be extremely effective, but few nations are willing to bear the cost. Indeed, the pressures today are in the opposite direction, namely, to relax air quality and emission standards to make coal-generated electric power more efficient and economical.

The prospects for timely action do not look promising. Sweden and Norway will undoubtedly call on their fellow ECE signatories to implement the principles of the Convention. The polluting countries will continue to call for proof of damage, identification of specific sources and resolution of scientific uncertainties. The polluters may propose to bear the modest costs of liming acidified lakes, an offer which the recipient countries will scorn as an inadequate substitute for abatement, and as potentially dangerous to aquatic ecosystems.

No international principles or practices, and certainly not the qualified language of the recent ECE Convention, can compel remedial action. But many consciousnesses were raised at the Stockholm Convention of 1972 and at all the international meetings and negotiations on environmental matters since then, including the 1979 ECE Convention on Transboundary Air Pollution. The Stockholm Conference led to the creation of numerous national institutions to protect the environment and made everyone on the public level aware of the acid rain phenomenon, if not of its danger.

The ECE Convention on transboundary air pollution at least may keep matters from getting worse and may perhaps make them somewhat better. The most promising provision is that which requires upwind nations to notify and consult with downwind nations. ECE-mandated exchanges of information may stimulate collaborative research on crop damage and health effects from sulfate aerosols and acid rain, which in turn may eventually demonstrate the cost-effectiveness and, indeed, the *necessity* of controlling and abating sulphur emissions throughout the industrial world. Ultimately, this would induce responsible officials to revise upward their estimates of what is economically feasible.

Transboundary air pollution is governed not by international law but by national self-interest. That self-interest, however, combined with the consciousness-raising effect of vigorous international discussion and negotiation concerning sulphur pollutants and their potentially irreversible effects can induce thoughtful and enlightened public officials to worry about and try to abate acid rain for their own nations' welfare.

During 1980, for example, most European countries did reduce their annual SO₂ emissions by efficiently employing low-cost sulphur control strategies such as burning low-sulphur coal and oil, washing coal before combustion and producing electricity from nuclear sources. West Germany began an ambitious research program dealing with the effects of acid rain on conifer forests and on buildings and monuments. Britain used aircraft to track chemically colored SO₂ emissions from their sources in Britain to their eventual deposition abroad.

International organizations and agreements serve the essential function of educating the international political community. They help to build a consensus about transnational problems and to develop a context in which sovereign States pursue pro-international policies by perceiving that it is in their own interest to do so. By making and keeping issues like transboundary air pollution salient topics for international investigation, discussion and negotiation, they create a ripple effect. (This is what is happening, on this side of the Atlantic, with the U.S.-Canada Memorandum of Intent.) International monitoring, data gathering and scientific research help to form a consensus among scientists that a problem is serious and deserves urgent remedial action. These ripples are bound to reach policy-makers and concerned citizens and to influence national agendas.

In this lies the main hope for progress in international environmental protection generally, and specifically, in the area of transboundary acid rain pollution.