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PRACTITIONER'S CORNER:

An Interview with Perry Wallace on the United States' Withdrawal from the Kyoto Protocol

Interviewed by Dave Newman

Professor Perry Wallace teaches Corporate Law, International Business Law, and a seminar in Environmental Issues & Business Transactions at American University, Washington College of Law. He has taught at WCL since 1991. Before that, he worked as an environmental litigator at the Department of Justice and taught at the University of Baltimore Law School.

DN: What interesting environmental classes have you taught recently?

PW: In my seminar on business transactions and environmental law, it really gives a lot of opportunities to explore the economic and business side and the interaction of actors and players. The evolution of environmental law in the United States – and I was around for a lot of that – has been one of a lot of conflict, and in some instances some softening of the conflict, between the business community and the pro-environmental community, with the government playing one role or another depending on the administration. I like to take the business context – like a real estate or merger transaction or just ongoing business activities – and use those to explore how these actors interact and play out their roles within the framework of some environmental legislation. I really see it like a drama with there being actors playing roles, having interests, having vulnerabilities, and the law playing a larger role than ever in sort of mediating the drama and dictating the drama. And lawyers, of course, representing their respective clients playing a large and important role.

DN: Now on to the Kyoto Protocol and climate change. First of all, do you expect Kyoto to be successfully implemented?

PW: Globally?

DN: Yes, globally.

PW: I don't think in the form that it's in. I think some version of it will see a great deal of progress and will move in the direction of the ultimate goals of the Kyoto Protocol. I think that in the particular form that it's in, it's probably not quite so realistic. In fact, I like what I've heard the European Union ministers call it: "an extremely important first step." Whether we'll get past that first step, I don't know. I think that we'll learn as we go. I think that we set some pretty ambitious goals. I don't even mind that they're unrealistic as long as we're willing to continue to learn. So that's it – I think that some form or

attempt at addressing climate change will be implemented within the next decade.

DN: What specific aspects of the Kyoto Protocol's current structure are unworkable in your opinion? Also, is it the United States' lack of cooperation that leads to your pessimistic outlook or is the basic structure simply untenable with regard to other nations as well?

PW: I think you have both things in play. Let me make it really clear that I support the Kyoto Protocol and I certainly support its goals. And even though pragmatist that I am, I still think that it's important to skew towards the more idealistic and ambitious side of it. As a practical matter, you've got the United States as the 800-pound gorilla. The United States is a central player not just because it produces the largest amount of greenhouse gases, but because it's such an important player in the world.

DN: Is the recently proposed climate change plan from the Bush Administration simply a smokescreen to cover up doing nothing or do you think that voluntary greenhouse gas intensity targets could actually achieve any significant reduction in emissions?

PW: I think that the President's plan is kind of much ado about nothing. I don't say that with any animosity towards the administration because I appreciate the difficult job that they have. In fact, one of the interesting observations that I heard when I was giving a presentation at the University of Aix-Marseilles was that under Clinton on the one hand and under Bush on the other hand you had the same lack of action, but a different rhetoric. Both men know that it's very difficult to get the United States to sign on toward mandatory targets because that implicates a restructuring of the economy.

DN: Eileen Claussen, head of the Pew Center on Climate Change, recently described the changes required to combat climate change as "nothing short of a new industrial revolution." Do you think that's overstating it?

PW: Not in the least. That's what's implicated. And I would say that that's the reason that we've found resistance on so many levels, starting with the attack on the sciences, the attack on the promoters and the objectives.

DN: You just mentioned a conference that you recently spoke

at in France. You also recently spoke at a conference in Texas about climate change. Would you explain a bit about your experiences?

PW: Back in the Fall of 2001, I was invited to speak at Southern Methodist University Law School's Corporate Council Symposium. Their law review sponsors this event every year and they bring together corporate practitioners and corporate executives to discuss a number of issues. They wanted me to deal with a broader issue, kind of a vision sort of issue, and I thought that the Kyoto Protocol was great. To go down to Texas and to talk about the Kyoto Protocol was a challenge to me because obviously I favor the Protocol and its direction, but I understood that I couldn't turn off my audience. I was in oil country and I wanted to try to inform and educate them. It was interesting to try to talk to them about corporate governance, the Kyoto Protocol, and the challenge to the modern American corporation and to talk in business terms but to try to give them information about climate change and about what some progressive companies were doing in trying to deal with climate change. The other major presentation I gave was at the University of Aix-Marseilles in Aix-En-Provence. I chose some subjects that would be provocative because I wanted to inspire a lot of debate.

DN: Who was your audience at that conference?

PW: French graduate students studying at a center for international and European Union law. I spoke about the tension between the United States and both France and the E.U.

DN: How would you characterize the response from these students?

PW: There was a certain amount of frustration and anger, which represented a larger reaction to the United States' isolationist approach in a number of arenas. I found, interestingly, that it was hard to detach and to talk only about Kyoto. I had to talk broadly about the transatlantic relationship and about their perceptions of Americans, about George Bush and the Bush Administration, and about any number of decisions and failures to act on the part of the United States. So the Kyoto Protocol was only part of a characterization of the United States as arrogant and unilateralist.

DN: Are you surprised that there is not more debate or discussion connecting the issues of the war on terrorism to our dependence on middle-eastern oil to climate change? These issues seem extremely interconnected yet the mass media, at least in the United States, hasn't made that connection much.

PW: It doesn't surprise me because we still have more educating to do about the Kyoto Protocol, the implications and all of those connections as you described it. I'll make reference to my SMU talk where most of the people were corporate lawyers and some corporate executives. Frankly, the only people who really got into my message were the kind of more visionary people. The kind of corporate lawyer business types listened but the best I accomplished with them was not to piss 'em off

and then to work in a little information. I had to talk like a corporate lawyer and talk about business objectives and at least it didn't piss them off and maybe a seed or two was sewn. Here we had a group of highly educated professionals in the corporate sector and many of them in the energy arena and they partly had some defensiveness about the subject, partly didn't understand the Kyoto Protocol and what it was trying to do (not in the kind of depth that you think a professional would) and also didn't have as much of a sense of the international links. They had certain knowledge, but it was the kind of knowledge that represented their company policies and you didn't get the sense that they've thought very deeply about it. So when you expand that out to members of the American public, you're not surprised that people typically don't see these connections. I'm not surprised that there is not more discussion because people don't make the connection. Americans are generally not very good at understanding international relations and foreign affairs. We had proof of that in the post September 11 period where we had to scramble to learn more about Islam and more about the Third World and we've been forced to look outward. But we still don't necessarily do so well with regard to these international issues. Kyoto is just one example. It's infused with things to learn about science, about politics, about law, and about international relations. So to see the connection, you don't expect it.

DN: A question about the emissions trading system of the Kyoto Protocol. There are already efforts under way with markets developing for greenhouse gas trading. How can these independently operating markets create a net reduction without a global cap on the overall amount of greenhouse gas emissions allowed?

PW: That's a good point. If you can achieve reductions at all in this way, you do it relatively inefficiently. I guess the idea overall in using these market mechanisms is that you get reduction in some way, but not in the larger global sense. That's the reason for Kyoto. It's almost like people trying to run a localized effort to end the broader war without a larger solution that covers all the parties. The notion of a global system is what Kyoto aims at. Putting that in place is not going to be the easiest task, but to the extent that the parties are willing to begin to put a solution in place – tune it, fine tune it, do what they can – that's the only way such a system will work. You think about the U.S. system that we've created under the Clean Air Act, and we've had some success with it. One of things you can take away from this is that if you look nationally and look regionally, then you might be able to reduce some emissions. But in terms of the system overall, there's no way that it can be effective; you've got different standards, different approaches, different valuations of credits and units of gases. The lack of coordination that is needed in a global system, how can you actually achieve an aim of reducing global emissions when you've got these systems that are not interconnected. Thinking about the real-life way in which progress takes place, thinking about the growth of the European Union and the emergence of the United States. They started as sort of independent units operating on their own and then it made sense that they needed to cooperate and have even greater union and that created in effect tensions that in this

country last to this day when we talk about federalism. One can observe those tensions in the case of the E.U. as well. What probably made sense, though was for people to get started and not for one group, you know Italy or for Spain or whomever to wait around and see whether they could get a global system. I think that analogy as a practical matter might end up being what happens in the Kyoto Protocol setting.

DN: What about the voluntary pledges made by certain corporations to reduce their own emissions?

PW: And thinking about that kind of voluntary approach, people have talked about the emergence of a sort of parallel system of the Kyoto Protocol and the nations that are working within that framework and the alternative - with the United States in that category - with the voluntary compliance. It's not that nothing is happening in the voluntary arena, it's only that you can only be so effective. Similar to self-regulation of the legal and accounting professions, it depends on the extent to which people and companies are willing to move towards that goal. At the same time, this voluntary system is not failing to accomplish any results. These companies, I like to see them as experiments that are building real live institutional contributions to knowledge, to technology and so on. I think that these two paths will move along parallel to each other and at a certain point they'll probably become a little closer together because as we try to implement the Kyoto Protocol it's going to be a little harder for the E.U. to do that than they are saying.

DN: What incentive do these companies have, especially under the current Administration, to take these voluntary steps to reduce their emissions?

PW: The answer rests with the story that environmental protection and productivity need not be antithetical to each other. What we have seen is examples of simultaneously increasing environmental protection and economic productivity. The fact of the matter is that that's not always the case and it's important to recognize that. But what's most important is that it has happened, it does happen, and that there are possibilities. Companies that want to play it safe and have an enhanced return on their investment in the environment, they want to see that show up in either increased productivity or at least increased publicity. The good citizen game.

DN: How much of the motivation for corporations to adopt voluntary reduction measures stems from a concern that, with the possibility of a new administration right around the corner, new mandatory standards could be adopted and enforced?

PW: Absolutely. Going back to the SMU talk – they understand a couple of things, even if they can't talk with their other colleagues about it. They understand that at any given point politically you might well have laws in place that push them. And they know enough about the history of environmental law in this country with issues like clean air, they they're going to be forced to come aboard. They want to look ahead – look down the line – and begin to prepare for this so the financial hit is not so hard and they can ease into it. The other thing they know is that the old traditional structure of industrial

economy has taken some hits and probably will continue to and they don't want to be stupid about that. They understand more than you might imagine about climate change and what the implications are in terms of our sources of energy and they recognize that it actually is more a part of their business planning, that they look to see what could be coming down the pipe in terms of energy dependence and energy availability. They even understand things like Arctic National Wildlife Refuge (ANWR) – how relatively little of a contribution it makes. The smarter ones – the British Petroleums and some others – are moving in that direction. Some others are doing it more quietly and they're smart enough to take advantage of the voluntary programs to be able to come in a safe setting – one where they're not pushed so hard and they get praised for everything that they do.

DN: Is there enough corporate leadership in taking these voluntary steps to counteract the power of the business lobby in pressuring the Bush administration against mandatory actions?

PW: The point is well taken. You've got a significant part of the business community that is grounded in the old system and that's still working for them. To that degree these interests are going to help limit the progress that occurs. At the same time, we've got pressure coming from a lot of places throughout the world – not only from the E.U., but also from many other sources. And here we are at a time when the U.S. is having to pay a lot more attention to these other sources. We have got to understand that we are a *part* of the whole world and not *the* whole world. I think that this is coming home to some degree or another. I'd also throw in the anti-globalization force – and it is a force that does have an impact in forcing people to think and rethink. American corporations have to work with the idea that their presence in many parts of the world is suspect.

DN: Would another energy crisis help to spur quicker action in dealing with climate change or would it simply lead to an increase in oil and gas development in environmentally sensitive areas of the U.S.?

PW: It would in part lead to some modest increases in that small, growing community of corporations who are willing to look more seriously at alternative energy sources and increased conservation. But I think in the main there are lots of diehards. To them, the system, they either feel like it works or that it's all they've got.

DN: What are some of the fundamental roles that environmental lawyers play throughout this debate over how to best respond to climate change?

PW: One thing is to keep the matter in everybody's face. Keep people aware and continue educating people. I'm not talking about the catch-phrases and the knee-jerk "oh, yes I'm an environmentalist." I'm talking about really understanding why the environment requires protection, understanding that there are going to be both trade-offs and the kind of learning by doing and making mistakes along the way.○