

INTERNATIONAL ENVIRONMENTAL LAW: RECENT ISSUES AND CURRENT NEGOTIATIONS

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Australia is one of an increasing number of countries who gather together in international forums to try to solve environmental problems which threaten the security of the globe. These problems include global climate change and ozone depletion in the atmosphere as well as the need to protect the earth's biodiversity. Australia will be represented at the United Nations Conference on Environment and Development which will be held in Rio de Janeiro from 1-12 June 1992. The progress of international agreements relating to these global environmental problems is on the agenda.

Ozone Layer

The Montreal Protocol for the Control of Substances that Deplete the Ozone Layer, was adopted in September 1987 and entered into force on 1 January 1989. Australia ratified the Protocol in May 1989.

The Protocol as drafted in 1987, required contracting parties to freeze the production and consumption of certain chemicals, chlorofluorocarbons (CFCs) and halons, at 1986 levels within 2 years of entry into force. Provision was then made for a gradual reduction in the consumption of the chemicals so that by 1997, parties would have cut their use by 50 per cent. This relatively measured reduction regime was tightened at the second meeting of the parties in June last year, when governments agreed to a more rapid-phase down in the use of ozone depleting substances, with the aim of their complete elimination in most cases, by the year 2000.

At the same meeting, the list of chemicals covered by the control regime was extended to cover a further 10 CFCs as well as carbon tetrachloride and methyl chloroform, which have both been identified as significant contributors to ozone depletion in the stratosphere.

Another decision taken by the parties was to set up a fund to assist developing country parties cover the incremental costs of introducing ozone benign technology into their industries. This fund was set at a notional level of \$240 million over 3 years (actually \$160 million pending accessions by the two largest developing countries, India and China), to be covered by mandatory contributions from developed country parties. The establishment of the fund was, in effect, the quid pro quo for developing country acceptance of the stricter control measures.

In June this year, the third meeting of the parties to the Montreal Protocol was held against a background of emerging scientific evidence that the rate and extent of ozone depletion was more serious than earlier thought. A series of largely procedural decisions were taken preparatory to further substantive changes to the Protocol and its mechanisms at the next meeting of the parties in September next year. These decisions included:

authorising a working group to draft amendments to tighten the reduction schedule even further;

- directing the scientific and technical panels to broaden the scope of their studies to include the impact on the ozone layer of extending the control measures to other chemicals; and

authorising a legal group to produce recommendations on a strengthened compliance mechanism.

The next full scientific assessment is due out shortly and the parties will be reacting to this in their decisions next September. The more dramatic elements of this assessment have already appeared in the media and suggest that there will indeed be a need to tighten the control regime further.

I have dwelt in some detail on the Montreal Protocol because it has an influence in environmental negotiations well beyond the narrow and rarefied issue of ozone depletion. Its distinguishing feature is that it is the most well known and widely ratified international instrument to date, based squarely on the "precautionary principle".

This principle implies that where there are threats of serious or irreversible environmental damage from commencing or continuing a particular practice, lack of full scientific certainty should not be used as a reason for postponing measures to control or prohibit that practice, pending clearer scientific evidence establishing exactly what the impact will be. With this in mind, the Protocol was drafted as an organic instrument containing fairly limited obligations initially, reflecting the less-than-full scientific consensus on the cause of ozone layer depletion in 1987. However it also contained mechanisms and procedures both to regularly reassess the scientific information on the problem and to adjust the control mechanisms as necessary, in the light of these revised assessments. As I have just mentioned, this has already been done once and will probably be repeated next year.

In both respects, that is in its embodiment of the precautionary principle and in its organic structure, the Montreal Protocol is a prototype instrument for the treaties currently being drafted on climate change and biodiversity, where no clear scientific consensus has emerged on either the full scope of the problems or the most appropriate remedial action.

Climate Change

I would now like to turn to developments in the negotiations on these two topics, beginning with the most recent session of the Intergovernmental Negotiating Committee (INC), on climate change. This was held in September in Nairobi and was the third such negotiating session in the five currently scheduled before the Diplomatic Conference in Rio de Janeiro next June, where the Convention will hopefully be adopted as part of the UNCED Summit.

The first two sessions largely focused on procedural matters. To some extent the September meeting was the first time delegations had actually sat down and started negotiating on substance. Not surprisingly, both because it was early days and because the subject matter is highly complex and touching on areas of direct national interest, progress was limited. An enormous amount of work still needs to be done but at least in Nairobi, a sense of the shape and structure of the Convention started to emerge, even if the extent and nature of the obligations parties will finally have to accept, remain hazy.

It is likely that the Climate Change Convention, like the Montreal Protocol, will contain a set of obligations requiring parties to limit greenhouse gas emissions within a certain time period. Obligations in this respect are likely to be "differentiated" between industrialised and developing countries so that the latter do not have their need for economic expansion unreasonably hampered by a need to freeze emissions at current levels. At the same time these countries will probably be expected to develop national inventories of greenhouse gas (ghg) emissions and to take environmental considerations into account when establishing industrialisation strategies.

The aspects of the Convention which are not at all clear at this stage include whether the initial obligations will relate to all ghg or just carbon dioxide (CO₂); (the former is a fairer measure, but the latter is technically much easier to measure and thus to monitor). Secondly, it is unclear whether only a stabilisation of emissions by say the year 2000 will be required, or whether obligations to reduce emissions by a certain percentage by later date (along the lines of the Toronto Target which require a 20 per cent cutback by 2005), will also be prescribed in the Convention. Thirdly, we do not yet know what differentiations beyond those between developed and developing countries will be allowed for in the application of obligations. Australia has actively promoted the notion that countries with a high dependence on fossil fuels need to be recognised as a special category under the Convention. The 37 members of the caucus group AOSIS - the Alliance of Small Island States - has similarly urged special recognition of the needs of those countries potentially most affected by global warming induced sea-level rise). A fourth area of uncertainty is what devices will be incorporated in the instrument to encourage or enable parties to comply with their obligations or cope with the problems of adjustment (examples of those being discussed are tradeable emissions permits, carbon taxes, compulsory insurance funds, clearing houses and transfer of technology arrangements). Another critical area of uncertainty

is whether the obligations will take account of both sources of ghg emissions (ie power stations, motor vehicles, rice paddys, ruminating cows etc) and sinks (ie forests and oceans). This comes down to the issue of whether credit will be given for preserving or enhancing sinks which absorb carbon dioxide, allowing an increase in the country's emissions from other sources. Yet another important issue for Australia is whether the Convention will address policies which although not directly related to emissions, in fact lead to greater ghg emissions (eg agricultural subsidies, policies encouraging increased population growth rates).

The Climate Change Convention will be more far-reaching in scope than the Montreal Protocol, hence its structure will inevitably be more complex. At the same time it will have many of the same sort of mechanisms, notably:

- a conference of the parties as the highest decision-making forum;
- a secretariat to implement the decisions of the parties;
- a scientific and technical body to review developments in the field and make recommendations to the parties;
- a fund to assist developing country parties to convert to more environmentally benign technology (this might be constituted as a trust fund of the Global Environment Facility of the IBRD or may, like the Montreal Protocol Fund, be established separately with its own elected Executive Committee);
- a compliance committee to receive and review parties' periodic reports on implementation of their obligations.

In addition to the above, there are a number of novel ideas for institutions for this convention including:

- a clearing house either to link developing country needs with available technology or to arrange emissions trading; and
- an executive committee to administer the convention and provide policy guidance between meetings of the conference of the parties.

Although there remains a fair degree of confusion over some of these ideas, in other instances a great deal of progress was made in Nairobi in actually drafting text. Articles on things like Transmission of Information, Scientific Exchange, Conference of the Parties, Secretariat, Amendments, Annexes and a number of other more-or-less standard provisions of the Final Clauses section of the Convention are reasonably well advanced. It is to be hoped that the next session of the INC, meeting in Geneva in 2 weeks time, will address and resolve more of the substantive uncertainties.

Biodiversity

Also in September in Nairobi, the INC on Biodiversity held its fourth session. This exercise is a bit more advanced than the Climate Change negotiation and we do have a text of the draft instrument, albeit one still heavily bracketed.

The aim of the negotiation is to reach agreement on concerted international action for the conservation and sustainable use of biological diversity. This will involve the adoption of measures to protect ecosystems, species and genetic diversity now under threat from human activities such as deforestation, marine pollution and global warming. The concern here is not simply that living organisms which have developed over millions of years are being accidentally wiped out - though that is an issue which raises for many people, serious philosophical and ethical questions - but also that species which may be of vital importance to humankind in the future, may be lost. In this context, it is worth noting that a significant proportion of drugs critical to the treatment of a range of diseases and conditions, derive from rare plant species. Since it is calculated that only a relatively small percentage of existing plant species have been fully catalogued and

assessed for their medicinal, scientific and industrial potential, it is reasonable to assume that many more treasures in this respect, remain to be discovered.

The draft convention tackles the task of trying to protect species lying in large measure within the national jurisdiction of particular states, by proposing a range of measures and procedures. These include obligations on parties to develop national action plans to conserve the country's biological diversity and to develop programs for the in situ conservation of species, amongst other things, by:

- designating geographical areas of particular importance to biological diversity;
- regulating the use of biological resources;
- adopting plans for the rehabilitation of ecosystems where necessary;
- controlling the release of genetically modified organisms;
- eradicating or controlling alien species which threaten ecosystems, habitats or species; and
- establishing systems for the recording and use of the knowledge of indigenous peoples relevant to the conservation of biological diversity and the sustainable use of its components.

Parties will also be obliged to adopt strategies for the ex situ conservation of species through zoos, botanic gardens and seed and gene banks and to make arrangements for the identification and monitoring of threatened species and ecosystems. Other important obligations will be:

- to carry out surveys and inventories of biological diversity within their jurisdiction;
- to establish a global list of areas of particular importance for the conservation of biological diversity and of species threatened with extinction on a global level
- to permit access to genetic material on mutually agreed terms; and
- to permit and promote access to technology, (including biotechnology), relevant to the conservation of biodiversity, taking into account the special needs of the developing countries.

Apart from the above measures, the Biodiversity Convention is likely to contain provisions similar to those in other environmental conventions on exchange of information, technical and scientific co-operation, establishment of a conference of the parties etc. A financial mechanism to provide funds to developing countries to assist them to comply with their obligations will be essential to the success of the Convention.

There is also a novel and controversial provision, proposed by Mexico, aimed at ensuring that the country of origin of genetic material, gains some benefit from research and exploitation of this material, carried out in or by some other state. As a country with extensive biodiversity, Australia could benefit from such an obligation. At the same time our scientific and industrial research programs, like those in other countries, make use of imported genetic material and we would not wish our access to this to be unduly hampered, nor the intellectual property rights deriving from that research, to be unreasonably compromised.

At the Nairobi session of the negotiations, some progress was made in developing a clearer negotiating text however significant, even fundamental, differences remain to be sorted out in some areas. As in the climate change negotiations, there is a reluctance on the part of many developing countries seriously to discuss substantive obligations before there is some guarantee on the part of industrialised countries that they will provide additional financial resources and technology transfer to assist in the implementation of those obligations. Developed countries on the other hand are concerned to ensure that financial resources committed under the Convention match the real requirements and that the mechanism agreed to distribute these funds, is consistent with the arrangements being negotiated under other instruments (such as the Climate Change

Convention). Another fundamental problem is the issue of national sovereignty and the right of each country to exploit its own resources in accordance with its own needs and priorities. This convention, like other environmental agreements, will lay down limits on that principle, potentially at some short-term economic cost to the relevant countries by requiring countries to take national measures to conserve biodiversity. These measures, if effective, and the inclusion of areas on the global list, will likely impact on the unfettered exploitation of natural resources. Some states have objections in principle to international interference in issues of national sovereignty in this way and harbour suspicions that it will lead to the impoverishment of developing countries to the economic benefit of the technologically advanced countries.

Cross-sectoral issues

I would like now to deal with three issues, which are increasingly absorbing negotiating energy, not only in the three negotiations I have been talking about, but also the UNCED preparatory process and in UNEP deliberations.

Intellectual property rights

The first issue I want to mention is that of intellectual property rights. This comes up in discussions on technology transfer in all negotiating forums to deal with intellectual property questions, notably WIPO and GATT. On the basis of negotiating positions staked out thus far, it is very likely that some sort of arrangements for allowing developing countries to take advantage of patented technologies without paying the full cost of this, will have to be made if these countries are to be brought into the various environmental control regimes being considered. Key developing countries are insisting that industrialised countries commit themselves to facilitate the transfer of technology on "a non-commercial and preferential basis", something which the latter in the vast majority of cases cannot or are unwilling to do. Developed countries fear that such an interventionist approach by governments might upset the existing system of intellectual property rights which by protecting the rights of the private companies and individuals who develop the new technologies, is providing an essential incentive for continued research and development. They argue that in any case the issue is a phantom problem in that much relevant technology is at a pretty basic level and not subject to intellectual property rights and secondly that the companies holding the more sophisticated technology are usually more than happy to negotiate commercial arrangements for this to be transferred and used in developing countries. It is then principally a matter of finding finance to cover this cost, through joint venture investment projects, through multilateral aid funds available from the IFIs, or through bilateral aid programs. Unfortunately the issue has become something of a touchstone of North/South differences and a solution which does not acknowledge some sort of right to access to technology tied up by intellectual property regimes, may be politically difficult for some developing countries to accept.

Non-conditionality

Another cross-sectoral issue is the practice of tying development assistance funds, either those dispersed through the financial mechanisms incorporated in the different instruments, or those provided bilaterally or multilaterally, to environmentally sound projects. For many countries such "conditionality" smacks of neo-colonialism and all the problems of economically-tied aid that the newly liberated colonies of Africa and Asia faced in the fifties and sixties. For donor countries and organisations, however, it is critical that development assistance projects are assessed for their environmental impact, not only because they do not want to see mistakes made in the industrialised countries repeated unnecessarily in the developing world, but because a project which ignores environmental considerations, is likely ultimately to fail in its objective of improving the lot of the population of the country concerned. In the case of development assistance funds made available through environmental treaty financial mechanisms, to comply with the principle of non-conditionality would be to undermine the purpose of providing the funds in the first place, notably to encourage the recipient country concerned, to comply with the environmental objective of the particular convention.

Verification and compliance

A third cross-sectoral issue of importance is verification and compliance, that is, the process of ensuring that states parties actually comply with their obligations. This issue, which comes down to incorporating in each instrument a mechanism to discourage parties from cheating on their obligations, is critical to the likely

success or otherwise of the instruments under negotiation. It is also important in the context of ensuring a level playing field amongst trade competitors in areas where the measures being contemplated are going to add costs to the production and export of particular products.

Australia has been active in promoting the notion that effective verification mechanisms should be included in environmental agreements and we have circulated a proposal to this effect in the climate change context. Given the reluctance of many countries to contemplate the application of direct sanctions against a party not complying with key obligations, our approach has been to focus on the need to gather information and provide expert assistance to countries having difficulty complying with their obligations. This is an approach, in part borrowed from the human rights field, which relies on incorporating into the convention a requirement that parties periodically report to some sort of international monitoring body on their strategies, policies, programs and legislation related to implementing the convention. The body, where it finds instances of failure to comply, can offer expert advice on how to rectify this and in the case of persistent or wilful non-compliance, can report the matter to the conference of the parties for further action. It remains to be seen if mechanisms along these lines will be acceptable to all parties to the current negotiations, but one positive indication is that the parties to the Montreal Protocol have adopted an interim arrangement similar to the above and will consider a more permanent compliance system at their next meeting.

There are a number of other cross-sectoral issues of interest and relevance to a meeting such as this including the use of the environment as a barrier to trade, liability for transboundary environmental damage, transfer of technology, and funding, but to deal in an adequate manner with all of these would require a seminar devoted to them exclusively.