



WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT

FOURTH MEETING  
Sao Paulo, Brazil  
25 October to 4 November 1985

WCED/85/24A

To: All Members of the World Commission  
on Environment and Development

From: Secretary General

Re: Discussion Paper on Legal Principles  
for Environmental Protection and Sustainable  
Development

At its Second Meeting (Jakarta, March 1985) the Commission approved the Proposed Programme of Work on International Co-operation (WCED/85/10), including work on (i) legal principles, (ii) modalities for avoiding and resolving environmental disputes, and (iii) multilateral conventions related to environment.

A small Experts Group on Environmental Law was formed to advise and assist on the preparation of a draft set of principles for consideration by the Commission. It met for two days in June at The Hague and agreed on a basic structure and initial list of principles. The lead author and Rapporteur, Dr. Johan Lammers, then prepared tentative drafts with explanatory notes for many of the proposed principles and these were circulated to the experts for comment by late August. Taking into account the comments and suggestions received, an expanded but still preliminary draft was sent for review to the experts in October.

This first Discussion Paper on "Legal Principles for Environmental Protection and Sustainable Development" presents a summary of the main guidelines and thrusts of the work to date on proposed global rights and obligations and those regarding transboundary natural resources and environmental interferences. First of all, however, three selected global issues with significant legal and political implications are presented briefly for discussion and guidance.

To ensure that the future work and report to the Commission addresses the major concerns of Members, five key questions are proposed in this report as a basis for discussion.

1. Three questions concern the selected issues, namely:
  - (1) WHAT ARE THE VIEWS OF THE COMMISSION ON WHETHER AND HOW BEST TO ASSERT LEGAL PRINCIPLES TO PROTECT THE RIGHTS OF PRESENT AND FUTURE GENERATIONS AND THE COMMON INTERESTS OF THE COMMUNITY OF NATIONS ?
  - (2) TO WHAT EXTENT, AND IN WHAT RESPECTS, SHOULD FUTURE WORK ON LEGAL PRINCIPLES ADDRESS THE RIGHT (SHARED BENEFITS) AND OBLIGATIONS (SHARED COSTS) OF ALL STATES CONCERNING GLOBAL COMMONS AND THE CONSERVATION OF SPECIES, ECOSYSTEMS AND ENVIRONMENTAL FUNCTIONS OF INTERNATIONAL SIGNIFICANCE?
  - (3) TO WHAT EXTENT, AND IN WHAT RESPECTS, SHOULD FUTURE WORK DEAL WITH LEGAL OBLIGATIONS REGARDING ENVIRONMENT AND INTERNATIONAL TRADE AND INVESTMENT?
2. One question concerns rights and obligations of a global nature and regarding transboundary resources and environment, namely: ARE THERE OTHER MAJOR POINTS, RIGHTS OF OBLIGATIONS WHICH THE COMMISSION WANTS CONSIDERED IN FUTURE WORK?
3. The last question concerns the general guidelines for current and future work, namely: ARE THERE OTHER MAJOR GUIDELINES WHICH THE COMMISSION WANTS REFLECTED IN FUTURE WORK?

Action required: Discussion and Direction

October 7, 1985

# WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT

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## Discussion Paper on Legal Principles for Environmental Protection and Sustainable Development

### I. SELECTED ISSUES

1. Three significant global issues are presented below, each with major legal and political implications. None is adequately covered by existing international law nor, as yet, in the evolving draft report. Salient points are presented briefly as a basis for the Commission to express its views on the extent to which, and in what respects, they should be considered in future work.

#### A. Global Rights of Present and Future Generations

2. The universal concern for the welfare of future generations has gradually evolved in international agreements and law since wars became global. The United Nations Charter, drafted forty years ago in reaction to the devastation of the Second World War, begins "we the peoples of the United Nations, determined to save succeeding generations from the scourge of war ..."
3. The responsibility to conserve the planet's natural heritage for present and future generations was initially asserted in the 1972 Stockholm Conference Declaration. The first principle stated that "Man ... bear a solemn responsibility to protect and improve the environment for present and future generations", and the second principle declares that the "natural resources of the earth ... must be safeguarded for the benefit of present and future

generations". These environmental rights and obligations have been developed further in later declarations such as the resolution on the Historical Responsibility of States for the Preservation of Nature for Present and Future Generations (1981) and the World Charter for Nature (1982).

4. It is proposed to address these fundamental rights and obligations of present and future generations in the first three articles of the evolving draft report for the Commission. They warrant special attention because of their relationship to the primary mandate and objectives of the Commission for environmental protection and sustainable development to the year 2000 and beyond. However, while these rights and obligations have been increasingly stated and gradually gaining recognition at the international level, there are few possibilities under existing international law for asserting and protecting them.
5. One major question relates to the scope of those rights and obligations. While man has always been able to impact adversely on the environment, we now have the capacity to do so on a global scale and, because of increasing ecological and economic interdependencies, in many different ways. Do the rights and obligations of individuals and States extend only to their national environment, or are they global in scope ?
6. A related problem has been highlighted by Commissioner Okita over the past few years: that the aggregate of national environmental and resource management policies, even though all are formulated in accordance with national and international law, may not be sufficient to protect the global environment and the common interests of the community of nations. In the case of the common interests of all States, as with the rights of present and future generations, how can they best be asserted and protected ?
7. Different proposals have been made and they include:
  - a. Endow a body of all States, or one representative of or authorized by all States, with the powers and responsibilities to do so;

- b. Allow any State the legal possibility to assert the rights and interests of present and future generations or of the community of nations (without having to establish direct injury to its nationals or present interests);
- c. Establish ombudsmen at local, national, regional and global levels (to, for example, monitor compliance with national and international laws, investigate alleged violations, and publicize their findings).

FOR DISCUSSION: WHAT ARE THE VIEWS OF THE COMMISSION ON WHETHER AND HOW BEST TO ASSERT LEGAL PRINCIPLES TO PROTECT THE RIGHTS OF PRESENT AND FUTURE GENERATIONS AND THE COMMON INTERESTS OF THE COMMUNITY OF NATIONS?

#### B. Sharing Global Benefits and Costs

- 8. International law, through bilateral and multilateral agreements, has developed rapidly over the last few decades with respect to water resources and pollution physically crossing the boundaries of contiguous States and, in the last decade, even on a regional basis with respect to long-range transfrontier air pollution and regional seas. The relevant existing and emerging legal principles and rules are being taken fully into account in the evolving draft report for the Commission.
- 9. Major legal and political differences arise, however, when considering the shared or even collective responsibilities, rights and obligations of all States with respect to (i) areas outside the national jurisdiction of any State (global commons), and (ii) areas under national jurisdiction where there are species, ecosystems or environmental functions of special international significance.
- 10. Regarding global commons and their resources, the concept that they are the common heritage of mankind was initially adopted by the UN General Assembly in 1970 as the foundation for the development of a regime to govern exploitation of the seabed. The concept has since been embodied in an extra-terrestrial treaty, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979), and in the Convention on the Law of the Sea (1982).

11. Although - and because - the general meaning and practical implications of the concept are still in contention, it is important and timely for the Commission to consider it. The key question for the global commons concerns the benefits from their use and exploitation, and the costs of protecting and conserving them. Should these global benefits and costs be rights and obligations shared by all States?
12. Regarding the protection of resources or natural heritage of international significance, there are five major multilateral conventions: the Convention on Wetlands of International Importance (1971); the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973); the Convention on the Conservation of Migratory Species of Wild Animals (1979); and the Convention for the Protection of the Ozone Layer (1985).
13. With the increasing population, economic and other pressures on areas within national jurisdictions where there are species, ecosystems and environmental functions of international significance, especially in developing countries, it is timely for the Commission to discuss the possibility that the costs of protecting and conserving them - including any foregone economic benefits - be shared by all States. Moreover, as at present the implementation of the above conventions depends entirely on voluntary contributions; therefore more secure and even automatic forms of funding also be considered.

FOR DISCUSSION: TO WHAT EXTENT, AND IN WHAT RESPECTS, SHOULD FUTURE WORK ON LEGAL PRINCIPLES ADDRESS THE RIGHTS (SHARED BENEFITS) AND OBLIGATIONS (SHARED COSTS) OF ALL STATES CONCERNING GLOBAL COMMONS AND THE CONSERVATION OF SPECIES, ECOSYSTEMS AND ENVIRONMENTAL FUNCTIONS OF INTERNATIONAL SIGNIFICANCE?

C. Environment and International Trade and Investment

14. The evolving draft report for the Commission so far focusses largely on transboundary issues concerning natural resources and environmental interferences. However, there are also critical environmental

issues with significant implications for international law concerning harmful or potentially harmful chemicals, products and technologies entering international trade, and the international movement of hazardous wastes. A completely different but related set of issues concern the avoidance of non-tariff barriers and other possible distortions of international trade and investment due to national environmental policies and measures.

15. With increasing production, use and trade of existing and new chemicals, the potential for widespread pollution or contamination worldwide has also grown. There are an estimated 80,000 chemicals already on the commercial market, most of which are thought to be beneficial, but most of which also are put on the market and released into the environment with little or no knowledge of their potential, cumulative or long-range effects. In addition, an estimated 1,000-2,000 new chemicals enter the market each year. The increased use of chemicals has been most dramatic in the developing countries. The volume of trade in chemicals from industrialised market economies to developing countries has expanded in value from \$ 4 billion in 1970 to \$ 26 billion in 1980 (not accounting for inflation).
16. Agreements have been reached over the past few years among western industrialized countries on, for example, the testing and exchange of essential information on the known characteristics and effects of chemicals entering international trade. Work at the global level has focussed on toxic chemicals, including the development under UNEP auspices of an International Register of Potentially Toxic Chemicals (ERPTC) and a Provisional Notification Scheme for Banned and Severely Restricted Chemicals.
17. While the limited number of existing international agreements and guidelines provide a basis for further work, there is a continuing major challenge and need to ensure that new international agreements and law develop quickly enough to keep pace with the increased global production, use and trade of chemicals, as well as with increased international movements of hazardous wastes.
18. The impact of trade and investment on the environmental basis of sustainable development is of far greater significance than the converse discussed above, but so far has received little attention. Requirements for prior notification and procedures for consultation remain limited in scope and weak in application. Recently, in the case of certain types of chemicals and hazardous wastes, consideration has



been given to extending the scope from prior notification to prior and timely notification, prior assessment and prior consent. Certain states now require prior notification and prior consent before export of certain products.

19. To date, however, only the industrialized countries appear to have adopted a set of guiding principles concerning the impact of international economic activity on environment and development (and vice versa) and the application of these principles still has a very long way to go. Failure to apply these principles at the global level and the absence of similar principles and guidelines accepted by all States, could become yet another factor contributing to environmental degradation and unsustainable development to the year 2000 and beyond.

FOR DISCUSSION: TO WHAT EXTENT, AND IN WHAT RESPECT, SHOULD FUTURE WORK DEAL WITH LEGAL OBLIGATIONS REGARDING ENVIRONMENT AND INTERNATIONAL TRADE AND INVESTMENT ?

## II. SCOPE AND CONTENTS OF THE EVOLVING DRAFT REPORT

20. The presently evolving draft report to the Commission has two major parts dealing respectively with (A) more general or global rights and obligations, and (B) those more specifically concerned with transboundary natural resources and environmental interferences. To ensure that the report to the Commission addresses the major issues of concern to Members, the scope and contents of the evolving draft are presented briefly below.

### A. Global Rights and Obligations

21. The intention in the first section is to advance a series of general rights and obligations needed to preserve the interests of each nation and the common interests of the community of nations and mankind regarding environmental protection and sustainable development. As they are intended to be both general and global in their scope and application, the term "global" has been used for working purposes in the title until a more suitable but equally concise term is found.

22. The evolving draft so far includes ten proposed global rights and obligations. The following summary list indicates only the main thrust of each proposal, as more complete and precise legal formulations and explanatory notes are still being developed and tested.

- (1) The fundamental right of all people to an environment of a quality that permits a life of dignity and well-being.
- (2) The obligation to conserve\* natural resources and the environment for the benefit of present and future generations. (\* For working purposes the Experts Group adopted the definition of "conservation" used in the World Conservation Strategy: "the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. Thus conservation is positive, embracing preservation, maintenance, sustainable utilization, restoration and enhancement of the natural environment.")
- (3) The obligation to maintain essential ecological processes and life-support systems, to preserve genetic diversity, and to ensure sustainable use of natural resources.
- (4) The obligation to control or prevent wasteful uses of natural resources or the environment.
- (5) The obligation to establish adequate norms, to monitor changes in quality or use, and to publish relevant data and research and monitoring results.
- (6) The obligation to undertake or require environmental assessments of proposed activities which may detrimentally affect the use of natural resources or the environment.
- (7) The obligation to provide prior and timely notification and information to, and to consult with, those whose environment or use of a natural resource may be adversely affected by a proposed activity.
- (8) The obligation to provide equal right of access to and treatment by administrative authorities and courts of law to all injured parties.

- (9) The obligation to abstain from military or any other hostile use of environmental modification techniques.
- (10) The obligation to co-operate and co-ordinate activities in support of environmental protection and sustainable development.

B. Rights and Obligations  
Regarding Transboundary Natural Resources  
and Environmental Interferences

- 23. The intention in the second section of the evolving draft report is to advance a series of rights and obligations dealing largely and more specifically with transboundary natural resources and environmental interferences.
- 24. The Experts Group agreed to use the term "transboundary" rather than "transfrontier" as it seemed to have a wider application not only to natural resources and pollution crossing the frontiers of two or more States, but also to the boundary between areas claimed by national jurisdictions and the global or regional commons. Moreover, the term "transboundary natural resources" also seemed to avoid some of the difficulties associated with the terms "shared" or "internationally shared" natural resources.
- 25. The Experts Group also agreed to the provisional use of the term "environmental interferences" to embrace not only activities contributing to transboundary pollution problems but also other environmental modifications with significant transboundary effects (e.g. major changes in streamflows, over-fishing in territorial waters, changes affecting regional or global climate, etc.).
- 26. The evolving draft so far includes thirteen proposed rights and obligations. As before, this summary list indicates the main thrust of each proposal.
  - (1) The right to reasonable and equitable use of a transboundary natural resource.
  - (2) The obligation to prevent or reduce transboundary environmental interferences causing substantial harm.
  - (3) The obligation to compensate injured parties for substantial harm caused by a transboundary environmental interference.

- (4) The obligation to apply the same standards for environmental conduct and effects regarding transboundary natural resources and environmental interferences as are applied domestically.
- (5) The general obligation to co-operate in ensuring reasonable and equitable use of a transboundary natural resource and in preventing or reducing a transboundary environmental interference.
- (6) The obligation to co-operate in establishing adequate norms, to monitor changes in quality or use, and to exchange relevant data and research results concerning transboundary natural resources or environmental interferences.
- (7) The obligation to undertake or require environmental assessments of proposed activities which may detrimentally affect the use of a transboundary natural resource or involve a transboundary environmental interference causing substantial harm.
- (8) The obligation to provide prior and timely notification and information to, and to consult with, those who may be adversely affected by a proposed activity involving a transboundary natural resource or environmental interference.
- (9) The obligation to develop contingency plans, including provisions for mutual assistance, for emergency situations involving transboundary natural resources or environmental interferences.
- (10) The obligation to provide equal right of access to and treatment by administrative authorities and courts of law to non-nationals adversely affected by the use of a transboundary natural resource or an environmental interference.
- (11) The right to bring a claim under relevant international law by or on behalf of non-nationals even though local remedies may not have been exhausted.
- (12) The obligation to pay compensation to injured parties for a not unlawful environmental interference when the costs or loss of benefits in preventing or reducing the activity are significantly greater than the harm cause in another State.

- (13) The obligation to settle disputes concerning transboundary natural resources or environmental interferences by peaceful means, using one or more of the dispute settlement procedures or mechanisms available under international law.

FOR DISCUSSION: DOES THE COMMISSION WISH THE WORK TO PROCEED IN THESE AND/OR OTHER DIRECTIONS AND ARE THERE OTHER MAJOR POINTS, RIGHTS OR OBLIGATIONS WHICH THE COMMISSION WANTS TO HAVE CONSIDERED?

### III. GUIDELINES FOR CURRENT AND FUTURE WORK

27. Based on the Commission's primary objectives and strategy as set out in its report "Agenda for Change", and also on the discussions at the first meeting of the Experts Group on Environmental Law, the following major points have so far emerged as a guide for current and future work on legal principles for environmental protection and sustainable development:
- (1) International environmental law evolves slowly relative to the problems to be addressed, and often develops on the basis of cases or incidents after significant damage has already occurred. With the increasing incidence, severity and inter-national and even global ecological and economic impacts of environmental problems, relevant principles and rules of international law must be developed more quickly and before rather than after significant damage occurs.
  - (2) The Commission has a unique opportunity to make a timely and necessary contribution to accelerating the development of international environmental law by reinforcing existing rules and formulating new rules and principles which reflect and support the mainly anticipatory and preventative strategies which the Commission is committed to proposing.
  - (3) The Commission's work should avoid duplicating and instead reinforce and build on the relevant work of other international organizations (e.g. of UNEP, the International Law Commission, the International Law Association, etc.) which have been working for years and even decades to codify and extend existing international law.

- (4) The Commission has far less time but fewer constraints than existing bodies, as well as the obligation to take a longer view "to the year 2000 and beyond". Moreover, one of the Commission's primary objectives is "to propose new forms of co-operations that can break out of existing patterns and influence policies and events in the direction of needed change." Consequently, in addition to examining existing and emerging international environmental law, special attention should be given to international legal principles and rules which ought to be in place now or before the year 2000 to support environmental protection and sustainable development within and among all States.
- (5) Given the political and other constraints which normally prevail in formal inter-governmental processes and negotiations on international law, and the Commission's emphasis on anticipatory and preventative measures, the principles and rules should initially be formulated to respond to existing and emerging ecological realities and be carefully reconsidered later by the Commission and associated experts in the light of political realities and possibilities.
- (6) The Commission's work should consider not only principles regarding the obligations of States to reduce or avoid activities affecting the environment of other States, but also principles regarding the individual and collective responsibilities of States concerning future generations, other species and ecosystems of international significance, and the global commons.
- (7) As the Commission is committed to producing concrete and realistic action proposals which can be widely understood and supported by individuals, voluntary organizations, businesses, institutes and governments, the legal principles should be formulated in terms that are recognizable and defensible in the legal community yet are still understandable by non-lawyers.

FOR DISCUSSION : ARE THERE OTHER MAJOR GUIDELINES WHICH THE COMMISSION WANTS REFLECTED IN FUTURE WORK?