

WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT

SIXTH MEETING
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WCED/86/23/Add.1

MEMORANDUM

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

FROM: Jim MacNeill
Secretary General

DATE: 1 September, 1986

RE: Report of the Experts Group on Environmental Law

The final report of the Experts Group on Environmental Law is attached.

The overall report contains a series of specific recommendations for strengthening the legal and institutional framework at the national and international levels.

The Experts Group has developed for consideration and approval by the Commission a detailed set of legal principles for environmental protection and sustainable development. These are summarized in the overall report, but the actual text approved by the Experts Group, with explanatory notes for each of the 22 Articles, is also enclosed as a separate Annex (see WCED/86/23/Add.1/ANNEX.)

The Experts Group benefited greatly from the active participation throughout its work of Commissioner Singh. Some of his colleagues at the International Court of Justice also took part in discussions on a personal and private basis.

The report of the Experts Group deals with key principles and issues that are relevant to virtually all draft Chapters, but are particularly pertinent to Chapters 12 and 13.

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REPORT
TO THE COMMISSION
OF THE
EXPERTS GROUP
ON
ENVIRONMENTAL LAW

AUGUST 1986

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TERMS OF REFERENCE

The Experts Group on Environmental Law was established in 1985 to prepare a report on legal principles for environmental protection and sustainable development, and proposals for accelerating the development of relevant international law, for consideration by the Commission.

Main Guidelines

The main guidelines for the work of the Experts Group were:

- to reinforce existing legal principles and to formulate new principles and rules of law which reflect and support the mainly anticipatory and preventive strategies which the Commission is committed to developing;
- to complement and build on the relevant work of other international organizations (e.g., of UNEP, the International Law Commission, the International Law Association, IUCN, etc);
- to give special attention to 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;
- to 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;
- to prepare proposals for strengthening the legal and institutional framework for accelerating the development and application of international law in support of environmental protection and sustainable development within and among all States.

DEVELOPMENT OF THE REPORT

The Experts Group met twice, during 4-5 June 1985 and 18-20 June 1986. Both meetings were held at the Peace Palace in The Hague. A summary report on the first meeting was presented to the third meeting (Oslo) of the Commission (see Annex 7 to the Secretary-General's Progress Report, WCED/85/CRD.2)

Soon after the first meeting of the Experts Group the Rapporteur, Dr. John Lammers, prepared a preliminary draft of the proposed principles which were then circulated to the members for comment. That draft was then revised and re-circulated for comment in September 1985.

Two discussion papers on "Legal Principles for Environmental Protection and Sustainable Development" (WCED/85/24A) and on "The Settlement of Environmental Disputes: A Forward Look" (WCED/85/24B) were then prepared for and discussed at the fourth meeting (Sao Paulo) of the Commission.

A further draft of the evolving legal principles was prepared and sent in early 1986 to the Experts Group members for comment. It was subsequently revised and became the main report for discussion at the second meeting of the Experts Group. For that meeting there were also a series of background papers with proposals for strengthening the legal and institutional framework for accelerating the development and application of international law regarding environmental protection and sustainable development.

A list of all background and discussion papers is attached as Annex 1.

In Annex 2 are the approved texts for each of the 22 Articles proposed by the Experts Group, plus detailed "Comments" with explanatory notes on the intent and application of each Article as well as selected references to relevant precedents and cases.

LEGAL PRINCIPLES FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT

The main mandate of the Experts Group was to prepare legal principles which ought to be in place now or before the year 2000 to support environmental protection and sustainable development within and among all States.

Character and Structure of the Proposed Legal Principles

The proposed legal principles are developed in 22 Articles which are divided into four parts dealing respectively with:

- Part I General Principles concerning Natural Resources and Environmental Interferences (Articles 1 - 8);
- Part II Principles Specifically concerning Transboundary Natural Resources and Environmental Interferences (Articles 9 - 20);
- Part III State Responsibility (Article 21);
- Part IV Peaceful Settlement of Disputes (Article 22).

The first and keystone principle is the fundamental right of all human beings to an environment adequate for their health and well-being (Article 1). The subsequent 21 Articles represent key principles which need to be adopted and applied by all States individually and collectively in order to achieve sustainable development on a world-wide basis within and among all countries. The Articles are presented as formal and binding obligations of and among all States. This binding character is represented in the text of the Articles by the use throughout of the auxiliary verb "shall" rather than "should".

The Articles are also an implicit statement of the rights of all States even though only expressed in terms of their obligations. For example, the obligation of any State to avoid or compensate for transboundary environmental impacts also involves a reciprocal right to protection against or compensation for harm caused to it by activities of or in other States. Consequently, the adoption of such a set of mutual obligations and rights would be in both the common interests and self-interest of all States.

In this section of the report there is a brief introduction and summary of the main thrusts of each of the 22 Articles. However, Annex 2 contains both the full texts in legal formulations and detailed "Comments" which include explanatory notes on the intent and application of each Article as well as selected references to relevant precedents and cases.

The full texts in legal formulations in Annex 2 were approved by the members of the Experts Group, with the exception of Dr. Timoshenko as he was unfortunately unable to attend either meeting of the Experts Group but did provide comments and suggestions which were taken into account in the various drafts and development of the proposed legal principles. The texts in the "Comment" for each Article were generally agreed to by the participants at the second meeting, but time did not permit either full review or endorsement in detail of them.

Key Terms Used

Regarding some of the key terminology used in the text, 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 under national jurisdiction and the global or regional commons. Moreover, the term "transboundary natural resources" also seemed to avoid some of the difficulties previously associated with the terms "shared" or "internationally shared" natural resources.

The Experts Group also agreed to use the term "transboundary environmental interferences" to embrace not only activities contributing to international pollution problems but also other environmental modifications with significant international effects (e.g. major changes in streamflows, introduction of exotic migratory species, changes affecting regional or global climate, etc.)

More detailed and formal definitions for all of the key terms used in the 22 Articles are provided at the beginning of Annex 2.

Summaries of the Legal Principles

The following summaries are based on the more detailed legal formulations of the 22 Articles approved by the participants at the meeting of the WCED Experts Group on Environmental Law which was held during 18 - 20 June 1986 at the Peace Palace in the Hague.

These summaries highlight only the main thrusts of the various Articles. The summaries do not fully reflect all of the important qualifications and nuances in some of the key Articles, and should therefore not be considered as substitutes for the original full texts in Annex 2.

PART I SUMMARY

General Principles, Rights and Obligations Concerning Natural Resources and Environmental Interferences

Fundamental Human Right

Article 1 affirms that all human beings have the fundamental right to an environment adequate for their health and well-being.

Inter-Generational Equity

Article 2 stipulates that States shall conserve and use the environment and natural resources for the benefit of present and future generations.

Conservation* and Sustainable Use

Article 3 specifies that States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, to preserve biological diversity, and to observe the principle of optimum sustainable yield in the use of living natural resources and ecosystems.

* Throughout all of these Articles "conservation" means the management of human use of a natural resource or the environment in such a manner that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. It embraces preservation, maintenance, sustainable utilization, restoration, and enhancement of a natural resource or the environment.

Environmental Standards and Monitoring

Article 4 requires States to establish adequate environmental protection standards and to monitor changes in and publish relevant data on environmental quality and resource use.

Prior Environmental Assessments

Under Article 5, States must make or require environmental assessments of proposed activities which may significantly affect the environment or use of a natural resource.

Prior Notification, Access and Due Process

Under Article 6, States are obliged to inform in a timely manner all persons likely to be significantly affected by a planned activity and to grant them equal access and due process in administrative and judicial proceedings.

Sustainable Development and Assistance

Article 7 enjoins States to ensure that conservation is treated as an integral part of the planning and implementation of development activities and to provide assistance to other States, especially to developing countries, in support of environmental protection and sustainable development.

General Obligation to Co-operate

Article 8 affirms that States shall co-operate in good faith with other States in implementing the preceding rights and obligations.

PART II SUMMARY

Principles, Rights and Obligations Specifically Concerning Transboundary Natural Resources and Environmental Interferences

Reasonable and Equitable Use

Article 9 enjoins States to use transboundary natural resources in a reasonable and equitable manner.

Prevention and Abatement

Article 10 requires States to prevent or abate any transboundary environmental interference which could cause or causes significant harm (but subject to certain exceptions provided for in Articles 11 and 12).

Strict Liability

Under Article 11, States may carry out or permit certain dangerous but beneficial activities provided they take all reasonable precautionary measures to limit the risk and ensure that compensation is provided should substantial transboundary harm occur. States shall also ensure that compensation is provided for substantial transboundary harm resulting from activities which were not known to be harmful at the time that they were undertaken.

Prior Agreements When Prevention Costs Greatly Exceed Harm

Article 12 provides that States which plan to carry out or permit activities causing transboundary harm which is substantial but far less than the cost of prevention shall enter into negotiations with the affected State on the equitable conditions under which the activity could be carried out. (If no agreement can be reached, Article 22 will apply).

Non-Discrimination

Article 13 requires States as a minimum to apply at least the same standards for environmental conduct and impacts regarding transboundary natural resources and environmental interferences as are applied domestically (i.e. do not do to others what you would not do to your own citizens).

General Obligation to Co-operate on Transboundary Environmental Problems

Article 14 affirms that States shall co-operate in good faith with other States to achieve optimal use of transboundary natural resources and effective prevention or abatement of transboundary environmental interferences.

Exchange of Information

Under Article 15, States of origin are obliged to provide timely and relevant information to the other concerned States regarding transboundary natural resources or environmental interferences.

Prior Assessment and Notification

Under Article 16, States must provide prior and timely notification and relevant information to the other concerned States, and make an environment assessment of planned activities which may have significant transboundary effects.

Prior Consultations

Article 17 stipulates that States of origin shall consult at an early stage and in good faith with other concerned States regarding existing or potential transboundary interferences with their use of a natural resource or the environment.

Co-operative Arrangements for Environmental Assessment and Protection

Article 18 specifies that States shall co-operate with the concerned States in monitoring, scientific research and standard setting regarding transboundary natural resources and environmental interferences.

Emergency Situations

Under Article 19, States are obliged to develop contingency plans regarding emergency situations likely to cause transboundary environmental interferences. States of origin must promptly warn, provide relevant information to and co-operate with concerned States when such emergencies occur.

Equal Access and Treatment

Under Article 20, States shall grant all persons who are and may be affected by transboundary interferences, with their use of a natural resource or the environment with equal access, due process and equal treatment in administrative and judicial proceedings.

PART III SUMMARY

State Responsibility

Article 21 obliges States to cease activities which breach an international obligation regarding the environment and to provide compensation for the harm caused.

PART IV SUMMARY

Peaceful Settlement of Disputes

Article 22 affirms that States shall settle environmental disputes by peaceful means. It further requires that if mutual agreement is not reached within 18 months on a solution or on other dispute settlement arrangements, the dispute shall be submitted to conciliation and, if unresolved, thereafter to arbitration or judicial settlement at the request of any of the concerned States.

PROPOSALS FOR STRENGTHENING THE LEGAL AND INSTITUTIONAL FRAMEWORK

As noted earlier, the Experts Group met only twice for a total of five working days of discussion, with the main focus on developing and refining the concepts and legal formulations for the 22 Articles set out in Annex 2.

In spite of the severe time constraints for discussion, the participants at the second meeting of the Experts Group also reached general agreement on a series of recommendations to the Commission for strengthening the legal and institutional framework for accelerating the development and application of international law in support of environmental protection and sustainable development within and among all States.

The following recommendations reflect the main thrust of the principal concerns and views of the participants at the second meeting of the Experts Group, as time did not permit their full development or approval in detail. Further variations of some of the recommendations could be made. For example, the proposals for setting up a special United Nations Commission and/or appointing an international "ombudsman" are in the following text both linked to the preceding recommendation for a new universal Convention or Covenant, but either proposal could also be considered on its own merits and launched without such a link by proceeding with elections by the UN General Assembly.

The recommendations for consideration by the World Commission are briefly set out below.

1. Establish a New Legal Basis for Environmental Protection and Sustainable Development

It is recommended that a new and legally-binding universal Convention be prepared under United Nations auspices.

- (a) The Convention should consolidate existing and establish new legal principles, and set out the associated rights and responsibilities of States individually and collectively for securing environmental protection and sustainable development to the year 2000 and beyond.
- (b) The Convention should also include effective measures for protecting those rights and for fulfilling those responsibilities.
- (c) The UN General Assembly should establish a special negotiating group to prepare a text for signature by States during or preferably before 1992, the 20th anniversary of the United Nations Conference on the Human Environment.

2. Set-Up a Special UN Commission

It is recommended that a special UN Commission for environmental protection and sustainable development be established under the above Convention.

- (a) The special Commission should have a limited but representative membership consisting of competent individuals serving in a personal capacity who are elected preferably by secret ballot by States Parties to the Convention.
- (b) The special Commission should receive and review regular reports from States and from relevant organizations of the UN system and other concerned international organizations and NGO's on actions they have taken to implement the Convention.
- (c) Other main functions of the special Commission would include: (a) to issue periodic public reports on progress in implementing the convention and other relevant international agreements; (b) to assess and report on alleged violations; (c) to

receive and review recommendations and proposals for improved implementation or extension of the Convention and other relevant international agreements.

3. Appoint an International "Ombudsman"

It is recommended that a UN High Commissioner for environmental protection and sustainable development (with some functions similar to an "ombudsman" and "trustee" for environment) be elected preferably by secret ballot by the States Parties to the above Convention.

- (a) The High Commissioner would receive and assess communications from private organizations and individuals concerning compliance with or violations of the above Convention or related international agreements. The High Commissioner could submit any such cases for consideration to the special UN Commission or other appropriate international organizations (e.g. UNEP).
- (b) The High Commissioner would have special responsibilities regarding the protection and use of areas beyond national jurisdiction, and for representing and protecting the interests of future generations.
- (c) The High Commissioner would also prepare and publish, in co-operation with key scientific and UN bodies such as UNEP, special reports with recommendations regarding the state of the world's natural and cultural heritage, and particularly on environmentally-based situations and conditions threatening critical ecological systems and processes which could increase economic, social and political instability within and among States.

4. Strengthen the Existing Global and Regional Legal Framework

It is recommended that States:

- (a) accede to or ratify global and regional Conventions dealing with environment and development;
- (b) adhere more rigorously to the provisions, spirit and objectives of existing Conventions relevant to environment and development;
- (c) review and revise existing Conventions relevant to environment and development in order to bring them in line with the latest available technical and scientific information;

- (d) enter into new global and regional Conventions or arrangements aimed at promoting co-operation and co-ordination in the field of environment and development (including, for example, new conventions on biological diversity and on high risk technologies);
- (e) include a legal expert with special competence and experience on environmental and resources management issues on all delegations to relevant treaty negotiations and conferences;
- (f) adopt at the national level adequate legal guidelines based on the "General Principles concerning Natural Resources and Environmental Interferences", with the advice and assistance of relevant international organizations such as UNEP.

5. Increase the Capacity to Avoid and Settle Disputes

It is recommended that intergovernmental and non-governmental organizations which maintain panels or rosters of those with experience and competence in various forms of dispute settlement include and indicate on their rosters those with special experience and competence on legal and substantive aspects of environmental protection and natural resources management.

It is recommended that "clearing house" services be established on global, regional and national levels to assist in the avoidance or settlement of environment and resources disputes. The service:

- (a) should, where possible, use existing institutions;
- (b) should be available to States and other natural or juridical persons;
- (c) should include a range of dispute avoidance or settlement mechanisms including fact finding, good offices, mediation, conciliation, arbitration and judicial settlement;
- (d) should develop a roster of available experts for each of the above categories;
- (e) should be well publicized.

It is recommended that States, when unable to resolve any dispute concerning a transboundary natural resource or environmental interference within a reasonable time, agree to submit any such case for binding arbitration or judicial settlement to, for example, the Permanent Court of Arbitration or the International Court of Justice.

- (a) Regarding the Permanent Court of Arbitration, those States with the right to select four members of the Court should give special consideration to ensuring that at least one of the four members has special legal experience and competence on questions of environmental protection and natural resources management.
- (b) Regarding the International Court of Justice, the Court (under Article 26 of the ICJ Statute) can form special chambers for dealing with particular cases or categories of cases, including environmental protection or resources management cases. The Court has recently emphasized its readiness to deal with such cases fully and promptly, and States should consider making more use of this capacity for avoiding prolonged disputes.

6. Launch New NGO Initiative on Implementing International Agreements

It is recommended that non-governmental organizations (NGO's) establish special committees or groups at global and regional levels: (a) to encourage States to accept and implement international agreements related to environmental protection and sustainable development, especially those which have not entered into force because they lack the minimum number or acceptance needed; (b) to monitor compliance with such agreements; and (c) to publish periodic reports on acceptances still needed, and on any violations of the agreements.

7. Expand NGO Participation and Standing

It is recommended that international inter-governmental organizations that engage in activities relating to environmental protection and development should establish procedures for official consultative status for and consultations with capable and qualified NGO's.

It is also recommended that all States should accord capable and qualified NGO's concerned with environmental protection and sustainable development the right to consult with all relevant agencies and political sub-divisions of the State with respect to protecting and conserving the environment. States should provide the above groups with locus standi to present evidence that the environment is not being adequately protected. Proceedings in such cases should be open and decisions made public.

8. Extend Environmental Responsibilities of Private Enterprises

It is recommended that multinational enterprises accept and implement on a world-wide basis the principles already adopted within OECD as a clarification of the OECD Guiding Principles for Multinational Enterprises of which the main thrusts read:

"Enterprises, whether they are domestic or multinational, should within the framework of laws, regulations and administrative practices in each of the countries in which they operate, take due account of the need to protect the environment and to avoid creating environmentally-related health problems."

"Enterprises should in particular:

- (a) assess and take into account in decision making the foreseeable consequences of their activities which could significantly affect the environment;
- (b) co-operate with competent authorities, inter alia, by providing adequate and timely information regarding the potential impacts on the environment and on environmentally related health aspects of all their activities and by providing the relevant expertise available in the enterprise as a whole;
- (c) take appropriate measures in their operations to minimize the risk of accidents and damage to the environment, and to co-operate in mitigating adverse environmental effects, in particular:
 - by selecting and adopting appropriate technologies and practices compatible with those objectives;
 - by implementing education and training programmes for their employees;
 - by preparing contingency plans; and

- by enabling their competent entities to be adequately equipped, especially by providing them with adequate knowledge and assistance."*

It is recommended that private banks and other financial institutions that provide funds for development projects should require an assessment of the environmental effects and sustainability as part of the evaluation process for projects for which loans are requested.

9. Apply Criminal Liability for Environmental Damage

It is recommended that effective criminal liability be established and applied by States for actions of their nationals which have a detrimental effect upon the environment, in particular on ecosystems and species of international significance, and including those actions in areas beyond the limits of national jurisdiction.

10. Assess Risks of New Technologies

It is recommended that States establish:

- (a) a special international capacity or system for monitoring and assessing risks regarding new technologies, including chemicals and biotechnology, which may have significant effects on human health, the environment or natural resources;
- (b) guidelines and standards to reduce those risks in the conduct of experiments, or in the production, transport, and use of new technologies and products;
- (c) international networks for the collection and dissemination of information on such new technologies and products

11. Adopt Basic Safety and Notification Measures for Nuclear Power Installations

It is recommended that States adopt as a matter of priority basic international safety standards for the design, construction and operation of nuclear power installations as well as measures for regular safety inspections; and (b) make it mandatory for all public authorities to make all relevant information public without delay whenever they have been notified of any harmful or potentially harmful release of pollutants, especially radioactive releases.

* See International Legal Materials, Vol. 25, No. 2 (1986), page 494.

12. Increase Environmental Education and Expertise

It is recommended that States increase the emphasis on and support for environmental information and education programmes as a major and integral part of all primary, secondary school and university curricula as well as in professional and other in-service training courses, with particular attention to the relationship between environmental protection and sustainable development.

It is recommended that States give particular encouragement and support to specialized education programmes for training experts on the scientific, technical, economic and legal aspects of environmental protection and sustainable development.

13. Avoid Severe Environmental Damage from Armed Conflicts

It is recommended that all parties involved in an international or even purely national armed conflict abstain from methods or means of warfare which are intended, or may be expected, to cause widespread, long-lasting or severe damages to the environment (e.g. nuclear, biological or chemical weapons; weather or other major environmental modification techniques).

CONCLUDING NOTE

The Experts Group was able to accomplish so much in so short a time in large part because of the dedicated and formidable work of the Rapporteur, Dr. Johan Lammers. He persevered under difficult circumstances and time constraints to formulate and refine many key principles, and to prepare well researched and detailed explanatory notes for each. Also, the discussions at the two meetings were necessarily both extensive and intensive, and were only able to reach a successful conclusion through the shared knowledge and active participation and co-operation of every member of the Experts Group.

Thanks are also due to The Carnegie Foundation which kindly provided the meeting facilities and essential support services for both meetings at the Peace Palace in The Hague.

The Government of the Netherlands deserves special thanks for its constant and generous support for the work of the Experts Group, including their agreement to allow Dr. Lammers to serve as the Group's Rapporteur on part-time secondment from the Ministry of Foreign Affairs. Also, the costs of the Group's second meeting were covered by a

special grant jointly from the Netherlands Ministry of Development Assistance and the Ministry of Housing, Physical Planning and Environment.

The work of the Experts Group was inspired and driven throughout by the shared conviction of the members that there must be an accelerated development of national and international law in support of environmental protection and sustainable development within and among all countries. This report is their contribution to help launch that necessary process.

R.D. Munro
Chairman
Experts Group on Environmental Law

LIST OF BACKGROUND AND

DISCUSSION PAPERS

FIRST EXPERTS GROUP MEETING (JUNE 1985)

Lammers, Dr. J.G. Concepts and Principles of International Law concerning the Use of Shared Natural Resources and Transfrontier Environmental Interferences (Draft Outline for Discussion)

Summary Date Sheets on Principles Proposed for Discussion (EGEL/685/2)

WCED Draft Programme and Workplan on International Co-operation (EGEL/685/2)

Rules of International Law Applicable to Transfrontier Pollution (EGEL/685/4)

IUCN Environmental Law Centre, Status of Multilateral Conventions Related to Environment (EGEL/685/5)

INTERIM REPORTS (JULY 1985 TO MAY 1986)

Summary Report of the First Meeting (WCED/85/CRD.2/Annex 7)

Reports by the Rapporteur on Principles of and for International Environmental Law (three consecutive working drafts)

Legal Principles for Environmental Protection and Sustainable Development, Discussion Paper for the Fourth Meeting of the Commission (WCED/85/24A)

Stein, R.E., and Grenville-Wood, G., The Settlement of Environmental Disputes: A Forward Look, Discussion Paper for the Fourth Meeting of the Commission (WCED/85/24B)

SECOND MEETING (JUNE 1986)

Report by the Rapporteur on Principles of and for International Environmental Law (EGEL/686/2)

Strengthening International Legal Institutions and Processes (EGEL/686/3), including the Fortieth Anniversary Statement by the President of the International Court of Justice (Annex 1), a Proposal to Strengthen the Permanent Court of Arbitration (Annex 2), and a Proposal for a World Tribunal for Environmental Protection (Annex 3)

Multilateral Conventions Related to Environment
(EGEL/686/4)

IUCN Commission on Environmental Policy, Law and
Administration, Proposals for International Environmental
Law Developments Towards the Year 2000

IUCN, World Charter for Nature: Commentary, Part II

Quebec Minister of Environment, Proposal for an
International Code of Ethics for the Environment

NOTE TO WCED/86/23 Add. 1

For 'Legal Principles for Environmental Protection and Sustainable Development' adopted by the World Commission on Environment and Development's Legal Expert Group on Environmental Law, see WCED Collection, Volume 9, Paper no. 100