PROTECTING THE ENVIRONMENT: OLD POLITICAL BORDERS AND NEW LEGAL CONCEPTS

The earth, seen from space, is a borderless world. But borders are very important to humans. Pollution, for example, moves across national boundaries. But governments are reluctant to surrender some of their sovereignty to work together to solve environmental problems. The destruction of the environment may be forcing humans to choose between saving the world or preserving their borders.

Concern about environmental problems is not new. London in the Middle Ages, for example, had a problem with smog as a result of burning logs, and so there were restrictions on the logs to be burnt. There have also been periodic plagues and these have forced public health officials to encourage care about such matters as the cleanliness of water. In the 19th century, park areas were created for the preservation of nature and for places of human recreation.

There is now a changing view of the environment. Destruction of the environment is not new but the size of the problem is. National attempts to address environmental problems have gone on over the centuries; now there are international attempts to protect the environment. However, international action is lagging behind what is required. Governments are co-operating more in protecting the environment but there is still much to be done.

In the late 1960s, the environmental impact of the post-war economic boom was being felt in various ways. There was growing concern about the spread of pesticides (such DDT), oil spills from oil tankers, severe river pollution, and the pollution of inland waterways (the most famous case at that time being the US river which had so many pollutants that, in fact, it was a fire hazard). Questions were being asked by organizations such as The Club of Rome as to whether the high level of consumption of raw materials could be sustained. Governments responded to this growing public pressure by agreeing that the United Nations should convene an international conference on the human environment.

The 1972 UN environment conference was the first of the UN's "mega-conferences" in which governments from around the world were brought together to discuss the UN's work in economic and social co-operation. The mega-conference represented a new form of diplomacy. Most international governmental conferences previously were convened to discuss and adopt international law treaties. The mega-conferences were both less ambitious and yet also more ambitious. They were conferences to discuss common problems and suggest ideas on how they could be solved; they were not creating treaties as such and so were not as ambitious as the usual

diplomatic conferences. But they were also more ambitious in that, freed from the requirements to remain focussed on a particular issue, they could roam freely over a range of issues and encourage governments to think about these problems. To use the jargon of that era, they were "consciousness-raising" conferences designed to encourage governments to think more creatively about international co-operation.

For example, at the end of the 1960s, there were virtually no "ministries for the environment". Governments broke up the "environment" as a governmental task and shared the work between the existing ministries. The 1972 UN Conference on the Human Environment required governments to be represented by their appropriate ministers. Thus governments at this time created tentative ministries for the environment. Now every government has a large ministry and extensive environmental protection legislation.

In retrospect, the Stockholm Conference was the high point of the first post-war "wave" of public concern about the environment. The general public is always eager to be reassured that "something" is being done. It seemed that something was now being done as a result of the UN Conference and the new government departments, and so people thought that they could relax again.

Additionally, the 1973 Middle East war and the dramatic increase in oil prices triggered concern about a global depression. This meant that people were less interested in saving the environment than in saving their jobs. A US car bumper sticker at around this time said: "If you're unemployed and hungry, eat a greenie".

The environmental reforms, such as domestic laws, remained in place and were gradually increased in some cases. But there was less anxiety about the environment within the general public and there was a decline in the membership of environment groups.

The next wave of environmental concern began, I believe, in the northern summer of 1988. There was a very hot summer in the US, with "traffic jams" on the Mississippi, with the river running out of water and boats running aground. Also, there was speculation over both a hole in the ozone layer over Antarctica and a "greenhouse effect" in which the earth was getting warmer (thereby changing weather patterns and holding the potential for melting the polar ice-caps). These were separate matters but the media ran them together and got people worried about the environment. Once again, environment groups reported increased memberships.

The UN likes anniversaries. Therefore to mark the 20th anniversary of the Stockholm Conference, the UN decided to hold a Conference on Environment and Development (UNCED). UNCED was one of the largest gatherings of heads of state/ government in world history. This was an indication of just how much attention was now focussed on environmental matters.

Five documents were adopted by UNCED. First, the Rio Declaration is a set of 27 non-binding principles to govern the economic and environmental actions of individuals and

governments towards the goal of global sustainability. It proclaims that human beings are entitled to a healthy and productive life in harmony with nature; that governments have the right to exploit their resources as well as the responsibility to ensure that their activities do not harm the environment. Agenda 21 is to be carried out in full respect of all the principles contained in the Rio Declaration.

Second, Agenda 21 (running to 600 pages divided into 40 chapters) is an "action plan". It is a status report on the impact of humans on the planet and what is to be done to convert sustainable development into an operational goal. The UNCED Secretariat estimated that Agenda 21 would cost US$125 billion per year to implement - this is an immense sum of money until it is realized that this represents less than 20 per cent of the world's total annual military expenditure. Agenda 21 also called for the creation of a UN Commission on Sustainable Development within the UN system.

Early in the preparations for UNCED, some governments and NGOs hoped for a treaty to be created on forestry. The negotiations were too difficult and complicated. Consequently, the third document is a non-binding statement of Forest Principles which recommend that countries assess the impact of economic development on their forests. It called on countries to take steps, nationally and regionally, to minimize forest damage.

An Inter-governmental Negotiating Committee (INC) was created in the lead up to UNCED to produce a treaty on biological diversity. This was aimed at preserving species and ecosystems while pursuing economic development. Countries which ratify the treaty are required to support the diversity of existing plant and animal life and to protect endangered species. Such countries are also required to share research, profits and technology with the countries whose genetic resources were being used.

Finally, a second treaty was also available for signature which had been produced by an INC: the framework convention on climate change, which is aimed at halting the alleged "greenhouse effect". The countries which ratify the treaty undertake to stabilize their emissions of harmful gases. The treaty will be amended as subsequent inter-governmental negotiations produce protocols with explicit timetables and targets.

What came from all this mountain of paper? Very little money was pledged at Rio - about US$3 billion. This is much less than a week's expenditure on the arms race. The UN Environment Programme itself operates on a minute budget (about US$40 million) - less than the total international budget of Greenpeace. Governments remain reluctant to commit funds to international co-operation.

Additionally, the only explicit institutional change was the recommendation for a UN Commission on Sustainable Development. UNCED was not used as an opportunity to (for example) recommend the creation of a world authority for protecting the environment, or for introducing an international environmental tax, or for any suggestions on UN reform. In other

words, UNCED skirted around the structural challenges presented by the global protection of the environment.

The 1993 UN General Assembly agreed to create the Commission on Sustainable Development. But it has no binding decision-making powers. It will make recommendations that governments are at liberty to ignore.

Thus, the UNCED was disappointing but predictable. There is a paradox in the global protection of the environment. On the one hand, there is a global environmental revolution underway in that the threats to the environment are now much greater than ever before. On the other hand, governments remain reluctant to surrender any of their power to a global environmental body. Even though governments make statements acknowledging the dangers to the environment, they are unwilling to make the real changes that are necessary to protect the environment.

Some Progress

But some progress is being made. The environmental situation is not entirely bleak. While the politicians are bickering over sovereignty, new concepts are emerging among from the experts and environmental groups. This article ends with six promising developments.

First, there is progress on the concept of the "global commons". In 1968, US scientist Garrett Hardin wrote an influential essay on the use of common resources. In Europe's Middle Ages, parcels of land were set aside for common use (hence today's use in England of areas called "the commons"). A peasant could graze cattle, and pigs, and collect firewood.

In the language of today's economics, each person is supposed to be a "rational actor seeking to maximize self-gain". If the medieval peasant were a rational actor, that person would have grazed as many cattle and pigs on the common land as possible. But if all the community also acted "rationally", then the common land would have been destroyed through overgrazing. If a person felt high-minded and decided not to act as badly as the rest, then they would do little good as others would simply overgraze in the area that person did not use. Thus, it was necessary for the use of common land to be regulated by the church and the local baron to avoid overgrazing.

The new UN law of the sea treaty made the seabed the common heritage of humankind. Malaysia and some other Third World countries as well as some environmental groups have claimed that Antarctica ought also to be given the same status.

The global commons topic raises two sets of questions. The basic idea of the commons is that there are parts of the globe that are too important to be left to national control (and possible national misuse) or which are too large to control (such as the seabed).

First, then, what are the global commons? The seabed is the best known example, with the Antarctic as the next target. What other areas which could be considered part of the global commons? Air, for example, is vital for almost all of life on earth and it does not recognize national boundaries. Should it be seen as part of the global commons? The top-soil is also important for life on earth and so perhaps it too should be added to the list.

Second just how could a part of the global commons be managed? What international machinery should be created? Who will pay for it? Is there a role here for environment groups and transnational corporations to be involved in decision-making? Since governments are so reluctant to pay for UN projects, why not give environment groups and transnational corporations the opportunity for payment and involvement?

The second sign of progress was the 1986 publication of the report Our Common Future by the independent commission on environment and development. This commission, chaired by Norway's Mrs Gro Harlem Brundtland, the world's first female minister for the environment, was asked to examine how environmental and economic concerns could be reconciled. The commission popularized the term "sustainable development" - meaning that economic development should be done in such a way as to not harm the opportunities of our successors in being able to also make use of the environment.

Third, there is the development of the concept of "intergenerational equity". This is a sequel to "sustainable development": thinking about our responsibilities for later generations and not merely living for today. It also means thinking about our responsibilities to the generations of citizens who will live in other countries.

Fourth, there is the concept (already well developed in the environmental legal systems of many countries) of "polluter pays". In other words, an individual or company polluting the environment should pay the clean-up costs.

Fifth, there is the "precautionary principle": a warning that if there is doubt about the environmental consequences of a decision, then it is better to err on the side of caution. Just how this will acquire the force of law remains to be seen, not least because there is often scientific uncertainty over the long-term consequences of a decision. But, then, the notion of "polluter pays" was unheard of a century ago.

Finally, there is the concept of "global interdependence". For example, the South Pacific islands are very worried about the speculation over the greenhouse effect because rising seas (from the melting of the polar ice caps) would see their islands among the first in the world to go under water. But the minute populations on the islands contribute very little to the greenhouse problem. Developed countries like Australia, by contrast, are a far greater contributor to this problem. Is there, then, a moral obligation on, say, Australia (assuming that sea-levels do eventually rise) to take environmental refugees from the South Pacific islands? This may be argued in the future by environment groups.

To conclude, there are three trends in environmental matters. First, there is a growing scientific and public concern about the long-term threats to the earth arising from such problems as the hole in the ozone layer and the "greenhouse effect". Second, national governments are slow to respond to these problems because of the priority being given to national sovereignty. Third, out of the political spotlight, a new approach to the environment is emerging. This is based on such concepts as the global commons, sustainable development, intergenerational equity, polluter pays, the precautionary principle and global interdependence. The earth's future depends partly on the third trend triumphing over the second.

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