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LAWS OF THE SEA

Marine Pollution from Land-based Sources:

Towards a global approach

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Marine pollution from land-based sources (LBS) always has very much been seen as a regional problem requiring regional solutions. It is more and more recognized, however, that regional approaches can provide solutions only if they are supplemented by an adequate global strategy. This recognition is in particular reflected in the preparations of the 1992 United Nations Conference on Environment and Development (UNCED). This contribution will provide an overview of the reasons for this development and of the main elements of a possible future global strategy.

The case for a global strategy

The case for a global strategy is derived from the inadequacy of existing regional approaches to LBS. Many regions either are not at all covered by regimes or are covered by regimes which encounter several problems in their implementation. This latter point applies to all 12 regions for which UNEP has developed Regional Seas Programmes. For only three of these regions Protocols have been adopted which specifically deal with LBS: the 1980 Athens Protocol to the 1980 Barcelona Convention, covering the Mediterranean Sea, the 1983 Quito Protocol for the Protection of the South-East Pacific Against Pollution from Land-Based Sources and the 1990 Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources to the Kuwait Convention. Only in the Mediterranean some progress has been made in the implementation of the protocol; the Quito Protocol has seen no implementing measures and the Kuwait Protocol has not yet entered into force. The fact that there are no specific legal measures (in force) does not mean that nothing happens. For all 12 regions, various programmes are in progress, in particular dealing with monitoring and training. In all cases, however, the regions encounter similar problems, related to a structural lack of resources.

The programme for the *Mediterranean Sea* is generally seen as the most advanced of the Regional Seas Programmes. But in recent years limited substantive progress has been made. Most recently, the Contracting Parties met in their Seventh Meeting in Cairo, October 8-11 1991. Although the Meeting

discussed a number of recommendations concerning LBS, the Meeting failed to overcome the structural problems. In his statement to the Meeting, Dr. Mostafa Tolba, Executive Director of UNEP, noted that the Athens Protocol suffers from interrelated problems of inadequate funding and inadequate implementation. He pointed out that dealing with LBS in an adequate way would cost somewhere between US\$ 25-100 billion in the next 20 years. The question for the coming years will be how far the parties will be prepared to go beyond the current budget of about US\$ 7 million to meet that financial demand.

Similar problems are envisaged for the *Wider Caribbean Region*. At present there is substantial progress towards the development of a Protocol on LBS, as provided for by the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. The Secretariat submitted a background document for the development of such a protocol (UNEP(OCA)/CAR IG.8/INF.5 of 15 April 1991) to the Ninth Meeting of the Monitoring Committee of the Action Plan and the Special Meeting of the Bureau of the Contracting Parties to the Cartagena Convention (13-15 June 1991, Kingston). No substantive discussion took place, but for early 1992 an experts meeting is scheduled to begin developing the protocol. It has already been recognized, however, that the main problem will not be the elaboration of the Protocol itself, but how to make it work. In the Commentary to the background document, it rightly is noted that the main challenge is to find funding for the necessary programmes and measures, such as building, operating and maintaining sewage lines and plants, monitoring coastal waters and enforcing relevant legislation.

As regards the *South-Pacific Region*, the 4th Intergovernmental Meeting of UNEP's Regional Environmental Program for the South Pacific (SPREP), held in conjunction with the 1st Meeting of Contracting Parties to the Convention on the Protection of the Natural Resources and Environment in the South Pacific (SPREP Convention) adopted the 1991-1995 Action Plan for managing the Environment of the South Pacific Region. The Action Plan includes a number of priorities relating to LBS, such as coastal zone management, waste management and water treatment. At the same time, the states involved recognize that by themselves they may be unable to attain the objectives set. In a Statement to the Third Session of the UNCED Preparation Committee (doc. A/CONF.151/PC/87 of 16 August 1991), the members of SPREP expressed their concerns about the ability of the region to adequately address these problems. They noted that it is essential that Pacific Island countries be assisted to prevent, minimize and control LBS, and pointed to the need of funding and

transfer of technology for the purpose of combating pollution.

Apart from the Regional Seas Programme for the Mediterranean, three Regional Seas Programmes are relevant for Africa, covering the *West and Central African Region*, the *Eastern African Region* and the *Red Sea and Gulf of Aden Region*. Although none of these three Action Programmes has seen the development of specific legal instruments concerning LBS, a number of activities have been developed, among others by FAO, UNESCO, and UNEP. An assessment of the problems and approaches was made by the Committee on Seas of the African Ministerial Conference on the Environment (ACMEN), which convened in Senegal in March 1990 (doc. UNEP/AEC/B5/COMM.4/8). The Meeting noted that all three Action Programmes are encountering serious problems which hamper their progress, such as a lack of appropriate financial resources which would enable an effective implementation of the priority activities of the action plans, a lack of efficient channels of communication between the African sub-regions which may facilitate the exchange of information and transfer of knowledge on the scientific aspects of the action plans and the lack of appropriate training of national experts.

In Asia two subregions are covered by UNEP Regional Seas Action Programmes: the *East Asian Sea* and the *South Asian Sea*. For neither of these two subregions has a specific protocol been established. Several programmatic initiatives have been developed however (see e.g. for the East Asian Seas Action plan: Report of the Meeting of Experts of 21 December 1990, doc. UNEP(OCA)/EAS WG.4/6). In a comprehensive report of the Economic and Social Commission for Asia and the Pacific (ESCAP) to the Second Session of the Preparatory Committee of UNCED, similar problems are indicated as those encountered in other regions (doc A/CONF.151/PC/38 of 26 March 1991). The Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, adopted by the Ministers of the ESCAP region on 16 October 1990 in Bangkok, recognizes that "adequate resources will be needed for the implementation of activities agreed to in this Declaration", and donor Governments and agencies are "urged to make appropriate voluntary contributions so that actions identified can be implemented" (par. 23 of Annex II to A/CONF.151/PC/38).

These developments support the argument that in its present form, the regional approach is inadequate to come close to a solution of the problem of LBS. This leads to two major requirements for a global strategy, which have aptly been summarized in a Report of the Secretary-General on LBS to the Third Preparatory Committee (PrepCom) of UNCED (A/CONF.151/PC/71 par. 26). On the one hand we need a refinement of the normative structure by adopting general principles for global application, and on the other hand we need an improvement of global mechanisms for the development and implementation of scientific, legal, economic and social measures so as to ensure that specific programmes are implemented. Before turning to these issues more

closely, it will be indicated how these issues have been picked up in UNCED.

Development of the LBS issue in UNCED

It is widely accepted that if in the coming years we are going to see a strengthened global strategy for LBS, UNCED will have to lay its foundations. By now, it has become clear that if UNCED is going to yield any important developments for the oceans, these have to be incorporated in 'Agenda 21': the programme of work for the international community, to be agreed at UNCED, addressing major environment and development priorities for the initial period 1993–2000 and leading into the 21st century. At the time of writing, the ocean issue is envisaged to have six entries into Agenda 21, one of which is 'Protection of the marine environment', which in turn has been subdivided in sea-based and land-based marine pollution (doc. A/CONF.151/PC/WG.III/L.18 of 23 August 1991). Following a decision of the Third PrepCom, for each programme area (including LBS), Agenda 21 will set forth the management related activities on a national and international level, as well as the means through which these activities have to be implemented in terms of financial, scientific and technological means, human resource development and capacity building of developing countries (doc A/CONF.151/PC/L.49 of 4 September 1991).

PrepCom is having a difficult time in laying down the contents of these requirements. A major input the development of these issues was expected from an Intergovernmental Meeting of Experts, convened in Halifax, 6–10 May 1991. This Meeting strengthened the consensus that we do need some sort of a global strategy. It adopted a statement (reproduced in doc A/CONF.151/PC/71 of 17 July 1991), in which it was recognized that further action at the global, regional and national level was needed, and that UNCED should not miss the opportunity to advance international action by initiating a global strategy for addressing LBS. In terms of substance limited progress was made however. After reaffirming a number of basic elements which should be part of a global strategy (assigning responsibilities for coordinating and catalytic functions; providing for exchange of information and transfer of resources and for more effective data-collection and monitoring), the Meeting decided to recommend to the Third PrepCom to reconvene the Intergovernmental Meeting. The Third PrepCom, originally conceived as the PrepCom in which the oceans issues would receive most attention, also failed to make substantial progress. In spite of a number of excellent documents submitted by the Secretariat, the meeting ended up with an enumeration of some LBS elements for inclusion in Agenda 21, which are a far cry from what many had hoped for (see doc. A/CONF.151/PC/WG.III/L.18, paras 32–37, 52–56). PrepCom followed however the recommendation of the Halifax Meeting and decided to reconvene the Intergovernmental Meeting of Experts in Nairobi in December 1990.

The following sections will shortly put the two main elements of a future global strategy, which will be

addressed in the further preparations for UNCED, in perspective.

Improvement of the normative structure

In accordance with their preference for a regional approach, states have already taken a somewhat reluctant attitude towards the development of global standards concerning LBS. There are three points of contact for such a development.

The first one is the 1982 Law of the Sea Convention (LOS Convention). Compared to its provisions on marine pollution from dumping or from ships, the provisions of the LOS Convention on LBS (Articles 207 and 213) are rather indeterminate. Article 207 requires states to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from LBS, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures. But as many commentators have noted, there is little to be found in State practice which amounts to the internationally agreed rules and standards to which art. 207 refers.

We do, secondly, have 'recommended practices and procedures' however. At its Thirteenth Session (1985), UNEP's Governing Council adopted by Decision 13/18 the Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources. These Guidelines are intended to assist Governments in the process of developing national legislation and international agreements for the protection of the marine environment from LBS. States have, however, never committed themselves to these Guidelines. Following a request contained in Decision 1/20 of the first substantive Meeting of the PrepCom, UNEP has undertaken an evaluation of the action taken to implement or respond to the Montreal Guidelines (published in doc. A/CONF.151/PC/71). Apart from the fact that only 34 Governments bothered to reply to the request for information, the evaluation makes clear that, first, the Montreal Guidelines are considered as a pick-and-choose instrument (most states refer to a limited number of different guidelines to which they have given response), and, secondly, that to the extent that guidelines are implemented, they are so general that indeed in practice can be considered compatible with them.

A third element of the global normative structure are the Draft Articles on the law of the non-navigational uses of international watercourses of the International Law Commission. At its 1991 session, the ILC provisionally adopted these draft articles, drawn up under the guidance of Special Rapporteur Stephen McCaffrey. Art. 23 of the Draft articles provides that "Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards". (Rep. of the ILC on the work of its 43rd, GA Official Records: Forty-Sixth Session, Suppl. No. 10 (A/46/10), p. 169.) Here as

well it can be said that the effect of this provision would be greatly enhanced by additional international rules and standards, which would count as rules of reference.

It always has been recognized that the LOS Convention and the Montreal Guidelines would not be the final word. The 1982 'Montevideo Programme for the Development and Periodic Review of Environmental Law', adopted by Decision 10/21 of the UNEP's Governing Council, envisaged that in the longer term a global convention might be prepared, 'based on further experience gained in the development and implementation of regional, sub-regional and bilateral agreements and taking into account guidelines or principals at the global level developed within the framework of UNEP'. The Montreal Guidelines state as one of their main functions to 'lay a foundation for the preparation of a global convention at some stage in the future'. If we consider the fact that many regions are still uncovered by specific regimes, take into account the lack of rules of reference for the provisions of the LOS Convention and the Draft articles of the ILC and the non-committal character of the Montreal Guidelines, there is strong support for the argument that we indeed should move to additional global rules.

In the preparations for UNCED the need for an updated and more detailed set of standards as such is uncontested. It is reflected in the Report of the Secretary-General to the 3rd Session of PrepCom, which argues strongly for a refinement of the global normative structure by setting forth "general principles for global application which would inspire, motivate and guide national and regional measures" (A/CONF.151/PC/71 par. 26). The main discussion will rather focus on the contents. The two general lines here are that on the one hand we should build on the valuable material contained in the LOS Convention and the Montreal Guidelines, and on the other hand take into account the way in which in recent years our views on the types of principles applicable to LBS have started to shift. In particular in the European region we can witness a shift towards prevention and application of clean technology. Both the 1974 Paris Convention and the 1974 Helsinki Convention are at present under revision for this very reason. Also fora in developing states have indicated their positive attitude towards this shift, *inter alia* reflected in the 1990 Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific. The principles of the seventies and the early eighties may not be the principles of the nineties.

Improvement of funding and transfer of technology

Three Prepcoms have made it clear that protection of the marine environment is not a top priority for developing states. The Group of 77 takes the legitimate position that new obligations can only be accepted if these are supplemented by additional financial resources, as well as a transfer of technology which should make it possible to implement these obligations.

In view of the problems encountered in the various regions, it indeed would be a futile exercise to promulgate new obligations without prior commitment to help them implement.

Obviously, this is not a new problem. The 1972 Stockholm Declaration points with a clarity which may be difficult to surpass to the need for financial and technological support to developing countries in order to attain the objectives of the Declaration (see in particular Principles 9, 12 and 20). The LOS Convention contains a variety of provisions which call upon industrialized states to grant financial, technological and scientific support to developing states (see Articles 202 and 203, and Annex 6 to the Final Act of the Conference). Guideline 9 of the Montreal Guidelines calls upon states to promote, directly or through competent international organizations, 'programmes of assistance to developing countries in the fields of education, environmental awareness, training, scientific research and transfer of technology and know-how'.

In view of these commitments, UNCED faces two challenges. First, the commitments should be specified in concrete terms. Secondly, agreement should be reached on global mechanisms for the development and implementation of these commitments. These issues touch upon the very core of UNCED. Its mandate stipulates that UNCED should integrate the concerns of development and the environment (GA Resolution 44/228, par. (15c)). UNCED is to move the economic issue into the centre of the development agenda and of economic and sectoral policy and decision-making. It has been clear from the outset that any progress on sectoral issues such as LBS depends on progress on the cross-sectoral issues, particularly financial resources, transfer of technology, international economy, poverty, sustainability, demographic pressures and health of education. As fundamental problems of underdevelopment cannot be bridged by a single Conference, it is not surprising that the progress made on these cross-sectoral issues is extremely slow. It might be expected that, although difficult enough in itself, states will find it easier to cope with the problems of resources related to relatively specific issues such as LBS.

One of the more fortunate developments in the preparations for UNCED was that during the third PrepCom, the Netherlands, speaking on behalf of the European Communities and its Members showed a greater preparedness than before to commit themselves to new and additional financial resources and cooperation on technological issues. As far as LBS are concerned, the challenge for the Fourth PrepCom and the UNCED Conference itself is to translate this commitment in support for concrete, targeted and costed commitments. In view of the limited time available and the comprehensive data which already exist, UNEP Governing Council Resolution 16/26A indicated that such a targeted and costed action programme should initially be confined to the Mediterranean. The provisional outcome of this (which was referred to by Dr. Tolba in his statement to the Contracting Parties of the Barcelona Convention) indicates to what extent current approaches to the problems of LBS

lag behind what is required according to the perceptions of 1991.

The design of a new global strategy

Whereas the basic outline of action to be undertaken at the global level is clear, a major point of contention is how this is to be visualized. There are basically two questions: do we need a new legally binding convention, and what sort of institutional structure is going to be attached to the instrument?

With regard to the first point, the Report of the Secretary-General to UNCED distinguishes three alternative constructions (par. 43-66): a legally binding convention, a non-legal instrument which would contain a formal declaration of principles, supplemented with an action plan and thirdly, and a combined approach: a global convention articulating general principles supplemented with an Action Plan. The disadvantages of a legal instrument have in particular been picked up by the developed states, who argue that the elaboration of such an instrument may impede the soonest possible progress at the regional level. It is easy to misconceive the question, however. As has been shown in many cases, non-legal instruments can do the job perfectly, whereas legal instruments can prove to be particularly unhelpful. What counts is commitment and the creation of legitimate expectations of compliance and implementation. If these are present, a legal instrument might be drawn up within a short time. There is general agreement however that what is called the action-plan (i.e. a set of concrete strategies to implement LBS programmes at the regional and national level) need not necessarily be of a legal nature, in particular in view of the expected need to update it regularly. These remarks would support the case for the third of the three options.

As regards the institutional aspects, the document of the Secretary-General indicates that a new mechanism would have to consist of three elements (A/CONF.151/PC/71, par. 42). First, it requires a high level inter-governmental body to provide political, legal and administrative direction and coordination for the various measures which would be needed to implement and apply the principles and standards of the instrument at all levels. Secondly, it would encompass a technical body for the development, review and updating of standards, required for the practical implementation and enforcement of the principles and regulations specified in the instrument. Thirdly, it would need an institutional agreement for the procurement, management and disbursement of financial and other resources to assist States and other relevant entities to take measures needed to achieve the objectives of the instrument.

This is an accurate statement of the institutional tasks to be fulfilled. Its application will have to find a delicate balance between on the one hand the need to strengthen the valuable tasks which at present being fulfilled by institutions as FAO and IOC, and on the other hand the need to endow one institution with the tasks of coordination. The report of the Secretary-General prefers to endow UNEP with this task, rather than setting up a new institution (par. 66). One need not

object. UNEP has the required mandate, and, what is more important, the requisite experience and expertise and capacity to perform the tasks which are involved in giving meaningful institutional support to the elaboration of a global instrument for the prevention of marine pollution from LBS.

Within a relatively short time, the stage for a global strategy for LBS has been set. It is up to the final preparations for UNCED to transfer it in a commitment for a global strategy. It will be up to the post-UNCED process to corroborate the view that a global strategy can make regional approaches work.
