Commission for Environmental Cooperation

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INTERRELATIONSHIP OF ISSUES: QUIXMALA MODEL DRAFT TREATY

INTRODUCTION:

In an address I gave in Dallas, Texas, on June 15, 1973, I stated:

> "existing international law is inadequate, both in scope and substance - in scope, in that it is incomplete, and in substance, in that it is inconsistent, fragmentary and in large part inchoate."

Unfortunately, while much has happened since, these words still apply. Today I submit to you a document intended to help fill the gaps in the law, and better integrate existing law. Thus the conceptual approach it adopts is holistic, rather than piece-meal.

The three items on the agenda (Long-Range Transport of Air Pollutants, Voluntary Compliance, and Environmental Networking) are not mutually exclusive. Indeed, they overlap and dovetail considerably. Thus, not surprisingly, they are all addressed directly or indirectly in the document I have the honour to submit, namely: The Quixmala Model Draft Treaty for the Protection of the Environment and the Natural Resources of North America, of which I am one of the three co-authors.

SCOPE AND NATURE OF THE QUIXMALA DRAFT TREATY:

That document shows clearly that virtually all environmental issues are inter-related, and should be examined in an integrated and holistic manner. It can be readily seen that the draft treaty is overarching in its scope, as well as both broad and precise in the subject matter it addresses. It was conceived and elaborated as a "framework" or "umbrella" treaty, analogous in that respect

to the 1982 UN Law of the Sea Convention. It does not purport to legislate on every aspect of every issue; while it is a comprehensive treaty, it envisages and presupposes further trilateral accords concluded under its umbrella.

LONG RANGE TRANSPORT OF AIR POLLUTANTS IN NORTH AMERICA:

It should be noted, at the outset, that the draft treaty deals with the three agenda items in quite different ways. Much of the treaty, for example, is directed to words preventing, containing or ameliorating Long Range Trans Boundary Pollution, as a legal obligation. The whole of the Draft Treaty reflects this approach.

VOLUNTARY COMPLIANCE WITH ENVIRONMENTAL LAW IN NORTH AMERICA:

The obligations postulated in the Draft Treaty are based on the leading case of international environmental law, the famous Trail Smelter case, in which Canada accepted liability and a remedial regime for the damage done by air-borne pollution caused by a privately owned industrial concern (i.e. the private sector) known as the Trail Smelter. Largely due to the efforts of Canada, the Trail Smeletr case provided the foundation for principle 21 of the Stockholm Declaration of Legal principles and principle 7 of the Rio Declaration of principles. Indeed, it is my thesis that the Trail Smelter principles are reflected directly or indirectly in all of the international environmental law which has been developed since the 1972 Stockholm Conference.

Not surprisingly, legal liability and state responsibility are central aspects of the Draft Treaty's treatment of Long Range Trans Boundary Pollution. The Rule of Law rather than Voluntary Compliance is the foundation upon which the Draft Treaty has been constructed. That is the conceptual approach of the three co-authors, and that remains their approach. The Draft Treaty should not be confused with a draft declaration of principles or guide-lines.

It is not suggested that Voluntary Codes of Conduct cannot

play a useful role. As an example, in September, 1971, I proposed in the Legal Committee of the United Nations in New York that it was time for the world organization to consider developing a code of ethics leading ultimately to a multilateral treaty to regulate the activities of multilateral corporations. The Canadian proposal was based on the argument that, if states had long been the subjects of international law, and individuals were now the objects of international law, as in the Human Rights Conventions. for example, "why not attempt to develop international law applicable to the large multilateral or transnational entities, many of them with budgets bigger than some western governments, which are regulated on a hit or miss basis by unharmonized national legislation. The application of such an initiative to the question of pollution havens suggests the need for the development not only of trade law but of international law." Well, we have all had more than twenty-five years to mull over the proposal. Who better than Maurice Strong to spear-head the project?

ENVIRONMENTAL NETWORKING AMONG NORTH AMERICAN COMMUNITIES:

The question of Environmental Networking is not directly addressed in the Draft Treaty, but the question was repeatedly discussed by the three authors, not as a given, but in the context of the decision-making process built into the treaty. Only if there is systematic regular and effective networking amongst non-governmental organizations, the private sector, and even officials of the three countries, can duplications and competition for positions of perceived power be avoided. Clearly, it is not possible to legislate cooperation, but the structures and mechanisms of the decision-making process are so divised as to make it a virtual necessity.

GENESIS OF THE DRAFT TREATY:

Presumably it is common ground here that any attempt to

resolve environmental problems must reflect an inter-disciplinary approach. Why, then, should three private lawyers, one Canadian, one American and one Mexican have taken it upon themselves to attempt such a major law-making exercise, for that is what it is, as I can attest, after many many hours of drafting, consultations, debate and re-drafting. The phrase "back to the drawing-board", which I recall vividly from my years as Chairman of the Drafting Committee of the Law of the Sea Conference, and later, as a member of the International Law Commission, still rings in my ears. The reason for such action, at least in my own case, is contained in the following extract from a statement I delivered at the Hague Academy of International Law, on July 14, 1973:

"What is required is an engagement of the spirit. ... The role of the lawyer must be that of an activist much more than the traditional view of the lawyer's role", -as someone who waits to be consulted, in this case, by the scientists, the engineers, the politicians, the bureaucrats, the media, or the NGO's.

How, then, did "an engagement of the spirit" on international environmental issues lead to the elaboration of this Draft Treaty? Firstly, it was begun before the NAFTA, and continued after the conclusion of the Sidebar Agreement. Second, it was begun during the negotiation of the Draft International Covenant on Environment and Development by the Commission on Environmental Law, and completed afterwards. I am a member of both of these institutions, and was a member of the inner drafting group which worked so hard for so many years to produce the Covenant. I pressed hard to utilize the Covenant as a precedent, successfully, as can be seen from the many citations of the Covenant as a source. Finally, there was a coming to-gether at a meeting in Ottawa of the Canadian Council on International Law on October 21, 1989, of two of the authors of the Draft Treaty, on a panel discussing "Innovative Solutions to the North American Environmental Problems". (Alberto Székely was on the panel with me, to-gether with an official of the US EPA; Professor Al Utton

is, however, the US co-author.) This is what I said on that occasion:

"There ought to be a consultative, cooperative North American regional process on environmental issues. ... The time has come to make a beginning, on a North American trilateral basis, of a broad North American regional approach to the serious, important and increasingly urgent environmental problems our three countries share."

I cited in support of the proposal both the successes and failures of Canada and the USA under the 1909 Boundary Waters Treaty; I warned of increasing dangers to the marine environment; (in spite of the 1982 UN Convention of the Law of the Sea, which neither Canada nor the USA had ratified, - nor have they done so to this day); and I referred with concern about the impact of both water-borne and atmosphere-borne pollutants upon the marine environment. In particular, I stated that after four years of study by an interdisciplinary Canadian team it was found that "pollution by toxic substances in the Arctic food chain was very severe", a problem I had just raised as Head of Canada's delegation to the Rovaniemi Conference on the Arctic Environment. I pointed out that " many of the substances found in the Arctic food chain - the whole food chain, on which Canada's northern people depend - are not produced or used in Canada."

I said further that " If these three countries could work together on environmental issues, they might well produce a model for global cooperation on the environment."

I concluded by arguing for "a broad ecological approach" by the three countries and "not the kind of narrow sectorial approach of the past, nor a hit and miss 'fly-swatter' approach." In other words, I argued for the approach reflected in the Draft Treaty I have presented to you. I sincerely hope that participants will agree that it is an idea whose time has come.

Victoria, B.C. 14 May, 1997