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DRAFT TREATIES BY INTERNATIONAL AND CANADIAN-U.S. BAR GROUPS MAY SPUR GOVERNMENTS TO ACT ON TRANSFRONTIER POLLUTION.

Recent initiatives by international and U.S.- Canadian legal groups may help spur government efforts in North America to draft treaties on acid rain and other types of transfrontier pollution. The initiatives are a set of recommendations by the Organization for Economic Co-operation and Development (OECD) to its members (which include Canada and the United States) and two draft treaties prepared jointly by the American and Canadian Bar Associations.

The OECD recommended in 1977 that nations whose industries may cause pollution in other countries try to make their environmental policies and laws compatible and should ensure that any person in a neighbouring country who may be harmed by transboundary pollution has equal access to the courts of the country where the pollution originates as that country's own citizens would have for redress from pollution within their own nation. The document, entitled "Implementation of a Regime of Equal Rights of Access and Non-Discrimination in Relation to Transfrontier Pollution", sets out ten principles for neighbouring nations. Among the goals are uniform environmental quality standards, non-discrimination between the domestic and international effects of pollution, information sharing and compatible land use planning.

The thrust of the 1979 CBA-ABA draft on transfrontier pollution is based heavily on the earlier OECD recommendations. The draft recognizes that it should not matter on which side of the border the polluter is located, where the person affected lives, or in which jurisdiction the judicial or administrative protection is available. The main operative provision of the treaty, Article 2, would ensure that the actual or potential victim of transfrontier pollution would have a remedy in the courts of the country where the pollution originated, if a victim residing in the country of origin would have had a remedy in the case of domestic pollution. For example, if a North Dakotan has a right of action for pollution prevention or control in a court somewhere in the United States, so should a Manitoban similarly affected, and vice versa. Under Article 3, the same principle would apply to access to administrative proceedings pertaining to approval of permits and related matters.

However, the regime proposed by the CBA-ABA draft is strictly procedural; it would not alter substantive rights, obligations or remedies on either side of the border. (See Article 5). It would merely grant equal access to whatever procedures and remedies now exist - or could exist in the future - in Canada and the U.S. In this sense, the draft treaty is very much status quo in nature. Given the current inadequate state of the common law of public nuisance in Canada, a problem that has been recog-

nized by the CBA itself in its 1971 and 1973 national resolutions, any American who sought redress in Canadian courts would be confronted with the same archaic legal and financial barriers that Canadians face (e.g. lack of standing, broad agency discretion under statute and prohibitive costs). In short, Canadians have little access to their own courts on environmental matters to seek appropriate remedies, and therefore the draft treaty would put Americans in no better position. Canadians, on the other hand, have generally been able to appear in U.S. courts to seek redress from pollution originating in the U.S., because of liberalized standing rules. The draft treaty does not further improve that situation.

Similar problems arise in respect of administrative decision-making (e.g. control orders issued under Ontario's Environmental Protection Act) which generally are made without benefit of appropriate public involvement. In the case of the recently revised Inco control order on sulphur and nitrogen emissions, the draft treaty would put U.S. residents in no better position than Ontario residents have been with respect to a proper process for review of the environmental and social implications of that order.

While this draft treaty is a step forward in recognizing the need to deal with transfrontier pollution, it is clear that the draft treaty will only be as effective as the domestic law of either country permits, and that domestic legislative reform, particularly in Canada, is past due.

A second treaty drafted by the two Bar Associations would be useful to implement any treaty on acid rain. At present, if the Canadian and U.S. governments disagree about the legal effect of a treaty, the difference between them must be resolved by negotiations between them. Neither government can refer the dispute to an independent arbitrator or an international court without the consent of the other. The Draft Treaty on Third-Party Settlement of Disputes would allow either country to submit any question relating to the interpretation or application of a treaty to binding arbitration without the advance agreement of the other. Thus, if the United States, for example, refused to implement an existing acid rain treaty because it would be too costly to its industry, Canada would have access to an independent agency to seek compliance.

Whether Canada and the United States are willing to strengthen the hand of private citizens affected by pollution and public interest groups in this manner, and whether the United States, which would often be able to overpower its smaller neighbour in the absence of any independent arbitration, would be willing to sacrifice some of this power in the interest of eliminating acid rain, will be interesting questions that are bound to be in the mind of the teams negotiating any treaty on transboundary pollution.

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