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The Law of Ecodevelopment:
A Canadian Perspective

From

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THE ENVIRONMENT**

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1. Introduction

This joint statement to the World Commission on Environment and Development is submitted by Paul Muldoon, a researcher conducting a study on Development Assistance and the Environment, funded by the Social Sciences and Humanities Research Council of Canada, and the Canadian Environmental Law Research Foundation. The Foundation is a non-profit organization carrying out research in environmental law and policy and disseminating information by means of its publishing and conference programs.

The focus of the report is on the emerging international law framework governing development and environment and Canada's commitment to and practice in the implementation of these international law principles. More specifically, the first part will put forth what is suggested as the emerging "soft" international law principles, called "ecodevelopment" norms, governing environment and development. After making some recommendations on how these norms may be implemented generally, the second part examines the extent to which Canada accepts these principles in both its domestic policy and law and within its international activities in regard to development assistance.

Our concern with issues of "development" in the context of this report is very broad. Development is discussed with regard to both the degree of economic development within a country or region, and the social and political development of the peoples of a nation, including their health and education.

The term "ecodevelopment" is used to describe those principles which treat long-term economic development and environmental protection and management as compatible and necessarily inseparable goals. This concept assumes that sustainable development requires preservation of environmental quality, rehabilitation of the environment and conservation of natural resources.

2. The International Law of Ecodevelopment

a. The Relevance of International Law

International law is the system of "law" created by states to govern their behaviour and is treated as binding by them. While there is no central enforcement authority, there are sanctions for failing to follow the rules of international law.

In the past two decades, there has been a consistent movement to strengthening the legal regime pertaining to environmental protection and management. This legal regime is evidenced by some 113 international agreements, broadly accepted principles of law and state practice. International environmental law imposes obligations upon international actors, such as states, their agencies and international and inter-governmental organizations, to, among other things.:

- prevent, abate and control pollution that may adversely affect the environment of another state or the global commons;
- use shared natural resources in a reasonable and equitable manner;
- inform and consult with all countries that may be affected by environmentally disruptive activities.

More recently, impetus to merge the international law development and international environmental law has come from inter-governmental organizations and non-governmental organizations. International development law dictates that:

- every state has permanent sovereignty over its natural resources;
- every state must contribute to global social and economic cooperation, well-being and peace through such mechanisms as development assistance.

The synthesis of international environment and development law has led to the recognition of the law of ecodevelopment. Ecodevelopment law qualifies the term development in the sense of requiring development to be sustainable. It also recognizes the interdependency of all living and non-living resources and the need for the rational use and allocation of these resources.

Although the law of ecodevelopment is still in its emerging stages, it does represent "soft" law which cannot be ignored by states and other international actors. Because many of the rights and duties imposed under this regime are based upon existing international duties, their transition into concrete rules is certain. For present purposes, those "soft" law notions which merge environment and development rights and duties are called "ecodevelopment norms."

b. Emerging Ecodevelopment Norms

In reviewing the international law of environment and development, at least four "ecodevelopment" norms can be identified. These norms are not exclusive; they represent only general parameters for the identification and recognition of more specific duties.

Duty to Integrate Environmental Considerations into Development Policies

Every state and international actor having a role to play in development activities is obliged to ensure that environmental considerations are integrated into their development policies. This integrative process, which is in contra-distinction to an "add-on" approach, must pervade all sectors.

The duty to integrate environmental considerations into development policies manifests itself in a number of ways. Initially, it requires the formulation of explicit policies committing the national agenda to the implementation of such principles. Further, it requires a systematic and comprehensive review of all existing development and environmental policies in terms of their environmental soundness. Third, it requires that there be sufficient institutional support and resources to ensure the coordination of environmental policies and to provide continuity for ongoing environmental responsibility.

Duty to Plan Development Activities

Natural resource planning is integral to sound management. There are two important aspects of the duty to plan: first, it is necessary to develop a baseline information bank through ecosystem and resource inventories and evaluations. Second, with the baseline data in hand, socio-environmental assessment procedures must be used to evaluate the impacts of development. Assessment procedures must be followed for development activities undertaken both within the national territories and in other countries.

Duty to Improve Environmental Capability

It is a fundamental precept of ecodevelopment that states and development agencies have a duty to seek to improve their own environmental capability and the capability of countries to whom they provide development assistance.

Environmental capability has many facets to it. It involves:

- supporting institutional development, including governmental and non-governmental organizations and agencies;
- strengthening national legislation aimed at the conservation, protection and rehabilitation of natural resources and the environment;
- increasing the capacity to manage the natural resource base through research, training and education;
- building awareness and support of ecodevelopment through such avenues as public participation in the environmental decision-making process and access to information.

Duty to Promote Integrated Regional Planning

From the legal concepts of equitable use of shared natural resources and riparian rights, development policies, programs and activities should be viewed from a regional perspective. Most often, this duty is operative in the context of river basin developments, requiring all concerned to ensure that the proposed use is reasonable and to take into consideration the effects of the development on co-basin states. Where the development will affect existing uses (whether because of altering water quantities, water flows or increased levels of pollution), then there is a duty to notify and consult with the affected states.

It is recommended that the Commission recognize these eco-

development norms and promote the development of mechanisms at the national and international levels to facilitate their implementation.

c. Transforming The Norms Into Law

The next issue is to transform these "soft" law norms into "hard" law. This process can be achieved through a variety of ways:

Stockholm II Conference

The Declaration on the Human Environment which resulted from the 1972 Stockholm Conference provided a foundation for the development of many international law duties. As the Nairobi Declaration demonstrates, the Declaration is just as vital today as it was a decade and one-half ago. However, in light of the recognition of the pressing global environmental and natural resource problems, the time is now ripe for a Stockholm II Conference. The purpose of the Conference would be to re-affirm the commitments within the Declaration and carry its momentum to the next stage.

World Convention on Environment and Development

Impetus must be given to strengthening and particularizing ecocodevelopment norms. The most expeditious method of doing this is through a general legal instrument, analogous to the Law of the Sea Convention. Existing multilateral and non-governmental organizations should provide a catalytic role in the realization of this goal through the convening of a law-making conference.

It is recommended that the Commission consider such proposals

to further ecocodevelopment norms and provide other means to secure their foundation in international law.

3. Ecodevelopment in Canada

a. Ecodevelopment norms -- the Canadian experience

The relationship between environment and development in Canada follows a pattern similar to that in other developed nations. In domestic law and policy, there are few formal links made between environment and economic development and the two are viewed as separate and incompatible goals by the federal and provincial governments, industry and the public.

The characteristics of environmental law and policy in Canada include the following:

- There is no constitutional protection for environmental quality.
- Responsibility for environment and development is divided between two levels of government, resulting in overlap and fragmentation of activities.
- Environment is treated as a separate sector or an "add-on" to existing agencies and procedures. The link between environment and development has been recognized by strategic thinkers in Canada, such as the Science Council of Canada, the Economic Council of Canada and the Macdonald Royal Commission on the Economic Union and Development Prospects for Canada, but this thinking has yet to be reflected in government policy or practice. For example, at both federal and provincial levels there are environmental agencies separate from and lacking coordination with agencies responsible for industrial development, trade, agriculture, forestry, mining and energy.
- Industrial growth and use of resources is allowed to proceed unless and until significant evidence of harm to health or the environment is shown. This results in an approach which is reactive, often to single-chemical hazards and emergencies.
- The physical environment is divided into different media -- air, water, land -- for regulatory purposes.

- With a few exceptions, ecosystems or physical regions are not used as a focus for regulation.
- Methods, such as environmental impact assessment, are used to predict the potential impacts of development on the environment and long-term availability of natural resources, but they are limited in their operation (e.g, environmental assessment does not apply to private sector projects even with significant impact) and the use that is made of them. Often such methods are only used after fundamental development decisions have already been made.
- Existing regulatory approaches are used to accomodate new technologies, such as biotechnology, which, because of their nature and the uncertainties involved, more appropriately require innovative approaches.
- Public participation in regulatory processes -- standard setting, issuance of permits, etc. -- is minimal or non-existent.
- Enforcement of environmental laws is often minimal and there is little understanding in government as to how to best achieve maximum compliance or how to measure the effectiveness of environmental protection programs.

Beyond domestic policy, there are a number of features of Canada's policy toward the international community regarding environment and development that bear mention. Discussion of these is limited to those respecting development assistance:

- Canada has participated in a large number of multilateral initiatives advancing the norms of ecodevelopment, including the Stockholm Conference and the work of UNEP, OECD and other intergovernmental organizations.
- Canadian aid is given on the basis of priority to helping the poorest groups first.
- 3/4 of bilateral aid is "tied aid", i.e., that proportion of the funds advanced to aid recipients

is used to purchase Canadian goods and services for use in the recipient country.

- Environmental impact assessment of aid projects is not a formal, integrated part of the project approval process.

b. Implementing the norms in Canada

Despite the widespread international acceptance of the principles linking environment and development, implementation of the principles is only beginning. It is a difficult task, requiring a realignment of many existing economic assumptions, expectations and relationships. No fundamental change to the status quo comes quickly or easily. Changing the way Canadians view the interrelationships between environment and development will require public information and education, new economic policies, institutional changes and law reform.

(i) The nature of the changes required

The kinds of changes which need to be made in Canada in order to implement ecodevelopment principles include the following. Because of the nature of the Canadian system of government, changes must come at the federal, provincial and municipal levels.

° Policy changes:

- The emphasis in the economic policies of government and industry needs to shift from growth as the priority goal to achievement of sustainable development over the long-term.

- There should be a clear statement of national policy supporting the goal of sustainable development for Canada and the nations with which it deals, incorporating environmental concerns into economic decision making.
- The approach to the environment should change from reactive to anticipatory. This would require industry to provide evidence that its proposed use of resources or new processes is compatible with the goal of sustainable development and environmental protection prior to being allowed to proceed with development. This change would also limit the use of technologies with uncertain effects or by-products and wastes that cannot be safely disposed of or recycled.
- Canadian foreign policy should recognize the importance of a stable environment to international peace and security. International cooperation is essential and Canada has an important role to play in working to support ecodevelopment internationally and domestically.
- Canadian aid programs should promote the sustainable development of the developing world. This may require a shift from the heavy reliance on tied aid.

° Institutions:

- Environment needs to be integrated into economic decision making. This may require the elimination of separate environment departments and amalgamation of their present functions into agencies with mandates concerning economic and resource issues. At the least, this would require greater coordination of activities. In addition, increasing the environmental capability of industry will be necessary.
- Public participation should be incorporated into regulatory decision making, including in policy making, standard setting and project assessment.

° Law:

- Environmental assessment legislation should be expanded to private sector projects, so that all undertakings, including policy development, with potential for significant environmental, social or developmental-potential impacts are reviewed and not proceeded with if impacts are significant.

- Laws which require waste minimization in industry, such as mandatory recycling, should be implemented.
- Pollution laws should use a cross-media approach.
- Authority should be given to regulate on an ecosystem basis and to allow effects in other jurisdictions to be taken into account in the formulation of regulations and standards.

It is recommended that the Commission promote the development of national as well as international strategies for the implementation of the ecodevelopment principles. It is further recommended that the Commission consider these proposals for changes to Canadian law and policy as a contribution toward the development of appropriate national guidelines for implementation of the principles.

(ii) Mechanisms to implement the ecodevelopment norms in Canada

Clearly, implementing the principles of ecodevelopment is a difficult task. Of the changes required, a change in thinking or philosophy must come first. While there is acceptance of the need to integrate environmental and economic policies, broad support among all sectors is necessary to effect a transition. Generating such support requires educational programs and widespread opportunities for discussion among government, industry, citizens, NGOs and academics. The Commission's hearings are but one such opportunity.

To implement policy changes in Canada necessitates cooperation between federal and provincial governments and a

full understanding of where changes must be made. It is important in Canada that all governments participate and agree in order to realize these goals. The following are suggestions for mechanisms for effecting such changes:

- Establishment of a royal commission to review policies and the laws which implement them and to suggest targets for change, e.g., support for research into appropriate technologies.
- Convening a first ministers' conference on environment and economic development in Canada to reach national consensus on the changes to be made.
- Amending the Constitution, setting sustainable development and environmental protection as national goals.

It is recommended that the Commission support such initiatives in Canada and promote cooperative mechanisms to advance similar initiatives as part of national strategies to achieve the principles of ecodevelopment.

4. Conclusion

As international acceptance of the norms of ecodevelopment grows, the need to develop strategies at the national and international levels to implement these norms becomes more acute. The World Commission on Environment and Development can play an important role in advancing the world's understanding of these norms and in promoting the development of implementation strategies.