



United Nations Environment Programme

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ПРОГРАММА ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ ПО ОКРУЖАЮЩЕЙ СРЕДЕ

NEGOTIATING INTERNATIONAL ENVIRONMENTAL AGREEMENTS Seton Hall Graduate Programme on Multilateral Diplomacy

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The development of international environmental law has been one of the most rapidly evolving fields in international relations over the last decade. Under the auspices of the United Nations (UN), the progressive development of such legal arrangements has burgeoned. Through the development of this expanding body of environmental law, the international community has been able to craft innovative responses, building and enhancing processes to address the most pressing environmental challenges. The negotiation of multilateral environmental agreements (MEAs) is thereby playing an increasingly important role in promoting the integration of environment and development, and in providing an effective legal and regulatory framework to underpin the efforts of the international community in the field of the environment.

Clearly, the definition, negotiation and creation of the various legally binding conventions and protocols in the field of the environment, represents an outstanding achievement of the international community. Conventions represent the collective will of the international community to legally commit to protecting the environment. Binding international conventions now exist in areas as diverse as climate change, biological diversity, desertification and, more recently, prior informed consent of trade in hazardous chemicals and pesticides. The total number of such MEAs is steadily rising, while the average time taken to negotiate each treaty is decreasing. Within this same timeframe, the scale of problems to be addressed has widened – from the regional through the hemispheric to the global – while the total number of sovereign States that participate in the negotiation of such legal arrangements has grown. Moreover, new concerns and principles – precaution, inter- and intra-generational equity, scientific uncertainty, sustainable development – have also arisen in recent years and now need to be factored into negotiation processes.

In my talk today, I would like to trace the evolution of the body of MEAs, and the role of the United Nations Environment Programme (UNEP) in supporting their negotiation, further development, implementation, and in ensuring policy coherence and the development of synergies between them. I would then like to consider various examples to illustrate some of the practical issues involved in negotiating MEAs, including with regard to the recent negotiation of the Cartagena Protocol on Biosafety, and the negotiations currently being held at UNEP's headquarters in Nairobi, namely the meeting of the Conference of the Parties (COP) to the Convention on International Trade in Endangered Species (CITES).

Although some international environmental treaties date back to early in the 20th century, it was not until the 1960s that concern about environmental pollution and the depletion of natural resources led to the kind of binding MEAs that we know today. Many of the early MEAs focused on the allocation and exploitation of natural resources such as wildlife, air and the marine environment. MEAs drawn up in the lead-up to and aftermath of the UN Conference on the Human Environment held in Stockholm in 1972, largely laid an emphasis upon conservation, for example, the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1975 Mediterranean Action Plan, and the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS). These all address biological diversity, and as I will touch on later in my speech, the protection of wild fauna and flora has become one of the most developed areas of international environmental law.

A milestone in the evolution of environmental agreements and legislation was the United Nations Conference on Environment and Development (UNCED), the Earth Summit, held in Rio de Janeiro in 1992. With all but six member states of the UN represented, the conference was a landmark in the history of environmental law, confirming the global character of environmental protection and its integration with development. Two new conventions were opened for signature: the UN Convention on Climate Change (UNFCCC), which is sectoral in that it deals with climate and the atmosphere, but holistic in addressing their effects, and the Convention on Biological Diversity (CBD) which brings together agriculture, forestry, fishery, land use and nature conservation in new ways. The negotiation of the UNFCCC and CBD demonstrated the difficulty of pursuing agreements that affect multiple sectors. Both agreements were highly politicised with major diplomatic battles taking place during negotiations. This illustrates the fact that as more holistic, multi-sector agreements involve so many different and crosscutting areas of law, policy and politics, they can engender more conflict and problems than the earlier generation of sectoral MEAs.

The Rio Conference also encouraged the development of other MEAs, including the Convention to Combat Desertification (CCD, 1994), and the Rotterdam Convention on Prior Informed Consent (PIC) on Hazardous Chemicals (1998), as well as new regional MEAs including, the Regional Agreement on the Transboundary Movement of Hazardous Wastes in Central America (1992), the Convention on Cooperation for the Protection and Sustainable Use of the Danube River (1994) and the Agreement on Cooperation for the Sustainable Development of the Mekong River Basin (1995). In this regard, it is significant to note in the past quarter of a century, thirteen regional Action Plans and nine Regional Seas Conventions and their protocols have been formulated, making up a web of detailed obligations for the majority of coastal states.

Since its inception in 1972, UNEP has played a pivotal role in supporting the development and implementation of environmental law. In Agenda 21, UNEP was specifically called upon to give priority to the further development of international environmental law. Five years later, the General Assembly, in the Programme for the Further Implementation of Agenda 21, stated that, consistent with the Nairobi Declaration on the Role and Mandate of UNEP (adopted earlier in 1997), the role of UNEP in the further development of international environmental law should be strengthened, including through the development of coherent inter-linkages among relevant conventions, in cooperation with their respective COPs or governing bodies. It further stated that, in performing its functions related to the conventions signed at UNCED or as a result of it, and other relevant conventions, UNEP should strive to promote the effective implementation of those conventions in a manner consistent with the provisions of the conventions and the decisions of the COPs.

As such, UNEP has undertaken a series of initiatives, in cooperation with the respective

governing bodies of the environmental conventions, to develop coherent interlinkages among the conventions with a view to achieving synergies and multiple benefits and promoting coherence of policies and actions. UNEP is putting an increased emphasis on facilitating collaboration and identifying synergies amongst conventions, utilising the capabilities of the entire Programme to contribute to the objectives agreed to under the various global and regional conventions and action plans. UNEP's effort to promote collaboration and synergies amongst conventions has been launched on the basis of the following priorities; promoting information exchange amongst convention secretariats; strengthening collaboration amongst the conventions' scientific and technical bodies; revitalizing UNEP's support to the regional seas conventions and actions plans; making international trade and environmental regimes more compatible; and streamlining national reporting for the environmental conventions. One important initiative that UNEP collaborated on in this area, was the UNU international conference on 'Synergies and Coordination between Multilateral Environmental Agreements', held in Tokyo, Japan, in July 1999.

Critical to any MEA is credible scientific information to underpin the negotiation process, for example the authoritative assessments undertaken by the Intergovernmental Panel on Climate Change (IPCC) and the various assessments in the area of Ozone. Forging international consensus around such information has been another key objective of the UN Environment Programme in the field of international environmental law, UNEP is working to build its capacity and networks to ensure the scientific underpinning of conventions, and facilitate their implementation. Recently, UNEP developed a central strategy to strengthen its capacity in the area of information, monitoring and assessment of environmental trends and threats, building on the capacity of a network of centres of excellence in developed and developing countries.

As such, last month, the World Conservation Monitoring Centre (WCMC) based in Cambridge, United Kingdom, joined UNEP as its global biodiversity information and assessment centre. For more than twenty years, WCMC has gathered and compiled information on the living world, always in association with research experts in governments, NGOs and the private sector. Its reports and analyses are acknowledged as being objective and authoritative and have served to underpin the establishment and activities of a number of biodiversity-related multilateral agreements. The expertise offered through the new institutional arrangement between UNEP and WCMC will be utilized in the area of harmonizing information management requirements under the various biodiversity-related treaties and conventions. This will complement UNEP's long-standing commitment to promoting synergies among international environmental agreements, and international and regional institutions.

Another key element of UNEP's role in the field of international environmental law, is its hosting of Secretariats for many of the MEAs negotiated under its auspices, for example the CBD, CITES, CMS, the Vienna Convention and Montreal Protocol, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, and various regional agreements. UNEP provides administrative and policy support to these secretariats. Secretariats assist Parties in implementation by collecting reports on compliance and transmitting these to the COP, facilitating technology transfer, maintaining information on the development of projects relevant to the convention and, in certain cases, by enhancing compliance and implementation through a financial mechanism.

The global conventions developed since Stockholm are supported by a COP. The COP exists to: review implementation based on reports submitted by governments; consider new information

from governments, NGOs and individuals to make recommendations to the Parties on implementation; make decisions necessary to promote effective implementation; revise the treaty if necessary (adopting amendments and additional protocols to help them adapt to new circumstances, i.e. the Montreal Protocol of the Vienna Ozone Convention and the Kyoto Protocol of the UNFCCC); and act as a forum for discussion on matters of importance. The meetings of COPs are open to representatives of the Parties and others. This helps ensure transparency of operation and cooperation with other intergovernmental bodies and non-state actors. For example, more than 200 intergovernmental and NGOs were represented at the meetings of the COP of the UNFCCC in Bonn in 1995 and in Kyoto in 1997.

A third element of many of the MEAs is a scientific body to support the implementation of the convention by making proposals and providing advice to the Secretariat and the COP. Scientific Bodies are generally consulted before the discussion by the COPs on reports or information related to the implementation of the convention, as well as with regard to new or emerging scientific and technical issues related to the implementation of the convention or protocol.

It is also significant to note that non-binding instruments are often forerunners of binding policy instruments and have at times had a more profound effect on environmental policy than binding ones. Non-binding instruments have also helped to bring about changes in attitudes and perceptions at all levels of society. While binding instruments receive the bulk of attention from policy makers and the public alike, non-binding instruments have played and are likely to continue to play a major role in the management of global and regional environmental problems.

Non-binding instruments, rather than creating commitments for action in the form of legally binding targets and timetables, provide a looser framework. In some cases, the main aim is to set out important issues and priorities, foster discussion and attention, and stimulate new thinking and understanding about the relation of humans to the natural world. In other cases, such as the non-binding Prior Informed Consent (PIC) system for chemicals and pesticides, jointly administered by UNEP and FAO, non-binding instruments provide international procedures and arrangements that contributed to the development of a legally binding regime, the 1998 Rotterdam Convention.

Examples of important non-binding instruments include the Rio Declaration, Agenda 21, and the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA). Agenda 21 is probably the most prominent, significant and influential non-binding instrument in the environmental field and has become the guiding document for environmental management in most regions of the world. Its most important impact, through its core concept of sustainable development, has been to extend the environmental debate beyond environmental departments and NGOs. It provides policy makers with a starting point for linking environmental and socio-economic issues.

The Rio Declaration is also a very significant non-binding instrument, in that it includes several established and emerging principles, including common but differentiated responsibilities of states, the precautionary principle and the polluter pays principle. Many of the environmental agreements drawn up since UNCED include principles contained in the Rio Declaration that are now becoming part of international law. These include the right of people to an appropriate environment, the right to information, the right to participate in environmental management, and the precautionary principle.

The recently adopted Cartagena Protocol to the CBD on Biosafety is the first global treaty that reaffirms, incorporates and operationalises the precautionary principle enunciated in the Rio Declaration. The protocol outlines procedures to deal with issues arising from the transboundary

movement, transit, handling and use of genetically modified organisms (GMOs) – and commodities containing them – that may adversely affect the conservation and sustainable use of biological diversity or pose risks to human health and the environment. The precautionary principle is reflected in a key provision of the protocol which states that countries do not have to have complete "scientific certainty" to block imports of a GMO they fear could be harmful to biological diversity and, by extension, human health.

After five years of often difficult and tense negotiations, Governments meeting in Montreal in January 2000 finalised the Cartagena Protocol on Biosafety. The Montreal session followed the suspension of the First Session of the Extraordinary COP in February 1999 in Cartagena, Colombia, when officials were unable to finalise the text of a Biosafety Protocol in the time available due to a number of outstanding differences. In the interim period, the President of the Extraordinary Session, the Environment Minister of Colombia, held two rounds of open-ended informal consultations. At these meetings, representatives of all the negotiating groups that emerged from the Cartagena meeting expressed their commitment to concluding a Biosafety Protocol and confirmed that the political will did exist to achieve this. The negotiating groups were the Miami Group (Argentina, Australia, Canada, Chile, Uruguay, and the US), the European Union, the Central and Eastern European Countries, the Compromise Group, and the Like-Minded Group of Countries (which includes most of the developing countries).

The biosafety talks reflected growing public concerns about the potential risks of biotechnology. While many of the countries with modern biotechnology industries have domestic legislation, there existed no binding international agreements covering LMOs. Another concern was that many developing countries lack the technical, financial, institutional, and human resources to address biosafety. They need greater capacity for assessing and managing risks, establishing adequate information systems, and developing expert human resources in biotechnology.

The talks stalled over a number of issues. In particular, governments disagreed over the proposed scope of the treaty's regulatory powers. Some wanted to restrict the scope of the Protocol to Living Modified Organisms (LMOs) intended for introduction into the environment, such as seeds. Others argued for a broader scope that would include LMOs that are agricultural commodities or that are used for food, feed, or processing. Another contentious issue was liability: if LMOs enter the environment and cause damage, who pays? Also unresolved was how to minimise the potential socio-economic impacts, such as the competitive decline of traditional crops faced with LMO imports.

One of the most contentious issues related to the Protocol's relationship to other international agreements, particularly those under the World Trade Organization (WTO). So why is biotechnology also a trade issue? And why did the relationship with the WTO cause such obstacles in the negotiation of the Cartagena Protocol? The commercialisation of biotechnology has spawned multi-billion-dollar industries for foodstuffs and pharmaceuticals that continue to grow at a dramatic pace. Under WTO regulations, the regulation of trade must be based on "sound scientific knowledge". Yet under environmental regimes, the standard of proof is the "precautionary principle". The WTO also does not accept socio-economic concerns, such as the risk that exports of genetically engineered crops may replace traditional ones and undermine local cultures and traditions in importing countries. The subsidiary agreements of the WTO, including the Sanitary and Phytosanitary Agreement (SPS), Technical Barriers to Trade Agreement (TBT), and the Agreement on Trade-Related Intellectual Property (TRIPs), also contain specific provisions that apply to the biosafety issue.

In the end, the compromise reached, and approved by representatives of more than 130 countries, was that in the preamble, it is emphasised that the protocol "shall not be interpreted" as changing the rights and obligations of countries under other international pacts, such as the WTO. The preamble also recognises that trade and environmental agreements should be mutually supportive and the protocol is not subordinate to other international pacts.

Under the Cartagena Protocol, signatories will signal whether or not they are willing to accept imports of agricultural commodities that include (LMOs) by communicating their decision to the world community via an Internet-based Biosafety Clearing House. In addition, shipments of these commodities that may contain LMOs are to be clearly labelled. Stricter Advanced Informed Agreement procedures will apply to seeds, live fish, and other LMOs that are to be intentionally introduced into the environment. The aim is to ensure that recipient countries have both the opportunity and the capacity to assess risks involving the products of modern biotechnology. The agreed text of the Biosafety Protocol will be opened for signature at UNEP headquarters in Nairobi from 15 to 26 May, on the occasion of the Fifth Session of the COP to the CBD. The Protocol will then enter into force for its members after 50 countries have ratified it.

Another interesting example of an intergovernmental negotiation process is the major new MEA on Persistent Organic Pollutants (POPs), currently being developed under the auspices of UNEP. The treaty, which aims to ban the "dirty dozen" list of POPs, such as DDT, dioxins and PCBs, which have been linked to cancer, birth defects and other health problems, is expected to be opened for signature early in 2001. The fourth round of inter-governmental negotiations held last month made important progress on a number of key issues, and reaffirmed the eventual elimination of those POPs as the goal of the Convention and stressed the need to include exemptions, *inter alia*, for use of DDT in controlling malaria mosquitoes, subject to periodic review. Intensive discussions also laid the basis for deciding on technical and financial assistance at the last round of negotiations, to be held in December 2000 in Johannesburg, South Africa.

While it is considered that negotiators are now in a good position to reach agreement on the treaty by the end of 2000, the deadline in the mandate from the Governing Council of UNEP, a number of contentious issues are outstanding. For example, negotiators recognised that technology and funding are critical to successful implementation of the convention, and that developing countries and countries with economies in transition would need funds and environmentally sound technology to allow them to meet their obligations, however the modalities for achieving this are under discussion. As such, proposals for ensuring access to funding were considered, including several which, if adopted, would build on the Global Environment Facility (GEF), in recognition of its potential for addressing global environmental issues. The Group of 77 (G77) developing countries and China take the position that the nature of the POPs issue, and experience with existing mechanisms, reflect the need for a dedicated financial mechanism, which should include an independent multilateral fund (such as the one that exists for Ozone, under the Montreal Protocol). This will be one of the issues that will be discussed during a planned intersessional meeting, which will seek to establish common ground and help bring about resolution in December.

Another interesting example of the issues that are impacting the negotiation and implementation of MEAs, can be seen in discussions currently being held to adapt certain provisions under a well-established treaty, namely, CITES. The 11th COP of the Convention on International Trade in Endangered Species is being held at UNEP's headquarters in Nairobi. The discussions reflect the increasing appreciation of the need to complement conservation efforts and trade controls

with stronger support for the sustainable use of wildlife. Sustainable use is key to building support for conservation among local communities while directly raising funds for protecting endangered species. There is also an increasing recognition that developing countries need more capacity building in order to monitor and control both wildlife trade and wildlife populations.

This CITES meeting will establish a five-year "strategic vision" to guide the work of the CITES through the year 2005. It is also considering proposals to amend the lists of species subject to trade controls or bans. The proposals cover over 60 species, ranging from the African elephant and the minke whale to Malagasy poison frogs and the monkey puzzle tree. Perhaps the most high profile proposals involve whether or not to authorize annual sales of ivory from southern African elephants. Passions are running high over proposals to relax global bans on the trade in elephants. At the last CITES conference, in Harare in 1997, governments agreed that Botswana, Namibia, and Zimbabwe could make a one-time and highly controlled experimental sale of existing ivory stocks to Japan. Together with South Africa, these countries now propose a further authorization for trade in elephant products under strict conditions. The proceeds would be devoted to elephant monitoring and conservation. Kenya and India, among others, are opposed and propose a total ban on such trades, contending that CITES-approved, one-time sales last year sparked an increase in elephant poaching. Kenya says that it opposes lifting the ivory ban until such time as an effective monitoring capacity is established and is operational. The debate over the ivory trade embodies the emerging tensions between saving endangered animals and raising the resources to sustain them. For example, Zimbabwe wants to sell ivory, as otherwise they contend that there will not be sufficient funds toward conservation for the elephants, while Kenya's economic reliance on elephant-related tourism puts it at the forefront of those who want a stricter ban. Africa's elephant population was halved in the 1970s and 80s, with some 650,000 killed, but the numbers recovered somewhat after CITES imposed a total ban on ivory trade in 1989.

In another emotional-charged debate, the issue of whales is also being revisited. Japan and Norway believe that certain stocks of gray and minke whales are healthy enough to be transferred from CITES Appendix I (which bans all trade) to Appendix II (which regulates trade through a system of permits) on the basis of their good conservation status. Similar proposals were rejected by CITES in 1997, but fell only nine votes short of victory. In 1986, the International Whaling Commission banned all commercial whaling. Japan argues that with 1 million minkes worldwide and 760,000 around Antarctica alone, the creatures do not deserve the level of protection reserved for endangered species. Japan also says the plentiful minkes have depleted food supplies for the rarer blue whales. Environmentalists contend that renewed whaling for minkes could threaten other species as well, and that it is nearly impossible to tell one species of minke from another, with not all of the species falling under CITES' protection. Environmentalists have also warned that Russia is looking for the hard currency that whaling could produce.

Among the other issues on the CITES agenda, Cuba wants the right to sell stockpiles of shells from the endangered hawksbill turtle, and Australia, the United States and the United Kingdom will propose measures to protect sharks. Tigers, dolphins, snakes and spiders are among the other species under consideration.

I would like to conclude by dwelling on a Convention that is considered by many to be the example of success in the field of international environmental law. Last month marked the fifteenth anniversary of the adoption of the Vienna Convention for the Protection of the Ozone Layer. With the adoption of that Convention, the foundation was laid for concerted international efforts to protect the ozone layer. The Vienna Convention and its Montreal Protocol on Substances that Deplete the Ozone Layer are now acknowledged as outstanding successes and as examples to be followed for the

solution of global environmental problems through global cooperation and partnership.

The Vienna Convention committed parties to protecting human health and the environment against the adverse effects of depletion of the ozone layer due to human activities. It set out broad principles of ozone layer protection, rather than establishing the detailed phase-out schedule of ozone-depleting substances, which were later, included in the Montreal Protocol in 1987. The Convention committed States to cooperate in researching the causes and effects of ozone depletion as well as alternative technologies; to cooperate on adopting legal and policy measures to counteract activities that are harmful to the atmosphere and to facilitate the transfer of technology and transmission of information, especially to developing countries.

Both the Convention and the Protocol allowed the Parties thereto to progress step-by-step in building ownership of the process by all Governments, industry, NGOs and academia, among others. At its adoption on 22 March 1985, 28 countries signed the Convention. There are now 173 Parties to the Vienna Convention. These Parties have phased out 84 per cent of consumption of the chemicals that destroy the ozone layer. This path must continue to ensure recovery of the ozone layer by the year 2050.

A key to the Vienna Convention's success has been its flexibility and ability to adapt to new scientific evidence and make amendments accordingly, coupled with strong political will and the engagement of the private sector. It serves as a laudable example of how to negotiate an effective multilateral environmental agreement, and it can even serve as a model for forging international treaties in other fields.

Thank you.