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Land-Based Pollution

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2. MARINE POLLUTION

a. LAND-BASED POLLUTION (RIVERS/AIR)

1 *The Global Level*

(a) *UNCED*

The slow progress that had been made in the UNCED process in 1991 (*see* 2 *YbIEL* 132 (1991)), had considerably reduced the hopes for positive outcomes regarding land-based marine pollution (LBP). Already before the Fourth Meeting of the Preparatory Meeting (PrepCom) (2 March–4 April) it was clear that UNCED would not yield the commitment that is needed to reinforce the sparse and fragmented international approaches to this issue. At best, UNCED could be the start of a process that eventually yields such a commitment. As the relevant part of Agenda 21 essentially reproduces the documents agreed at the Fourth PrepCom (the main difference being the section on financing and cost evaluation), the outcomes of PrepCom will not be separately discussed.

LBP is covered in Agenda 21 by paras. 17.18–17.23 (basis for action), 17.24–17.29 (management-related activities), 17.35 (data and information) and 17.36–17.43 (means of implementation). These provisions can be grouped in three categories, which respectively concern the global approach, the regional approach and the recommendation of a number of more or less specific substantive approaches to LBP at the national, regional or global levels. It should be noted that due to the close relationship between LBP and many other environmental issues, several other chapters of Agenda 21 are at least indirectly relevant, particularly chapter 17A concerning integrated management and sustainable development of coastal areas and marine areas, which explicitly is linked to LBP (paras. 17.21 and 17.24). These indirectly relevant chapters will not be discussed here.

Agenda 21 unequivocally reflects the feeling of many states that the global level is not appropriate for an effective approach to LBP. It is recognized that “there is currently no global scheme to address marine pollution from land-based sources,” (para. 17.18) but apparently this is not considered as a *lacuna* that would urgently warrant the development of such a scheme. Nonetheless, Agenda 21 envisages two future global developments.

First, Agenda 21 recognizes that the 1986 Montreal Guidelines for the Protection of the Marine Environment from Land-Based Sources (which, apart from the general provisions of the 1982 Law of the Sea Convention concerning LBS, still is the only global instrument) may not fully satisfy the current needs. Even though states still are recommended to take these Guidelines into account (para. 17.24), they also should cooperate “to consider updating, strengthening and extending the Montreal Guidelines, as appropriate . . .” (para. 17.25(a)). The question of the substance and form of such an update, which were extensively discussed in the preparatory work for UNCED (*see* respectively the draft Strategy discussed by the Meeting of Government-Designated Experts, Nairobi 9–13 December 1991 and the Report of the Secretary-General of UNCED to the Third PrepCom) were not addressed in the final version of Agenda 21.

Secondly, Agenda 21 acknowledges that the abilities of countries, in particular developing countries, to address the problems of LBP should be improved. The Conference agreed

that provision of additional financial resources as well as access to cleaner technology and relevant research are necessary to support action by developing countries regarding LBP (para. 17.23). However, the question of how this recognition should be translated into action is dealt with only in general terms. Apart from the provisions in chapters 33 and 34 of Agenda 21 concerning financial resources and mechanisms and transfer of environmentally sound technology, which fully apply in this context, states are recommended to "develop policy guidance for relevant global funding mechanisms." (para.17.25(c)). The Conference did not address the questions of actual costs of preventive strategies and financial terms. The bracketed section in the documents of the Fourth PrepCom (A/CONF.151/PC/WG.II/L.25/Rev.1) on the specific amounts that should be made available for technical cooperation with developing countries to implement Agenda 21 activities concerning LBP eventually was deleted. Agenda 21 now notes that these amounts "depend upon *inter alia*, the specific strategies and programmes Governments decide upon for implementation." (para. 17.36). In this respect, it may be recalled that in December 1991, the Experts Meeting had noted that, at present, a detailed costing of either regional action programmes or of a global programme could not be made, due to a lack of information.

Both the further development of the Montreal Guidelines and the questions of financial and technological resources are envisaged to be taken up by an intergovernmental meeting on LBP which will be convened as a follow-up to UNCED. The UNEP Governing Council is invited to convene this meeting. (para. 17.26).

The provisions of Agenda 21 regarding action to be taken at the regional level reflect the recognition that many existing instruments have not (yet) proven to be effective and that many regions are not covered at all by regional instruments. Thus, states are urged to cooperate to assess the effectiveness of existing regional instruments with a view to identifying means of strengthening them (para. 17.25(b)) and to initiate and promote the development of new regional instruments, where appropriate. It is a plausible proposition that the practical impact of these paragraphs will largely depend on the success that is attained in developing a global approach, in particular in the sphere of financial and technological support.

The third category of provisions of Agenda 21 on LBP contains a variety of more substantive indications as to the most appropriate approaches to the problem. It is recognized that a precautionary rather than a reactive approach is necessary, which requires *inter alia* environmental impact assessment, clean production techniques, waste audits and minimization and a comprehensive approach to damaging impacts from air, land and water (para. 17.21). Particular action is paid to sewage (para. 17.27) and a variety of other priority actions are suggested (17.28). These sections very much have the character of a checklist: they are presented as examples of actions to be considered by states. Also the impact of these examples will fully depend on the way they are integrated in a regional or global strategy in the follow-up of UNCED, including the modalities for implementation. In this respect, the sections of Agenda 21 on LBP are primarily to be considered as a start of a process: they indicate useful elements, but whether they offer any contribution to the prevention of LBP depends on whether the states and organizations involved are able to maintain the momentum on this issue.

2 The Regional Level

(a) North East Atlantic

On September 22, 1992, the Ministers responsible for the protection of the marine environment in the North-East Atlantic and the representative of the Commission of the European Community signed in Paris the (→) Convention for the Protection of the Marine Environment of the North-East Atlantic (the 1992 Paris Convention). At the same occasion, they signed the (→) Final Declaration of the Ministerial Meeting of the Oslo and Paris Commissions and the Action Plan for the Oslo and Paris Commissions.

When the 1992 Paris Convention enters into force, it will replace the 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, as well as the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft. This implies that the 1974 Paris Convention, which still is the exclusive instrument concerning LBP in the North-East Atlantic, will be incorporated in a Convention with a much broader scope. In principle, the new Convention aims at all sources of marine pollution as well as with the protection of the maritime area against the adverse affects of human activities other than pollution.

The provisions of the 1992 Paris Convention concerning LBP are divided between the Convention itself and Annex I to that Convention. The definition of LBP, the principles applicable to all sources of marine pollution, the general obligation to prevent LBP as well as the institutional provisions are included in the main body of the Convention. More specific obligations concerning LBP are contained in Annex 1, which consists of only 3 articles.

The provisions on LBP for the most part are codificatory in nature as they incorporate the contents of existing decisions and recommendations of the Paris Commission, in particular concerning the definition of land-based sources and the prescription of best available technology (BAT) and best environmental practices. The signatory states chose not to include more specific agreements concerning reduction targets and measures in the Convention, but to leave these to the existing decisions and recommendations of the Paris Commission, which under Art. 31(2) remain applicable, and to the future decisions and recommendations of the Commission.

As regards general principles, it is noteworthy that, besides the polluter – pays principle and the principle of sustainable management, the precautionary principle has been included (Art. 2(2)(a)). Other elements of interest in the general provisions are the adjusted definition of marine pollution (which to a certain extent incorporates the precautionary principle), the amended definition of LBP (which adds “sources associated with any deliberate disposal under the sea-bed made accessible from land by tunnel, pipeline or other means and sources associated with man-made structures placed, in the maritime area under the jurisdiction of a Contracting Party, other than for the purposes of offshore activities”), the clarification that decisions of the Paris Commission are legally binding (Art. 13(5)), the possibility of regional differentiation (Art. 24), access to information (Art. 9) and the basis for a non-compliance procedure (Art. 23), still to be elaborated by the Oslo and Paris Commissions.

Of the regime specifically applying to LBP, two aspects are worth noting. First, the 1992 Convention does not distinguish between black and grey list substances. The use of the black/grey lists system, which was a characteristic feature of the 1974 Paris Convention, recently had become the subject of considerable criticism of a legal and a scientific nature. The black and grey lists have been combined in Appendix 2. This Appendix sets

forth 12 criteria to be used by Contracting Parties when setting priorities and assessing the nature, extent and times scales of the programmes and measures to be adopted. It should be noted that this does not necessarily imply a change in practice. The criteria in Appendix 2 have not been weighed or prioritized. As in the past, there will be considerable room for argument as to whether a certain substance should be the object of programmes and measures.

Second, the key obligations concerning the prevention of LBP involve the application of the BAT and best environmental practice (Art. 1(1) of Annex 1.). However, the legal implications of these concepts have not been clarified by the new Convention. Neither BAT nor best environmental practice is defined in a mandatory way. Appendix I sets forth a number of criteria that Contracting Parties have to take into account in defining these concepts. One important novelty of the 1992 Convention is its emphasis on clean or non-waste technology. According to Appendix 1, the "use" of best available technology shall emphasize the use of non-waste technology, if available; according to Art. 2(3)(b) the definition and application of best available technology and best environmental practices shall include clean technology where appropriate.

As noted earlier, the 1992 Convention does not include or reflect any specific commitments concerning LBP. This is widely regarded as the most disappointing outcome of the negotiations for the new Convention. Some specific actions are announced in the Ministerial Declaration and the Action Plan, which, however, mainly reaffirm existing commitments. The main point in the 1992 Action Plan is an overview of priority sectors that are to be addressed in the industrial sector approach and in the application of the concept of best environmental practices. The Ministerial Declaration has taken over the agreement of the 1990 Declaration of the International North Sea Conference to the effect that the discharges and emissions of substances that are toxic, persistent and liable to bio-accumulate have to be reduced in the year 2000 to "levels that are not harmful to man or nature with the aim of their elimination" (Part III, paras. 4 and 5.)

As long as the 1992 Convention has not entered into force, the further development of the regime for LBP will be undertaken on the basis of the 1974 Paris Convention. Thus, the Ministerial Meeting of September 1992 adopted a relatively large number of decisions and recommendations for the implementation of the 1974 Paris Convention. Mostly, these reflect the ongoing emphasis on the definition of the BAT and, to a lesser extent, best environmental practices, for certain sectors.

At the Ministerial meeting, the Commission adopted four new decisions. Remarkably enough, all these decisions were accepted by a three-quarter majority pursuant Art. 18(3) of the 1974 Convention. Although this possibility has existed ever since the entry into force of the Convention in 1976, it is only recently that this provision has been used, and the 1992 meeting indicates the increasing preparedness of the Contracting Parties to circumvent unanimity decisions. The three decision relating to LBP (the fourth concerns pollution from off-shore installations) concern:

- The phasing out of the use of hexachloroethane in the secondary aluminum industry and in the primary aluminum industry with integrated foundries. This decision follows on the invitation of the Third International Conference for the Protection of the North Sea to prepare proposals for the hexachloroethane. (*see 1 YbIEL 119 (1990)*).
- The reduction of discharges of chlorinated organic substances from the production of bleached kraft and sulphur pulp. This decision, which supersedes PARCOM Decision 90/1, was also directly induced by the Declaration of the Third International North Sea Conference.

- The phasing out of PCB's and hazardous PCB substitutes. This decision supersedes PARCOM Decision 90/4. It provides, *inter alia*, for regional differentiation between the coastal states of the North Sea and other Contracting Parties and includes a risks assessment scheme for PCB substitutes.

The Commission adopted eight recommendations, three of them by a three quarters majority. These recommendations largely concern the industrial sector approach. The recommendations related to LBP address BAT for plants producing anodes and for new electrolyses installations in the primary aluminum industry, the limitation of pollution from new secondary steel production and rolling mills, BAT in the pharmaceutical manufacturing industry, nonylphenol-ethoxylates, limitation of pollution from new primary iron and steel production installations, the reduction of emissions from the electroplating industry and the reduction of nutrient inputs.

(b) *The Baltic Sea*

On 9 April 1992, the (→) Convention for the Protection of the Marine Environment of the Baltic Sea Area was signed in Helsinki (1992 Helsinki Convention). The 1992 Helsinki Convention substantially revises the 1974 Helsinki Convention. The revision was induced by similar considerations as the decision to update the 1974 Paris Convention, *i.e.*; to bring the Convention in line with developments since 1974, and as could be expected the new Paris and Helsinki Conventions in several respects are similar.

The provisions relevant to LBP are scattered. LBP is covered by a number of general provisions applying to all sources, Art. 5 and Annex I on harmful substances, Art. 6 on principles, and obligations concerning pollution from LBP, Annex II concerning the BAT and Annex III on Criteria and Measures Concerning the Prevention of Pollution from Land-based Sources. Of the general principles reference can be made to the precautionary principle (Art. 3(2)), the polluter-pays principle (Art. 3(4)), environmental impact assessment (Art. 7) and access to information (Art. 17).

The prime obligation concerning LBP is Art. 6. This provision obliges parties to prevent and eliminate LBP by using *inter alia* best environmental practice and BAT and introduces an obligation to make discharges of harmful substances dependent on prior permits under conditions set out in Annex III and to cooperate in the development of specific rules concerning emissions, water quality and product control. Parties have to apply a number of specific obligations concerning *inter alia* municipal sewage water and industrial waste water (Annex III, Regulation 2). The center of gravity of the prevention of LBP is the application of BAT and best environmental practices (Annex III, Regulation 1 and 2(6-10) and Annex II, which includes criteria for the use of the concepts).

Harmful substances are dealt with separately in Art. 5, which obliges parties to prevent and eliminate pollution caused by these substances. More specific rules relating to this commitment are contained in Annex I. In addition to criteria for the identification of harmful substances and a list of priority substances, this Annex identifies banned substances (in particular DDT, PCB's, PCT's and, for some applications, organotin compounds) and a list of pesticides. With respect to this latter group of substances, states "shall endeavor to minimize and, whenever possible, to ban" their use.

(c) *The Economic Commission for Europe*

On 17 March 1992, the (→) Convention on the Protection and Use of Transboundary Watercourses and International Lakes was signed in Helsinki by all member states of the Economic Commission for Europe, except Canada and the United

States. Apart from the indirect relevance for LBP of the prevention of transboundary water pollution, the Convention also explicitly addresses LBP.

The relevant provisions of the Convention relate to taking all appropriate measures to prevent, control and reduce pollution of waters causing or likely to cause transboundary impact (Art. 2(2)(a)), and to prevention of pollution of the marine environment to the extent that the marine environment is "an area under the jurisdiction of another Party." (Art. 1(2)). This implies that the more specific obligations of the Convention apply in this respect, such as application of low-and non-waste technology, application of BAT and best environmental practices and definition of water quality standards (Art. 3). The remainder of the Convention mainly is concerned with cooperation between riparian states to achieve the objectives of the Convention, including the protection of the marine environment (Art. 2(6)). Article 9 covers the situation where a coastal state that is a party to the Convention is directly and significantly affected by transboundary impact. The riparian parties can, "if they all so agree", invite that coastal state to be involved in an appropriate manner in the activities of the relevant multilateral bodies. Finally, the Convention envisages institutional cooperation through joint bodies dealing with transboundary watercourses (Art. 9(4)).

(d) The Black Sea

On 21 April 1992, the (→) Convention on the Protection of the Black Sea against Pollution was adopted by the Diplomatic Conference on the Protection of the Black Sea, Bucharest, 21–22 April 1992. The Convention was signed by Bulgaria, Georgia, the Russian Federation, Romania, Turkey and the Ukraine.

LBP is covered by Art. VII, Art. XII and a Protocol. Art. VII contains the general obligation to prevent reduce and control pollution of the marine environment of the Black Sea from land-based sources. Although atmospheric pollution is covered by the provisions on land-based sources, Art. XII, the Convention features a separate article on pollution of the marine environment of the Black Sea from or through the atmosphere.

The obligations contained in the Protocol concern the elimination and reduction of pollution by respectively a black and a grey list (Art. 4), monitoring (Art. 5) and the development of common guidelines, standards and criteria (Art. 6).

As regards pollution of the Black Sea by international rivers, Art. 4 provides that the parties "will endeavor to cooperate, as appropriate, with other states" in order to comply with their obligations concerning black and grey list substances. In addition, Resolution 2 adopted by the Diplomatic Conference envisages cooperation with the riparian states of the Danube.

In several respect, the Convention does not correspond to recent developments in international instruments concerning precautionary action, application of BAT and regulation of pollution from diffuse sources. More specific agreements, however, are envisaged to be adopted by a Ministerial Meeting in 1993.

(e) Commonwealth of Independent States

From 6–10 April 1992, a Conference on LBP in the seas adjacent to the Commonwealth of Independent States was held in Sebastopol. The Conference was initiated by the Advisory Committee on Protection of the Sea, and representatives of governments and international organizations participated in it. The Recommendations address a variety of items, including planning, integrated pollution control and industrial audits, economic

incentives and freedom of information. Specific Recommendations address the Black Sea, the North West Pacific, the Arctic and the Baltic Sea.

(f) The Wider Caribbean Region

In 1992 only limited progress was made in the development of a Protocol on LBP to the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.

From 6–10 July 1992, a Meeting of Experts on LBP met in Veracruz, Mexico (UNEP(OAC)/CAR WG.9/4). The Meeting adopted a number of recommendations. As regards the development of a Protocol on LBP, it was recommended that this process should draw upon the 1985 Montreal Guidelines and fully take into consideration the provisions of the Rio Declaration and Agenda 21, particularly with regard to application of precautionary approaches, prior assessment of activities, development of economic incentives, and improving living standards of coastal populations. Also the relevance of the transfer of additional financial resources and transfer of environmentally safe and sound technologies was stressed. (para. 52). However, it was felt that insufficient information was available on relevant international and national legal instruments to proceed to a quick development of a protocol. The Regional Co-ordination Unit was requested to submit such information, which, after being reviewed by states, could provide the basis for a new meeting of legal and technical experts and eventually a Conference of Plenipotentiaries.

The issue was further discussed by the Tenth Meeting of the Monitoring Committee on the Action Plan for the Caribbean Environment Programme and Special Meeting of the Bureau of Contracting Parties to the Cartagena Convention, Kingston, 11–13 November 1992 (UNEP(OCA)/CAR IG.9/4). At this occasion, concern was expressed that the Conference of Plenipotentiaries should not be fixed at too early a date. The Secretariat indicated that 1995 could be considered as a reasonable schedule. The Meeting adopted the Recommendations of the above-mentioned Meeting of Experts, and indicated that a meeting of experts on LBP, planned for 1993, should identify a strategy for LBP to be considered in future negotiations on a Protocol (Annex IV, para. 6).

The outcomes of the Monitoring Committee/Bureau Meeting were approved and adopted by the Sixth Intergovernmental Meeting on the Action Plan for the Caribbean Environment Programme and the Third Meeting of the Contracting Parties to the Cartagena Convention, Kingston, 16–18 November 1992.

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