XIII. International Environmental Law

Convention on Biological Diversity—Entry into Force

Further to *Aust YBIL* 1994, vol 15, p 635, for the occasion of the entry into force of the above Convention on 29 December 1993, the journal *Insight* of the Australian Department of Foreign Affairs and Trade carried the following article by Ross Westcott of the Department on 14 February 1994:

> International cooperation to protect and preserve the world's environment has taken a further step forward with the entry into force, on 29 December 1993, of the Convention on Biological Diversity.
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> Biological diversity means the variability among living organisms on Earth, including diversity within species, between species and of ecosystems. The convention commits contracting parties to taking action to protect the world's biological diversity, to counter the effects of loss of biodiversity and to prevent further loss.
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> Australia played a leading role in the negotiation of the convention and was the third developed country to ratify it, on 18 June 1993. Nearly 170 countries signed the convention at the United Nations Conference on the Environment and Development at Rio de Janeiro (the Rio Earth Summit) in June 1992. Over 40 countries have since taken the further step of ratification.
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> The convention takes the approach that biodiversity provides the foundation for sustainable development. It does not treat conservation merely as a matter of protecting nature from the impact of mankind and development. Rather, it sees the sustainable use of biological resources as critical to meeting the food, health and other needs of the world's increasing population.
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> The convention also commits parties to ensuring access to, and a fair distribution of the benefits from, the use of genetic resources, so that all mankind, including future generations, benefits. To protect the interests of all parties, it recognises the sovereign right of States to exploit their own resources. However, it also charges parties with the responsibility of ensuring that such exploitation does not damage the environment of other States or of areas beyond the limits of national jurisdiction.
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> Australia and other parties, along with international organisations, are now working hard to put into effect a range of actions to ensure the early and effective operation of the convention.
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> **Implementation**
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> On 16 December 1993, the Commonwealth Government approved a draft National Strategy for the Conservation of Australia's Biological Diversity. Under the convention, parties are required to produce national strategies.
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> Australia has also been an active contributor to preparatory work being carried out for the convening of the first Conference of the Parties (CoP), to be held in November-December 1994.

Australia participated in the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD), which had its first meeting in October 1993. Through two working groups, the committee considered issues relating to conservation and sustainable use of biodiversity, scientific and technical work, factors for setting national priorities, biosafety, rules of procedure for the CoP, financial needs and mechanisms, technology transfer and regulating access to genetic resources.

Due to a lack of time and divergent views among participants, it was not possible for the committee to reach agreement on all issues. They will be taken forward at a second meeting, scheduled for mid–1994. The committee did agree on a provisional work program for an interim secretariat at that meeting.

The committee endorsed a proposal to convene an open-ended Intergovernmental Meeting of Scientific Experts, to take place in Mexico City from 11 to 15 April. An Australian delegation will attend the meeting, which will provide advice to the ICCBD and the CoP on scientific aspects of biodiversity and consider options for a research agenda. Progress will need to be stepped up in the lead up to the first CoP to ensure its success. Australia will continue to play an active role in the convention's implementation.

Convention to Combat Desertification—Australian Signature

The Foreign Minister, Senator Gareth Evans, issued the following press release on 14 October 1994:

> The Minister for Foreign Affairs, Senator Gareth Evans, announced today that the Treasurer, Mr Ralph Willis, will sign the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, at a signing ceremony in Paris on 14–15 October.
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> "The Convention aims to combat desertification, especially in the seriously affected countries of Africa where environmental change is helping to cause serious social, economic and security problems", Senator Evans said. "With about one sixth of the world's population and one quarter of the total land area affected by desertification, the Convention tackles a vital problem.
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> "As one of the few developed countries with experience in addressing land degradation, Australia played a positive and active role throughout the negotiation of the Convention. We are proud that the key provision of the Convention, the elaboration of national action programs by developing countries to combat desertification, is based largely on an Australian proposal which was modelled on the National Decade of Landcare Plan", Senator Evans said.
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> "Australia's participation in the implementation of the Convention will benefit Australia and the international community. Australia has extensive experience and expertise in the development of resource management policies and technology, including long range weather forecasting and land resources assessment, and the delivery of community based programs to address land degradation and encourage ecologically sustainable development.
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> "The Convention would not impose substantial obligations on Australia. Developed countries affected by desertification, like Australia, would have the option to prepare national action programs to combat desertification and to utilise existing plans and programs for sustainable resource management for this purpose", Senator Evans said.

The Government will now decide whether it will ratify the Convention. Consistent with the Government's practice of widespread consultations regarding adherence to international treaties, this decision will be made in consultation with the States and the Australian community, including relevant industry and environment groups.

Basel Convention on Hazardous Wastes

The Second Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which was held in Geneva in March 1994, aroused considerable interest in the Australian media. To supplement earlier discussion in the *Aust YBIL* 1993, vol 14, p 599, the following is a background article to the Australian position on the Convention (written by Peter Lawrence of the Department of Foreign Affairs and Trade) which appeared in the *Australian Environmental Law News*, vol III, September 1994:

The second conference of the parties to the Basel Convention was held in Geneva on 21–25 March 1994. In preparation, the Commonwealth Government undertook consultations in Melbourne, Sydney and Canberra, from December last year. Consultations took place with the Australian Chamber of Commerce and Industry, about 18 companies involved in waste trade, 12 Non-Government Organisations (NGOs) and community organisations.

The second conference of the parties was attended by almost 100 countries, 33 of which were represented at a ministerial level. Australia provided the president of the conference and will continue to be involved in meetings of the convention's bureau, which acts as a governing body between meetings of the conference of parties, and the technical working groups.

At the conference, Australia joined a consensus decision to prohibit immediately the export of hazardous wastes for final disposal from OECD to non-OECD states and to phase out by 31 December 1997 all exports of hazardous waste destined for recycling or recovery operations from OECD to non-OECD states.

The decision was strongly supported by the G77, including a number of Australia's key non-OECD trading partners in the region. Australia and other developed country parties were initially reluctant to support the decision, mainly because of its failure to include a reference to exports for recovery operations conducted in a fully environmentally sound manner and because of the artificial nature of the categorisation of countries as "OECD" and "non-OECD".

The first part of the decision, concerning final disposal, will have no effect on Australia, as there are no exports of hazardous wastes for final disposal from Australia to non-OECD countries, and Government policy makes it clear that an application for a permit for such disposal would not be granted.

The Australian Government is yet to take a decision concerning the export of hazardous wastes for recovery. Ministers have indicated that before any decision is taken on the implementation of the decision, there will need to be close consultation with Australia's regional non-OECD trading partners on this issue.

Currently a number of bilateral missions by Australian government officials to Australia's non-OECD regional trading partners is being arranged to take place in October/November this year. The purpose of these visits is to help

ensure that only environmentally sound trade continues with these countries and to help raise awareness in relation to both trade and environment issues relating to the implementation of the convention.

Data from a consultancy commissioned by the Australian Government, relying on classifications used by the OECD, indicated that each year, Australia exports about $A120 million of hazardous waste for recovery or recycling, mostly to OECD countries such as Japan, Germany and Canada. About $22M worth of hazardous wastes goes to non-OECD countries for recycling or recovery, mostly to China, Malaysia, Philippines and India (see Thompson Environmental Services Assessment of Australian Trade in Hazardous Wastes for Recovery, Report to the Commonwealth Environmental Protection Agency (April 1994)). Should Australia's trading partners adopt more expansive definitions of hazardous waste than those contained in the Basel Convention, so as to include, for example, metal scrap and plastics, the potential trade loss, and associated job losses, could be considerably higher than the $22M figure. (Nevertheless, the potential impact on trade would be nowhere near as high as the $2 billion figure quoted in the media.) Australia imports much less than it exports, about $8.5 million of hazardous wastes.

The second conference of the parties to the Basel Convention adopted, in all, 27 decisions on implementing and strengthening the convention. Further work on the definition of hazardous wastes will be done by the convention's technical working group. The legal experts working group will meet 10–14 October 1994 and continue working on draft articles for a liability protocol. Model legislation to assist countries in implementing the convention will be widely distributed. The third conference of parties is to take place in September 1995.

Australian implementation of the convention is done through the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* which is administered by EPA. The Australian Government is currently considering amendments to the Act to bring it fully into line with the legal obligations under the convention. (The existing legislation fails to fully implement Australia's obligations in relation to trade in hazardous wastes going for recovery or recycling overseas.) The amendment of the Act is being considered in full consultation with Australian industry, environment NGOs and the states and territories.

The following is the full text of the statement made by the Australian Delegation at the Conference upon the adoption of the decision on export of hazardous wastes from OECD to non-OECD countries, referred to in the article above:

Australia is pleased to have been able to join consensus on this important decision, a consensus that was only able to be reached after long and very difficult negotiations. We place on record our appreciation of you, Mr Chairman, the efforts of our colleagues in the contact group and then in the working group, and in particular, those of the Chairman, Finland, and our co-ordinators, Canada and Senegal.

Australia's approach to these negotiations was based first and foremost on our view that the Basel Convention is one of the most important international instruments for the protection of the environment.

No export of hazardous wastes can be permitted where such trade is environmentally unsound.

We note that the decision we have just adopted provides some flexibility for continued trading in hazardous recoverables within a timeframe. This is fully consistent with the provisions of the Basel Convention where such trade is properly regulated and environmentally sound.

My Government will respect the decision we have just adopted by consensus. My government remains committed to full compliance with the provisions of the Convention.

I would note, however, that this consensus decision of the Conference of Parties does not constitute an amendment to the Convention.

We had reservations about some aspects of the draft decision because, as indicated in my comprehensive statement of Australia's views on the Basel Convention in the general debate, we believe that environmentally sound recovery of wastes subject to the Basel Convention has the potential to reduce the quantity of residuals which would otherwise go to final disposal. We also believe that trade in hazardous recoverables, provided it is properly managed, can be not just economically efficient but, importantly, can yield environmental benefits.

But, at the same time, we wish to see progress towards reducing the generation of hazardous wastes and have looked consistently to the Basel Convention as an instrument which can assist all countries to achieve the important goal of environmentally sound and sustainable development. We will continue to implement the Basel Convention in a way which provides maximum protection to the environment and to those most vulnerable to abuse."

Later in the year, Australia participated in negotiations held in the Working Group of Legal Experts in Geneva in October, to draft a Liability Protocol to the Convention. The following is an article on the work of the Group which appeared in the *Environmental Newsletter* (also by Peter Lawrence, as above):

Australia took an active part in the second working group meeting of Legal Experts to draft a Liability Protocol to the Basel Convention on Transboundary Movements of Hazardous Wastes in Geneva, 10–14 October.

The aim of the Protocol is to provide a comprehensive regime for liability for damage resulting from the transboundary movement of hazardous wastes. The Protocol envisages that persons suffering damage in such situations will be able to claim compensation under national law. The Protocol is designed to harmonise national law in this field, provide an incentive for environmentally sound practices and help ensure that injured parties are compensated.

An issue yet to be fully discussed is that of so-called "residual state liability". This concerns the extent to which a state party to the Protocol may be made responsible for the actions of a private company within its jurisdiction. "Residual state liability" may be necessary to ensure the victim is compensated where the polluter is under-insured or bankrupt.

An important issue in the negotiations is the time at which the Protocol begins and ceases to apply. An Australian proposal that the Protocol begin to apply from the time at which a hazardous waste shipment leaves the exporting state's land territory until completion of disposal helped progress this difficult issue.

A feature of the meeting was the active participation of representatives of the international insurance industry, including the P & I Clubs which insure 95% of the world's merchant fleet. The current text provides for unlimited liability but limits (yet to be quantified) on the amount of insurance which must be taken out.

The Working Group discussed six of the 22 articles of the current draft and many issues remain contentious. Amongst the most contentious issues yet to be resolved are: who is to be liable (exporter, generator, person in control at time of incident, etc), and the creation of a compensation and/or emergency fund.

Madrid Protocol on the Antarctic Environment

The years 1989–91 saw considerable activity among the Parties to the Antarctic Treaty on the best means of dealing with the question of possible mining in the Antarctic. This activity, which was fully covered in volumes 12 and 13 of the *Aust YBIL* dealing with that period, led to the conclusion of the Madrid Protocol in 1991. After amendment of Australian legislation and regulations to ensure implementation of the Protocol (see "Australian Legislation Concerning Matters of International Law 1994", above in this volume, Item B.2), the following is a joint press release by the Acting Minister for Foreign Affairs, Senator Bob McMullan, and the Minister for the Environment, Senator John Faulkner, on 8 April 1994 announcing that Australia had ratified the Protocol:

Australia has ratified the Madrid Protocol on Environmental Protection to the Antarctic Treaty, the Acting Minister for Foreign Affairs Bob McMullan and the Minister for the Environment, Sport and Territories John Faulkner announced today.

The Ministers said today's announcement is the culmination of Australia's efforts in negotiating and bringing into practice this landmark international regime for protection of the world's largest wilderness.

"Australia can take pride in its leading role with France in the negotiation of the Madrid Protocol, which is the first comprehensive international environmental agreement for protection of Antarctica", they said.

Protection of the Antarctic environment has been among Australia's most successful international initiatives. In May 1989, the Government called for the negotiation of a comprehensive environment protection regime for Antarctica that would prohibit mining.

The Madrid Protocol, which contains a prohibition on mining, ultimately won strong international support and was signed by Antarctic Treaty Parties in Madrid in October 1991.

Over the last two years, Australia has put in place legislation and regulations to implement the protocol and allow its ratification, and our instrument of ratification was deposited with the United States Department of State in Washington on Wednesday 6 April.

Australia will confirm its ratification at the forthcoming annual meeting of Antarctic Treaty Parties in Kyoto (Japan) from 11 to 22 April.

"At this meeting we will urge other Parties to ratify so that the Protocol can enter into force as soon as possible. In the meantime, we will continue to promote action to improve Antarctic environment protection."

Under the Protocol the Antarctic Treaty nations have designated Antarctica as a natural reserve devoted to peace and science.

Civil Liability for Oil Pollution Damage—Amendment of 1969 Convention

A Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage was concluded in London in 1984, and Australia acceded to this Protocol in 1988. However, this Protocol was then overtaken and superseded by another Protocol to amend the Convention concluded in 1992. Accordingly, it became necessary to withdraw Australian accession to the first Protocol. The following is the text of the formal instrument concluded on 31 August 1994 for this purpose:

> WHEREAS Australia is a Contracting State to the International Convention on Civil Liability for Oil Pollution Damage, done at Brussels on 29 November 1969; and
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> WHEREAS an instrument of accession to the Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage, done at London on 25 May 1984 (the 1984 Protocol), was deposited for Australia on the twenty-second day of June, One thousand nine hundred and eighty-eight; and
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> WHEREAS it is the Government of Australia's intention to become a party to the Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage, done at London on 27 November 1992 (the 1992 Protocol);
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> NOTING Paragraph 1 of Resolution 4 of the International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Convention, held under the auspices of the International Maritime Organization, which "INVITES States which have consented to be bound by the 1984 Protocols and which also wish to become parties to the 1992 Protocols to take appropriate measures to avoid being faced with a situation in which two compensation regimes would be in force concurrently";
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> NOTING ALSO that Article 16 of the 1984 Protocol provides for denunciation of its provisions at any time after it enters into force for a particular party, but that the Protocol is not yet in force and is unlikely to enter into force because of the conclusion of the 1992 Protocol:
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> THE GOVERNMENT OF AUSTRALIA DECLARES that it hereby WITHDRAWS Australia's accession to the 1984 Protocol from the date of deposit of this instrument.
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> IN WITNESS WHEREOF, I, GARETH JOHN EVANS, Minister for Foreign Affairs, have hereunto set my hand and affixed my seal.
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> DONE at Canberra this thirty-first day of August, One thousand nine hundred and ninety-four.
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> (Signed) GARETH EVANS
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> Minister for Foreign Affairs

The following is the text of the Note circulated by the International Maritime Organisation to States Parties informing them of this development:

> The Secretary-General of the International Maritime Organization has the honour to refer to the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, and to the accession by Australia effected on 22 June 1988 (CLC.3/Circ.3 dated 8 August 1988).
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> The Secretary-General has the honour to state that, with reference *inter alia* to Resolution 4 of the 1992 International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, withdrawal of Australia's accession was effected by the deposit of an instrument on 7 September 1994.