

THE OBSTRUCTIVE ROLE OF THE US, CANADA, AND AUSTRALIA IN NEGOTIATING INTERNATIONAL ENVIRONMENTAL POLICY AND LAW MAKING

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During the negotiations of the POPs treaty, a most unfortunate dynamic exists; a dynamic that is not too different than that found in other environmental negotiations. Rather than the subject matter, i.e., POPs being the most pressing problem in need of solutions, a few regressive, obstructionist countries have become the most pressing problem. The US, Canada and Australia in particular have made themselves the most pressing immediate problem due to their weak and regressive positions, and role in obstructing international solutions expected and necessary for inclusion in an adequate POPs treaty. The impact of these countries on the negotiations represents a significant opportunity cost to the environment and human health, as well as a significant cost to their position in the international community. Indeed their behavior is a foreign affairs liability, while simultaneously threatening humanity's ability to achieve sustainable development.

CONTEXT:

The author has been working within Greenpeace International's Political Unit which is responsible for Greenpeace objectives vis-à-vis international environmental policy and treaty negotiations for the past twelve years. His specific responsibilities cover the field of toxic chemicals/hazardous waste. The comments and conclusions made are restricted to first hand experience in this field only. But, on other critically important environmental issues, the role and reputation of these countries is similar, as has been documented by others. The various environmental forums in which the author has been involved include negotiations at the regional and global level. Some of these involve the US, Canada and Australia, while others (many regional agreements) do not. As a general statement, there is a marked difference when these countries are present, as compared to negotiations not involving them. Given that context, now on to the subject matter – the US, Canadian and Australian role in international environmental policy and treaty negotiations in this particular field.

OVERVIEW:

The following three points are addressed in this paper:

1. The US, Canadian, and Australian role and reputation summarised; basic conclusions.
2. Three case studies, covering the past decade of environmental negotiations (the Precautionary Principle; the Basel Convention covering hazardous waste generation and transboundary movements; and the on-going Persistent Organic Pollutants (POPs) draft treaty negotiations).
3. Returning to the US, Canadian, Australian role, what progressive governments can do.

I. THE U.S., CANADIAN, AND AUSTRALIAN ROLE AND REPUTATION SUMMARISED:

It is obvious that these countries, individually and collectively, have tremendous potential to fulfill the role of global leadership on environmental issues – with great capacity, resources and international position to bring the world along the correct road to real sustainable development. But, they fail to assume this potential. So, is it a case of wasted potential? No, unfortunately it is far worse. These countries are

actually a barrier or obstacle to progressive and necessary measures to protect the environment and human health. They have become (a significant) part of the problem, not the solution.

Essentially the US, Canada and Australia (and a handful of other countries, e.g., Japan, S. Korea, New Zealand) have made themselves the biggest obstacle to progress where the future health of the planet is at stake. By acting as a major obstacle to the adoption of needed international environmental solutions, these countries have unnecessarily made themselves and their negotiation positions the most pressing problem, rather than the toxic pollution. This represents an enormous opportunity cost to sustainable development. And it is a serious foreign affairs liability for the country itself.

The reputation is very clear. These countries carry a low- or no-ambition mandate to: “Weaken the text, weaken the text, weaken the text, and then don’t accept it or respect it in the end when adopted”.

In the case of the US, although obvious from the US positions and interventions at international meetings, contacts within the US administration have stated that the US will not accept measures in environmental treaty negotiations which go beyond their own domestic legislation. In other words, the US position is, “We will agree to anything as long as we don’t have to change legislation or policy back home”.

With this position of - maintain the status quo, no forward progress - the US, and the few others are arrogantly trying to bring the rest of the world DOWN to their lack of aspirations, instead of up with a leadership role. With these conclusions in mind, let’s move to the three case studies.

II. CASE STUDIES

Case Study One – the Precautionary Principle

The Precautionary Principle represents a significant and fundamental shift in environmental policy and approach. It has its origins in the 1980s, in Germany, and internationally within the North Sea Ministers Conferences, followed by its adoption in other regional forums and at the global level. The original application of the Principle was in the context of pollution and the release of contaminants to the environment, although today virtually all discussions on environmental issues include references to the Precautionary Principle.

The Principle provides a necessary change away from the historical and mistaken policy based on the so-called “assimilative capacity approach”, wherein it was wrongly assumed that hazardous substances can be released to the environment where they are diluted and dispersed rendering them harmless. Indeed, it is common sense that this can not continue without significant and irreversible harm to the environment and human health – we can not continue to play large-scale laboratory with the health and livelihood of our very future. The Principle derives from the failure of the past approach, and this common sense recognition. It requires that preventive measures be taken to stop the release of substances to the environment when there is reason to believe that they can cause harm, without waiting for scientific proof, at which time it is too late. Prevention is required based on the inherent hazards of the substance in question, e.g., toxicity, persistence, or bioaccumulation potential.

The first time the Precautionary Principle was adopted at the global level was in 1989 at a UNEP Governing council meeting. The US was the only country to oppose the proposal by Ghana and Italy with support from a number of other delegations. The issue went into a working group wherein the US, Canada and Australia tried to weaken it. The resolve of other countries in support of the draft decision was strong, while the US, Canada and Australia were not very knowledgeable about the Principle at that time. The US did achieve some weakening but basically lost the battle, and the Precautionary Principle was adopted. That was in 1989, and the US was a voting Member of the UNEP Governing Council that adopted the Principle by consensus. Yet, today the US, Canada and Australia continue to ignore this consensus decision, and fight against the Principle in every discussion to attempt to weaken its impact. These countries advocate an interpretation co-opting and misusing the Principle to say that it is part of a risk assessment approach to regulating the release of substances to the environment. Risk assessment is a

component of the failed assimilative capacity approach, and is in stark contrast and incompatible with the significant policy change and approach resulting from the Precautionary Principle. The risk assessment approach is the approach favoured by the chemical industry because it ensures the destructive status quo of continuing to release toxic chemicals to the environment. It allows even the most damaging substances to continue to be released if the so-called exposure, especially to humans, is “sufficiently low or acceptable”.

As a side note, in contrast to these countries, Denmark provided a significant role in assisting the adoption of the Precautionary Principle in the 1989 UNEP Governing Council meeting, and indeed has provided the leadership for its adoption in other environmental meetings as well. In particular, the adoption of the Precautionary Principle has led to, among other commitments and bans, the prohibition of ocean dumping of industrial wastes and low-level radioactive wastes, as well as the prohibition of ocean incineration within the global treaty, the London Convention. In the Oslo-Paris (OSPAR) Convention responsible for the protection of the North-East Atlantic marine environment (a regional treaty of West European governments, not including the US, nor Canada), the adoption of the Precautionary Principle has led to the commitment to phase out the release of all hazardous substances (based on the inherent hazards of toxicity, persistence, bioaccumulation) within one generation, i.e., 25 years.

Unfortunately, the US disservice to the international environmental community continued at the next UNEP Governing Council meeting, a Special Session meeting in 1990. At that meeting, a follow-up proposal was made to the Precautionary Principle with respect to its implementation in the context of hazardous wastes. The draft decision called for implementation based on alternative cleaner production methods to avoid the generation of hazardous wastes. It also included a provision promoting the use of audits regarding hazardous substances generated, and applicable cleaner production methods, with a public right-to-know clause with respect to public access to the audit information. Tanzania, Ghana and other developing countries proposed the draft decision. The US was the only country to take the floor and object. During the ensuing discussion and adoption of the decision, the US succeeded in deleting the public right-to-know provision that the rest of the international community could accept. This was indeed a shocking blow to public environmental rights and democracy, in 1990, at a time when the US was claiming credit for the democracy movement sweeping Eastern Europe.

Case Study Two – the Basel Convention

The Basel Convention provides another more recent example of a very negative role by the US, Canada and Australia, and indeed an example of their refusing, in bad faith to accept the consensus decisions of the international community. The bad faith and regressive positions of these governments in this Convention continue to be an on-going problem today, and represents an obstacle to real solutions to the hazardous waste crisis. These countries have made themselves infamous in an exceptionally negative way vis-à-vis most governments of the world on this issue. Indeed, their position is a foreign affairs liability and the subject of condemnation in both public and private conversations within the international community.

The Basel Convention is a global treaty with the primary objective to minimise, with the aim of eliminating the generation, and transboundary movement of hazardous waste. It was adopted in reaction to the growing problem in the 1980s of industrial countries’ industries exporting their hazardous waste to cheaper, polluting disposal facilities in developing countries. As the cost of waste management increased in industrial countries due to stronger laws to protect the environment and human health, one consequence was the export of hazardous waste to poorer countries where costs were cheaper. Hazardous waste began to flow out of the industrial countries, down the economic gradient, rather than being responsibly addressed through cleaner production methods to minimise and eliminate its generation.

The Convention was negotiated in the 1980s, adopted in 1989 and entered into legal force in 1992. Currently there are over 130 countries Party to the Convention, including all OECD countries, except the United States. The US, Canadian and Australian role during the Convention negotiations, and with respect to the ban adopted by the Parties is shameful.

During the negotiations of the Convention in the 1980s, the call came repeatedly from a host of developing countries for a ban on all exports of hazardous waste from rich to poorer countries. The US, Canada and

Australia rejected this request and fought hard against its inclusion in the text. They prevailed on this issue, as they also did on another draft provision which would have prohibited all exports to facilities with lower environmental protection standards.

Many other examples exist where these countries watered down, watered down and continued to water down provisions in the draft text. Another example was the US insistence on the inclusion of an Article (Article 11) which would allow a Party to go outside the Basel Convention, in effect circumventing the Convention, as long as the Party has a bilateral or multilateral agreement with another country that is “no less environmentally sound” than the Basel Convention. This Article opens up the issue of compliance for subjective interpretation regarding whether another agreement is indeed no less environmentally sound. It opens the door to potential bad faith circumvention or avoidance of Basel provisions. The Basel Convention was adopted without the ban, but with Article 11, and other provisions weakened by these three countries.

Ploys used by the US to force a watered down, weaker text included the threat that the US, the largest hazardous waste generator, would not be Party unless they got their way. The US basically forced the rest of the world to come down to their level saying the Convention would not be meaningful without the US as a Party. This ploy worked to create a weaker version, yet the US is still not a Party after 10 years from the time of the adoption of a Convention greatly weakened to suit the US position.

Now a few comments regarding the US, Canadian and Australian role in the negotiation, adoption and implementation of the Basel ban during the Conference of Parties to the Convention. With the exclusion of a ban on hazardous waste exports to developing countries, in the original Convention in 1989, many developing country regions were forced to take self-defense measures and adopt their own import bans on hazardous waste. A host of national bans in policy and law was adopted by developing countries as well. At the regional level, the following bans were adopted:

1. Lome IV Agreement (Article 39), adopted in 1989, prohibits all hazardous waste, including radioactive waste imports (for any reason whether final disposal or recycling) into the ACP (African, Caribbean, Pacific) Group of developing countries, former European (EU) colonies.
2. Bamako Convention (1991) prohibits all hazardous, including radioactive waste imports, for any reason, into Africa.
3. The Central American Agreement, adopted at presidential level, prohibits all hazardous waste imports, for any reason, into Central America.
4. Under the Barcelona Convention for the protection of the Mediterranean Sea, a Waste Trade Protocol was adopted that prohibits all exports to non-OECD countries, and prohibits all imports into non-EU countries.
5. The Waigani Treaty for the South Pacific region prohibits all imports of hazardous waste into Small Island developing States, from other States.

At the same time these regional self-defense measures were being pursued, the First Conference of Parties to the Basel Convention (COP1) was held in December, 1992. At COP1, the G-77 (all developing countries), and indeed UNEP Executive Director, Dr. Tolba proposed a ban on all hazardous waste exports from OECD to non-OECD countries. The prohibition covered the export for final disposal and for recovery/recycling.

The problem with recycling hazardous waste (in contrast to non-hazardous waste where recycling has an important role to play) is that it perpetuates, and exacerbates the generation of hazardous waste and associated pollution and damage to human health and the ecosystem. Recycling of hazardous waste continues a dirty, polluting cycle of generation with pollution, recycling with pollution (often in an even more concentrated damaging form), and disposal with pollution. The only viable alternative is to avoid hazardous waste generation through alternative raw material use, products, and technologies, i.e., cleaner production.

The G-77 made passionate appeals, during COP1, for the adoption of the ban through their designated co-leaders India and Senegal. The Nordic countries, Italy and Switzerland supported the ban proposal.

Canada, Australia and US (a non-Party) strongly opposed it. The result was a compromise, interim measure that was weak. India and Senegal, on behalf of the G-77 announced that at the next Conference of Parties (COP2) they would re-submit the ban proposal.

At the second COP in 1994, again the ban proposal dominated the discussions. The ban proposal was again sponsored by the G-77, and this time joined by China, and subsequently by the EU. The US, Canada and Australia frantically tried to gain support in opposition. Greenpeace was informed that the ploys from the US included approaching selected developing countries, e.g., the Philippines with the message that this issue may affect their assistance programmes.

At COP2 the message was made by Greenpeace that the real problem is not the hazardous waste, but rather the small minority of industrial countries which were blocking the adoption of the ban. The obstructionist countries included the US, Canada, Australia, New Zealand, Japan, and S. Korea. By the end of the meeting, the resolve of the vast majority of Parties was too great for the opposition and the ban was adopted by consensus. The US admitted, privately that they grossly underestimated the resolve of the G-77. The G-77, led by Sri Lanka as Chairman of the G-77, together with China, the EU led by Denmark, and Malaysia, among others finally were able to prevail on a critically important issue for sustainable development.

What was the US, Canadian and Australian reaction to the ban decision adopted by consensus? Exclusively bad faith. They (together with New Zealand and S. Korea) said the ban decision was not legally binding, even though many governments considered that it is. Australia had agreed to respect the will of the international community and respect the ban in their closing statement regarding the consensus ban decision. They subsequently did not, i.e., they lied.

Given the bad faith position of the losers, the EU led by Denmark made a proposal for the Third COP (held in 1995) to adopt a legally binding amendment to the Convention to incorporate the ban. US documents leaked to Greenpeace and published in the "New Scientist" revealed that the US strategy in the run up to the Third COP was to target selected G-77 countries to break the G-77 solidarity. Australia also embarked on a lobby tour with this objective to break G-77 selected countries resolve. Fortunately, the ban amendment was adopted, although not without a serious struggle. The amendment was adopted by consensus.

What was the US, Canadian, Australian reaction this time? More bad faith which continues today. These countries, in an act of serious bad faith considered that the ban could be circumvented and ignored through using the Article 11 agreements mentioned earlier. This is an absurd position given that such an exception to the ban was proposed during the negotiations, and soundly rejected. Indeed, all proposed exceptions to the ban during negotiations were soundly defeated.

But, the bad faith does not end there. In addition, the US, along with Australia and Canada, are trying to get selected non-OECD countries to be added to the list of OECD countries in an effort to: 1) be able to keep hazardous waste export options to them open, and 2) to create an avalanche effect whereby if enough non-OECD countries are added to the list of OECD countries, the ban will erode and become meaningless. And finally, the US (still a non-Party) is discussing with its industrial interests, e.g., the US Chamber of Commerce, an attempt to try to use the World Trade Organisation (WTO) to rule against the ban. This would be an inconceivable result given that the ban was adopted within a multilateral environmental agreement (MEA) by consensus. Australia and Canada also investigated the WTO angle as a way to defeat the ban.

The US is considering becoming a Party to the Convention by ratifying it, but ratifying the Convention without the ban. Does consensus mean anything when dealing with countries like the US, Canada, Australia, or New Zealand) which can not be trusted to uphold their agreements? Indeed, the credibility of these countries has seriously deteriorated as a result of their past and continuing acts of bad faith.

Case Study Three – the On-going Persistent Organic Pollutants (POPs) Negotiations

In 1998, under the auspices of UNEP, the international community began negotiations at the first Intergovernmental Negotiations Committee meeting (INC1) to draft a treaty to solve the problem of the worst organic pollutants. The existing list contains twelve chemicals (the dirty dozen) including the chlorinated pesticides DDT, chlordane, heptachlor, aldrin, dieldrin, endrin, mirex, toxaphene, as well as hexachlorobenzene, the industrial chemical group PCBs, and the unintended by-products dioxins and furans that are formed when chlorinated materials combust. The INC process is expected to culminate in 2001 in Stockholm with the adoption of the Stockholm Convention on POPs.

The US, Canadian and Australian positions in these negotiations again are regressive and concentrated on weakening progressive and necessary provisions proposed by the EU, and by developing countries. The regressive approach is to ensure that the US, Canada and Australia would not have any real obligations under the treaty, while developing countries would. Furthermore, if their positions prevail, the treaty would be grossly inadequate to meaningfully address the scope of the POPs problem.

Given the build up in the environment of POPs and the associated devastating damage, in particular to the unborn fetus, and developing child, the obstructionist approach by these countries is a recipe for global disaster for humanity. The treaty negotiations represent an historic opportunity to reverse the destructive course, and history will show who is responsible for its failure or success. The dangerous positions of these countries include:

1. No "aim of elimination" for the unintended POPs, dioxins and furans (contrary to the demand for this language from developing countries and the EU)
2. US proposed general exemptions for all POPs which would exclude from the scope of the treaty, among others, all stockpiles of POPs existing when the treaty enters into force. This has the potential to promote the release of POPs since an incentive would exist for producers to create stockpiles pending entry into force of the Convention.
3. The US refuses to acknowledge nor will they accept language addressing chlorinated materials as the real source of unintended POPs (dioxins and furans) created when chlorinated materials combust. The US approach is high temperature, extremely expensive incineration facilities with filters and an attempt to contain the POPs in the ash. Not only is this unavailable for most developing countries, but the incinerators are sources of POPs themselves. Clearly the logical approach is to require the use of alternative materials instead of chlorinated materials that create POPs.
4. No Precautionary Principle.
5. Neither new mechanisms nor sources of money to assist developing countries with their obligations and implementation. Here again, the US, Canada, and Australia want a draft only for their own interests, rather than the welfare of the global community. Indeed, the obvious new source for funds is to tax POPs producers and users and channel the funds to alternatives, thereby phasing out the bad, while phasing in the good in a self-contained financing mechanism.

The US approach gets worse. A US lobby memo leaked to Greenpeace reveals their abuse of the facts, and misinformation to try to get the EU countries to form an alliance with the US to negotiate against the developing countries. It is inconceivable that the EU (with good positions on most issues, supporting many of the positions of developing countries) would fall for this insulting attempt by the US.

The leaked memo, available upon request, reveals a US threat that the EU support for the "aim of elimination" language for unintended POPs could cause the negotiations to collapse. The US infers that developing countries can not accept this language, when indeed it is the demand of many developing countries including, among others, the entire African Group and China.

It is well known that one of the most controversial issues is the issue of assistance programmes for developing countries. If any issue would result in the collapse of the negotiations it would be this one, and the US is leading the call for no new funding mechanisms. The leaked memo indicates that the US wants the EU to join the US in their position and states that the developing countries can not expect much in terms of financial assistance.

Once again, the US, Canada and Australia with their bad faith role and reputation are living up to their negative image in the international environmental community. The US is embarked on a mission to make threats, and even manipulate in order to get their way. These three regressive governments are intent on ensuring that the resulting treaty imposes almost no obligations on themselves, and that it does not require changes to their existing legislation.

In addition to the mentioned three case studies, many other examples exist of the negative US (and Canadian and Australian) role, indeed too many to mention here. Brief mention of a few includes the following. During a meeting under the Montreal Protocol (addressing ozone depleting substances), the EU proposed to accelerate the phase out of HCFCs (toxic, greenhouse gas, and ozone depleting substances) from the year 2030 to the year 2015. The US again was a primary obstacle opposing the proposal. In addition, the results of the Rotterdam Convention addressing the international trade in banned and restricted chemicals and prior informed consent (PIC) indicate a weak Convention based on the lowest common denominator pushed down even further by the negotiating positions of the US and Canada. And it is well known in the context of the climate change convention that the US and Australia have been a major obstacle to the solutions.

In the context of dumping wastes at sea, subject to the global treaty, the London Convention, these countries proved to be the primary obstacle to ending this destructive practice. The US, Australia, and especially Canada tried to stop the will of the international community calling for a phase out of dumping industrial wastes at sea. In 1993, fortunately the will of the vast majority of the London Convention Parties was too strong for the US, Canada and Australia. In that year the Parties adopted a phase out of industrial waste dumping at sea, a prohibition of liquid noxious waste incineration at sea, and a prohibition on dumping low-level radioactive waste at sea. (Note: The US, Canada and Australia did not oppose the radioactive waste dumping ban at the 1993 meeting, but had opposed it during the long history of this issue within the London Convention). It should be noted that Australia was the only country in the world to submit a rejection of the phase out of industrial waste dumping. This move was to permit one of their mining companies to continue dumping industrial waste beyond the phase out date.

Conclusions Regarding the Role of the U.S., Canada and Australia

The case studies clearly indicate the US, Canadian and Australian dynamic in international environmental policy and law making already summed up earlier. The negative reputation continues to grow, based on an approach to weaken, weaken and further weaken draft texts. Misconstruing facts and other unscrupulous tactics do not seem to be beyond US tactics either in pushing their positions. And the US, Canada and Australia appear to be strongly opposed to adopting provisions that would require them to change domestic legislation, or the status quo of damage and destruction.

These countries therefore, appear more interested in protecting their respective industrial interests, and their own body of legislation from progressive change, than protecting the environment and human health, and achieving sustainable development for the benefit of future generations.

III. RECOMMENDATIONS AS A STARTING POINT IN ASSUMING THE RESPONSIBILITY

The National Level:

At the national level it is essential that progressive governments that have already agreed, or are committed to making agreements, to eliminate POPs and other hazardous substances, focus on effective implementation measures. The hazardous substances phase out commitments must be expeditiously implemented for their own country, but also in order to set the stage and provide a model for the other countries with the same phase out commitments or that are willing to make such commitments. In addition, expeditious programmes to phase out hazardous substances will have a significant positive impact on the efforts in other environmental forums and international agreements. And, overall a solid ecological tax reform programme needs to be put into place. The concept is so obvious and workable as a significant tool

toward sustainable development. Simply tax, increasing over time, the damaging activity, and channel the funds to subsidise the alternative sustainable practice to replace the damaging activity. In this way the objectives can be met, while the funding simultaneously is provided in such a simple and straight forward way, that it is surprising that this is not being undertaken as it should be. The same can easily be done if the political will exists, in the POPs treaty context to phase out the POPs and phase in their substitutes, thereby providing the needed resources for developing countries' implementation programmes.

The Regional Level:

The EU needs to continue and increase its leadership role within the international community which will serve to counter the negative, obstructionist role of the US, Canada and Australia. This is especially needed in the POPs negotiations where this positive EU dynamic is happening or for example in the WTO context. The EU does for the most part have very good positions on the key POPs issues and should initiate very positive connections and contacts throughout the developing country regions on given issues.

The International Level:

In addition to strong implementation measures, in dealing with the US, Canada and Australia, perhaps one of the important messages to send these governments is something that has been said by a number of their respective officials unhappy about their countries' negotiating mandate: Their negative, bad faith reputation as outlined above is clearly a foreign affairs liability with possible short term benefit for some of their interests if they succeed, but more longer term damage with respect to international relations, not to mention the damage to the environment and human health. The word in the corridors or in discussions with delegates from various countries is strong dislike, frustration and condemnation for the US, Canadian and Australian attitude and positions in international environmental negotiations. This message must continue to be sent to these countries, although one would expect they are well aware of their negative reputation, but arrogantly don't seem to mind. In the longer term it can make a difference.