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A Word from the Editors

This issue of the eJournal sees a number of changes both to the content of the journal and to the team contributing to its production. Sandy Patterson, who did so much to bring the eJournal to life, decided it was time to make way for others to lead the eJournal Editorial Board. In his place, Amanda Kennedy joins Elizabeth Kirk as Co-editor. The editing team has also expanded with the addition of Micha Young (nee Lau) as Managing Editor, and Emma Lees, Kylie Lingard and Krisdakorn Wongwuthikun as Assistant Editors. David Hodas, a long standing member of the Editorial Board has also assumed responsibility as editor of the book review section.

While these changes have helped the editors enormously in the preparation of this issue, for the readers we believe the biggest change will be in the types of articles found in this issue. The issue contains the first teaching article published in the eJournal: Professor Bradford Morse reflects upon comparative teaching through videoconferencing. His insightful paper highlights a number of key concerns both with co-teaching a course and with the use of technology in teaching. It begins with a review of the developments in technology that first made distance learning a possibility, then leads us to the point where co-teaching across continents is possible. Thereafter Morse considers the challenges and benefits of teaching law through videoconferencing, highlighting as he does some of the benefits and challenges of this form of teaching.

The teaching piece is followed by another first: an opinion piece by Academy Fellow Professor Nicholas Robinson in which he argues that it is time for legal systems to embrace the Resilience Principle. Robinson outlines the Principle of Resilience as it applies in the natural world and explores the benefits of such a principle as a part of legal systems.

In this issue we have four short “Insights Papers” which cover a range of issues, from the development of environmental impact assessment in India, to agri-biodiversity in Europe and the conservation of marine biodiversity in areas beyond national jurisdiction.

The insights papers are followed by an array of Country Reports from 26 countries, including the first report from the Caribbean region. A few broad themes can be gleaned from both the Insights papers and the Country Reports.

First, energy generation remains a key issue for many countries. Thus some reports address measures that have been adopted or considered to ease the way for mining (Australia, Bahamas and Czech Republic Country Reports), or fracking (Ukraine Republic Country Report and Ceri Warnock's Insights Paper). Other Country Reports demonstrate attention being turned to renewables (Brazil, Caribbean, Denmark, Ethiopia, Turkey and the United Kingdom Country Reports) to endeavour to meet energy demands. While some of the reports which demonstrate a focus upon renewables are encouraging, in that they show countries such as Ethiopia and the Caribbean countries recognising that a reliance on renewables rather than hydrocarbons may help pave the way to a development that is sustainable, other reports suggest less concern with ensuring the necessary environmental protection for truly sustainable development to take place. The Australian report, for example demonstrates a rolling back of regulation and the Brazilian and Turkish reports indicates just how delicate the balance is between promoting economic development and protecting the environment. Turkey, for example, imports fossil fuels, but is also increasing its reliance on renewable energy sources. What is noticeable in the Turkish Country Report is that the protection afforded the environment appears quite weak, with limited requirements to carry out EIAs and the tendency to look at projects on their own, rather than looking at the cumulative impacts of projects.

Secondly the Country Reports point to what might be termed a 'cycle of environmental activity'. Thus while we see increasing environmental regulation being reported on in countries such as China and Burkina Faso, improving their environmental law and increasing its range, for example through increasing protection for wetlands in China (Lin and Chen) or improving air quality and establishing an Environmental Police team (Zhao), we see the repeal of the carbon tax in Australia and, as Riley notes, the general erosion of 'sustainability' from the concept of sustainable development. Similarly the *Wicklow v Fortune* case discussed in the Irish Country Report show planning laws being rolled back, and the Italian Country Report points to the economy being prioritised over the environment.

Some other common issues to emerge are the difficulties associated with defining and using environmental impact procedures. While Chowdhury's Insights paper shows the development of EIA procedures in India, for example, a more restrictive approach has been taken to the development of EIA in the Bahamas (see also the Country Reports from

Denmark and Germany). Public participation also remains a contentious issue (see the Country Reports on the Bahamas, Germany, Thailand and the United Kingdom, and Warnock's Insights Paper).

One other interesting topic to emerge in this year's Country Reports is the issue of the reintroduction of certain species to some countries. The Netherland's Country Report addresses the reintroduction of wolves and raises many issues that will be of interest to all States where native species have become locally (though not completely) extinct.

We trust that you find this issue stimulating, and look forward to further contributions to the next issue

	China: Global Environmental Issues *Nengye Liu*
	China: Atmospheric Pollution *Jingjing Zhao*
	Congo *Dignité Bwiza*
	Czech *Milan Damohorsky and Petra Humlickova*
	Denmark *Birgitte Egelund Olsen* *Anita Rønne and* *Helle Tegner Anker*
	Ethiopia *Fikremarkos Merso Birhnu*
	Federated States of Micronesia *Justin Rose*
	France *Marion Bary*
	Germany *Eckard Rehbinder*
	India *Kavitha Chalakkal*
	Ireland *Sean Whittaker*
	Italy *Carmine Petteruti*
	Mexico *Ivett Montelongo and* *José Juan Gonzalez*
	Netherlands *Arie Trouwborst*
	New Zealand *Trevor Daya-Winterbottom*

COMPARATIVE LAW TEACHING THROUGH VIDEOCONFERENCING

BRADFORD W. MORSE*

Introduction

This article is provided in the hope that it will successfully encourage many others to experiment with co-teaching a course on any aspect of environmental law with colleagues in other countries. It describes my own experience over the past 14 years in co-teaching a course on comparative and international indigenous rights with Professor Lindsay Robertson of the University of Oklahoma. While our experience only occasionally addressed environmental and natural resources law issues, my objective here is to focus on the use of videoconference technology as a tremendously effective vehicle to enhance the way we teach. Over the intervening years this course has grown from a North American focus to a more international one that has involved 13 law lecturers from 8 different law schools as well as many hundreds of law students from the 4 countries that have participated. It has excited students and other colleagues now for many years while prodding all of the participants to think far more profoundly about how the law has evolved in their own country and why it has taken the paths that it has, in contrast to other options pursued elsewhere. All of the law lecturers have dramatically increased their expertise in their own legal system and quickly gained an enhanced understanding of the legal systems of the other three countries that have been the focal points for our course. Thus, while the specific subject matter in our course is quite distinct from that in which most readers of this article will regularly teach, I would suggest that the experience gained since 2000 is readily transferable. The key lessons to be drawn are from the use of videoconferencing as a medium of delivery and the many attractions of using this technology as well as occasional pitfalls remain constant regardless of the content. Before turning to my own experience with teaching through the utilization of the now widely available videoconference facilities, it is first important to situate

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this form of teaching in an historical context. It is through possessing a clear understanding of how distance education has developed over time, the criticisms that it has received for its divergence from the standard classroom teaching experience, the views of some of its strong supporters and how videoconferencing technology has enabled law professors to overcome virtually all of the prior complaints that one can fully appreciate the exceptional opportunities now available to us all to offer exciting new courses. Co-teaching among law schools and across borders can further generate fascinating new research questions, enjoyable collaborations with international colleagues, enliven existing thinking and strengthen partnerships within the Academy of Environmental Law.

The History of Distance Education

Distance education (DE) has always been identified through its stark difference from traditional notions of education as well as methods of instruction. It is, as Larreamendy-Joerns and Leinhardt note, known for its "departure from the conditions in which teaching and learning 'naturally' take place".[1] The history of distance education attests to the different directions it has taken in comparison to the conventional classroom setting.

Although agreement on the origins of DE has never been reached, this form of instruction has existed for centuries. Some argue that "a unique period of correspondence education" began as early as the medieval period,[2] while others, using a more technology-based definition[3] situate its origins in the 19th Century.[4] Although exact origins of DE remain in doubt, the dominant view provided by Keegan, stresses the necessity for the postal service developed during the Industrial Revolution to make DE effective.[5]

According to Larreamendy-Joerns and Leinhardt, one of the more well-known examples of widely available correspondence education in the United States was Anna Eliot Ticknor's Society to Encourage Studies at Home.[6] The Society provided personalized instruction conducted through regular mail which, upon completion, students would mail back for "comment and discussion".[7] Another prominent example of the growing trend towards

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[1] J Larreamedny-Joerns, and G Leinhardt. 'Going the Distance with Online Education' (2006) 76 (4) Review of Educational Research 570.
[2] A Blinderman, 'Medieval Correspondence Education: The Response of the Gaeonate' (1969) 9 (4) History of Education Quarterly 473.
[3] D Keegan (1996). *Foundations of Distance Education* (3rd edn, Routledge, 1996) 7-8.
[4] Ibid 8.
[5] Ibid 44.
[6] Larreamedny-Joerns and Leinhardt (n. 1) 573.
[7] Ibid.

distance education was the University of Chicago's Department of Home-Study. Correspondence study at the university coincided with the increasing university extension movement taking place across the United States and United Kingdom throughout the latter part of the 19th century.[8]

With the rise of distance education as a non-traditional form of teaching and learning came many concerns focused on the effectiveness of independent study, the role of pedagogy and student-teacher interaction. The advent of newer technologies such as audio and then video recordings, broadcast radio and television and telecommunications have all been utilized in the delivery of courses to address these concerns.[9] Nevertheless, debates regarding this alternative to traditional in-class instruction continue to the present day.

The Advent of New Technologies in Distance Education

Film and radio are two of the earliest examples of the incorporation of more interactive and engaging technologies to be used. Instructional film was introduced as early as 1910 and was believed to have the capacity to transform distance education.[10] It was not until the 1920's that instructional media became a feature of many extension programs "in the form of slides and motion pictures just as they were in the classroom".[11] Nistorescu *et al.* note that, with the introduction of radio broadcasting, the U.S. government issued the first educational radio licence to the Latter Day Saint's University of Salt Lake City in 1921. The next year the University of Wisconsin and the University of Minnesota were also issued radio licences.[12] While an improvement in many ways over reliance solely on printed materials, radio was a less effective and less popular method of instruction than television later proved to be.

By the 1950s, instructional television had established itself as a viable mode of delivery for educational programs and the 1960s saw numerous educational institutions develop courses for TV broadcasting to on and off-campus student populations as well as the implementation

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[8] Ibid 574.
[9] Ibid (n. 1), "Since the inception of correspondence study classroom instruction has been the standard to match. Consequently, advocates of distance education were expected to demonstrate that distance teaching and learning were at least as good as residence education. It is noteworthy that, after more than a century of collegiate distance education, pro and con arguments have changed very little." 579.
[10] M Jeffries, 'Research in Distance Education' (2000.) Indiana Higher Education Telecommunication System Online http://cmapspublic.ihmc.us/rid=1HZXXGY8W-1ZZ4DLF-137T/Research%20in%20Distance%20Education.docx
[11] Ibid.
[12] M Nistorescu, L Carabaneanu, and I Mierlus-Mazilu, *Distance Education and Interactive Technology* (Technical University of Civil Engineering Bucharest, 2006) 62. Online: http://www.codewitz.net/papers/MMT_61-66_NISTORESCUect.pdf.

of closed-circuit television systems to present course materials to students at different locations.[13]

An example of this type of program was the Midwest Program of Airborne Television Instruction (MPATI), which offered a "flying classroom" from an airfield close to Purdue University in Lafayette, Indiana. From the airfield the MPATI broadcasted instructional programs to schools and to the general public in Indiana as well as to five surrounding states.[14]

A significant outcome of the "flying classroom" experiment was the increased implementation by many schools of closed-circuit television systems as well as Instructional Fixed Television Service microwave systems.[15] Microwave technologies increasingly improved in quality throughout the 1960's making it an attractive option for universities to use to connect to other sites within their local region, as well as serving to increase the access of distance education students to course material. It relied upon rather inexpensive transmission equipment with low energy needs and inexpensive receivers within 20 miles (32 kms).

Other prominent examples of institutions drawing on instructional technologies included Britain's Open University. The Open University made available a wide variety of courses through broadcast television[16] by offering lectures in conjunction with correspondence texts and professor-student visits.[17] What was significant about its method of course delivery was its open distribution to the general public, in comparison to the more frequently used closed-circuit systems by American universities.[18]

Satellite technology proved to be another major advance in the delivery of televised distance education programs. The University of Maine provides an example through its utilization of a low-level satellite system to deliver academic courses throughout the state of Maine.[19] DE students were able to take the same university course delivered to their local communities via satellite transmission alongside their on-campus counterparts. Satellite transmission has the advantage of enabling connection from the teaching site via an uplink satellite dish to downlink receivers anywhere in the world that can use standard televisions to display the

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[13] M Jeffries, (n. 10).
[14] Ibid.
[15] Ibid.
[16] I Miller, 'Distance learning – A Personal History' (2000) 3 Internet and Higher Education 8.
[17] The Open University, "History of the OU" Online: http://www.open.ac.uk/about/ou/p3.shtml.
[18] Ibid.
[19] Ibid 10.

video transmitted. Initially the use of this technology was either not interactive or relied upon recipients to communicate with the teacher by telephone (which could include very expensive long distance charges). Considering that the satellite dishes and uplink transmitters were rather expensive, this technology was largely restricted to circumstances where significant numbers of students would congregate in distant classrooms.

Distance Education and Theories of Learning

While technological developments enhanced the delivery mechanisms for DE, considerable resistance remained among the general community of educators who perceived it as inferior due to insufficient student-instructor interaction.[20] Michael Moore was particularly influential in describing the limitations of these earlier forms of DE.[21] He emphasised that the limitations are not merely about the geographic separation of teachers and students, but are also founded in a pedagogical issue that requires a reworking of traditional conceptions of teacher-learner interaction.[22] As Moore puts it, "with separation there is a psychological and communication space to be crossed, a space of potential misunderstanding between the inputs of the instructor and those of the learner. It is this psychological and communications space that is the transactional distance."[23]

According to Heath and Holznagel, the significance of the separation necessitates adopting teaching and learning strategies tailored to the distance environment. Importantly, the nature of communication mediums will also influence the interplay between teacher-learner and environment.[24] The use of one-way communication media, whether through traditional correspondence or modern satellite and microwave systems, are examples that do not allow for genuine dialogue between teacher and learner and, therefore, cannot successfully bridge transactional distances.[25]

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[20] RM Purcell-Roberts and DF Purcell, (2000). 'Interactive Distance Learning' in L. Lau, *Distance Learning Technologies: Issues, Trends and Opportunities* (Idea Group Publishing 2000) 16.
[21] M Moore, *Theory of Distance Education* (Distance Education Symposium: Selected Papers, Research Monograph Number 9, American Centre for the Study of Distance Education, College of Education, Pennsylvania State University 1991).
[22] Ibid.
[23] M Moore, 'Theory of Transactional Distance' in D. Keegan (ed), *Theoretical Principles of Distance Education* (Routledge 199) 22.
[24] M Heath, D Holznagel, K de Ford, and V Dimock, (2002). *Understanding the Value of Interactive Videoconferencing Technology in Improving K-12 Educational Systems* (Regional Technology in Education Consortia National Collaborative Project 2002) 9.
[25] Ibid.

Stanford and Roark assert that education is above all about human interaction, and teaching practices should be a reflection of this.[26] While not attempting to diminish the importance of content, they were trying to shift the focus of education towards social interaction and social learning, which included the teacher also being an active learner. In agreement with Marshall McLuhan,[27] Stanford and Roark thought that the "medium is the message" such that within the context of education, social interaction is the medium.[28]

Haughey noted that temporal distance presents conflicting perceptions of the learner; on the one hand they are independent and autonomous and on the other they are dependent upon interaction, in need of guidance from the centre and using technologies should seek to overcome as much as possible their separation from the traditional classroom.[29] The role of the teacher is significant in bridging the interactivity gap, however, she has argued that simply replicating models of interaction within the traditional classroom in a DE setting can lead to the same problems of disconnectedness often found in face-to-face classes.[30] For Haughey, both "presence and distance are held in tension as aspects of learning".[31]

Distance Education and the Electronic Revolution

According to Keegan, the possibility of truly teaching face-to-face at a distance was not possible until the 1980's with the advent of the electronic revolution.[32] The arrival of satellite technology, along with digital telephony systems in the 1980s, created the Integrated Services for Digital Network (ISDN). This established common communication standards to simultaneously transmit bits of data that could be voice, video, text or other data over standard public telephone lines. This meant that the virtual classroom could now be linked in a manner that allowed students to respond to their lecturer.[33] The lecturer's ability to view and communicate with students at multiple sites was also now possible, while students at different sites could hear and see the lecturer. The arrival of such technologies meant that where virtual systems existed the "interpersonal communication of conventional education can be achieved at a distance".[34] The ISDN system was dependent though upon the use of multiple phone lines to transmit video along with a single line for audio. As a result, long

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[26] G Stanford and A E Roark, *Human Interaction in Education* (Allyn and Bacon, 1974) 2
[27] M McLuhan, Understanding Media: The Extensions of Man (McGraw-Hill 1964).
[28] Standford and Roark, (n. 26) 3
[29] Ibid, 6.
[30] Ibid, 8.
[31] Ibid,13.
[32] Keegan, (n. 3) 8.
[33] Ibid.
[34] Ibid.

distance charges could be an expensive factor until the arrival of Internet Protocol (IP) in the late 1990s.

Belanger and Jordan noted that most of the early electronic technology of the 1920s to the 1970s provided little to no mutual interaction between teacher and learner, as students could only receive the audio (and later audio and video) signal without an ability to reply. Most of the regularly scheduled radio and TV format style DE offered little contextual information, if any, outside of lecture content; while other, even traditional correspondence, distance education technologies could provide a wealth of additional information.[35] More recent technological advances have enabled marrying various methods of interactivity with the ability to supplement the 'class time' with added text, audio, video and weblink materials. Certain technologies can provide for greater learner flexibility in terms of time and place due to their asynchronous style of course delivery; while others offer synchronous learning that provides the greatest amount of communication and interaction outside the traditional classroom.[36]

Computer based training remains one of the most popular technologies. Typically the course is provided online without the presence of an instructor, with students able to complete the course work at their own pace, have a limited amount of interactivity, including with each other. The course may also include receiving immediate feedback in the form of marking and correction of answers previously prepared by the lecturing staff.[37] The downside to online delivery is its fully independent nature, thereby meaning there is no direct instructor verbal feedback or room for student-to-student verbal or face-to-face interaction.[38] Similarly, it is hard to develop groups of 'study buddies' to work together and learn from each other amongst students who only connect through cyberspace, although online chat rooms and email lists do make such communication possible.

Computer aided instruction (CAI) has become one of the mainstays of many DE courses. Originally used as an add-on to supplement the traditional in-class lecture, CAI now often accompanies distance education texts. Only providing online lectures, practice, tests and tutorials, is not sufficient for delivering DE. Belanger and Jordan outline that web-based training should also use the Internet to deliver courses and includes the use of chat rooms and email to enrich simple online delivery. Web-based training morphs into web-based

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[35] F Belanger and DH Jordan, Evaluation and Implementation of Distance Learning: Technologies, Tools and Techniques (Idea Group Publishing 1999) 35.
[36] Ibid.
[37] Ibid, 41.
[38] Ibid, 42.

courses when offered in the place of a traditional classroom; such courses are referred to as "cybercourses" or "virtual courses". Not only can students work at their own pace (as with online courses), but it also allows for the distribution of course materials at any time through the dedicated website, and it has thereby gained "unprecedented popularity in academic circles".[39] Not only does it offer relatively low cost and greater revenue possibilities for universities but it importantly adds the capability of some communication. Interaction between students and teachers through email, Listservs and chat facilities all enhance the web-based learning experience.[40] Nevertheless, these cybercourses, especially when asynchronous, still suffer from a student sense of being disconnected as all interaction is indirect relying upon text to convey questions and comments. The ever more cryptic, depersonalized form of modern email communication inevitably means the loss of subtleties in more expansive word choice, and the import of body language and facial expressions. This is coupled with the lack of immediacy in reply, *et cetera*.

On the other hand, online learning can provide far greater access to education for a large and distinct segment of the population. Those who wish to further education while working full-time, raising young children, caring for elderly parents, living in remote locations, working night shifts, possessing major physical disabilities and in many other circumstances can find access to the standard tertiary educational institution difficult if not impossible. At the same time, improvements in technology have now created the expectation that online learning will involve a high degree of interactivity so as to closely resemble traditional classroom-based learning.[41] The growing use of videoconferencing is a reaction to this student expectation and to the inability of online teaching fully to recreate the classroom experience.

Fully Interactive Distance Education – Videoconferencing Technology

The rise of distance-reducing technologies is leading to the "passing of remoteness" in distance education.[42] Videoconferencing is one of if not the most interactive forms of distance education. It makes immediate, two-way, face-to-face communication a reality in DE. This has the benefit that, "the visual cues so often considered important in determining if messages were being properly communicated were now available. Immediate visual feedback leads to more productive dialog."[43] The initial use of videoconferencing for teaching was between campuses of the same university to replace one-way video

[39] Ibid, 49.
[40] Ibid, 50.
[41] L Schrum, 'Online Teaching and Learning: Essential Conditions for Success' in L Lau (n. 20) 92.
[42] I Yermish, 'A Case for Case Studies via Video-Conferencing' in L Lau (n. 20) 208.
[43] Ibid, 208-9.

transmission for students enrolled in the same course with a single lecturer at the main site.[44]

As this article demonstrates, videoconferencing has come to be used not only within universities but also across national borders, just as it similarly moved beyond initial communication within companies to extend to widespread external corporate communication. More recently it has been accepted by courts as a means to connect prisoners to judicial proceedings as well as convene bail and motions applications in many countries.

Distance Education in the Law School Environment

According to Gleason, despite the growth of distance education in the mainstream of higher education, law schools have been slow to accept distance education.[45] Many law schools have argued that the value of a sound program of legal education relies on class sessions, interaction with instructors and fellow students, and physical "residency" so as to steep students in the law school environment.[46] Despite this, changes have been put in place that signal a growing switch towards distance education in law schools.

Nottage and 5 colleagues discussed the possibility of transnational legal education and argued in 2008 that the value of the global classroom is self-evident.[47] Anderson noted in his contribution to the joint article that one of the original challenges was the technology itself, particularly technological glitches or hiccups.[48] He suggested, however, that this problem has itself become a valuable learning tool; challenges are typical in the lawyering environment, "thus learning to roll with the punches is a lesson that as a practical matter will make the students better lawyers".[49]

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[44] Ibid, 211.
[45] D Gleason, 'Distance Education in Law School: The Train Has Left the Station', (unpublished 2006) available via SSRN online database, 2.
[46] Ibid, 4.
[47] L Nottage, F Bennett, K Prokati, K Anderson, L Wolff, and M Ibusuki, 'Beyond Borders in the Classroom: The Possibility of Transnational Legal Education' (2008) 25 *Ritsumeikan Law Review* 183, 190.
[48] Ibid, 191.
[49] Ibid.

Teaching Comparative or International Law through Videoconferencing

The comparative and international indigenous rights course I co-teach today grew from an idea over lunch between Professor Lindsay Robertson of the University of Oklahoma College of Law (USA) and myself, while at the University of Ottawa (Canada), at a Sovereignty Symposium conference in Tulsa, Oklahoma in June of 1998. Online courses were becoming popular at the time and seemed to be the way of the future. Each of us had taught domestic oriented courses on indigenous legal issues and thought it would be fun as well as of student benefit to co-teach on a North American basis so as to focus on the similarities and differences between the laws in each country and their respective histories of colonization and struggles against dispossession. We thought it might be possible to use the new technology available to make our mutual DE course fully interactive so as to overcome most of the flaws with standard DE experiences. Another trigger for the commencement of a transnational comparative course in this field was the progress being achieved at a global level in discussions on a UN Draft Declaration on Indigenous Rights as well as within regional and other international bodies.

Our course began in 2000 and comprised of a two hour class each week for an entire semester that were fully interactive, with us using PowerPoint (PPT) presentations and audio-visual material along with lecturing, as well as promoting discussion amongst all students participating. Everyone could see and speak to all others in the 2 classrooms in Norman, Oklahoma and in Ottawa. Thus, we were able to overcome the lack of mutual interaction in most DE by having full access to every other person in each classroom and questions were encouraged at any time. Students were enrolled in a course with their own law school so there were no admission or registration issues, no cross-crediting or transcript transfers, and no added fees or transfer of funds. Both Professor Robertson and I handled all administrative matters for our respective students as well as grading. Students loved the technology while also having the comfort provided by their own professor in their classroom.

We began initially by transmitting video and audio data via 6 long distance ISDN telephone lines to each other paid by the University of Ottawa. The change over from expensive ISDN lines to VoIP (Voice over Internet Protocol) in 2003 allowed us to expand so that the Universities of Monash, Saskatchewan, Queensland, Auckland, Waikato and Victoria University of Wellington have become involved since the course was first launched with as

many as 7 law school classes connected in any one year.[50] The VOIP system also has much higher quality and has enabled us to transmit PPT or film simultaneously on separate or split screens in addition to the live video feed from up to 7 law schools. It also has no transmission cost.

Videoconferencing technology is not difficult to implement. The initial cost to install the necessary technology of a bridge that can handle linking multiple sites is undoubtedly expensive [roughly US$100,000], but the capital cost is dramatically less for those other universities that merely connect to the host university's bridge. The cost for the actual videoconferencing teaching sessions is nothing beyond staff time since Internet Protocol became available to replace ISDN. While videoconferencing technology is usually user friendly, good technical backup is vital. In theory, all that is required is for a lecturer to turn the video equipment on in the classroom and wait until a call is received to link their site to the others. Increasing the number of sites involved in each videoconference does lead potentially to more technical difficulties.

There are a variety of other challenges that are unique to any long distance comparative or international law course, which include multiple time zones and scheduling difficulties, differences in the academic year as well as class sizes. Importantly a course like this requires a significant amount of organization. Discussion must take place far in advance around not only the course outline as a whole but also what precise topics are to be covered in each jurisdiction, by whom and in what order. Communication must take place on an on-going basis in order to successfully "choreograph" each weekly session as much as possible while factoring in student participation and questioning.

Course Website

One of the important ways to connect students together more effectively and help them to feel part of an extended class with staff and students from the other partnering law schools is through sharing a common course website. I originally developed a quite rudimentary website in 2000 that contained all of the assigned readings for each week's class throughout the many weeks that we were meeting together through videoconferencing. I also posted the list of research topics selected by the students at Oklahoma and Ottawa followed later by

[50] For a more detailed description of the structure and nature of this course as well as student feedback see, M Stephenson, B Morse, L Robertson, M Castan, D Yarrow and R Thompson, "International and Comparative Indigenous Rights via Videoconferencing," (2009) 19 *Legal Education Review* 237.

their draft and final research papers.[51] Over the years the website evolved to contain the final research papers for most of the law students from most of the participating law schools.[52] The participating teachers also frequently added reference materrials (for example, relevant national legislation; recent government, legislative or international treaty body reports; personal publications; reading lists; important other websites; *et cetera*) as well as some videos of distinctive events (such as the video produced to capture what transpired on September 7, 2007 when the UN General Assembly passed the Declaration on the Rights of Indigenous Peoples). We would occasionally post newspaper articles and other major events happening in one of the coutries over the last week or even during the class itself when germane to the discussion.

The website was also used as a means of encouraging communication. Since it was password protected with each student having a unique password,[53] it meant that students had a reasonable degree of comfort about the security of their conversations when they emailed each other individually or in groups or used the chat room. Some years I had sufficient grant funds to enable a graduate student specialist to be hired to run discussions each week through the chat room to spark more discussion and answer questions. By announcing in class that we had posted research topics we were encouraging students to see what others were doing so that they might find projects overlapping their own in which sharing information would be mutually beneficial. As students were required to do comparative research, this also encouraged them to pass on any prior research of their own that might connect to a new student project as well as to share their greater expertise in their home country – often in return for a student doing the same from a country in which the first student was pursuing a comparative topic.

The class was also recorded each week with the website serving as the repository for these videos. This meant that students who missed a class could readily later view that session as well as those who simply wished to refresh their memory, see themselves on camera or who had not fully understood part of a discussion. Since as many students as possible would provide a 5-10 minute summary of their research paper in the final weeks of the shared

[51] The website was hosted and supported tremendously by the Centre for Mediated Teaching and Learning at the University of Ottawa from 2000 until 2013. The course website is now hosted by the University of Oklahoma College of Law.

[52] I use the expression 'some' in describing this aspect of the content of the website as some participating law schools never supplied me with student research papers, some years individual law schools used exams rather than papers and a few students declined to have their papers posted for future student inspection.

[53] The Distance Education Office at the University of Ottawa provided a discrete password for each student registered in one of the participating law schools connected to his/her preferred email address until 2014.

course, watching that class's video of their own presentation could be highly informative for a student wishing to see her/his own style and possible unintentional mannerisms.

Students from all participating classes are encouraged to collaborate and support each other with feedback and sharing research ideas and sources while they individually write a relevant research paper from a comparative law perspective. This creates an interactive international learning environment. In fact in the first lecture in most years the students introduce themselves and state their areas of interest. In the mid-session break the students may immediately rush to the microphones and make contact with students in the other jurisdictions. Students frequently initiate informal chats with one another by email or chat rooms hosted by the main course website. Students can also directly email the other lecturers to discuss areas of interest or their research papers.

One of the advantages of a videoconference course is that it truly allows students to interact with and learn from professors who are co-teaching the class from afar and who are expert in that field in their home country. This overcomes complaints regarding online and other DE learning where students work from a book or on a computer with no face to face contact with lecturers or other students. In our course, students are encouraged to participate in class, question the teachers directly at any time and also engage with other students outside of class. Therefore, this DE experience is intended significantly to enhance and enrich the learning experience for regular law students and give them perspectives from other countries rather than providing DE to those unable to engage in university campus education. It can, however, be used for students who can only study remotely; and in fact we did so for a student residing in the far north of Canada in 2002.

Positives and Challenges

Student reaction over the years has ranged from very good to the overwhelmingly positive. Each participating teacher's university naturally conducts its own course appraisal system, however, examples of student feedback are:

> *"This was one of the best courses I've done for a long time: revolutionary to say the least."*

> *"Fantastic video-conference course. It was great to be connected to students on the other side of the world. It was great to be taught by instructors, in each jurisdiction, who were experts on legal Indigenous issues."*

> *"It was interesting to get a more global perspective on Indigenous legal issues. The course has definitely widened my interest in this area of the law."*

> *"The opportunity to video conference with universities abroad and international aspects was excellent, and unlike any learning format I had ever participated in. I hope this innovative format continues and is expanded to other courses."*

As globalisation increases, acquiring knowledge of the principles and practices of various peoples and nations around the world is vital so that we can share and learn from 'foreign' experiences. Broadening student knowledge of what is occurring elsewhere not only avoids ethnocentrism but also positions students to be better placed in their future careers to deal with evolving legal issues. Our videoconferencing course certainly broadens students into considering a global perspective on indigenous laws that then translates for them to think comparatively in all legal spheres. Other positives include:

- It dramatically broadens the depth and breadth of expertise available among the teaching staff through the participation of colleagues at other law schools.
- It brings comparative law to life in a real way for students as they inevitably see similarities and differences between the laws in their own country with the legal regimes in the other participating nations. This easily generates the questions of: why is our law and policy the way it is? Why is it not like the law in X nation? Would it be better if we adopted the approach of Y nation? How different are our conditions, history, economy, or culture that explains these differences? Why do we share certain elements in common when we are so different?
- Students witness differing views among scholars expressed in the presentations and discussions among the teachers (thereby realising that there can be different perceptions that are still valid and we are not always right).
- It can create greater diversity among the participating students (regarding citizenship, ethnicity, cultural background, legal system, *et cetera*.) that can enrich the discussions and fosters greater cross-cultural sensitivity in a different way than in a single classroom of multicultural or international students.
- It can offer interaction opportunities for one's own students with law students from other countries by enabling students to share experiences via social media and even form friendships leading to travel opportunities and possible impact on future career choices.
- It helps develop research links among students so that they can share their current or past research sources and ideas with other students who have similar research

paper topics (thereby demonstrating to themselves that their research can be of value to others). We post many past student research papers on the course website and encourage all students to examine them for research sources and ideas.

- It enables students to interact with law teachers in other countries without leaving home (thereby reducing possible boredom or overexposure of their own law school's teachers).
- It generates a sense of curriculum excitement, international connectedness and feeling enriched by foreign experts. They can see and hear leading experts on the other side of the world just as they experience in watching TV news programmes – except they are part of the programme and can speak directly to teachers and students abroad. Guests at one school benefit all the others. For example, in one recent class we had the new President of the Committee of Experts of the UN Convention on the Elimination of Racial Discrimination, Francisco Cali, speak at the beginning of the session from Oklahoma while Professor Aaron Tupper of the University of San Francisco was in the Monash classroom and Professor Keira Ladner of the University of Manitoba was at Waikato.
- Students love seeing themselves on TV – even if nervous when presenting or asking questions – while also getting valuable visual feedback on their own presentation style when reviewing the video later.
- Students highly value the immediacy of the interaction. It is literally up to the minute as students and teachers can share newspaper headlines, court decisions, Bills introduced, UN or government reports just released, *et cetera*. that have occurred that very day on the other side of the world by posting it on the course website or uploading and discussing it in class. No single law professor can do this effectively for multiple jurisdictions just before each class.
- Each teacher enriches her/his expertise in the substantive law and policy issues present in that topic in the other participating countries simply by being involved in the course and learning from one's co-teachers.
- New friendships may develop amongst teaching staff or become deeper through co-teaching experience (resulting in subsequent visits, collaborative research, conference panels arranged, *et cetera*.).
- The course website builds over time with added resources, past student papers, video clips, *et cetera*. so that each year new students can see they are part of something that has a bit of history to it in which their forerunners have contributed so that they can benefit, and then they can contribute too to aid their successors.
- IT IS REALLY FUN!

The course is not, however, without its challenges and drawbacks. It may cross several or many time zones; in our course there is a maximum of an 18 hour time difference over 2 days in opposite hemispheres and in very different seasons, yet students and teachers come together through videoconferencing to discover both how much they have in common and also how different their approaches can be to similar issues. All four of our countries have a similar history of British colonization and share the legacy of English common law yet the interesting thing to study is how each country developed differently from that same origin. It can be a revelation for the students to see just how things can be so different elsewhere in the world while also being so similar in very many ways. While our course is one that consciously explores not only similarities but also differences in the experiences of the various jurisdictions, any transnational law course will inevitably challenge the students and teachers to ask and seek to understand why those differences have occurred. Other challenges include:

- Technical failures will inevitably happen. It is best to expect them and be prepared as best one can. Each teacher needs to have some capacity to substitute immediately when the key speaker of the moment suddenly disappears due to lost connection, power failure, *et cetera*. (or have a co-teacher who can readily do so). Similarly, when their site is disconnected, they must scramble to reconnect while also trying to keep their own students engaged. Everyone needs to have emergency contact details for co-teachers, their own university IT specialists AND, most importantly, for the host university's IT that provides the bridge to connect all classes together.
- Organizing course content and planning the schedule of classes, readings, structure of each class, clarifying the role and order of each teacher in each topic is not easy when colleagues are in different cities, let alone time zones. This entails group emails, Skype & phone calls, *et cetera*.
- Differing school years – semesters run at different times, study weeks or exam times differ as do statutory holidays. This can mean starting or ending a course at times outside of the normal semester period and/or having participating law schools for differing lengths of time. Where one university group miss a week due to a vacation they can, however, still benefit from the teaching experience by accessing the class through a video recording posted on the course website.
- Time zones – finding a schedule that fits all participants becomes ever harder as distance expands (our classes start from 17:00 on Wednesday evenings in North America to noon local time on Thursdays in New Zealand). Some time zone

connections simply will not work. We have had to reluctantly turn down involvement from law schools in South Africa and Western Australia as it was impossible to find a common timeframe that suited all without someone having classes in the middle of the night.

- Daylight savings time (DST) – our course has had up to 7 law schools participate in any one year that have varied from 4 to 6 distinct time zones each year due to differences in when daylight savings starts in North America [9 March 2014] and ends in Oceania (6 April 2014). This creates shifting class times somewhere of 1 hour (when DST starts in North America) and then 2 hours (when DST ends in Australasia), which is further compounded by some jurisdictions that do not follow DST at all (which includes our 2 participants in Saskatchewan, Canada and Queensland, Australia).
- Password protected course website – A website is required to enable all readings to be posted online as it is simply too hard to print course materials at each law school. A further factor is that fully, open access may run afoul of local copyright laws. We also want to upload new material regularly, including even during class that is accessible to all who have internet access. Since there are unpublished papers and chat room discussion, there is an added need for the website to be password protected, which then means there is a small logistical irritance around issuing usernames and passwords to all teachers and students. It is best if this is done by the university hosting the course website as soon as possible before the course commences so that adding late stragglers is not too burdensome.
- Varying equipment quality and nature - Some universities have superb equipment with HD transmission, voice activated or individual microphones around their room, multiple screens in class, able to record classes for future uploading and access, easy capacity to share documents during class, can handle 9 separate sites simultaneously on their giant video screens, *et cetera*. On the other hand, some law schools have few microphones, poor classroom acoustics, only 1 screen with limited capacity for Picture-in-Picture (PIP)[54] transmission, are unable to see themselves, *et cetera*. The teachers all need to know what the equipment situation is at each participating law school so that they all can adjust their teaching accordingly.

[54] Picture-in-Picture refers to the capacity of a television or projector to handle more than one live video feed at a single time. Some equipment will provide up to nine video feeds on a single overall screen simultaneously through subdividing screens into segments. Some PIP will be designed to have a dominant video transmission that captures the source where talking is occurring while the silent sites remain in smaller squares. These latter systems will then shift any other site into the larger, central location as soon as the other site starts speaking.

Fortunately, the rewards far outweigh the challenges that exist and most of the latter can be mitigated, if not eliminated, by proper planning along with good IT support (especially from the law school(s) that will bridge linking together all sites and host the course website). Conducting a 'dry-run' that successfully links together all the sites with their technicians and teachers present is critical so that everyone knows how it will work and how to contact each other if an emergency arises. It is virtually certain that a technical failure will occur at some point where a site is lost for part or all of a class so fall-back planning and capacity is vital if reconnection does not occur quickly.

The technology to undertake videoconferencing courses exists at most Universities today. This technology could be used not merely for an occasional guest lecture, as is commonly the case, but it can also be used for a course taught entirely or predominantly by videoconferencing. Courses that conceptually could be taught comparatively with others in different parts of the world lend themselves immediately to teaching through videoconferencing. This is a stellar way to internationalize the curriculum, a great experience for the students and also for the teaching team. In my opinion, videoconferencing courses will become a standard part of the curriculum of all universities in the not too distant future as its potential benefit is so massive. All law schools are aware that the legal profession is becoming ever more transnational, such that we need to respond by aiding our students to become global lawyers. Teaching domestic law subjects comparatively as well as international law through transborder videoconferencing is an excellent method to help achieve this goal.

Despite the challenges, the benefits completely overwhelm the problems for both staff and students. So long as teachers can be patient, are flexible by nature and everyone has a sense of humour, then this is a fantastic teaching and learning experience for everyone involved.

THE RESILIENCE PRINCIPLE

NICHOLAS A. ROBINSON *

Studies of resilience have become widespread, in ecology[1] and in human relations.[2] Societies seek resilience as they experience disruptions. The effects of climate change are becoming evident in extreme storms, such as typhoon Haiyan, which raked over the Philippines in November of 2013, or the acute floods and droughts which societies in all regions of the world face. Human societies seek to enhance their capacity to "bounce back." Yet the enormity of the damage, in the wake of Biblical floods, such as the Indus River Valley suffered in 2010,[3] exceeds the capacity of all governments and intergovernmental organizations to restore what is lost. Rather the stark reality is that each society must adapt to the new conditions and move on.

Resilient self-help is essential in coping with life's upsets. This essay explores the prospect of recognizing Resilience as a Principle of Law. The propositions set forth here were debated at two conferences held in Brasilia, in December of 2013. The first, for legislators, was convened in the Senate of Brazil by the National Congress' Joint Permanent Committee on Climate Change,[4] and the second, for judges,[5] was convened by the Federal Judicial Council's Judicial Studies Center (*Conselho da Justiça Federal Centro de Estudos Judiciários*) and the High Court of Brazil (*Superior Tribunal de Justiça*). This *eJournal* of the IUCN Academy of Environmental Law has emerged as a leader in exploring new principles of environmental law, such as the Principle of Non-Regression, framed by Prof. Michel

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[1] See C.S. Hollings, "Resilience and Stability of Ecological Systems," *Annual Review of Ecological Systems* 4 (1973).
[2] See The Stockholm Resilience Centre, www.stockholmresilience.org .
[3] This was the worst flood in Pakistan's history and eradicated all the social and economic development in the Indus River Valley. See www.cicero.uio.no. Six decades of peaceful socio-economic development in this region of Pakistan represented a great success for the World Bank (IBRD), which in 1960 had provided for the equitable allocation of the waters of the Indus River through the Indus Waters Treaty.
[4] "International Colloquium on Climate Change: The Post-Warsaw Agenda," *International Perspectives Panel: Impacts on Law, Biodiversity & Soil,* Brasilia, 6 December 2013.
[5] **"**International Conference on Environmental Law," Panel on *Challenges and Trends in Environmental Law,* Brasilia, 9 December 2013.

Prieur.[6] Just as courts have begun to recognize the Principle of Non-Regression,[7] the welfare of both humans and nature requires recognition of Resilience. Many of the jurisprudential foundations for the legal Principle of Resilience are set forth by Lia Helena Monteiro de Lima Demange in her insightful recent article about the Principle.[8]

Resilience is an inherent capacity to react to disruptions of human or ecological systems to sustain their health, wellbeing or integrity. Resilience is found in both individual humans, other species, and in ecosystems. Humans bring their resilience to their socio-economic and cultural systems, such as a local community, a trading network, an educational institution or a health care provider. Humans often provide contingency plans to keep these systems going in the face of disruption. The aim is to anticipate and respond or adapt to disruptive, or changed conditions in order to sustain health, natural integrity, or the social objective of a system.[9]

When a human trips and falls, she or he responds by getting up and walking on. If a bone is broken, it needs time to heal. If a virus attacks us, our bodies struggle to repel the attack and we nurse ourselves back to health. Our bodies have inherent resilience. Our human constitutions, our bodies, have natural capacities to restore health, which seem invisible, until we need them. We can enhance our return to renewed normal conditions by seeking medical care or prescribed rest. We seek to enhance our resilience by taking vitamins and getting exercise.

When ecosystems are disrupted, plants and animals seek to adapt to the changed circumstances. For example, in natural settings, wetlands are great sponges, absorbing floodwaters while serving as huge reservoirs for many species. Wetlands experience floods or droughts as temporary disruptions, after which their natural features continue. When disruptions are extreme, as when a river changes course, wetlands ecosystems reappear in new locations and their ecological functions reappear. Ecosystem integrity has a resilience

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[6] Michel Prieur, "Urgently Acknowledging the Principle of 'Non-Regression' in Environmental Rights," IUCN Academy of Environmental Law *eJournal* Issue 2011(1), available at http://www.iucnael.org/en/e-jouinral/previous-issues/157-issue20111.html.

[7] Decision on the Demand of Constantino Gonzales Rodriguez to Declare Null Resolution No AG-0072-2009 of the National Environmental Authority (ANAM), published in the Official Gazetta No. 26,221 (11 February 2009), Entrada no. 123-12, Supreme Court of the Republic of Panama, Third Administrative Law Chamber (23 December 2013), available at http://es.scribd.com/doc/193671950/Setencuia-Bahia-Panama-Principio-No-Regresion .

[8] Lia Helena Monteiro de Lima Demange, "The Principle of Resilience," 30 *Pace Environmental Law Review* 695 (2013), available at http://digitalcommons.pace/edu/pelr/vol30/iss2/11.

[9] Andrew Zolli and Ann Marie Healy, *Resilience – Why Things Bounce Back* (Simon & Schuster 2012).

that reasserts itself. The natural design of a wetland is resilient, conserving soils and species alike. Yet when humans drain a marsh, we weaken or destroy its natural resilience. On the other hand, humans have enhanced natural resilience when they create botanical gardens. This socio-biological activity on one level seems to be an attractive conservation of species of plant life, which otherwise might be lost in the wild. But this is more than a scientific study. We know that botanical gardens are also a reservoir of biodiversity, and we restore plants when their habitats are lost or they become endangered with extinction. At this deeper level, botanical gardens are biodiversity health care systems. Similarly, the Global Crop Diversity Trust has created the Svalbard Global Seed Vault, a seed bank deep in Spitsbergen, an island off of Norway, to conserve all the seeds of flora species. We also conserve biodiversity in large protected areas, such as national park.

Why does this matter? Why can we no longer take resilience for granted?

The world has left the Holocene epoch, which lasted 10,000 years, and entered the Anthropocene epoch, the era in which humans shape nature.[10] The International Commission on Stratigraphy, a scientific body of geologists, is studying the indicators that physically exist to show that humans have permanently altered the crust of the Earth, its soils and rocks.[11] The key indicators of this Anthropocene are:

- Melting the cryosphere – the loss of frozen glaciers and ice caps
- Sea level rise and new coastlines & coastal sedimentation
- The acidification of the oceans and the increase in carbon dioxide in the atmosphere
- Radioactive rocks and soils from pre-1963 atmospheric nuclear weapons tests
- Synthetic and organic chemical waste that never existed naturally before humans invented them
- Extinction of species and the new fossil record

Each of these new physical markers also reflects on-going interactions of human systems and natural systems. In the Anthropocene, it is expected that storms will be more intense,

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[10] Will Steffen, Paul J. Crutzen and John R. McNeill, "The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature," 36 *AMBIO* 614 (2007).

[11] The International Commission on Stratigraphy is the oldest constituent scientific body in the International Union of Geological Sciences (www.iugs.org). Its primary objective is to precisely define global units (systems, series, and stages) of the International Chronostratigraphic Chart that, in turn, are the basis for the units (periods, epochs, and age) of the International Geologic Time Scale; thus setting global standards for the fundamental scale for expressing the history of the Earth. The Commission has constituted a working group to determine, perhaps by 2016, whether Earth has entered a new geological stage: www.inqua-saccom.org/major-divisisions/anthropocene.

droughts more severe, and other shifts in the hydrologic cycle will be unpredictable but are coming. There are feedback loops. For example, impacts will grow as the world population of humans increases by 2 billion more persons in the coming years. How humans behave exacerbates or ameliorates the disruptions of natural patterns, making it more difficult or more likely to achieve a new equilibrium. When one species becomes extinct, other species take over its niche. When the polar icecap melts fully, navigation across the North Pole will increase and new pollutants and new invasive species appear in this region.

As humans experience the more severe disruptions of the Anthropocene, humans strive to learn how to build and sustain "robust resilience." If humans consciously enhance resilience, they can survive and "bounce back" better. Typhoon Haiyan, which struck the Philippines on November 27th 2013, was then the strongest storm to hit land ever measured. Among its victims was the campus of a school founded in Barangay, near Cebu, by the renowned environmental lawyer, Tony Oposa. Oposa won the landmark decision of the Supreme Court of the Philippines recognizing the right to the environment in the Constitution of that nation, and granting standing for future generations, represented by children, to sue to enforce that right. *Oposa v. Factoran*[12] resulted in the withdrawal of timber concessions that would he denuded the forests of the Philippines, forests key to averting flooding and erosion.

Following an earlier destructive typhoon, Tony Oposa had built a building at his School to show local people how a two-story structure could survive typhoons, with waters passing through an open ground floor and safeguarding a second floor. At his School of the SEA (Sea, Earth, Air), this building survived.[13] The homes of all his neighbors were traditional one-story buildings, which were destroyed by the Typhoon. Oposa's water well, which deliberately is not operated by electricity, survived and now provides the only potable source of water for the people living around his school. Their wells depended on electricity, and the typhoon destroyed all electrical grids.

Oposa is teaching his community, by example, how to design stronger, more robust resilience into their lives. We can all learn from this environmental lawyer to design with nature[14] in our homes, neighborhoods, our utilities and transport systems, and all human-

[12] *Oposa v. Factoran, Jr.*, G.R. No,. 101083, Supreme Court of the Philippines (1993-07-30).
[13] http://opinion.inquirer.net/66901/filipino-name-for-storm-surge>.
[14] Ian McHarg, *Design With Nature* (1969; 1992 Edition, J. Wiley & Sons).

built infrastructure. Architectural designs that enmesh together human and nature enhance the integrity and resilience of both.[15]

In order to ensure that everyone can survive disruptions, it is important to recognize the Principle of Resilience as a legal principle. The Principle of Resilience is reflected already implicitly in other legal principles, such as the Precautionary Principle.[16] Because this Resilience Principle inheres in each human being and in each natural system, it is rather too easy to take resilience for granted. We expect ourselves to be resilient and do not think about how to ensure stronger resilience.

If human society is to effectively "bounce back" in coping with the disruptions of the Anthropocene Epoch, more will be needed than a voluntary effort to enhance resilience. Everyone should follow the lead of Tony Oposa. Governments will need to acknowledge formally the legal Principle of Resilience in its own right.

There are several rationales for doing so. One is because the Resilience Principle is universal, operating throughout all living systems.[17] It is perhaps also a reflection of what Edward O. Wilson has called Biophilia.[18] Another rationale is more utilitarian: humans see that they are better off by anticipating trouble and avoiding it. Elsewhere, I have argued also that resilience is an evolved norm, which all societies naturally already accept; A Rule of law for Nature[19] presents this rationale.[20] I have found generalized support for the recognition of resilience when presenting this thesis to the some 500 scholars gathered at the 11th Conference of the Nordic Environmental Social Sciences in Copenhagen in June of 2013, and to a conference of international lawyers at the University of Denver a year ago[21], and in Waikato, New Zealand, to environmental law professors from developing and developed

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[15] Stephen R. Kellert, Judith H. Heerwagen, and Martin L. Mador, Biophilic Design: The Theory, Science & Practice of Bringing Buildings to Life (2008, Wiley).
[16] See http://www.precautionaryprinciple.eu. The Precautionary Principle has been defined as follows: "When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is threatening to human life or health, or serious and effectively irreversible, or inequitable to present or future generations, or imposed without adequate consideration of the human rights of those affected."
[17] It should be acknowledged that both medical researchers and biological sciences such as ecology are still studying this proposition, and while environmental lawyers should accept that resilience is a general principle of law, other fields of endeavor still debate this proposition. See the Resilience Alliance's references at www.resalliance.org or the Transition Network, www.transitionnetwork.org .
[18] Edward O. Wilson, Biophilia – The Human Bond with Other Species (Harvard, 1984).
[19] Christina Voigt, *A Rule of Law for Nature* (Cambridge University Press, 2013).
[20] Nicholas A. Robinson, "A Canon for the Anthropocene," in A Rule of law for Nature, Chapter 4.
[21] Nicholas A. Robinson,"Keynote: Sustaining Society in the Anthropocene Epoch," 41 *Denv. J. Int'l L. & Pol'y* 467 (2012).

nations to the IUCN Academy of Environmental Law's annual Colloquium.[22] Last month, I explored the principle of resilience with environmental diplomats and lawyers in Germany.[23] In each of these debates I have found that there is general acceptance of the proposition that Resilience may be usefully stated to be a principle of law.

A general principle of law must be acknowledged to inhere in human nature, such as the duty to cooperate. Resilience is similarly such a basic trait. To encourage cooperation, humans invoke an ethical norm to do so, and in turn restate that norm as a legal duty. States shall cooperate in public international law, in the UN Charter,[24] in the Law of the Sea Convention [25] and the many multilateral environmental agreements, [26] such as the Convention on Biological Diversity.[27] To promote cooperation for enhancing socio-biological resilience, it is important to recognize our duty to do so as a general principle of law.

Principle of Resilience: *"Governments and individuals shall take all available measures to enhance and sustain the capacity of social and natural systems to maintain their integrity."*

How would this legal principle be reflected in law? Here are some concrete examples, both for legislative enactments and for judicial decision-making.

Judicial Rules of Interpretation and Decision - Affirming Resilience is the preferred option when the choice either to do so or not to do so is presented in a judicial setting. Courts recognize this in following the interpretive guides of ***in dubio pro natura***, since when natural systems are left intact, their integrity naturally supports resilience.[28] The Supreme Court

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[22] IUCN Academy of Environmental Law Annual Colloquium, 25-28 June 2013, at the University of Waikato.

[23] *Elizabeth Haub Award Laureates' Symposium*, Murnau, Germany, 15-16 November 2013, under the auspices of the International Council of Environmental Law. Paper by Nicholas A. Robinson "Fundamental Principles of Law for the Anthropocene," to appear in *Environmental Policy & Law* (Wolfgang E. Burhenne, Editor) in 2014.

[24] 1 UNTS XVI www.un.org/en/documents/charter/index.shtml

[25] 1833 UNTS 397 www.un.org/depts/los/convention_agreements/convention_overview_convention.htm.

[26] L. Kurukulasuriya & N. Robinson, Training Manual on International Environmental Law (UNEP, 2006).

[27] 1760 UNTS 79, 31 ILM 818 (1992); www.cbd.int.

[28] The applications of this rule are explored in *In Dubio Pro Natura* (the proceedings of the Brazilian Association of Magistrates' First International Conference on Environmental Law, 8-11 August 2011, Manaus (published by *the Associação dos Magistrados Brasileiros (AMB)*, 2013, with the support of the Konrad Adenauer Stiftung, ISBN 978-85-7504-178-9).

Procedural Rules in the Philippines,[29] and the Writ of *Kalikasan* (Nature), provide for an automatic injunction to stop actions harming the environment, and thus leave natural systems intact pending adjudication of a matter. Judicial decision-making thus can sustain natural resilience. In final adjudications, remedies to enhance resilience can be mandated to reverse past acts of environmental degradation. Finally, when statutes covering the matters below are in force, courts can give full effect to their remedial purposes when called upon to interpret such statutes.

Insurance for Casualty Losses – Cooperative insurance systems can provide the financial means to bounce back and adapt to post-disaster conditions. These are self-insurance programs organized locally. Farmers already use "Crop Index Insurance" in parts of Africa and India and other states are experimenting with micro-insurance regimes for poor communities. Most of the world lacks the statutory framework for communities to organize cooperative insurance systems. These statutes need to be enacted. There will not be adequate governmental finances for adapting and building new more sustainable living systems. Self-help is required. That is resilience.

Legal Frameworks Mandating Distributed Energy and Other Services – It is possible for local communities to generate their own electricity, supply clean water, provide for local foods, and build self-sufficiency into their living conditions. This must be replicated locally in all countries. The result is robust resilience. Electricity supplied from centrally located power generating facilities through electrical power grid distribution lines is efficient but brittle. It is too easily disrupted by storms and other events. Technology no longer requires such a centralized system. It is now possible to produce and store electricity locally, as needed. When local communities, and sites within them, produce their own electricity they become self-reliant. When some local sites lose power, micro-grids can share locally generated power, and also feed a wider grid. These systems do not depend on external supply chains, such as imports of energy or resources, which can be interrupted. Legislation is needed to mandate that new electricity will be supplied through distributed systems, and that such systems also be installed to replace central systems and build redundancy, and thus resilience in to those systems. Similar distributed systems will be needed for water supplies and other essential utilities.

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[29] *Rules of Procedure for Environmental Cases*, A.M. o. 09-6-8-SC (Phil.) available at http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html . See also the discussion of these rules in Hilario G. Davide, Jr., "The Environment as Life Sources and the Writ of *Kalikasan* in the Philippines," 29 *Pace Environmental law Review* 592 (2012).

Design with Nature - As sea levels rise worldwide, communities will retreat from the coastlines, and in anticipation all countries need to design to protect natural systems that will protect human communities. Trees on hillsides and upstream in watersheds will conserve water and avert flooding; wetlands should be re-established and expanded. Protected natural areas need to buffer human communities. Many nations need to enact legislation to enable wider use of natural systems to protect human settlements. The trends currently are to sacrifice the natural areas, and make human settlements less resilient.

Resilience Preparedness Planning – More thorough and diligent use of the procedure mandating Environmental Impact Assessment (a duty of States provided for in Principle 17 of the Declaration of Rio de Janeiro on Environmental Development).[30] Each EIA should identify and specify how natural resilience can be sustained or enhanced when governments act, or approve actions of others, that have an adverse environmental impact. This can also be made clear through ensuring that there is full public participation in environmental decision-making and access to environmental information, as mandated in Rio Principle 10. The public invariably identified issues of resilience when they speak up.[31]

Adaptation Through Revised Land Use Laws – Climate change requires everyone to begin adapting to the new environmental conditions on the Earth. All land use activities will need to adapt. This becomes evident in the current rise in sea levels along all coasts worldwide. As local authorities plan to retreat from the coastal areas to higher ground, they have opportunities to restore wetlands as buffers between storm surges and the land, and to enhance the food chain for coast fishing resources. All local land use laws need to launch "smart" planning activities. [32]

Providing Back-Up Systems and Redundancy - It can no longer be taken for granted that one social system will provide all necessary services. In the past, there was an interest in designing very efficient systems. Excessive efficiency can make for a brittle system. When Bangkok was flooded in a typhoon, the assembly of computers in other countries had to stop, since the last-minute efficiency of ordering computer chips from Thailand, rather than having the costs of a supply on hand, resulted in closing down manufacturing around the

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[30] A/Conf.151/26 (vol I, 12 August 1992); www.un.org/ga/conf151/aconf15126-1annex1.htm.
[31] See for example, Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2 608 (Second Cir., 1965), where citizens preserved Storm King Mountain and stripped bass fish spawning areas in the adjacent Hudson River, by pressing for a holistic weighing of environmental impacts and alternative means to supply energy without a new hydro-electric facility.
[32] See the publications and programs for smart land use planning and climate change prepared by the Land Use Law Center of Pace University School of Law in New York. www.law.pace.edu.

world. To build resilience, all social systems should design redundancy and back-up procedures.

Adaptive Planning – Spatial planning has traditionally imposed human development upon the natural environment. In the future, effects induced by climate change will disrupt the built environment. In adapting to the changed conditions, it will be essential to anticipate environmental impacts and design in light of that knowledge. New physical development will need to design sympathetically with natural systems, and ensure that natural resilience is sustained. Each society has its own cultural and social ways of learning how to adapt to the Anthropocene. Each society already has its cultural resiliencies. The Principle of Resilience will call upon governments at all levels to give this adaption priority.

Conclusions

None can claim to know with certainty how anthropogenic climate change is impacting on Earth and humanity. The Fifth Assessment Report of the UN Intergovernmental Panel on Climate Change, when released officially in 2014, will offer some guidance. Analysis of the previous four Assessment Reports[33] makes it amply clear that human society will need to rethink "business as usual," in light of the changing inter-dependencies of humans and nature.

The extraordinary benefit of the Principle of Resilience is that it already exists and can be applied in all present and future circumstances. Resilience is a characteristic of humans and nature alike. Human legal systems will themselves be more resilient, when they embrace the Principle of Resilience.

[33] See www.ipcc.ch.

ENVIRONMENTAL IMPACT ASSESSMENT IN INDIA: REVIEWING TWO DECADES OF JURISPRUDENCE

NUPUR CHOWDHURY*

Abstract

This short note reviews two decades of significant case law developments in the environmental impact assessment process in India. EIA was first introduced as a regulatory requirement in 1994. EIA reflects the constant struggle to balance economic development with ecological integrity in the context of a developing country. The Courts have developed a rich jurisprudence thereby considerably deepening and widening the EIA process.

Note

The primary aim of EIA procedures is to gauge the potential environmental impact of an economic project so as to allow for measures to minimize that impact. The methodology adopted is that of self-assessment by the project proponent followed by review and project approval by the regulators. The EIA notification[1] was first issued in 1994[2] by the Central Government (Ministry of Environment and Forests (MOEF)) in exercise of its power to take any measure to protect and improve the environment as provided under Section 3 of *the Environment Protection Act, 1986*. It introduced a process for prior environmental approval[3] of certain kind of projects (specified in Schedule 1).[4] The project proponents were required to submit an environmental assessment report, environmental management plan and the details of the public hearing conducted in the vicinity of the project (exceptions to these

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[1] Notification is an executive order passed by a Government Department on any issue and is applicable to the general public. The competence of the executive to pass a notification is always based on a statutory provision.
[2] Environment Impact Assessment Notification S.O.60 (E), dated 27/01/1994. http://envfor.nic.in/legis/eia/so-60(e).html.
[3] The term used in the notification is that of 'environmental clearance'.
[4] These included *inter alia* projects in river valleys, nuclear power, exploration of oil and gas, ports, petroleum refineries, mining (major minerals), thermal power, highway roads etc.

requirements were permitted for certain projects). The MOEF would function as Impact Assessment Agency which could consult a Committee of Experts set up for this purpose.

Three significant changes were initiated through the 2006 amendment[5] that superseded the 1994 notification. First, the decentralization of regulatory functions to State level Environment Impact Assessment Agencies (SEIAAs).[6] SEIAAs were to oversee smaller scale projects (Category 'B') and the MOEF would continue to regulate larger scale projects (Category 'A'). Second, although the final regulatory approval would be decided by the MOEF or the concerned SEIAA, they in turn were to base their approvals on the recommendations of the State Expert Appraisal Committee (SEAC) and the Expert Appraisal Committee (EAC) functioning in the MOEF. Third, the State Pollution Control Boards (SPCB) or the Union Territory Pollution Control Committee (UTPCC) were given the responsibility for conducting the public hearing, taking responsibility away from the project proponents. These three changes were designed to make the appraisal process more streamlined, transparent and independent of politicking.

The Courts have subsequently expanded upon and deepened the impact of these changes through their decisions which developed key aspects of the EIA process.

In *Sterlite Industries (India) Ltd. v. Union of India*[7] the Supreme Court discussed the specific grounds on which administrative action involving the grant of environmental approval could be challenged. The grounds for judicial review were illegality, irrationality and procedural impropriety. Thus the granting of environmental approval by the competent authority outside the powers given to the authority by law, would be grounds for illegality. If the decision were to suffer from Wednesbury unreasonableness,[8] the Court could interfere on grounds of irrationality. Last, an approval can be challenged on the grounds that it has been granted in breach of proper procedure.[9] Nevertheless the Court has not restrained itself, in cases where it found that the SEAC had recommended approvals without any application of

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[5] Environmental Impact Assessment Notification S.O. 1533(E) dated 14/09/2006. http://www.moef.nic.in/legis/eia/so1533.pdf

[6] The growing number of projects requiring environmental approvals along with the need to decentralize the process via engagement of environments departments of the states prompted this step.

[7] 2013 AIR SCW 3231.

[8] The Wednesbury principle means that only an administrative decision that is unreasonable to an extreme degree can be brought under the legitimate scope of judicial review. The principle is generally considered as a reason for courts not to interfere in administrative body decisions. Non-applicability of the principle would imply that courts will be less hesitant in interfering in such decisions.

[9] The procedural breach has to be of a mandatory requirement in the procedure.

mind.[10] Thus in *Gram Panchayat Navlakh Umbre v. Union of India and Ors,*[11] the Court held that the

> *"decision making process of those authorities besides being transparent must result in a reasoned conclusion which is reflective of a due application of mind to the diverse concerns arising from a project such as the present. The mere fact that a body is comprised of experts is not sufficient a safeguard to ensure that the conclusion of its deliberations is just and proper."*[12]

In *Utkarsh Mandal v. Union of India*[13] the Delhi High Court had held that the EAC was bound to disclose the reasons underlying its decision following the principle enunciated by the Supreme Court that quasi-judicial and administrative bodies have to disclose reasons for reaching a particular conclusion. Further the Court has emphasized the need for a detailed analysis of facts and reasoning. The National Green Tribunal (NGT) has held that the

> *"appraisal is not a mere formality and it requires detailed scrutiny by EAC and SEAC of the application as well as the documents filed, the final decision for either rejecting or granting an EC vests with the Regulatory Authority concerned viz., SEIAA or MOEF, but the task of appraisal is vested with EAC/SEAC and not with the regulatory authority."* [14]

In *Samata and Forum of Sustainable Development v. Union of India & Ors* the NGT held that

> *"In order to demonstrate [the] threadbare nature of discussions while considering a project for giving its recommendation, it is essential that the views, opinions, comments and suggestions made by each and every member of the committee are recorded in a structured manifest/ format."*[15]

Conduct of public hearings in an improper manner has also emerged as a common ground for challenging environmental approvals. In *Adivasi Majdoor kisan Ekta Sangathan and Another v. Ministry of Environment and Forest and Others*[16] the evidence of persons who voiced their opposition to the project was not recorded and no summary of the public hearing

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[10] This phrase is frequently used in law to refer to the failure of administrative authority to actively consider all aspects and issues while arriving at a particular decision.
[11] Public Interest Litigation No. 115 of 2010. Judgment of Bombay High Court on June 28, 2012.
[12] Paragraph 26 ibid.
[13] Writ Petition (Civil) No. 9340 of 2009. Judgment of Delhi High Court on November 26, 2009.
[14] Gau Raxa Hitraxak Manch and Gaucher Paryavaran Bachav Trust, Rajula v. Union of India and Others, Appeal No. 47/2012. Judgment of NGT on August 22, 2013.
[15] Appeal No. 9 of 2011. Judgment of NGT (Southern Zone, Chennai) on December 13, 2013.
[16] Appeal No. 3/2011 (T) (NEAA No. 26 of 2009). Judgment of Principal Bench of the National Green Tribunal on April 20, 2012.

was prepared in the local language nor was it made public. Therefore the Court declared the approval invalid.

Attempts at circumvention by breaking up land parcels so as to escape the minimum land area cut off requirement of five hectares for the conduct of EIAs have also been addressed by the Court. In *Deepak Kumar v. State of Haryana and Ors,* [17] referring to the recommendations of the Committee on Minor Minerals,[18] the court underlined that state governments should be discouraged from granting a mining license/lease to plots less than five hectares so as to reduce circumvention and ensure sustainable mining. Further, where land is broken up into smaller parcels, prior environmental approvals should be sought from the MOEF.

The role of private expert bodies and consultants conducting the EIA has also attracted judicial scrutiny. Furnishing of false information by the consultant has been deemed by the Court professional misconduct and it has recommended strict action in such cases.[19]

While all the cases referred to point to issues and approaches to EIA that would be generally recognizable in other States, a further development by the Court in India has involved the confirmation of the role of community actors. In this the Indian Court may be some way ahead of the courts of other States. The Gram Sabha[20] is obligated to safeguard the traditions and customs of the scheduled tribes and other forest dwellers as mandated under both *the Forest Rights Act 2006* and the PESA Panchayats (Extension to Scheduled Areas) Act 1996. Underlining this role of the Gram Sabha in *Orissa Mining Corporation Ltd. v. MOEF and Ors*,[21] the Supreme Court has ruled that the religious rights of individuals and communities to be determined by the Gram Sabha would have to be protected and therefore the decision of the Gram Sabha would have to be considered before the MOEF grants environmental approvals for developmental projects in forests or scheduled areas.[22]

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[17] Special Leave Petition (Civil) No. 19628-19629 of 2009. Judgment of Supreme Court on February 27, 2012.
[18] Committee set up by the MOEF. http://www.indiaenvironmentportal.org.in/files/file/mining_minor%20minerals_sand_India_moef.pdf
[19] V. Srinivasan v. UOI, Appeal No. 18 of 2011 (T), Judgment of Principal Bench of the National Green Tribunal on February 24, 2012.
[20] Section 2 (g) of the Forest Rights Act 2006 defined Gram Sabha as " a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women."
[21] Writ Petition (Civil) No. 180 of 2011. Judgment of the Supreme Court of India on April 18, 2013.
[22] Schedule areas are areas which are declared as such by the President of India. Such areas usually have a preponderance of tribal population and are relatively economically underdeveloped. See http://www.tribal.nic.in/Content/DefinitionofScheduledAreasProfiles.aspx.

Another innovation follows the reservations expressed by a number of courts about the present institutional arrangements governing EIA. Ultimately frustrated by these structural limitations, the Supreme Court (confirming its earlier judgment[23]) has recently ordered the appointment of a national environmental regulator to oversee this process. It held that the:

> *"present mechanism under the EIA Notification … is deficient in many respects and what is required is a Regulator at the national level ….which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances."*[24]

The EIA process is India faces several critical challenges,[25] the primary being the need for greater transparency, ensuring accountability of regulators and improving the quality of public participation. The Court's interventions in various cases have sought to address each of these challenges. The recent order to establish an independent national environmental regulator to oversee the EIA process is a reflection of the Court's frustration with the piecemeal nature of policy reforms and an attempt to provide a clear institutional framework for addressing the existing challenges. Although some may criticize this as an example of the judiciary stepping into the policy sphere, nevertheless the Court's commitment towards making the EIA process more effective deserves to be applauded.

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[23] Lafarge Umiam Mining Private Limited v. Union of India & Ors. ((2011) 7 SCC 338).
[24] T N Godavarman v. Union of India. Order of the Supreme Court on January 6, 2014 in I.A. Nos. I.A. NOs.1868, 2091, 2225-2227, 2380, 2568 and 2937 in Writ Petition (Civil) No. 202 of 1995.
[25] The fact that more than a hundred changes have been made to the EIA process has also contributed to these challenges. See http://www.hindustantimes.com/india-news/environment-impact-assessment-changed-100-times-in-less-than-7-years/article1-1149633.aspx.

PREVENTING AN ECOLOGICAL "CLASS STRUGGLE": THE IMPLICATIONS OF AN IDEOLOGICAL READING OF THE KOKOPELLI CASE

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Abstract

The controversy raised by a judgment delivered by the Court of Justice of the European Union in the case *Kokopelli v. GrainesBaumaux* has much in common with traditional class struggles with environmental groups and seed companies acting as though they belong to competing classes within society. As such, it is an excellent opportunity to assess existing legislation in the field of agro-biodiversity and to emphasize that ideological interpretations are not helpful for the improvement of the normative framework.

Introduction

"The collisions between individual workmen and individual bourgeois take more and more the character of collisions between two classes". It might sound heterodox to use a quote from Karl Marx to introduce a paper on environmental law issues, but the notion of "class struggle" is not as misplaced as it seems when it refers to the radical reactions caused by a judgment of the Court of Justice of the European Union in a dispute between a not-for profit seed association and a seed distribution company for the commercialisation of traditional seed (case C-59/11, *Association Kokopelli v. GrainesBaumaux SAS*, 12 July 2012). The substitution of "not-for profit seed association" for "individual workmen" and "seed distribution company" for "individual bourgeois" describes how the judgment split commentators into "two classes": the self-proclaimed custodians of biological diversity and those who support European Union law tout court, leaving no room for a middle-ground.

Background Information

In January 2008, the Tribunal de Grande Instance de Nancy held that the Association Kokopelli was to pay damages amounting to €10,000 to the seed company Graines Baumaux for unfair competition. Both operated in seed supply and Kokopelli was found culpable for selling seed which was not registered either in the French or in the common catalogue of varieties established by European legislation on the marketing of vegetable

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seed or on the derogatory regime set up for "conservation varieties" and "varieties developed for growing under particular conditions". Kokopelli appealed to the Cour d'Appel, which on February 2011 referred the case to the Court of Justice of the European Union for a preliminary ruling. In particular, the validity of *Council Directives 98/95/EC, 2002/53/EC*, *2002/55/EC* and *Commission Directive 2009/145* was questioned in light of four fundamental principles of the European Union: freedom to pursue an economic activity, proportionality, equal treatment, and the free movement of goods. The French judge added another basis for the evaluation of validity: the commitments arising from the participation of the European Union to the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).[1]

On January 19, 2012 the Advocate General of the Court, Professor Kokott, presented her conclusions: first, the obligations contained in the ITPGRFA were too vague to invalidate the directives. Second, she invoked the power of the Court to dismiss European legislation inconsistent with the Charter of the Fundamental Rights of the European Union to invalidate provisions contained in Article 3(1) of *the Council Directive 2002/55/EC* which established criteria of distinctness, stability and sufficient uniformity to register a seed in the national catalogue. The justification for invalidating the provisions was that they conflicted with Articles 16 (freedom to conduct a business), 20 (equal treatment) and 34 (free movement of goods) of the Charter.

Judgment and Reactions

Unusually, the Court departed from the conclusion of its Advocate General. Although the vagueness of the obligations deriving from the ITPGRFA was confirmed, the proposal to declare Article 3(1) of *Council Directive 2002/55/EC* invalid was refused. The Court emphasized that the provisions contained in Article 3(1) meet the primary objectives of effectively improving agricultural productivity and establishing the internal market for vegetable seed by ensuring its free movement within the Union. In addition, the derogatory regime guarantees the conservation of plant genetic resources while at the same time taking into consideration the economic interests of those traders who offer for sale old varieties not included in the official catalogues. The Court also excluded any breach to the principles of equal treatment, the freedom to pursue an economic activity and the free movement of goods. The potential disadvantages for some were deemed justified in order to obtain the general benefit of increased agricultural productivity.

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[1] (adopted 3 November 2001 entered into force 28 June 2004) 2400 UNTS 303.

The judgment was immediately followed by radical reactions by environmental groups: the Réseau Sémences Paysannes denounced the decision as condemning biological diversity to death following life imprisonment, while other commentators accused the Court of having banned the sale of old seed and outlawed the associations of volunteers involved in the recovery of traditional seed. Those remarks seem however excessive, as an analysis of the sentence pursued without ideological prejudices reveals that if the Court had ruled for the invalidity of Article 3(1), it would have compromised the whole European normative approach to the commercialisation of vegetable seed and challenged the precarious balance found between market and environmental concerns. Thus it appears that the court was bound to make the decision it did.

Two critical remarks can, however, be made on the judgment: on the one hand, *obiter dictum* could have been used to open a debate on the need to modify the current legal framework in a more environment-oriented sense, putting the preservation from biodiversity loss on the same level of commercial interests. On the other hand, the judges should have consulted experts in the field of agro-biodiversity before peremptorily affirming that "the criterion relating to uniformity encourages an optimum yield". The Court's decision leaves no room for account to be taken of recent developments in agriculture showing, for example, that biological complexity helps sustainable development, adaptation to climate change and economic growth. Optimum yield may not, therefore, be the best goal to aim for and indeed it too may be more likely to be obtained through ensuring biological diversity.

Conclusion

Despite the critique above, a middle ground does exist. A non ideological reading of the judgment combined with a careful analysis of European and national legislation reveals a two pronged scheme of preservation for seeds: on the one hand, it is possible to trade in traditional seeds after a free and simple registration in the specific derogatory catalogue. On the other hand, no legislation can prohibit the exchange of seeds for self-cultivation and nourishment. This type of exchange has permitted a flexible, dynamic, non commercial management of agro-biodiversity for decades and it ought to be the main concern of any self-proclaimed not-for profit association. Thus it is possible to see that the Court's decision not only upholds European Union law and not only preserves the interests of agribusiness, but does leave room for preservation of biodiversity.

PETROLEUM DEVELOPMENT: EXCLUDING THE PUBLIC

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Abstract

This article examines how the law excludes the public from decision-making, and thus from formally opposing petroleum development in New Zealand.

This insight piece reports on an interesting, albeit troubling phenomena taking place in New Zealand. Specifically, it addresses the exclusion of the public from decision-making concerning petroleum development. This development contrasts sharply with the long established and wide-ranging requirements for public participation in other areas of environmental management, and jars with the general approach to participatory democracy in New Zealand. The author invites readers to consider the scenario in their own jurisdiction in order to ascertain whether this is a widespread issue, and to provoke debate within the IUCN AEL about the causes, consequences and possible responses to this development.

Within New Zealand, the state owns petroleum in all its forms. Rights to prospect, explore for and take petroleum are allocated via a permitting system determined by the Minister for Energy (*Crown Minerals Act 1991*). There is no public input into these processes. New Zealand's Government aims to increase petroleum production. In the last three years, a number of exploration permits have been granted for deep-water drill sites outside the territorial waters. A condition of an exploration permit is that the holder drills an exploratory well within the five-year duration of the permit.

Offshore petroleum development has proved controversial in New Zealand. The pristine but treacherous oceanic conditions make drilling difficult and the nation has limited capacity to respond to a spill. Petrobras has been granted prospecting and exploratory permits for an area off the Eastern Cape, in the deep waters of the South Pacific Ocean. In April 2011, as part of a protest flotilla organised by Maori iwi against the granting of those permits, Elvis

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Teddy sailed within 20 meters of a Petrobas seismic survey ship causing it to divert from its route. The navy stopped the protest and Mr Teddy was arrested and charged. At first instance the Court dismissed the criminal charges, finding that the section of law the Government was purporting to operate under had no application outside New Zealand's territorial waters. Upon appeal in March 2013, the decision was overturned but leave was granted for the matter to go before the Court of Appeal, with the High Court noting the public importance of the case (*Teddy v Police* [2013] NZHC 756).

The Government reacted swiftly. On 9th April 2013 a law change was introduced that made protesting against minerals exploitation at sea, within the entire area of the exclusive economic zone and territorial waters, a criminal offence (*Crown Minerals Act 1991 ss101A-C*). The change empowered the Government to impose 500 m wide "non-interference zones" around structures and ships. It is now a strict liability offence to enter a non-interference zone without reasonable excuse, enforcement officers have extensive powers of seizure and may arrest without warrant, and the penalty is a fine of up to $10,000.

The manner in which this law change was effected drew condemnation from many sectors. It was introduced via a "supplementary order paper" (a process reserved usually for minor technical amendments to Bills) thus avoiding any opportunity for public input and parliamentary scrutiny. The change to the law was enacted within 7 days and narrowly approved by a one-vote majority. Concern has been expressed as to the legality of the substantive provisions (Duncan Currie *Opinion on Proposed Amendments to the Crown Minerals (Permitting and Crown Land) Bill* 5th April 2013 at http://www.greenpeace.org/new-zealand/en/press/Government-Bid-to-Criminalise-Sea-Protests-Slammed/).

Additional legislative amendments have been introduced that have the effect of silencing further any opposition to offshore petroleum development. Amendments to *the Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2011 (EEZA)* are particularly note-worthy.

Prior to 2011, there was no environmental regulation of activities in the exclusive economic zone but following Deepwater Horizon the Government fast-tracked the EEZA (legislation that had hitherto been languishing at the policy development stage for over a decade). The Act creates an environmental permitting regime for the exclusive economic zone. Activities are classified as permitted, discretionary, or prohibited. Discretionary activities require a marine permit from the Environmental Protection Agency (EPA), a full environment impact

assessment is required, and the EPA must be satisfied that the applicant can "remedy, mitigate or avoid" any adverse effects on the environment posed by the activity (EEZA s 10).

Initially, well drilling was classified as a discretionary activity. The EEZA has been heavily criticised but one feature, supported by all parties at the time of enactment, was that discretionary activities would be fully notified. This meant that any member of the public was entitled to make submissions on an application, mirroring the wide approach to public participation in other environmental management regimes in New Zealand.

However, on 28th August 2013, the Government proposed introducing a new category of "non-notified consent" for exploratory drilling (Ministry for Environment (2013) *Classifications under the EEZ Act: A discussion documents on the regulation of exploratory drilling, discharges of harmful substances and dumping of waste in the Excusive Economic Zone and continental shelf,* Wellington, New Zealand). The justification given was "the cost to applicants and likely impact on investor certainty of the discretionary consent process are disproportionate, given the nature of exploratory drilling and its likely impacts" (at 13). The timeframes for public consultation on the new proposals were truncated, and the primary legislation was amended in October 2013 (EEZA s 29C). The effect is to lock the public out of all decision-making concerning exploratory offshore drilling.

Concern is now being raised as to the lack of transparency surrounding decision-making. On 26th November 2013, Greenpeace filed for judicial review of the EPA's decision to approve Anadarko's exploratory drilling programme off the Raglan coast (*Greenpeace NZ Inc v The Environmental Protection Authority* CIV 2013-485-9572, (HC) Wellington, 9th December 2013). Note that the New Zealand High Court has inherent jurisdiction to review the decisions of public bodies for legality, and adopts a liberal approach to standing. Responsible environmental organisations, representing a relevant aspect of public interest, will be granted standing (see for example, *Environmental Defence Society Inc. v South Pacific Aluminium Ltd* (No3) [1981] 1 NZLR 216 (CA)). The application by Greenpeace claims that the EPA had not seen Anadarko's Discharge Management and Emergency Response Plans for the Raglan coast drilling, which are critical parts of the environmental impact assessment. The EPA responded that Maritime New Zealand had seen these documents and would be the appropriate agency to respond to a spill. Maritime New Zealand has resisted public disclosure of these documents, insisting that any interested persons apply under the *Official Information Act 1982*. This process serves to delay the release of the Plans until after the well has been drilled (http://business.scoop.co.nz/2013/11/26/correct-greenpeace-hauls-down-flag-at-sea-heads-

for-court/ accessed 19.12.13). It remains to be seen whether the High Court will find the EPA's procedures to be legal.

To conclude, New Zealand is regarded as a liberal country with meaningful participatory democracy, and New Zealanders have a proud tradition of protesting against perceived social wrongs. It is the combination of these factors that makes the present approach to petroleum development so incongruent.

The author would like to invite IUCN AEL members who have researched or written papers on the issues raised here from the perspective of their own jurisdictions, to contact her.

RECENT DEBATES ON THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY BEYOND AREAS OF NATIONAL JURISDICTION, INCLUDING MARINE GENETIC RESOURCES

ROSER PUIG-MARCÓ*

Abstract

This insight offers a brief up date of the recent debates on issues relating to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (ABNJ) - in particular on marine genetic resources. The debates were held at the United Nations General Assembly and mainly within the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (Working Group).[1] It also presents the steps set out by the General Assembly towards developing a possible international instrument under the United Nations Convention on the Law of the Sea for areas beyond national jurisdiction.

Recent Debates at the United Nations General Assembly

In 2011 the General Assembly, pursuant to resolution 66/231[2] initiated, within the Working Group, a process

> *"with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea".*

This process is mandated to address the conservation and sustainable use of marine biodiversity in ABNJ, "in particular, together and as a whole, marine genetic resources,

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[1] The Ad Hoc Open-ended informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction was established by the United Nations General Assembly in resolution 59/24 of 17 November 2004.
[2] UN Doc. A/RES/66/231, resolution adopted by the General Assembly on 24 December 2011.

including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology".[3] The process will take place in the existing Working Group and in the format of inter-sessional workshops aimed at improving understanding of the issues and clarifying key questions as an input to the Working Group.

A year later, in resolution 67/78[4] the General Assembly recalled the United Nations Conference on Sustainable Development (Rio +20) and its outcome document "The future we want", where

> *"States committed to address, on an urgent basis, building on the work of the Ad Hoc Open-ended informal Working Group and before the end of the sixty-ninth session of the General Assembly, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the United Nations Convention on the Law of the Sea".*

In accordance with the terms of reference annexed to resolution 67/78, two inter-sessional workshops were convened in May 2013. The workshop on marine genetic resources included eight panels which addressed, *inter alia*, the following issues: meaning and scope; extent and types of research, uses and applications; impacts and challenges to marine biodiversity beyond areas of national jurisdiction; access-related issues and types of benefits and benefit-sharing; intellectual property rights issues; and capacity-building and the transfer of marine technology.[5] It was reported by the Co-Chairs of the Working Group that the workshops provided valuable scientific and technical expert information as an input to its work.[6]

The Working Group held its sixth meeting from 19 to 23 August 2013. Discussions focused on the conservation and sustainable use of marine biodiversity in ABNJ and in the identification of gaps and ways forward to ensure an effective legal framework, taking into

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[3] UN Doc. A/RES/66/231, paragraph 167. See Annex Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction**.**

[4] UN Doc. A/RES/67/78, resolution adopted by the General Assembly on 11 December 2012, at paragraph 181.

[5] Detailed information on the methods and organization of work of the inter-sessional workshops can be found at UN Doc. A/AC.276/6. Reports and abstracts presented at the workshops are available at http://www.un.org/depts/los/biodiversityworkinggroup/intersessional_workshop_2013.htm (accessed 1st April 2014).

[6] UN Doc. A/68/399, Letter dated 23 September 2013 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Annex.

account the discussions at the previous meeting, as well as the input provided by the inter-sessional workshops.[7]

As regards marine genetic resources, the letter from the Co-Chairs notes in paragraph 27 the diverging views between delegations on whether or not marine genetic resources of the Area are to be considered part of the common heritage of mankind.[8] In paragraph 28 the Co-Chairs report that the suggestion was made "that international regulations on the sharing of benefits arising from the utilization of marine genetic resources beyond areas of national jurisdiction should be discussed separately from marine scientific research". The report also notes in paragraph 29 the view expressed that there are still major obstacles to benefit sharing, including the fact that it is difficult to identify the various uses and origin of the resources. As reflected in the Co-Chairs summary of discussions, there seems to be a growing consensus that access and benefit-sharing related to marine genetic resources is a key issue that should be addressed, including in any future normative instrument;[9] and on the importance of intellectual property rights for understanding how the exploitation of genetic resources is carried out.

The plenary of the Working Group adopted a number of recommendations for consideration by the General Assembly at its 68th session by consensus.

On December 2013, at its 68th session, the General Assembly requested the Working Group make recommendations to the Assembly on the scope, parameters and feasibility of an international instrument under the Convention in order to prepare for the decision to be taken at its 69th session. To this end, it requested the Secretary-General to convene three

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[7] For a summary of the discussions on identification of gaps and ways forward with a view to ensuring an effective legal framework for the conservation and sustainable use of marine biodiversity in ABNJ see UN Doc. A/68/399, Annex paragraphs 39 to 51.

[8] A comprehensive review of the many differing views on the relevance of the common heritage of mankind to the debate surrounding marine genetic resources in ABNJ can be found in Leary, D. K., 'Moving the Marine Genetic Resources Debate Forward: Some Reflections' (2012) 27(2) The International Journal of Marine and Coastal Law 435, 448. The author puts forward a draft provision, based on article IV of the Antarctic Treaty, which "might be one possible way to help to bridge the ideological divide on the common heritage issue".

[9] For an assessment of the options within existing legal frameworks for accommodating an access and benefit-sharing system from marine genetic resources originating from ABNJ and suggestions to move the international debate forward, see Drankier, P., Elferink, A. G. O., Visser, B., and Takács, T., 'Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit-Sharing' (2012) 27(2) The International Journal of Marine and Coastal Law 375, 433. See also Broggiato, A., Arnaud-Haond, S., Chiarolla, C., Greiber, T., 'Fair and equitable sharing of benefits from the utilization of marine genetic resources in areas beyond national jurisdiction: Bridging the gaps between science and policy' (2014) Marine Policy (in press, corrected proof).

meetings of the Working Group,[10] and the Working Group to invite "Member States to submit their views on the scope, parameters and feasibility of an international instrument under the Convention".[11] This information will be compiled into an informal working document that will be updated and circulated prior to subsequent meetings with the aim of informing the deliberations of the Working Group.

The General Assembly also recognized the "abundance and diversity of marine genetic resources and their value in terms of the benefits, goods and services they can provide" and "the importance of research on marine genetic resources for the purpose of enhancing the scientific understanding, potential use and application, and enhanced management of marine ecosystems".[12]

Steps Towards a Negotiation of a Possible International Instrument

The General Assembly has marked the start of possible negotiations on a new international agreement for ABNJ by asking States to submit their views on its scope, parameters and feasibility. The resulting informal working document has the potential to evolve into a common ground for negotiations, if on September 2015 the General Assembly decides on the need to develop an international instrument under the United Nations Convention on the Law of the Sea. A range of different mechanisms and options has been put forward for better governance of marine biodiversity in ABNJ,[13] and there are many legal issues at stake that have to be discussed taking account of the scientific and technical information available. The next meetings of the Working Group, as recently stated by a UN legal counsel, "present a clear opportunity to try and overcome remaining differences and to crystallise the areas of convergence into concrete action".[14]

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[10] The meetings will take place from 1 to 4 April and 16 to 19 June 2014 and from 20 to 23 January 2015.
[11] UN Doc. A/RES/68/70, resolution adopted by the General Assembly on 9 December 2013, at paragraph 201.
[12] Idem, at paragraphs 202 and 203.
[13] A detailed three policy recommendations on how to advance the governance of marine biodiversity in areas beyond national jurisdiction can be found in Ardron, J., Druel, E., Gjerde, K. M., Houghton, K., Rochette, J., and Unger, S., 'Advancing Governance of the High Seas' (2013) 6 IDDRI Policy Brief. See also Gjerde, K. M., Currie, D., Wowk, K., and Sack, K., 'Ocean in peril: reforming the management of global ocean living resources in areas beyond national jurisdiction' (2013) 74(2) Marine Pollution Bulletin 540, 551.
[14] UN News Centre, *At UN, countries to consider need for global instrument to protect marine biodiversity*,http://www.un.org/apps/news/story.asp?NewsID=47492&Cr=ocean&Cr1=#.Uz1yXs40opk, 2 April 2014.

In light of the threats facing our oceans, the time has come to address the fragmented and inadequate management of marine biodiversity in ABNJ. There is still time for the required political discussions that have to lead to an agreement on the scope, parameters and feasibility of a future international instrument under the Convention on the Law of the Sea. Recent debates indicate, at least, that States are conscious of the need to tackle these pressing issues, and that they have started thinking of the many possible ways to address the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. While these processes are ongoing more pragmatic action could be adopted. It may be possible to enhance the coordination and coherence among the numerous instruments and bodies that currently have a mandate over biodiversity in ABNJ.

COUNTRY REPORT: AUSTRALIA

SOPHIE RILEY*

The most significant developments over the last year in Australia have centred on three areas: first, the challenge by Australia in the International Court of Justice to Japanese whaling in the Southern Ocean; second, the continuing debate about energy matters including the carbon tax and mining; and third, the streamlining of development approval processes by the Federal Government and also by the New South Wales (NSW) Government. The issues raised by these matters comprise a mix of policy, legislation and court cases, and are dealt with in the first part of this report. The second part of the report provides a short critique of these developments. It should also be noted that following a change of Federal government in September 2013, the former Department of Sustainability, Environment, Water, Population and Communities is now known as the Department of the Environment, and will be referred to as such.

Part 1 – Recent Developments in Policy, Statute and Case Law

1.1 Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)

In May 2010 Australia commenced proceedings in the International Court of Justice (ICJ), against Japan's continued whaling in the Southern Ocean.[1] New Zealand intervened in 2012 in support of Australia's position.

Globally, whaling operations are administered in accordance with *the International Convention for the Regulation of Whaling (ICRW)*. Article VI(c) of that convention provides for the establishment of Whale Sanctuaries; while Article VIII allows governments to grant their nationals a permit to kill, take or treat whales for scientific research. In 1985 the International Whaling Commission (IWC) agreed to a moratorium on commercial whaling, but the moratorium would not apply to scientific research conducted in accordance with Article VIII of the ICRW. Additionally, in 1994, the IWC established the Southern Ocean Whale Sanctuary.

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[1] Whaling in the Antarctic (Australia *v.* Japan: New Zealand intervening). Case available from http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&code=aj&p3=1 .

Both before and after 1994, Japan had set up whale research programs, to be conducted in the Southern Ocean under the rubric of 'JARPA'. The first JARPA continued until the 2004-5 season, while JARPA II was designed to run from 2005-2013. Australia contends that JARPA II breaches the ICRW.

Australia's main arguments center on whether JARPA II is truly a scientific program, or is instead a guise for commercial whaling. If JARPA II is the latter, then according to Australia it not only breaches the moratorium on commercial whaling but it also breaches the ban on commercial whaling in the Southern Ocean Whale Sanctuary. In making this argument Australia considers that differences between JARPA and JARPA II are significant. For example, JARPA concentrated on the hunting of minke whales in numbers of approximately 400 per season. By way of contrast, JARPA II authorises the hunting of minke, fin and humpback whales. The Antarctic minke whale, fin whales and humpback whales are listed by *the Convention on International Trade in Endangered Species, (CITES),* and are also found on the IUCN Red List of Threatened Species. Accordingly, in addition to arguments based on the operation of the ICRW, Australia also claims that JARPA II breaches CITES and hastens the threatened status of the species in question.

Japan disputes these allegations and states that its activities accord with the scientific exception contained in Article VIII of the ICRW; and that furthermore, the JARPA II program has produced valuable scientific outputs. The proceedings closed in July 2013 and a decision is expected early in 2014.

1.2 Energy Matters: Carbon Tax and Mining

Climate change and energy matters continue to be contentious in Australia. The new Federal government, led by Prime Minister Tony Abbott, has already released draft legislation to change Australia's carbon regime. In addition, at both the state and federal levels, recent developments indicate that governments are willing to prioritize mining interests above environmental and social concerns.

Carbon Tax

In 2011, the Gillard government passed the *Clean Energy Act 2011*. A key feature of this legislation was the Carbon Pricing Mechanism that commenced on 1 July 2012 and was due to end on 30 June 2015. The mechanism imposed a fixed price per ton of carbon emitted, to be paid by 500 of the nation's highest polluters. On 1 July 2015 the scheme would have

converted to a trading scheme that was fully market-based. In 2011, the then leader of the opposition, Tony Abbott pledged that he would repeal the carbon tax. A draft exposure of the new laws was released on 15 October 2013 and was open for public comments until the beginning of November.[2] The laws will repeal the carbon tax from 1 July 2014 and abolish the office of the Climate Change Authority (CCA).

The repeal of the carbon tax is being promoted as necessary in order to lower business expenditure and ease the cost of living for families. The carbon tax will be replaced by the introduction of a 'Direct Action' plan. Pursuant to this scheme, the government will create a fund to pay industry for reducing emissions. Although full details of the scheme have not yet been released, the Direct Action plan has already drawn criticism from economists and academics.[3]

The proposed abolition of the CCA is also troubling. The rationale behind this move is that once the carbon tax is repealed '[m]any of the functions currently performed by the Authority will not be needed'.[4] Yet, the functions of the CCA include making recommendations on emissions reduction goals as well as evaluating Australia's progress towards these goals and also its international obligations. In its first draft report, *'Reducing Australia's Greenhouse Gas Emissions: Targets and Progress Review Draft Report,'* the CCA noted that Australia could do more to meet its international obligations and that its current emissions reduction targets are not adequate.[5]

It is not clear whether these changes will have an easy passage through the Australian parliament. Abbott's government does not yet control the upper house and amongst the other parties, neither the Labor Party nor the Greens support the amendments.

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[2] The draft laws were released on the web site of the Office of the Environment: http://www.environment.gov.au/carbon-tax-repeal/consultation.html.

[3] See for example, report in the Sydney Morning Herald, by Matt Wade, Gareth Hutchens, ' Tony Abbott's New Direct Action Sceptics' 28 October 2013, available from http://www.smh.com.au/federal-politics/political-news/tony-abbotts-new-direct-action-sceptics-20131027-2w9va.html#ixzz2jGBpuh1f; Stephen McGrail, 'Climate Action Under an Abbott Government', 10 May 2013, available from http://researchbank.swinburne.edu.au/vital/access/manager/Repository/swin:32811.

[4] Department of the Environment, Fact Sheet 'Repealing the Carbon Tax', available from http://www.environment.gov.au/carbon-tax-repeal/index.html.

[5] Climate Change Authority, 'Reducing Australia's Greenhouse Gas Emissions: Targets and Progress Review Draft Report,' Australian Government, (2013), see 'Executive Summary' section. Available from http://climatechangeauthority.gov.au/content/reducing-australia%E2%80%99s-greenhouse-gas-emissions-targets-and-progress-review-draft-report-0.

Mining

In February 2013 the then Minister for the Environment, Tony Burke, approved a series of coal and coal seam gas developments, predominantly located in New South Wales. It is estimated that these developments would have had the potential to add approximately 47 million tons of greenhouse gases a year to Australia's emissions.[6] For these reasons the approvals were condemned by the NSW Greens and environmental groups, such as, the Nature Conservation Council of NSW.

Residents in the vicinity of one of these developments, the Maules Creek Mine in the Narrabri area, commenced legal action. They formed an association known as the 'Northern Inland Council for the Environment' that became the plaintiff in the litigation. The case was run by the EDO (Environmental Defender's Office) on behalf of the Inland Council. The latter argued that the approval process was discredited because the Minister rushed his decision and did not take into account important environmental impacts. These included the fact that the open cut mine would impact negatively on the Box-Gum ecosystem, which has been listed as an endangered ecological community under the NSW *Threatened Species Conservation Act 1995* and also as a critically endangered ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The case was heard on 16 September 2013 by Cowdroy J who reserved his decision, which has not yet been handed down. On 25 September Griffiths J in the Federal Court of Australia refused an interlocutory injunction to restrain the mine operator from carrying out works in accordance with the original approval pending the decision of Cowdroy J. His Honor Griffiths J stated that while the case presented serious issues, the Plaintiff's case for the interlocutory injunction was not strong.[7] Mining litigation elsewhere, however, has gone against the proponents of the mine.

A case in point is the decision in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. The litigation involved an appeal to the Land and Environment Court against Warkworth Mining Limited and the Minister for Planning and Infrastructure on the basis that approval for

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[6] See posting 'Gas and Coal Plans Approved by Burke', Natural Resources Review 19 Feb 2013, available from http://nationalresourcesreview.com.au/2013/02/gas-and-coal-plans-approved-by-burke/.

[7] Northern Inland Council for the Environment Inc v Minister for the Environment, Heritage and Water [2013] FCA 993 (25 September 2013), available from http://www.austlii.edu.au/au/cases/cth/FCA/2013/993.html.

expansion of the mine did not adequately take into account environmental and social consequences.

In 1981 Warkworth received approval to conduct an open cut coal mine in the Hunter Valley of New South Wales. Although the original approval was given in 1981, at the time of the hearing the mine operated under approval DA 300-9-2002-1 issued by the Minister for Planning in May 2003. The 2003 approval was subject to a biodiversity offset, which meant that part of the land on which the mine operated could not be disturbed. In seeking to expand its operations, Warkworth would have mined closer to residential areas and also in the biodiversity offset area. Nevertheless, the Minister approved the mine's expansion, but subject to a number of conditions that were designed to protect biodiversity in general and several endangered ecological communities.

The Land and Environment Court held that the conditions were inadequate and refused the application to expand the mine. Preston CJ noted that there were significant adverse impacts relating to 'biological diversity, noise and dust, and social impacts' that were inadequately addressed by the Minister's approval.[8] Furthermore, his honour noted that the economic evaluations provided by Warkworth did not address these issues appropriately.[9] Warkworth appealed this decision. The appeal was heard in August 2013 and the judgment was reserved. In the interim, the New South Wales Government has passed a legislative amendment, *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* that will prioritise mining projects above environmental and social matters.

Clause 12AA of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* now provides that the aims of the policy are to promote the development of significant mineral resources, a matter that is to be determined by the project's economic benefits and consideration of whether 'other industries or projects are dependent on the development of the resource.'[10] The amendments have raised economic issues to a level that arguably conflicts with principles of ecologically sustainable

[8] Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48, paragraph 14 Available from: http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=164038.
[9] Ibid, paragraphs 14-20.
[10] State Environmental Planning Policy (mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013, clause 12AA(4).

development, including the precautionary principle.[11] These concerns are further reinforced by clause 12AA(4) that creates a test of proportionality, pitting environmental and societal concerns against the significance of the resource.[12]

In Western Australia, the decision in *The Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307 has similarly been decided against the Western Australian Government. The Government was the proponent of a $AU40 billion natural gas hub at James Price Point in the Kimberley region of that state. Before the case was heard, 'Woodside', the operator of the mine, shelved plans to develop the mine due to cheaper alternatives becoming available through fracking. Accordingly, the plaintiffs in the litigation who were the Wildness Society, and a traditional owner, were content to withdraw the proceedings. However, the Western Australian government wished the case to proceed. They pointed out that they were the proponents, and that Woodside was merely the operator. The government was keen to source another operator, hence the decision in the case would be crucial those plans.

The Plaintiff's argument proposed that the approval was improper and invalid under the *Environmental Protection Act 1997 (WA).* Martin CJ held that three of the approvals were unlawful because the chair of the Environmental Protection Authority (EPA) made the decisions sitting on his own, due to the fact that the other four members of the Authority's board had declared conflicts of interest. In these circumstances, the court held that the chair 'did not validly discharge the obligation imposed upon the EPA by s 44 of the Act'.[13] The WA state government is considering its options, but continues to purchase land in the James Price Point area in the hope of developing the gas hub.

Water Trigger

Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) restricts a person from taking any action that is likely to have a significant impact on matters of national environmental significance without first obtaining consent from the Minister of the Environment. In June 2013, the Federal Government amended the EPBC Act by adding section 24D, in effect providing what is known as a 'water trigger'. The section

[11] The Law Society of New South Wales, Young Lawyers, Environment and Planning Law Committee, Submission on the State Environmental Planning Policy (mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 NSW Young Lawyers, (2013) at 5. Available from http://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/763290.pdf.
[12] Ibid.
[13] The Wilderness Society of WA (Inc) v Minister for Environment, paragraph 286.

applies to large-scale coal mines and coal seam gas extraction where such developments will have a significant impact on water resources. Any such proposed developments are now a matter of national environmental significance, and require approval from the Minister for the Environment. Section 24D applies to developments proposed by the Commonwealth and Commonwealth agencies as well as trading corporations within the meaning of section 51(xx) of the Australian Constitution. As the Bills Digest entry notes:

> *The practical effect of this amendment would be that the Minister would have the power to impose water specific conditions on large coal mining and coal seam gas projects, whereas at present this power is limited to conditioning water impacts only to the extent that any such impacts relate to an existing matter of national environmental significance protected by the EPBC Act.*[14]

This is a promising development, yet seems at odds with streamlining of approvals being promoted at both the Federal level and also by some state governments.

1.3 Streamlining Approvals

The newly-elected Federal Government is working at a policy level with the State Governments to streamline development approvals to circumvent 'green tape.' It proposes to do this by way of bilateral agreements in the form of Memoranda of Understanding. It also appears that the first bilateral agreement has been signed with the Queensland Government.[15] Section 45 of *the EPBC Act* envisages the use of bilateral agreements that incorporate State environmental processes; and section 45(4) provides that the Minister needs to publish the agreement 'as soon as practicable.' The agreement with Queensland has reportedly been signed, but a copy has not been released. This is somewhat problematic given the fact that the Memorandum of Understanding with Queensland is the first agreement and will undoubtedly serve as a precedent for similar arrangements**.** The use of bilateral agreements may also present a further difficulty as any environmental benefits flowing from the evaluation process will depend on the inclusivity of mechanisms at the state level. If the following changes, proposed by the NSW Government, are an indication there is cause for much concern.

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[14] Environment Protection and Biodiversity Conservation Amendment Bill 2013, Bills Digest no 108 2012-13, available from http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd108.

[15] Andrew Powell, Minister for Environment and Heritage Protection, media release 'One Step Closer to Streamlining Environmental Approvals', released 25 September 2013, available from http://statements.qld.gov.au/Statement/2013/9/25/one-step-closer-to-streamlining-environmental-approvals.

In October 2013 the NSW Government introduced two bills into Parliament: *the Planning Bill 2013*; and *the Planning Administration Bill 2013*. These bills are part of a design to overhaul planning laws in NSW and will replace the *Environmental Planning and Assessment Act* 1979. One of the main areas of concern stems from the removal of community rights and merits review. In a submission to the NSW Government on the proposed changes, the EDO had this to say:

> *…there is a fundamental imbalance in relation to merits review and appeal rights as proposed. While there are expanded rights for proponents and developers, community review and enforcement rights are restricted by the draft legislation. Under the guise of giving the community new upfront engagement rights, existing review rights are being removed.*[16]

The amendments have passed through the lower house and have been introduced into the upper house, where they are expected to become law by early 2014.

Part 2 – A Critical Consideration of Recent Domestic Developments

Recent policy and legislative changes evince a discernable trajectory towards juxtaposing environmental matters against industry and development. The effect is to erode the notion of 'sustainability' from the concept of sustainable development. To start with, governments have shown that they are not averse to using legislation to overthrow a court's interpretation of the law. *The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* provides a clear example. These amendments were introduced after the decision in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* and overcome the reasoning of Preston CJ in that case. As already noted, his Honour found that economic issues should not necessarily trump environmental and social ones, yet that result is precisely what the amendments promote.

In an analogous manner, policy at the Federal level that adopts State environmental impact procedures has the potential to whittle away community participation if State processes are not based on a solid foundation of open justice. In late 2012, for example, the NSW State government embarked on a path to remove much of the funding given to the EDO.[17] If this is considered in the light of the same government's proposed changes to the planning laws, it

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[16] EDO, *NSW White Paper Submission – Executive Summary*, June 2013, available from http://www.edo.org.au/edonsw/site/pdf/pubs/130621EDONSWWPSubmission_ExecSummary.pdf.
[17] Sophie Riley, 'The Last Word: Environmental Justice in NSW', (2013) 18 (1) *Alternative Law Journal* 68.

is clear that these revisions will severely curtail the rights of citizens to participate in environmental decision-making and environmental review. This is not a welcome change, especially in view of the fact that litigation discussed in this report has been undertaken by concerned individuals and/or community groups. The troublesome state of Australia's planning laws is underscored by the near-miss Australia has had with the threat by UNESCO to classify the Great Barrier Reef as being in danger.[18] Although Australia narrowly avoided this embarrassment, UNESCO did voice concern with 'coastal development and intensification and changes in land use within the GBR catchment'.[19] These matters squarely rest on the design and implementation of adequate and appropriate planning laws.

It is perhaps a somewhat cynical observation that while Australia is quick to point the finger at Japanese whaling, Australia appears far less concerned with environmentally-damaging activities where those activities benefit the Australian economy. The promotion of economic matters also appears to be at the heart of alterations to Australia's climate change regime. Regrettably, Australia appears to be losing its environmental compass, something it needs to monitor carefully.

[18] See, UNESCO: Committee Decisions, 37COM 7B.10 Great Barrier Reef (Australia) (N 154), available from http://whc.unesco.org/en/decisions/4959.
[19] UNESCO 'Great Barrier Reef', available from http://whc.unesco.org/en/list/154.

COUNTRY REPORT: THE BAHAMAS

Access to Environmental Information, EIAs and Public Participation in Development Decisions

LISA BENJAMIN*

It seem the Council dem tek a big liberty,
Them called up man with machinery,
They tear down the front line vicinity,
But not a word was said to da community,
So evening come; the youth get angry,
Start trow firebomb in da old property. – In A Mi Yard, Papa Levi

Introduction

This report will be a brief overview of two series of cases in The Bahamas dealing with access to environmental information and public participation in development decisions. At the time of these cases, and to date, there is very little domestic environmental legislation governing the process and content of environmental impact assessments or public participation in developmental decisions. In addition, as a small jurisdiction, there are not many environmental decisions which come before the judiciary in the Bahamas, and therefore these two series of cases constitute important environmental legal developments in the jurisdiction. The first case was brought by residents of Great Guana Cay which culminated in a Privy Council decision in 2009. The Guana Cay decision formed an important judicial precedent to the most recent case involving Wilson City in Abaco. The final appeal of this case was dismissed by the Privy Council in May 2013. These national cases build on recent Caribbean jurisprudence regarding access to environmental information and EIAs, and a short summary of this regional jurisprudence is provided as background information.

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Regional Cases

The BACONGO Challilo Dam Case

The outcome of a series of cases brought by a coalition of environmental NGOs, the Belize Alliance of Conservation Non-Government Organizations (or BACONGO), against the Department of the Environment and the Belize Electricity Company Ltd., has had significant influence in the region. BACONGO brought an action to quash the decision of the Department of the Environment to approve the building of a hydroelectric plant in the Chalillo Dam of the Macal River. This development was anticipated to flood an area of pristine and rare biological diversity along the river and to displace local inhabitants. Under the 1995 Environmental Impact Assessment Regulations, the Department of the Environment was to carry out an EIA, and the National Environmental Appraisal Committee (or NEAC) was to review the EIA, advise the Department on its adequacy, and advise whether a public hearing on the EIA was necessary. Justice Conteh in the High Court supported the notion that the EIA is meant to be an iterative process, and decided that the project was so significant that the Department of the Environment should have required a public hearing on the project itself.

On appeal, the Court decided that although it was arguable that the Department of the Environment had acted unreasonably, given the wide public consultation and the fact that stopping the project would seriously prejudice the government and investors, they decided not to order a public hearing.

Belize, like The Bahamas, is a commonwealth country and an appeal was made to the final court of justice, the Privy Council. In this decision further facts regarding the incompleteness of the EIA, which had been concealed by the developers, were brought to light. One of the members of the NEAC, Mr. Cho, had disputed the statement in the EIA that the ground of the valley upon which the dam would be built was made of granite. Despite this, the NEAC decided it would approve the EIA as it was. The Privy Council issued a split three to two decision on the case, with Lord Hoffman delivering the majority opinion not to order a public hearing or overturn the Department of the Environment's decision to approve the project. Lord Hoffman argued that any defects in the EIA could be cured by follow up monitoring of the project. Lord Walker delivered a powerful dissenting opinion, stating that the EIA was based on a previous survey that was so full of fundamental errors that it should not be relied upon, and that it was unreasonable to withhold fundamental geological facts from the public.

The majority opinion in the BACONGO case has served as a precedent for other common law cases in the region, but has been critiqued.[1] The considerable deference provided by the judiciary to developers and the government for projects already underway has also become influential in regional jurisprudence as later cases will demonstrate.

The Fishermen and Friends of the Sea Cases

From 2002-2005 two series of cases were brought in Trinidad and Tobago by Fishermen and Friends of the Sea (F&FS) against the Environmental Management Authority (EMA) regarding liquified natural gas (LNG) facilities. These cases appeared to adopt the majority opinion of the Privy Council in the *BACONGO* case, and provide useful regional guidance on whether continuing public consultation is required.

In 2002 F&FS brought an action to judicially review the decision of the EMA to issue a certificate of environmental clearance (CEC) to a company to pipe LNG from an offshore drilling platform to an LNG industrial complex.[2] The EMA had failed to carry out public consultation on the project. In the High Court Justice Bereaux refused the application for judicial review, although he acknowledged that the issue of public interest had caused him significant anxiety, as the case involved the lives and wellbeing of approximately 110,000 people. In a majority opinion, the Court of Appeal upheld Bereaux's decision not to review the EMA's approval, relying on 'good administration', deference to affairs of the state and to the oil and gas industry.[3] On appeal to the Privy Council, Lord Walker criticized Bereaux's opinion.[4] According to Walker, Bereaux had not paid sufficient attention to the need for public consultation, which Walker stated was of high importance in a democracy.

In a 2004 dispute brought by F&FS against the EMA and a different company, Atlantic LNG, the EMA exercised its discretion not to hold a further consultation after issuing the CEC. Justice Stollmeyer of the High Court stated that the rules of natural justice do not require that a formal, oral hearing take place in public and include no requirement for ongoing public debate.[5] These decisions demonstrate a judicial deference to good administration and

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[1] Francis Botchway, 'Privy to Unsustainable arguments in the Belize Dam Case' (2006) 8(2) ELR 144.
[2] Re: Fishermen and Friends of the Sea (2002) TT HC 148.
[3] *Fishermen and Friends of the Sea v The Environmental Management Authority et al* (2003) TT CA 45 The dissenting judgment by Lucky in this case criticized this deference to potential hardship caused to the company, and that environmental concerns should have been fully addressed.
[4] Fishermen and Friends of the Sea v The Environmental Management Authority and BP Trinidad and Tobago LLC (2005) TT PC 15.
[5] Fishermen and Friends of the Sea v Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (2004) TT HC 113.

private industry over the right of the public to be consulted, reflecting the majority opinion in the BACONGO case.

The Pear Tree Bottom Case

There is only one Caribbean case to date which takes up the minority opinion in the *BACONGO* case, the 2006 Supreme Court decision of *Northern Jamaica Conservation Association v Northern Resources Conservation Authority and National Environment and Planning Agency (No.1).*[6] The dispute involved an application to quash the decision of the National Resources Conservation Authority to issue a permit to construct a 2,000 room hotel in an area of rich biodiversity called Pear Tree Bottom in Jamaica. In comparing Lord Hoffman's majority opinion and Lord Walker's minority opinion in the *BACONGO* case, Justice Sykes stated a clear preference for the latter. In this dispute the EIA was posted on the government's website but was missing a marine ecology report which was never disclosed to other government agencies or the public. Justice Sykes decided that the public had a legitimate expectation to be told that the EIA was incomplete, and be provided with the rest of it when it was available. He stated, 'The people of Jamaica are entitled to be properly informed about the project by being given full and accurate information…concealing information and failing to disclose its existence will undermine public confidence in the decision making process.'[7]

Recent Bahamian Case Law

The Great Guana Cay Cases

Great Guana Cay is a small cay in the chain of islands called The Abacos in The Bahamas. Residents on Great Guana Cay include a number of expatriates who own second homes there, and Bahamians who make their living through fishing, the rental industry, restaurants, dive shops and bed and breakfast establishments.

The Supreme Court decision by Justice Carroll sets out the facts of the case. The applicants consisted of hundreds of landowners and residents of Great Guana Cay. One of the orders they sought was an order of mandamus requiring that the respondents conduct a full and proper public consultation prior to the Government of The Bahamas granting or issuing any

[6] (2006) JM SC 49.
[7] Ibid, para 115.

leases or approvals, and to prohibit construction until an environmental management plan was completed. The government had already entered into a Heads of Agreement (HoA) on 1 March 2005 with the developers. The proposed development, Baker's Bay Golf & Ocean Club, included 400-500 residential units, a 240 slip marina and eighteen hole golf course within a private, gated community which would extend to cover over half of Great Guana Cay.

At the time of the dispute there was no statute which provided for the undertaking of an EIA, access to environmental information or public consultation procedures; rather it was the practice of successive governments to ask a developer to undertake an EIA. This was usually submitted to the Bahamas Environment Science and Technology (or BEST) Commission, which engaged an independent consultant to review the EIA. It is important to note that the BEST Commission is not established by statute and therefore has no statutory functions. EIAs are often posted on the BEST Commission's website, and the public is often allowed to comment on them. The BEST Commission's mandate is to provide advice to the National Economic Council (or NEC), also not a statutory body, made up of the Prime Minister and his Cabinet. The NEC makes a decision whether or not to enter into an HoA, and then the required permits and licences for the development are subsequently granted by the relevant departments and Ministries. In this instance, the developers had submitted an EIA to the BEST Commission in October 2004, and the BEST Commission listed 25 concerns. The concerns of the BEST Commission, and its recommendations to government, are not made available to the general public. The concerns of the BEST Commission were cited in the judgements, and included the lack of a landfill site, lack of clarity regarding responsibility for the clean up of hazardous waste and abandoned structures, concern regarding the impact of the development on wetlands, lack of reports from public meetings, lack of mitigation measures from dredging the marina, lack of an environmental management plan, and concerns regarding potential contamination of groundwater wells and marine areas from the golf course.[8]

According to the judgments, two public meetings had taken place. Although residents had been promised a further meeting with the Minister of Financial Services, this meeting never took place. Representatives of the developers, including the author of the EIA, provided presentations to the residents on 20 August 2004, but no copies of the EIA were made available (the EIA would not be officially submitted until October 2004). Nineteen concerns

[8] Save Guana Cay Reef Association Ltd and others v The Queen and others (2008) BS CA, Judgment of Justice Osadebay, para 56.

of residents were recorded, including that they be provided with copies of the documents. The residents were generally opposed to the project, although some favoured a scaled down version of it without a marina.[9]

The EIA is not publically available on the BEST Commission's website, but a copy of the final EIA, dated March 2005, has been obtained from the internet by the author. One of the foundational ideas of the EIA was that as there was no organization currently taking responsibility and stewardship of the environment of the cay, allowing the cay to remain as an open access area would lead to further degradation of the environment. The EIA therefore justified approving the development so that one organization could take responsibility for rehabilitating and conserving the area.[10] Part of the site had previously been used by Disney Corporation but the project had been abandoned, leaving environmental damage on the site such as open paint cans, hazardous waste, abandoned buildings and infrastructure, abandoned fuel tanks and transformers. The development also left offshore debris which posed the danger of chemicals leaching into the nearshore environment.[11] None of this damage had ever been remediated.[12] The EIA promised a commercial centre for the benefit of residents, including public parks, and to establish an independent foundation in cooperation with the development's management and academic institutions.[13] The developers also stated in the EIA that they would assist in the monitoring and regulatory process by preparing timely progress reports, funding external review processes, and facilitating on-site inspections by civil servants.[14]

The provisions of the EIA are important as a number of judges decided not to halt the development on the basis of the provisions of the EIA. Justice Carroll, in the Supreme Court Judgment, stated that the EIA was quite positive,[15] and that he was most impressed by the mitigation regime set out in it.[16] He also cited from the EIA issues such as the poor condition of parts of the cay from the abandoned Disney development, and the lack of environmental stewardship by various constituents, such as bleaching techniques used for fishing and

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[9] Save Guana Cay Reef Association Ltd and others v The Queen and others (2008) BS SC.
[10] Ibid para 21.
[11] Kathleen Sullivan-Sealey and Nicolle Cushion, 'Efforts, resources and costs required for long term environmental management of a resort development: the case of Baker's Bay Golf and Ocean Club, The Bahamas' (2009) 17(3) Journal of Sustainable Tourism 375, 383.
[12] Passerine at Abaco Community Development, Environmental Impact Assessment, Prepared for The Bahamas Environment, Science and Technology Commission, March 2005, http://www.notesfromtheroad.com/files/eia.pdf, 21, and *Save Guana Cay* (n9), 32.
[13] Ibid 12.
[14] Ibid 21.
[15] Save Guana Cay (n 9), 32.
[16] Ibid 47.

unregulated use by yachtsman and residents.[17] It is curious that at no time was it ever suggested by the judiciary that it was the responsibility of the government to remediate environmental damage, discipline environmentally damaging actions by residents, or take on overall environmental stewardship of the area. The incapacity of the government to monitor developments and remediate damage from failed developments was assumed. It was also assumed that a subsequent development would cure the defects of a previously failed development.

Justice Carroll also dismissed the applicants' major concern of chemicals leaching from the golf course, stating that no evidence was submitted to support it. This aspect of the decision is puzzling as chemical leaching from the golf course was one of the concerns listed by the BEST Commission, which necessitated the developers to submit a redesigned golf course.

Justice Carroll acknowledged that the EIA had no legal status in Bahamian law. Reference was made to Justice Conteh's decision in the *BACONGO* case, with Justice Carroll concluding that the government's decision to carry out the development was not unreasonable based on the existing damage at the site, that the BEST Commission had made recommendations to the developers, and that the development would provide jobs to the local economy.[18] Very little mention was made by Justice Carroll of the rights of the public to participate in development decisions, as he stated that he had not had time to fully research and determine whether a common law right existed.[19]

On appeal, Osadabay's judgment makes numerous references to the EIA, and he assumes that the development will be of the 'highest environmental standards and management practices.'[20] Heavy reliance was made by both Ganpatsingh and Osadabay on the Privy Council's majority decision in the *BACONGO* case, with both judges concluding that these types of development decisions were a matter of national policy for sovereign, democratically elected government to decide.[21] Osadabay relied on the *BACONGO* test for EIAs. The past, poor practice of lack of environmental monitoring by government officials, and lack of post-project public consultation, was never raised to counter the practicality of adopting an iterative approach. The lack of access to environmental information, including the EIA, by residents was never raised in this judgment.

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[17] Ibid 32.
[18] Ibid 36.
[19] Ibid 42.
[20] *Save Guana Cay,* (n8), para 3.
[21] Ibid 34.

The Bahamas, like Belize, is a former British colony, and this case was appealed to the Privy Council in England. The Privy Council set out clearly the peculiarities of Bahamian law: that there are no statutory provisions governing EIAs, access to environmental information or public consultation. Unlike England or Belize, an EIA in The Bahamas is primarily designed to receive scrutiny by the BEST Commission, and is not designed to inform public consultation. Lord Walker points to the BEST Commission to fulfill the role of public watchdog, as the law itself does not provide for the inclusive and democratic procedure to include the public in the decision making process.

It is the argument of the author that Lord Walker's statement is not in line with the mandate of the BEST Commission. This mandate includes acting as a national focal point, coordinating national efforts to protect, conserve and manage the environmental resources of The Bahamas, acting as a forum for exchange of information between the government and the private sector, and to advise the government on the environmental impact of various development proposals submitted to the Commission for review.[22] The BEST Commission has no statutory powers or functions, and its mandate does not directly include acting as a watchdog for the public. Its primary function in relation to EIAs is to advise the government, not the public, on the impact of development projects. These recommendations are not made available to the public, and the government has no obligation to heed these recommendations. Although the public interest may indirectly form part of the context for the Commission's recommendations, its lack of statutory footing makes it subject to the whims of the political directorate of the day. This institutional structure is incompatible with the public watchdog role ascribed to it by Lord Walker. This statement by the Privy Council demonstrates a fundamental misunderstanding of the nature of the BEST Commission's role nationally, and leaves the public without a statutorily incorporated institution to protect its rights, forcing a reliance almost exclusively on the common law.

The Privy Council does, however, clearly state that the public does have a legitimate expectation of consultation, and this legitimate expectation derives not from the law itself, but from official statements which recognize the need to take the public's views and concerns into account.[23] As a result, according to the Privy Council, if there is a legitimate expectation of consultation, it must constitute proper consultation. Lord Walker considered the argument by the applicants that they had not been properly consulted, and that they had

[22] http://www.best.bs/about.
[23] Save Guana Cay Reef Association Ltd and others v The Queen and others [2009] UKPC 44.

not officially been provided with a copy of the draft EIA prior to the meeting of 20 August. The Court considered that these imperfections were cured by the following considerations:

- the author of the EIA was present at the meeting;
- the EIA was made available at or after the meeting;
- the residents were given a reasonably full picture of what was proposed;
- an expert hired by the residents acquired the EIA (from its author);
- the policy of the government was that the EIA was addressed to the BEST Commission and not to members of the public.[24]

This finding could be read to conclude that the public has no right to access the EIAs of development projects. The last consideration, in particular, is troubling. The inadequacy of the law to provide for access by the public to EIAs leads to the conclusion that the public has no right of access to EIAs at all as they are directed to the BEST Commission. This common law decision, therefore, compounds the lack of legislative protections for the public to access to environmental information.

Although a significant number of reports, plans and guides, together with monitoring, took place during early phases of the development,[25] after that time very little external environmental monitoring of the Baker's Bay development has taken place. The Save Guana Cay Reef Association continues to be concerned about coral reef disease and algae growth resulting from the development affecting the tourism and fisheries industries there.[26] No foundation has ever been established for research and environmental monitoring between The College of The Bahamas, the University of Miami and the developers. In an interview in January 2012, the Senior Vice-President for Environmental and Community Affairs for the development, Dr. Livingstone Marshall, admitted that there had been no environmental monitoring from 2008-2012. He is quoted as saying, 'Environmental monitoring is expensive. We are running a business, and looking for the proper balance, so we will go back in and do some additional monitoring this year.'[27] It is unclear whether the development has facilitated monitoring by government agencies, or developed environmental progress reports as provided for in the EIA.

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[24] Ibid para 43.
[25] Sealey and Cushion (n 11).
[26] Neil Hartnell, 'Baker's Bay Opponents: 'Our Worst Fears Realised'', *The Tribune*, (Nassau, 24 January 2012) http://www.bahamaslocal.com/what/Baker%20Bay/10/island/1 accessed 3 December 2013.
[27] Ibid.

The Wilson City Cases

The Wilson City cases involved an application for judicial review of a decision by the Government of The Bahamas to build a power plant in Wilson City, which included a proposal to burn Bunker C oil, one of the heaviest and dirtiest fuels. It was found in the case that the decision to build the power plant was made in 2005, and a construction contract was entered into on 31 December 2007, and actual work began in August 2009. In September 2009, after the concerns of residents were raised regarding the power plant, representatives of the government, the Bahamas Electricity Corporation (a government corporation), the BEST Commission and the construction company met with concerned residents. An EIA had been prepared in October 2008 but was not circulated until November 2009, after the public consultation was held. Partial copies were given to NGOs at the September 2009 meeting, in part to debunk the myth that no EIA had been undertaken. The applicant's arguments included that no EIA was provided to them in advance of the public meeting, and the project was presented at that meeting as a 'fait accompli'.

In the Supreme Court, Senior Justice Longley considered the *Guana Cay* decision, and the fact that there was no law requiring an EIA. He made the following comments about the *Gunning/Coughlan* guidance on EIAs[28]:

> *"This is undoubtedly an excellent guide for determining if consultation is adequate. But it is not legislative code. One has to look at the particular circumstances of each case. There may be cases where certain items will be more important than others. Whereas, depending on the circumstances less weight may be attached to others."*[29]

Longley decided that the consultation was meaningful and adequate as the government had decided to switch from Bunker C to diesel oil for electricity generation at the plant. His judgment can be criticized as it is clear that the decision regarding the building of the plant had already taken place prior to the consultation; in fact the land had already been cleared for construction. In addition, the switch to diesel fuel may have been as a direct result of a report by a local NGO, or as a result of the judicial review proceedings. At the consultation, stakeholders were told that the location of the site was not open for discussion, even though Wilson City is situated between one existing and two proposed national parks. The timing of the meeting, lack of access to the EIA, and the unwillingness of the government to entertain

[28] R v The London Borough of Brent ex parte Gunning and others [1986] 84 LGR 168 (HC), R v North East Devon Health Authority ex parte Coughlan [2000] 3 All ER 850 (CA).
[29] The Queen v The Right Honourable Hubert Alexander Ingraham Prime Minister of The Bahamas and others (2010) BS SC.

objections to the site, put this consultation in direct contravention with at least three of the four stages of the test from the *Gunning/ Coughlan* cases.

On appeal, Mrs. Justice Allen overturned the Supreme Court decision. Allen cited the Privy Council statement from the *Guana Cay* case, which established that the public had a legitimate expectation to be consulted, and she rightly found there was a legitimate expectation that the public be consulted in relation to this project as well.[30] Allen cited the lateness of the consultation, the fact that the decision to build, and construction itself, had already taken place, and that the government had refused to discuss the location of the power plant, as reasons for overturning Longley's decision. In her view, these factors contravened the *Gunning* criteria, and she ordered a full and proper public consultation on the operation of the plant going forward.[31] As the plant had already been constructed, no order was made to stop construction or demolish it, following the 'good administration' deference employed by Bereaux in the *Re: Fishermen and Friends of the Sea* case.

The defendants applied to the Privy Council to appeal the Court of Appeal's decision, and this application was refused in May 2013 on the basis that it did not raise an arguable point of law of general public importance. Counsel for the applicants claimed that this rejection represented 'an historic point in the development of Bahamian environmental and regulatory law jurisprudence, a real tipping point in the fight for the protection of local rights and the environment.'[32]

New Research Agendas

It is clear from the *Wilson City* case that consultation must occur at a formative time in the project's life, before construction on the project has begun, and at a time when decision makers can fully take account of the public's views. There was no discussion in the *Wilson City* case regarding access to environmental information, and as a result the unsatisfactory decision of the *Guana Cay* case on this issue remains.

The Bahamas is not a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. In addition, a Freedom of Information Act is now languishing in the Attorney General's office for review, and its

[30] Ibid 53.
[31] Ibid 56-57 and 72.
[32] Neil Hartnell, 'Privy Council refuses Gov't BEC plant appeal', *The Tribune*, (Nassau, 7 May 2013) http://www.tribune242.com/news/2013/may/07/privy-council-refuses-govt-bec-plant-appeal/ accessed 3 December 2013.

status is unclear.[33] In 2012 construction began on a 1,000 acre, $2.6 billion hotel resort of BahaMar, which is anticipated to have 3,000 hotel rooms. Little public consultation on the project has taken place. The Bahamas is also contemplating authorizing commercial offshore oil drilling.

These cases and future developments clearly point to legislative gaps with both the institutional structure of the BEST Commission, and general rights of the public to access environmental information and participate in development decisions. Without framework environmental legislation which establishes legal rights and obligations of an environmental agency, the BEST Commission will not be able to act as a watchdog for the public. Regional examples of environmental framework legislation, such as the Jamaican Natural Resources Conservation Act and the Trinidad & Tobago Environmental Management Act, are instructive. Further research in the region regarding the assistance that framework environmental Acts provide to agencies to carry out post-development monitoring activities is needed.

Like other small island developing states, The Bahamas struggles to monitor and enforce its environmental laws and regulations and suffers from institutional fragmentation. Travel and communication between islands is expensive, and monitoring and enforcement of development conditions is particularly taxing on understaffed public agencies. The government's inability to monitor developments should be taken into account by the judiciary when making decisions about EIAs, their contents, and public consultation. Under current circumstances of fiscal constraint, it is unlikely that EIAs and public consultation will be an iterative process, and therefore further emphasis should be placed on the completeness and adequacy of the initial consultation prior to the beginning of the development. In addition, the public should have a statutory right to environmental information. The government should consider requiring environmental bonds from developers to ensure they comply with the conditions of their development. Bonds could also help finance monitoring activities of developments, and employ trained, local inhabitants in the islands to monitor the progress of local developments or external third party monitors. The utility of environmental bonds for development monitoring would also be another area of useful research in the region.

[33] The Bill was passed towards the end of 2012 but had no enforcement date.

COUNTRY REPORT: BRAZIL

The Current State of Socioenvironmental Law in Brazil: The New Forest Code, Megaprojects and Threats to Traditional Lands

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Introduction

Brazil is currently experiencing threats to its Environmental Regulations. We identify in this Country Report two fronts of attack, one concerning *the Forest Code*, and the other the threat to indigenous and traditional community rights.

In 2013 *the Forest Code* was modified by Congress, decreasing the protection of forests. Indigenous and traditional communities - the Forest people,[1] especially - are being threatened with developmental megaprojects and projects to modify the rules affecting their lands, territories and natural resources required for their physical and cultural survival. In this report, we use the term "socio-environmentalism" to reflect the link between the environmentalist movement (civil society) and the indigenous and traditional community organizations struggling for nature and peoples' rights. "Socio-Environmental Law" in Brazil started with the *1988 Constitution*.

The *1988 Constitution* enshrines in Brazilian law the fundamental right to an ecologically balanced environment, for the common use of the people, and essential to a healthy quality of life, by imposing on the Public Administration and the community the duty to defend it and

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[1] "Forest People" is an expression created by the environmentalist leader Chico Mendes (Acre-Brazil), in the 1980s, about the people living on the Amazon Forest, especially indigenous peoples, tappers and other traditional communities.

preserve it for present and future generations *(Article 225 et seq.).* The Constitution recognizes the ethnic and cultural diversity existing in the country by protecting the indigenous peoples' territorial and cultural rights and their unique social organization *(Article 231 and 232),* and by recognizing the property rights of the remaining *Quilombo* [2] communities over the land they occupy (*Article 68 of the Temporary Constitutional Provisions Act).*

In the last twenty-five years, Brazil may be considered to have made positive advancements in protecting environmental rights. However, beyond the issue of the effectiveness of environmental norms, it currently faces attacks on and setbacks in legislation to protect the environment and also in relation to the rights of indigenous peoples and traditional communities.

The recent amendment of the *Forest Code (Federal Law 12,651 of May 25, 2012)* represents a setback in forest protection, which threatens essential ecological processes. The last 12 months have seen increased deforestation. This threatens social biodiversity due to projects which disenfranchise protected territorial spaces thus reducing the boundaries of indigenous land areas and conservation units.[3] This is especially so in the Brazilian Amazon, due to the exploitation interests of hydroelectricity megaprojects and the mining industry.

The New Forest Code and Increased Amazon Deforestation

After intense political debate *Law 12,651/2012*, which came into force on May 25 2012, repealed *Law 4,771/1965 (The Brazilian Forestry Code)*, placing significant pressure upon the expansion of agricultural interests in the country. The Legal Reserve (RL) is the

> *"area located inside a rural property or possession, delimited as provided by Art. 12, whose function is to assure economic use in a sustainable fashion of natural resources on the rural estate, to aid in the conservation and the rehabilitation of ecological processes and to promote the conservation of biodiversity along with shelter and protection for wild fauna and the native flora."*

The RL for estates located in the Legal Amazon region is 80% (eighty per cent) in forest areas, 35% (thirty five per cent) in Amazonian savannah areas and 20% (twenty per cent) in

[2] Rural Afro-Brazilian communities (free slaves).
[3] Law 9,995 of 18 July 2000 establishes the National System of Conservation Units.

grasslands (campos gerais) areas; and for estates located in other regions of the country, 20% (twenty per cent) of the area must be kept as native plant cover (Article 12 of the new Forest Code).

A permanent protection area (APP) is defined by Article 3 of the new Forest Code as: "a protected area, whether or not covered by native vegetation, the environmental function of which is to preserve water resources, landscapes, geological stability and biodiversity, to facilitate the gene flow of fauna and flora, protect the soil and assure the well-being of human populations."[4]

When referring to the possibility of reducing the protection of *Permanent Protection Areas (APP)* and *Legal Reserves (RL*), in addition to granting amnesty to offenders for illegal deforestation that occurred prior to 2008,[5] the change to the law represents a setback in forest protection and a threat to essential ecological processes.[6] There is a consensus among researchers that the guarantee to maintain Permanent Preservation Areas along the riverbanks, water bodies, hilltops and slopes, as well as to conserve Legal Reserve areas in the different biomes, is of fundamental importance for the conservation of Brazilian biodiversity.[7]

In this first year of the new forestry law, the 27 states of the Federation still await the approval of the Environmental Regularisation Programme. Approximately 4.5 million rural

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[4] See: Solange Teles da Silva; Márcia Diegues Leuzinger. Biodiversity and Connection conservation in Brazilian Law. In David Farrier and Melissa Harvey, Solange Teles da Silva and Márcia Diegues Leuzinger, Jonathan Verschuuren and Mariya Gromilova, Arie Trouwborst, Alexander Ross Paterson *The Legal Aspects of Connectivity Conservation -- Case Studies*, (IUCN, Gland 2013).

[5] An amnesty from environmental liabilities for about 40 million hectares of savannahs and forests illegally deforested before July 2008 (Source: IPAM, 2013).

[6] Brazil's Higher Court of Justice (STJ) ruled in 2008 (published in 2009) on a special appeal filed by the Federal Prosecutor's Office in a class-action suit, which accused the Joinville city government (in southern Brazil) of having violated environmental law by suppressing vegetation without preserving the strip along a stream on its property (as required by 1965 Forest Code riparian permanent preservation area). Justice Benjamin noted that "The Federal Constitution safeguards essential ecological processes, including ciliary permanent preservation areas. They are essential because of their ecological functions, particularly to conserve soil and water, including (a) protection of water supply and quality, both by facilitating its infiltration and storage in the water table and by safeguarding the physical-chemical integrity of water bodies from mouth to headwaters, as a cover and a filter, above all by blocking erosion and silting, as well as contaminants and waste; and (b) the maintenance of habitats for fauna and the formation of biological corridors, which value grows with the fragmentation of territory caused by human settlements. (…)." (STJ, Resp 199800405950, Resp – Recurso Especial 176753). See more in: Solange Teles da Silva; Márcia Diegues Leuzinger, note 4 .

[7] Brazilian Academy of Sciences and the Brazilian Society for the Advancement of Science, cited in the Direct Action of Unconstitutionality filed by the Attorney General (Federal Prosecutor) before the Supreme Federal Court on January 18, 2013.

properties must be entered in the *Rural Environment Registry (CAR*).[8] This registry is a mandatory national registry for rural properties, the idea being that all APP and RL must be registered within two years. This information will then be made available to the public. For registration (in the CAR) to be effective, it must fulfil its purpose of ensuring legal certainty, with transparency and social control. In this respect, the participation of civil society in monitoring the implementation and regulation of the new forestry law through the Forest Code Monitoring Centre,[9] has been very important.

The main challenges arising for the successful implementation of the Act, as highlighted by the *Forest Code* Monitoring Centre, include: the technical and legal effectiveness, transparency and social control of the CAR; inter-institutional disjointedness between the three spheres of government (federal, state and municipal); a lack of social participation in the design of environmental regularisation programmes, and absence of official and participatory public spaces to monitor its implementation; a mismatch between agricultural and environmental policy; and overly bureaucratic regulations, which rural farmers find difficult to understand.[10]

> *"According to a recent study by the Strategic Affairs Secretariat of the Presidency of the Republic, there are more than 20 million hectares of forests and other native vegetation throughout the country to be recovered in PPAs and Legal Reserves alone. If we add carbon capture, as well as river preservation and direct job creation, we would be removing over 1 billion tons of CO2 from the global atmosphere in 20 years."*[11]

Deforestation of the *Legal Amazon*[12] increased by 28% in 2013. In the period from August 2012 to July 2013, 5,843 km² of forest were cleared, as against 4571 km² in the year

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[8] In Portuguese, "Cadastro Ambiental Rural (CAR)".

[9] Created in May 2012 by seven civilian institutions – the Environmental Research Institute of Amazonia (IPAM), WWF-Brazil, SOS Mata Atlântica, Instituto Centro de Vida (ICV), The Nature Conservancy (TNC), Conservation International (CI) and the Socio-Environmental Institute - the Centre aims to monitor the implementation of the new Forestry Law (Federal Law 12.651/12) throughout the country. Available at: http://www.observatorioflorestal.org.br.

[10] Lima, André. Forest Code Monitoring Centre. IPAM, May 22, 2013. Available at: http://www.ipam.org.br/noticias/Observatorio-do-Codigo-Florestal-e-criado-para-monitorar-implementacao-da-lei-/2723.

[11] Lima, André and Stella, Osvaldo. Observatório para o Brasil Potência Socioambiental (Valor Econômico, on 13.08.2013). Source: http://www.sae.gov.br/site/?p=17770#ixzz2mO2Taj3q.

[12] The Brazilian government instituted the concept of Legal Amazon in 1953 (Law 1.806/1953), bringing together regions of similar economic, political and social problems, in order to better plan the social and economic development of the Brazilian Amazon region,. The current area covered by the Amazon represents all the states of Acre, Amapá, Amazonas, Pará, Rondônia, Roraima and Tocantins and part of the states of Mato Grosso and Maranhão (west of the meridian of 44 ° west longitude).

before.[13] This increase may be directly attributed to the new Forest Code, as it discourages compliance and opens the withdrawal of specially protected territorial spaces with Government Acts.

The Threat to Protected Areas from Hydroelectric Construction

From a territorial point of view, two forms of nature protection are established under Brazilian law. First, there is a general collective duty to preserve nature, whereby public or private property is subordinated to preservation, through permanent preservation areas and legal forest reserves.[14] Second, the protected territorial areas known as protected areas indigenous lands and conservation units are areas demarcated by the Public Administration for the specific reason of protecting them.

With regard to the legal reserves (RL), the general rule in terms of the Forest Code is that legal reserves in forest areas in the Amazon are to be apportioned as follows: 80% for the maintenance of native vegetation on rural property, 35% in the Cerrado areas, and 20% in general countryside areas and other regions of the country, along with the exceptions set out in Article 68. Notable amongst these exceptions is the designation of licenses for hydropower operations, permitting the operation of electric power undertakings or substations, or the installation of electric power transmission lines (Article 12 §7). Furthermore, dam construction ventures are multi-millionaire dollar megaprojects that generate immeasurable environmental impacts, primarily in the Amazon biome, debunking the idea that hydropower, as an energy source, by being renewable, would also be "clean" and "cheap".

The following map shows the areas protected within the South American Amazon region:

[13] INPE, Deter System (real time deforestation detection). Available at: http://www.obt.inpe.br/deter/nuvens.php.
[14] In this sense: Carlos Frederico Marés. Traditional populations and forest protection. In: Código Florestal 45 anos. Curitiba-PR: Letra da Lei, 2010. Protected Environmental Spaces and Conservation Units, p. 20. Curitiba: Publisher: Champagnat University, 1993.

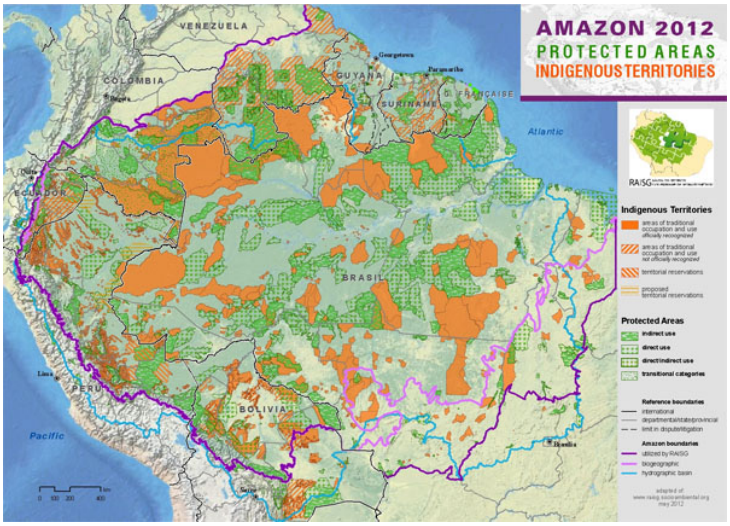

Figure 1. Amazon: Protected Areas and Indigenous Territories. Source: RAISG, 2012.

There are currently those in public office with a vested interest in decreasing the extent of these areas for economic gain. There are about 17 areas protected in the region affected by hydroelectric projects planned in the Growth Acceleration Program in the Amazon. These projects have not yet started, or are in the initial environmental licensing phase. An example of the threat posed by such projects can be found in the federal government reduction of the Conservation Units in the states of Pará and Amazonas in January 2012 in order to allow the construction of dams, as can be seen in the map below:

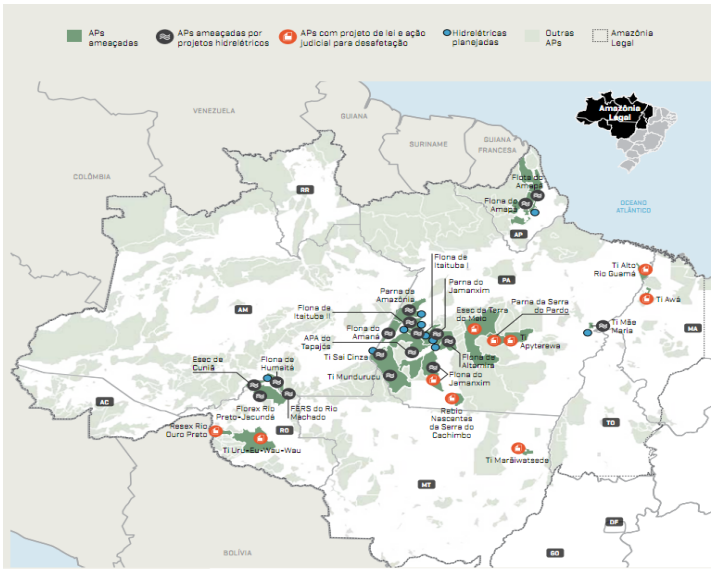

Figure 2. Brazilian Amazon Protected Areas potentially threatened by hydroelectric projects. Source: IMAZON 2012.

1,050 square kilometres from five Conservation Units were decommissioned in the Tapajós River Basin to construct two Hydroelectric Power Plants (HPPs). In this case, the areas were decommissioned even before environmental licensing.

The Belo Monte HPP on the Xingu River Basin

The *Belo Monte* HPP on the Xingu River Basin (Pará State) is the largest work of the *Growth Acceleration Programme*. The *Growth Acceleration Programme* (Programa de Aceleração do Crescimento – PAC) is a Development Governmental Programme of Brazil. The objective of the Programme is to "encourage private investment; increased investment in infrastructure; remove obstacles (bureaucratic, administrative, regulatory, legal and legislative) to growth."[15] The implementation of the programme will, however, be to the detriment of the environment.

On August 13, 2012, the First Regional Federal Tribunal ordered that the works be stopped because indigenous peoples affected by the Belo Monte HPP were not consulted. Then, on August 27, the Supreme Federal Court (STF) granted the Attorney General's injunction, suspending the decision, and the works were resumed. Environmental NGOs and indigenous organizations contend that the scale of the environmental impact has not been adequately evaluated. The dam construction directly affects the local flora and fauna, affects the course of the riverflow, depleting fish stocks and vilifying the communities to whom that land belongs and who depend on the natural resources of the area for their physical, cultural and spiritual survival and wellbeing. Besides violating the indigenous peoples' rights, riverside populations have been displaced - to date without reasonable compensation - creating tension, violence, poverty and insecurity over sustenance for the people affected, and infringing their dignity and physical and cultural integrity.

Another aspect to be considered in this context are the social and environmental impacts arising from migration of the displaced people to the Altamira municipality, since the *Norte Energia* company has not fulfilled the conditions of improving the city's infrastructure, having failed to implement basic sanitation and a new drinking water supply system, or to provide health and educational facilities for the increasing local population. This disregard for legal

[15] Available at: http://www.fazenda.gov.br/divulgacao/publicacoes/plano-de-aceleracao-do-crescimento-pac/r220107_pac.pdf.

procedure, required as a condition of the licensing process, led IBAMA[16] to issue an administrative penalty against *Norte Energia (IBAMA Technical Note 5460/2013*).[17]

Figure 3. Belo Monte HPP. Source: ISA, 2013.

The indisputable advance of the Belo Monte dam construction is only possible because of the '*Security Suspension'* procedural tool, created by *Law 4,348 of June 1964* to allow political control of judicial decisions contrary to the military dictatorial regime. This authoritarian mechanism allows courts to suspend a decision of a lower court on grounds of a risk of "the occurrence of severe damage to public order, health, safety and the economy."[18]

In 2006, the Supreme Court suspended the 1st Regional Federal Court's decision, which determined that the indigenous peoples affected by the plant had indeed not been heard, as required in terms of the *Federal Constitution* (Article 231 §3) and *ILO Convention 169*, ratified by Brazil in 2002, and promulgated by Decree 5,051 in 2004.

> *Through the means of the Security Suspension, ignoring illegalities, such as the above, has become a state of "institutional normality". This has led to a situation in which, with the endorsement of the highest courts, the major projects will only need to follow rules if convenient. (...) The repeated and unscrupulous use of the judiciary by government interests,*

[16] Brazilian Institute for the Environment and Renewable Natural Resources.
[17] Socio-Environmental Institute: Analysis of compliance with determinants for the Belo Monte Dam installation license. 2013. Available at: http://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/quadro_condicioanantes_2013_isa.pdf.
[18] Biviany Rojas e Raul Telles do Valle, 'Why the courts cannot decide on the case of Belo Monte', SIE, November 6, 2013. Available at: http://www.socioambiental.org/pt-br/blog/blog-do-xingu/porque-a-justica-nao-consegue-decidir-sobre-o-caso-de-belo-monte.

> *by means of the Security Suspension, suggests that the situation will be repeated in future major projects planned for the Amazon, like the Tapajós River plant complex."*[19]

In short, even outside the environmental licensing process, such projects are viewed as essential to maintaining "public order and the economy", even where there are no mitigating and compensatory measures. Among current projects with the highest funding, the *Belo Monte* hydroelectric plant, the *Jirau* and *Santo Antônio* plants, the *Madeira* River Complex and the *Carajás* Railway stand out. The various cases of environmental conflicts involving mega-enterprises in the Amazon have been building up, a problem that extends to financiers, especially public institutions, such as the National Bank for Social and Economic Development.[20]

Mining Projects in Protected Areas

The Draft Mining Law on Indigenous Lands (PL 1610/1996) and the new *Mining Code Bill (PL 5807 of 2013)* was proposed and is currently being analysed by Congress. The *National Committee to Defend Territories*, confronted with such mining, has rejected this proposed law. The law proposes that the creation of environmental conservation units, demarcation of indigenous land, rural settlements, and definition of *Quilombo* communities should require the prior consent of the *National Mining Agency*. In other words, mining interests would, if this law were adopted, start to take precedence over socio-biodiversity protection, and the traditional use of land belonging to the indigenous and Quilombo peoples, in violation of human rights treaties ratified by Brazil. The National Department of Mineral Production is currently considering 104 cases, constituting 4,116 mining interests in total (including small-scale mining, licensing and research applications, and processes held), relating to 152 Indigenous Lands in Brazil.[21]

Aiming for short-term gains, the mineral sector has intensified its activities in the country. The mining industry accounted for approximately 4.1% of Brazilian GDP in 2010. The mineral share in exports has also risen from 7.1% in 2006 to 17.3% in 2011. The National Mining Plan, proposed by the Ministry for Mines and Energy, outlines investment of 350

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[19] Ibid.
[20] Project to Double the Carajás Railway by the Mining Company Vale do Rio Doce. See: PINTO, Lúcio Flávio. The Amazon Question: Belo Monte, Valley and other topics. Sao Paulo: B4 Publishers, 2012; Public Amazon: Carajás Railway, available at: http://www.youtube.com/watch?v=v0F7ERvs-rg&feature=plcp ; Justice on Track: http://www.justicanostrilhos.org.
[21] Ricardo, Fanny and Rolla, Alicia. Mining on indigenous lands in the Brazilian Amazon, 2013. Socio-Environmental Institute, 2013.

billion Brazilian Reais by 2030, mainly earmarked for the Amazon.[22] The increase in mining activities is linked to mineral processing, a highly energy-intensive process. Arguably, the rapid expansion of mining in the Amazon region relies on a strong relationship with the planned installation of twenty new large and midsize hydroelectric plants by 2020. However, this development strategy by the State is likely to cause conflict over the unequal distribution of the social and environmental costs of exploiting mineral resources in the name of a supposed public interest.

Project Belo Sun: Gold Mining

It is notable that the largest gold exploration project in the country is intended to be built 10 km from the Belo Monte hydroelectric dam. The initiative is that of Belo Sun, of the Canadian Forbes & Manhattan group, and is intended to extract 50 tons of gold in 12 years.

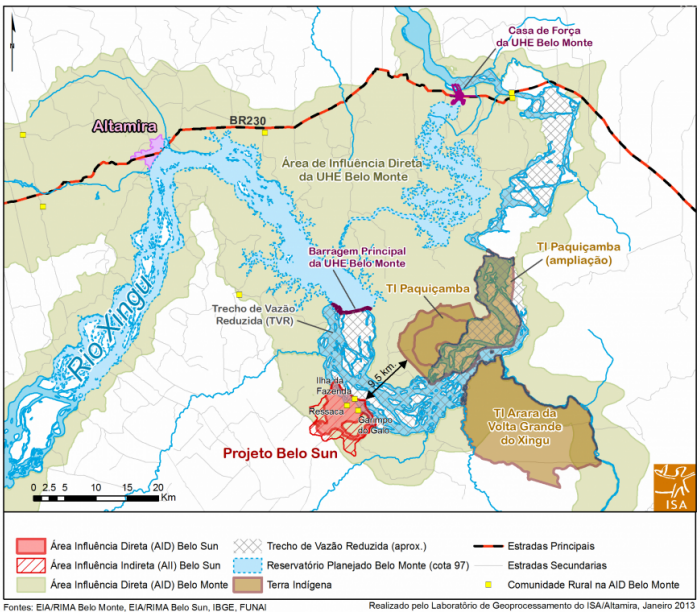

Figure 4. Volta Grande do Xingu – location of the Belo Sun Project. Source: ISA, 2013.

The Federal Public Ministry, in a Public Civil Action, requested the suspension of licensing process pending completion of the Environmental Impact Assessment, because of the absence of the participation of indigenous peoples, in accordance with Convention 169 of the International Labour Organisation (ILO). However, the Altamira Federal Court (PA) recently (in November 2013) ordered a halt to the licensing process for the gold mining

[22] Malerba, Julianna and Milanez, Bruno. A new mineral code for what? Le Monde diplomatique, Brazil, Year 6, Number 65, December 2012, p.22-23.

project of the Canadian Belo Sun company. The judge considered the irreversible nature of the project's impacts on indigenous peoples and their territories: "It is an incontrovertible fact that implementing the project in synergy with the *Belo Monte* HPP will be likely to cause direct interference with the existential-ecological minimum of the indigenous communities, with potential negative and irreversible impacts on their quality of life and cultural heritage."[23]

Human Rights Violations

Recent Supreme Court decisions favourable to the demarcation of the Raposa Serra do Sol Indigenous Land of the *Macuxi, Wapixana, Ingariko, Patamona and Taurepang* of Roraima (2009) and the *Caramuru Catarina Paraguasu* Indigenous Land of the *Pataxó Hã Hãe* people of southern Bahia (2012) confirm the constitutional guarantee of the right to indigenous land.

2013 has been a year of onslaughts and attacks of historic proportions on territorial rights enshrined in the Constitution, particularly on indigenous and the *Quilombo* peoples. This attack, coming mainly from the Legislature, intends to alter the jurisdiction of the Executive Branch to handle demarcation of indigenous lands. Proposals to amend the Constitution (*PEC 215/2000 and 38/1999*) are in progress before the Congress, including making approval of indigenous land demarcation the exclusive power of Congress, thus altering demarcation procedures. In this context of delays and omissions by the State in indigenous land demarcation, the most critical situation is affecting the *Guarani Kaiowá* and *Terena* people, threatened with genocide due to the land conflict in Mato Grosso do Sul state, where indigenous leaders are murdered by members of armed militias sponsored by large farmers who are holders of title deeds that affect land traditionally occupied by the *Guarani Kaiowá* people.

In the case of the Quilombos, the procedure for demarking and titling their lands is regulated by *Decree 4,887 of 2003*. However, the onslaught against their rights is highlighted by the interposition of the Direct Action of Unconstitutionality, number 3297 by the *Democrat* political party, the same parliamentary front that caused the recent change in forest law: the Parliamentary Front for Agrobusiness. These proposals are a step in the opposite direction to constitutional guarantees within an international human rights framework, such as the *United Nations Declaration on the Rights of Indigenous Peoples (2007), ILO Convention 169*

[23] ISA. Court Orders Suspension of Belo Sun Mining License. November 21, 2013.

concerning Indigenous and Tribal Peoples (ratified by Brazil in 2002 and promulgated by *Decree 5040* of 2004) and precedents of the Inter-American Court of Human Rights.

Final Thoughts

In a Latin American context, with new Constitutions in Bolivia and Ecuador, we see alternative proposals to the predatory development model. Bolivia recently enacted the Ley Marco de la Madre Tierra (2012); the respective *Sumak Kawsay* and *Buen Vivir* principles show us a way to respect nature *(derechos de Pachamama)* reconciled with a worldview of indigenous peoples. In Brazil, however, it is a time of setbacks in environmental legislation and threats to the human rights of indigenous and traditional peoples. The current state of social and environmental injustice is configured thus. The hope and struggle for enforcement of environmental rights must prevail. Accordingly, participatory democratic processes such as the mechanism of prior consultation of indigenous and tribal peoples, and social control over licensing processes and environmental impact studies, must be respected in policy decisions.

COUNTRY REPORT: BURKINA FASO

Evolution du Droit de l'environnement au Burkina Faso Rapport 2012

HABIB AHMED DJIGA*

Abstract

Environmental Law is a relatively new branch of law in Burkina Faso. It has evolved since the 1990s with the adoption of several laws that cover most sectors of the environment. The year 2012 was marked by the adoption of laws on agrarian and land reform, law on nuclear security, safety and guarantees, and laws on biotechnology safety.

The legislation aims to restructure agricultural areas through the development and redefinition of access, use and control of land rights. It recognizes the land area of public entities and private individuals. It focuses particularly on the integration of sustainable development in the planning and development of spatial development plans. The legislation also confers jurisdiction to local authorities and requires the inclusion of gender considerations in planning.

The legislation on nuclear security, safety and guarantees oversees nuclear technology to protect the environment and human health. It aims to improve the implementation of international commitments made by Burkina Faso in the nuclear field. The law subjects activities in the nuclear field to prior authorization and identifies a number of key principles to be followed to minimize any exposure to nuclear matters. It prohibits import of nuclear weapons as well as their manufacture, possession or activation, as well as the import of radioactive waste and a number of other activities. It also creates institutions to to ensure that the new law is complied with.

With the entry of Burkina Faso in the biotechnology era in the early 2000s, it became necessary to rigorously regulate the use of Genetically Modified Organisms (GMOs). The new law on biotechnology safety makes the use of GMOs subject to prior authorization and

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compliance with biosecurity measures in biotech operations, and specifies the methods for managing biosafety and regulates the marketing of GMO products. It also establishes the National Biosafety Agency.

Texte

Le Droit de l'environnement burkinabè a véritablement pris corps à la suite d'une triple évolution qui se conjugue avec l'histoire juridique, politique et sociale du pays. Le Burkina Faso a été colonisé dès 1898 par la France avant d'accéder à l'indépendance en 1960. Le droit de l'environnement burkinabè est donc intimement lié à la période coloniale et post coloniale. Il convient toutefois de souligner que dans les sociétés traditionnelles – la période précoloniale -, il a prévalu des prémisses du droit de l'environnement avec notamment la règlementation de l'accès et de l'exploitation des ressources naturelles, l'appropriation collective des ressources naturelles, ou encore l'institution de totems. Ainsi, la règlementation stricte et rigoureuse de la pêche, de la chasse, l'institution de forêts et de mares sacrées ou de totems étaient une forme de régulation normative soucieuse de la préservation de l'environnement.[1] Avec la pénétration coloniale, les règles traditionnelles vont disparaitre pour faire place à la règlementation coloniale. Le territoire burkinabè (ex-Haute Volta) conquis, le colonisateur français va encadrer juridiquement tous les secteurs de la vie socioéconomique, l'environnement y compris. Il va ainsi règlementer le secteur de l'eau, des forêts, de la faune et de la chasse.[2]

A l'accession à l'indépendance du Burkina Faso, aucune innovation majeure ne fut apportée au secteur environnemental. Les priorités de ce nouvel Etat étaient si nombreuses et si impératives les unes que les autres, que la question de l'environnement fut occultée par les nouvelles autorités étatiques. L'impérieuse protection de l'environnement s'invitera au débat national suite à la Conférence de Stockholm (1972)[3] et surtout suite à une grave et désastreuse sècheresse (1973-1974). Il sera créé un ministère spécifiquement chargé des questions environnementales et des lois et politiques relatives à la gestion des ressources

[1] Amidou GARANE et Vincent ZAKANE font des développements intéressants sur l'historique du Droit de l'environnement au Burkina Faso dans leur ouvrage: Droit de l'environnement burkinabè, Ouagadougou, Presses Africaines, 2008. Voir également Maurice KAMTO, *Droit de l'environnement en Afrique*, (Paris, Edicef-AUPELF, 1996).

[2] Le premier secteur à faire l'objet d'une attention particulière des autorités coloniales fut le secteur de l'eau en raison du caractère stratégique des ressources en eau. Ainsi, fut pris l'arrêté du 4 avril 1921 promulguant en Afrique Occidentale Française (AOF) le décret du 5 mars 1921 règlementant le régime des eaux en AOF. De même, a été pris l'arrêté du 10 février 1922 promulguant en AOF le décret du 28 décembre 1921 portant réglementation sur la police des eaux minérales aux colonies françaises. Enfin, il a été pris le décret du 4 juillet 1935 sur le régime des forêts en AOF.

[3] Conférence des Nations Unies sur l'environnement humain, Stockholm, 5-16 juin 1972.

naturelles, à la lutte contre la sècheresse et la désertification seront adoptées. Mais, le renouveau démocratique et constitutionnel du Burkina Faso (1991)[4] et la Conférence de Rio (1992)[5] vont insuffler un dynamisme au droit de l'environnement burkinabè qui connaitra une profusion normative avec notamment la constitutionnalisation de l'impérieuse nécessité de la protection de l'environnement, du droit à un environnement sain, de la participation citoyenne,[6] et l'adoption d'un code de l'environnement ainsi que de lois dans les domaines des forêts, de la faune, de l'eau, des sols, du pastoralisme, de la sécurité biotechnologique, ou encore du nucléaire.[7]

Depuis lors, le Droit de l'environnement burkinabè poursuit son évolution et s'est même enrichi en 2012 avec l'adoption de trois (3) lois majeures régissant trois secteurs importants en matière environnementale: le foncier, le nucléaire et la biotechnologie. Ces lois interviennent notamment pour adapter et surtout pour combler les lacunes de leurs prédécesseurs. Dans notre écrit, nous proposons de présenter la Loi portant réorganisation agraire et foncière, la Loi sur la sûreté nucléaire et la Loi sur la sécurité en matière biotechnologique.

La Loi Portant Réorganisation Agraire et Foncière

Le régime foncier et les mesures de protection de l'environnement initiées par un Etat sont intrinsèquement liés. En effet, la terre est le support de l'ensemble des ressources naturelles et une adéquate législation foncière est gage d'une meilleure conservation des ressources naturelles. Le régime foncier burkinabè a connu une évolution en 2012 avec l'adoption de la Loi n°034-2012/AN du 02 juillet 2012 portant Réorganisation Agraire et Foncière (RAF).[8] La loi, selon son article 1er, a pour objet la détermination du statut des terres du domaine foncier national, les principes généraux qui régissent l'aménagement et le développement durable du territoire, la gestion des ressources foncières et des autres ressources naturelles

[4] La Constitution du Burkina Faso sera adoptée par référendum le 02 juin 1991 et promulguée par le Président du Faso le 11 juin de la même année.
[5] Conférence des Nations Unies sur l'Environnement et le Développement, Rio de Janeiro, 3-14 juin 1992.
[6] Voir le Préambule ainsi que les articles 14, 29 et 30 de la Constitution.
[7] Loi n°005/97/ADP du 30 janvier 1997 portant Code de l'environnement (en cours de relecture pour adoption courant 2013); Loi n°003/2011/AN du 5 avril 2011 portant Code forestier; Loi n°034/2002/AN du 14 novembre 2002 relative au pastoralisme au Burkina Faso; Loi n° 002-2001/AN du 8 février 2001 portant loi d'orientation relative à la gestion de l'eau au Burkina Faso.
[8] Le régime du foncier rural est régi depuis 2009 par la Loi n° 034-2009 du 16 juin 2009 portant régime du foncier rural au Burkina Faso. Il a également élaboré en 2007 une Politique nationale en matière de sécurisation foncière en milieu rural. Voir Ministère de l'Agriculture, de l'Hydraulique et des Ressources Halieutiques, Politique nationale de sécurisation foncière en milieu rural. MAHRH, Ouagadougou, Burkina Faso, 2007.

ainsi que la règlementation des droits réels immobiliers et les orientations d'une politique agraire. Elle s'applique au domaine foncier national. La RAF est définie comme la « restructuration de l'espace agraire notamment les terres agricoles au moyen de l'aménagement et de la redéfinition des droits d'accès, d'exploitation et de contrôle de la terre ».[9]

La loi portant RAF consacre définitivement le passage de « l'étatisation-centralisation » des terres à « l'étatisation-privatisation ». En effet, depuis les indépendances, la terre appartenait exclusivement à l'Etat. L'article 4 de la précédente RAF [10] disposait par exemple que : « *Le domaine foncier national est de plein droit propriété de l'État* ». Elle précisait toutefois que, sur autorisation administrative, les personnes physiques ou morales peuvent bénéficier d'une appropriation privée de certaines portions de ce domaine.

Le régime foncier étatique qui prévalait à cette époque, au lieu d'être un instrument de protection efficace de l'environnement, en vertu de la domanialité publique, a plutôt abouti à une occultation des défis écologiques dans les politiques d'aménagement du territoire. De ce fait, la reconnaissance d'un domaine foncier des particuliers, qui coexisterait avec le domaine foncier de l'Etat et avec celui des collectivités territoriales constitue une innovation majeure. Le domaine foncier des particuliers ainsi prévu par la Loi est constitué : de l'ensemble des terres et autres biens immobiliers qui leur appartiennent en pleine propriété ;des droits de jouissance sur les terres du domaine privé immobilier non affecté de l'Etat et des collectivités territoriales et sur le patrimoine foncier des particuliers ; des possessions foncières rurales ; des droits d'usage foncier ruraux.[11]

Ainsi, avec cette reconnaissance du régime foncier privé, l'on peut souscrire avec Maurice KAMTO que: « On réalise alors tout l'intérêt de la propriété foncière individuelle relativement à la protection de l'environnement (…). En dépit de quelques risques réels d'atteinte à l'environnement, on constate de façon générale que les particuliers font des efforts considérables pour assurer la protection des sols dans leurs exploitations. L'appropriation individuelle, par le biais du titre de propriété ou du droit de jouissance, a montré à cet égard son efficacité dans la protection de l'environnement, en particulier sous l'empire du droit coutumier traditionnel qui, dans plusieurs pays africains, reste en conflit avec une législation moderne souvent étrangère aux réalités socioculturelles profondes».[12] Toutefois, il demeure

[9] Article 4.
[10] Loi n°014/96/ADP du 23 mai 1996 portant Réorganisation Agraire et Foncière
[11] Article 30 de la Loi portant RAF.
[12] Maurice KAMTO, *Droit de l'environnement en Afrique*, (Paris, Edicef-AUPELF, 1996) p. 92.

indispensable d'encadre l'appropriation privée de la terre par des exigences de développement durable afin d'éviter que ne se produisent des abus.

C'est dans cette optique que la RAF consacre le principe de l'aménagement et de développement durable du territoire. Elle considère que ce principe est un «concept qui vise le développement harmonieux intégré et équitable du territoire». Il doit contribuer à assurer le «renforcement du partenariat entre l'Etat, les collectivités territoriales et les autres acteurs du développement»,[13] repose sur deux postulats que sont, à la lecture de l'article 40:

- Le principe de la conservation de la diversité biologique
- Le principe de la conservation des eaux et des sols.

Au-delà de la consécration de ce principe, force est de constater que la loi portant RAF prend également en compte le principe du développement durable dans les instruments de planification spatiale qui visent à organiser l'espace territorial à des niveaux divers. Justement, en matière de protection de l'environnement, les instruments de planification jouent un rôle essentiel en ce qu'ils permettent à l'administration de l'environnement d'agir de façon planifiée.[14] En ce sens, l'article 41 de la Loi dispose que « L'aménagement et le développement durable du territoire est conçu au moyen de schémas d'aménagement et de développement durable du territoire dont l'application fait l'objet de déclaration d'utilité publique ». Ces schémas sont les suivants:

- le schéma national d'aménagement et de développement durable du territoire;
- le schéma régional d'aménagement et de développement durable du territoire;
- le schéma provincial d'aménagement et de développement durable du territoire;
- le schéma directeur d'aménagement et de développement durable du territoire;
- le schéma d'organisation fonctionnelle et d'aménagement;
- la directive territoriale d'aménagement.

Ces différents schémas ont un rôle très important à jouer en matière de protection de l'environnement, si l'on se réfère notamment à la définition du schéma national d'aménagement et de développement durable du territoire:

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[13] Article 37.
[14] Amidou GARANE et Vincent ZAKANE, *Droit de l'environnement burkinabè*, (Ouagadougou, Presses Africaines, 2008) p. 93.

> *« Le schéma national d'aménagement et de développement durable du territoire fixe les options de développement socio-économique et d'aménagement physique et spatial à long terme du territoire national. Il contient les grandes orientations de développement futur et leurs implications spatiales qui tiennent compte des contraintes du passé et du présent pour assurer un développement durable.*
>
> *Il détermine les principales actions de développement spatial afin d'assurer l'utilisation optimale des ressources naturelles.»*

C'est donc dire que l'efficacité de la protection de l'environnement dépend pour une grande part de la manière dont l'espace national est aménagé. En attendant l'adoption des textes d'application de la Loi ainsi que l'élaboration de la politique d'aménagement et de développement durable du territoire, l'on peut affirmer que la Loi vient renforcer le dispositif législatif en matière environnementale au Burkina Faso, en attendant que ne soit adoptée la loi sur le développement durable.

La loi 034 sur la RAF s'inscrit par ailleurs dans le processus de décentralisation amorcé par le Burkina Faso depuis les années 1991. Dans le cadre de la décentralisation territoriale, en effet, l'Etat central reconnaît aux collectivités territoriales que sont les Régions et les Communes [15] un certain nombre de compétences qu'il s'engage à leur transférer progressivement afin qu'elles puissent les exercer. La gestion du foncier, l'aménagement du territoire et l'aménagement urbain figurent parmi ces domaines de compétence qui devront être désormais exercés par les collectivités territoriales. La décentralisation, justement, allège la tâche de l'État dans la gestion des services publics, dans la mesure où celui-ci transfère aux collectivités locales des compétences pour qu'elles les exercent elles-mêmes. Elle constitue un moyen d'éducation des citoyens qui participeront à la désignation de leurs représentants pour l'exercice du pouvoir local. Il s'agit d'englober toutes choses qui permettent de favoriser une pleine participation des communautés et une meilleure gestion environnementale, puisque les populations riveraines sont plus imprégnées de leurs réalités. Par ailleurs, dans le domaine environnemental, la gouvernance locale est liée à la notion de développement durable.[16] De ce fait, les compétences en matière environnementale doivent

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[15] Voyons l'article 15 de la Loi n°051-2004/AN du 21 décembre 2004 portant Code général des collectivités territoriales au Burkina Faso : «La région a vocation à être un espace économique et un cadre d'aménagement, de planification et de coordination du développement.». Egalement l'article 17: «La commune est la collectivité territoriale de base».

[16] Christophe BEAURAIN, « Gouvernance environnementale locale et comportements économiques», Développement durable et territoire, Dossier 2: Gouvernance locale et Développement Durable, mis en ligne le 1 novembre 2003. http://developpementdurable.revues.org/document1110.html (Consulté le 22 octobre 2009).

être incluses parmi les compétences à transférer aux collectivités. Leur confier de telles compétences environnementales signifierait, à coup sûr, donner les moyens et capacités aux populations de s'approprier la gestion de leurs ressources naturelles. Il convient à ce propos de souligner que la Loi rappelle que l'aménagement des terres doit tenir entre autres compte de la protection de l'environnement.

C'est dans cette dynamique que la Loi portant RAF donne compétence aux collectivités territoriales pour la délivrance des titres d'occupation tels que le permis urbain d'habitation, le permis d'exploiter ou encore l'attestation de possession foncière. C'est également dans cette veine que les collectivités territoriales ont à charge de mettre en place et d'organiser les Commissions de retrait des terres à usage d'habitation et les Commissions de retrait des terres à usage autre que d'habitation. La mise en place des Commissions d'évaluation et de constat de mise en valeur des terres ainsi que la délivrance des titres de propriété demeurent, quant à elles, compétences exclusives de l'Etat central.

La Loi portant RAF dégage enfin les principaux généraux qui doivent régir l'aménagement et le développement durable du territoire, la gestion des ressources foncières et des autres ressources naturelles ainsi que la réglementation des droits réels immobiliers. Entre autres principes, il s'agit de l'anticipation, de l'équité, du genre, de l'information et de la participation, de la précaution ou encore de la prevention.[17]

La RAF prohibe à cet effet toute discrimination sexuelle ou maritale dans l'attribution des terres. Elle prescrit également le traitement juste, raisonnable de tous les citoyens, notamment de la même manière s'ils sont dans des situations identiques, selon le principe de l'égalité de droits, mais également en accordant des droits spécifiques aux groupes sociaux dont la situation est désavantageuse.

Elle soutient enfin l'analyse du genre sous l'angle des inégalités et des disparités entre hommes et femmes en examinant les différentes catégories sociales dans le but d'une plus grande justice sociale et d'un développement équitable, en matière d'attribution, d'occupation, ou encore de cession des terres. Toutes choses qui rendent conformes la législation foncière du Burkina avec ses engagements internationaux. La Loi portant RAF, combinée avec la Loi sur le régime du foncier rural devraient, a priori, résoudre les problèmes d'insécurité foncière qui prévalent au Burkina Faso. Il faudrait à cet effet, un effort soutenu de sensibilisation des populations. Il faudrait surtout très rapidement prendre les

[17] Article 3.

textes d'application de la Loi et veiller à leur application et à leur appropriation par les populations. Cela s'avère crucial dans un contexte où, en matière de procédure d'accès à la terre, prévaut un dualisme qui s'illustre par la coexistence d'un droit moderne avec un droit traditionnel foncier qui demeure prédominant.

La Loi Portant Sûreté, Sécurité Nucléaires et Garanties

Le Burkina Faso n'est pas un pays nucléaire, mais il fait usage de certaines techniques nucléaires. Or, dans la mesure où ces usages peuvent engendrer des effets sur la santé et l'environnement, il s'avère impérieux de règlementer les opérations relatives à la manipulation des matières et des substances nucléaires ainsi que des sources de rayonnement ionisants. C'est pourquoi le pays est Partie à plusieurs conventions relatives au nucléaire. C'est aussi la raison pour laquelle il a élaboré un cadre juridique et institutionnel national relatif à la question du nucléaire et aux rayonnements ionisants.

En effet, le Burkina a ratifié le Traité interdisant les essais nucléaires dans l'atmosphère, dans l'espace extra-atmosphérique et sous l'eau (Moscou, 5 août 1963), l'Accord régissant les activités des Etats sur la lune et les autres corps célestes (New-York, 5 décembre 1979), et le Traité d'interdiction complète des essais nucléaires (New York, 24 septembre 1996). Il a aussi et surtout ratifié le Traité sur la zone exempte d'armes nucléaires en Afrique (Pelindaba, 2 août 1995).

De même, au niveau national, la matière nucléaire est consacrée dans le Code de l'environnement qui a été adopté en 1997. Mais, c'est la Loi n°032-2012 portant sûreté, sécurité nucléaires et garanties, adoptée le 08 juin 2012, qui organise le droit nucléaire au Burkina.[18] Cette loi vient réviser la Loi n°010-2005/AN du 26 avril 2005 portant sur la sûreté nucléaire et la protection contre les rayonnements ionisants. Elle en comble les lacunes notamment en ce qui concerne l'élargissement de son champ d'application et sa conformité avec les normes internationales de radioprotection, de sûreté, de sécurité et de gestion des déchets radioactifs.

La loi portant sûreté, sécurité nucléaires et garanties se fixe un quadruple objectif:

[18] Le droit nucléaire est défini comme l'«ensemble de normes juridiques spéciales formulées en vue de réglementer la conduite de personnes morales ou physiques menant des activités se rapportant aux matières fissiles, aux rayonnements ionisants et à l'exposition aux sources naturelles de rayonnement.», Voir Carlton STOIBER *et al*; *Manuel de droit nucléaire*, (Publications de l'AIEA, Vienne, 2006) p.4.

- protéger les personnes, les biens et l'environnement tant pour les générations actuelles que pour les générations futures, des risques liés à l'utilisation des substances et matières nucléaires ainsi que des sources de rayonnements ionisants et non ionisants, conformément aux principes du développement durable;
- réglementer les activités et installations liées à l'utilisation pacifique des substances et matières nucléaires ou radioactives ainsi que des générateurs électriques de rayonnements ionisants dans tous les secteurs économiques et sociaux, publics et privés;
- fixer des mesures de protection physique requises des substances et matières nucléaires ou radioactives ainsi que toute mesure ayant pour but de limiter les dommages en cas de situation d'urgence radiologique et/ou nucléaire et de lutter contre toute utilisation malveillante des matières nucléaires et radioactives, en application des engagements internationaux pris par le Burkina Faso;
- fixer des mesures pour l'application des accords de garanties conclus entre le Burkina Faso et l'Agence internationale de l'énergie atomique (AIEA).[19]

Elle s'applique à toutes les activités et installations impliquant une exposition aux rayonnements ionisants, notamment la production, l'importation, l'exportation, le commerce, le traitement, la manipulation, l'utilisation, la détention, l'entreposage, le stockage, le transport et le transit de substances ou matières nucléaires et/ou radioactives et le cas échéant, des générateurs électriques, à la recherche, à l'exploration, à l'exploitation, au traitement, au transport et au stockage de minerais radioactifs, aux rayonnements électromagnétiques issus de la téléphonie mobile et de leurs stations relais.[20]

La loi 032 soumet les activités en relation avec le nucléaire à un régime d'autorisation préalable, instaure le cadre institutionnel y afférent, dégage les grands principes de protection contre les rayonnements ionisants, renforce la mise en œuvre efficace des accords de garanties, interdit certaines activités liées au nucléaire et prévoit des mesures de sanctions en cas de violation de ses dispositions.

La loi, à son article 18, soumet l'importation, l'exportation, la réexportation, la détention, la manipulation, l'utilisation, le transport, le stockage, l'élimination, le commerce, la production, la fabrication de substances et matières nucléaires ainsi que des sources de rayonnements ionisants ou non ionisants à un régime d'autorisation préalable.

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[19] Article 1er.
[20] Article 2.

Les autorisations sont délivrées [pour une période déterminée] après évaluation des conditions de sûreté et de sécurité liées à l'activité ou à l'installation, y compris une évaluation environnementale. Un plan d'urgence interne ainsi que les moyens de sa mise en œuvre doit être soumis en même temps que la première demande d'autorisation. L'autorisation préalable est donnée par l'Autorité Nationale compétente en matière de sûreté et sécurité nucléaires et de garanties: l'Autorité nationale de radioprotection et de sûreté nucléaire (ARSN).

La loi 032 confère à l'ARSN la charge d'assurer le contrôle de l'usage conforme de la technologie nucléaire avec les règles juridiques nationales et internationales.

Pour une efficace et efficiente action en matière de régulation du secteur nucléaire et des rayonnements ionisants, l'ARSN met en place un comité national de prévention des urgences radiologiques et un comité consultatif en matière de sûreté et sécurité nucléaires et de garanties.

Le comité national de prévention des urgences radiologiques est chargé de contribuer à la mise en œuvre du plan national d'urgence radiologique en collaboration avec les autorités compétentes. Il lui revient aussi d'élaborer et mettre en œuvre des plans communaux d'intervention en cas d'accident radiologique. Quant au comité consultatif en matière de sûreté et sécurité nucléaires et de garanties, sa mission est d'assister l'Autorité nationale de radioprotection et de sûreté nucléaire dans le but de lui permettre de s'acquitter de ses responsabilités. Ce comité, entre autres, contribue à l'examen des dossiers de demande d'autorisation, de déclaration et d'agrément, et donne un avis technique sur les dossiers d'étude de risques et de poste.

Outre le régime de l'autorisation préalable et le cadre institutionnel, la Loi 032 dégage les grands principes de protection contre les rayonnements ionisants. L'article 47 dispose à cet effet que:

> *«Toute exposition à des sources de rayonnements ionisants, lorsqu'elle est nécessaire et inévitable doit se faire en tenant compte des principes de justification, d'optimisation et de limitation suivants:*

- *le principe de l'avantage certain : aucune pratique ou activité impliquant une exposition à des rayonnements ionisants ne peut être autorisée si son application ne produit pas un avantage net positif pour les personnes, les biens et l'environnement;*
- *le principe de bas niveau: l'exposition à des rayonnements découlant de cette pratique ou activité doit être maintenue à un niveau aussi bas qu'il est raisonnablement possible en tenant compte des facteurs socioéconomiques;*
- *le principe du respect des limites autorisées : les doses d'exposition ne doivent pas dépasser les limites fixées par la réglementation en vigueur.»*

Par ailleurs, la Loi interdit l'importation d'armes nucléaires, de dispositifs explosifs nucléaires ainsi que leur fabrication, leur possession et leur activation. Elle interdit également l'importation de déchets radioactifs et de combustible nucléaire usé en conformité avec les engagements internationaux du Burkina en la matière.[21] De plus, elle interdit, dans le cadre de la Loi 032, l'addition de substances radioactives dans la fabrication des denrées alimentaires, des produits cosmétiques, des produits à usage domestique et de matériaux de construction. La loi prohibe enfin l'utilisation de substances radioactives dans la fabrication de jouets, de bijoux et de parures.[22]

Force est de constater à l'analyse de la loi portant sûreté, sécurité nucléaires et garanties que l'arsenal législatif du secteur nucléaire s'en trouve renforcer. Cette loi nouvelle témoigne de la persuasion du Gouvernement burkinabè que «l'utilisation de l'électronucléaire demeure, sans conteste, l'une des solutions d'avenir pour venir à bout des problèmes énergétiques et des changements climatiques».[23] Cette assertion se situe dans le débat mondial actuel sur l'énergie nucléaire, surtout depuis la débâcle des centrales nucléaires de Fukushima au Japon.

La Loi Portant Régime de Sécurité en Matière de Biotechnologie

Les biotechnologies font courir des menaces à l'Homme et à l'environnement. En dépit de leur contribution considérable à l'évolution de l'humanité et l'immense espoir qu'elles suscitent au regard de leurs nombreuses applications, les biotechnologies peuvent en effet constituer une menace sérieuse à la santé humaine, à l'environnement, et plus spécifiquement à la diversité biologique si leurs effets ne sont pas maitrisés. D'où la

[21] Conventions de Bâle et de Bamako.
[22] Article 4.
[23] Voir discours de l'Ambassadeur résident du Burkina Faso à Vienne; lors de l'AG de l'AIEA en septembre 2012, [disponible en ligne], http://www.iaea.org/About/Policy/GC/GC56/Statements/burkinafaso_fr.pdf, consulté le 05 février 2013.

nécessité d'instituer une biosécurité, c'est-à-dire un ensemble de mesures qui devraient permettre de prévenir, d'éliminer ou, à tout le moins, de réduire les risques réels ou potentiels susceptibles d'être engendrés par les biotechnologies.

Dans cette veine, et dès son entrée dans l'ère biotechnologique à partir des années 2000, le Burkina s'est doté d'un régime de gestion des risques biotechnologiques en 2004, puis en 2006. Ce régime a été réformé avec l'adoption le 20 décembre 2012 de la Loi n°064-2012/AN portant régime de sécurité en matière de biotechnologie.

Selon l'article 1er, «La loi s'applique à la mise au point, l'expérimentation, la production, la dissémination, le stockage, la destruction ou l'élimination, l'importation, l'exportation, le mouvement transfrontière, y compris le transit de tout OGM et de tout produit contenant un OGM», excepté les mouvements transfrontières des produits pharmaceutiques issus d'OGM.

La loi prévoit les règles d'utilisation des OGM en fixant les conditions d'utilisation en la matière. Elle soumet l'utilisation des OGM à une autorisation préalable et au respect des mesures de biosécurité lors des opérations biotechnologiques.

En effet, toutes les opérations relatives aux OGM qui affectent le territoire national sont soumises à une autorisation préalable en vertu de l'article 13.

La première étape de la procédure d'autorisation est la notification de l'utilisation des biotechnologies au Burkina Faso. A cet effet, l'article 32 de la Loi exige que «Tout opérateur qui souhaite se livrer à la production, l'importation, le transit, la dissémination, l'utilisation en milieu confiné ou la mise sur le marché d'un organisme génétiquement modifié doit le notifier par écrit à l'Agence nationale de biosécurité.». Suite à cette notification, la Loi oblige l'Agence Nationale de Biosécurité à rendre publiques les informations pertinentes non confidentielles notamment celles relatives à tout organisme génétiquement modifié pour lequel l'importation, l'utilisation en milieu confiné, la dissémination ou la mise sur le marché a été autorisée ou refuse.[24] Elle l'autorise également à organiser une consultation publique - aux frais du notifiant - concernant tout projet d'importation et d'utilisation confinée d'un

[24] Article 38.

organisme génétiquement modifié,[25] mais lui en impose l'organisation s'agissant de projet de dissémination ou de mise sur le marché d'un organisme génétiquement modifié.[26]

Il convient de souligner ici que l'Agence Nationale de Biosécurité est l'autorité nationale en matière de biosécurité. Elle est une autorité administrative qui jouit de la personnalité juridique et de l'autonomie financière. Elle est soutenue dans l'exercice de ses attributions par 2 organes consultatifs que sont l'Observatoire national de biosécurité (ONB) et le Comité scientifique national de biosécurité (CSNB).[27]

La deuxième étape de la procédure d'autorisation consiste en l'évaluation et la gestion des risques biotechnologiques. Selon l'article 22 de la Loi, conduite sous la responsabilité de l'Agence Nationale de Biosécurité, l'évaluation des risques consiste à:

- identifier les risques probables;
- évaluer la probabilité que ces risques se produisent;
- proposer les mesures pour gérer les risques identifiés;
- analyser les coûts liés à la gestion des risques identifiés;
- considérer l'efficacité et la durabilité des alternatives à l'introduction des organismes génétiquement modifiés ainsi que le principe de précaution.

Elle consiste également à élaborer un plan d'urgence pour faire face aux situations de dissémination accidentelle.[28]

Quant à la gestion des risques, elle désigne l'ensemble des mesures, stratégies et mécanismes appropriés pour maîtriser les risques liés aux OGM. Ainsi, selon l'article 28,

> *«Tout concepteur d'un organisme génétiquement modifié ou tout détenteur du permis y relatif est tenu de proposer à l'utilisateur des mesures de gestion des risques proportionnelles aux risques réels et potentiels inhérents à l'utilisation et à la dissémination dudit organisme.»*

A la fin de cette phase, l'Agence Nationale de Biosécurité ne pourra délivrer l'autorisation qu'après avoir établi que l'importation, l'utilisation en milieu confiné, la dissémination ou la mise sur le marché de l'organisme génétiquement modifié:

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[25] Article 39.
[26] Idem.
[27] Articles 3 et suivants.
[28] Articles 35 et suivants.

- profite au pays sans causer de risques dommageables pour la santé humaine, animale, la diversité biologique et l'environnement;
- participe au développement durable;
- ne nuit pas à l'environnement socio-économique;
- n'est pas contraire aux règles d'éthique.

Elle informe le notifiant[29] ainsi que le public[30] de sa décision.

Une fois l'autorisation accordée, les utilisateurs d'OGM doivent se soumettre aux mesures de sécurité prescrites à l'opération envisagée.

En ce qui concerne l'expérimentation des OGM en milieu confiné, la loi soumet toute utilisation d'OGM ou de produits dérivés à des fins d'enseignement et de recherche ou de production industrielle d'OGM à des mesures de confinement;[31] le confinement étant défini comme l'isolement des organismes génétiquement modifiés en vue de limiter effectivement le contact avec le milieu extérieur et l'impact sur ce milieu. Elle rend également nécessaire, en son article 14, la collaboration avec les structures nationales de recherche et d'enseignement en ce qui concerne l'utilisation des OGM à des fins d'enseignement et de recherche

A la fin des expérimentations, et avant toute dissémination intentionnelle dans l'environnement, la Loi stipule que «les organismes génétiquement modifiés sont soumis à des mesures appropriées de confinement pour les besoins d'évaluation et de gestion des risques»,[32] et doivent être détruits s'ils présentent des risques avérés, pour la santé humaine ou animale, pour l'environnement et pour la diversité biologique.[33] De même, «Tout essai ou application, par les utilisateurs des organismes génétiquement modifiés en milieu ouvert, est mené de manière à assurer la sécurité des populations humaines et animales et de l'environnement».[34]

S'agissant des essais ou des applications en milieu ouvert des travaux biotechnologiques, trois règles s'imposent:

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[29] Article 41.
[30] Article 46.
[31] Article 15.
[32] Article 17.
[33] Article 18.
[34] Article 59.

- la soumission à évaluation du projet de recherche ou de développement d'OGM sous la supervision de l'Agence Nationale de Biosécurité
- l'organisation de consultation publique et de sensibilisation par l'Agence Nationale de Biosécurité
- le respect de la procédure d'essai en milieu ouvert.

S'agissant particulièrement de la dissémination, la Loi la définit comme la diffusion dans l'environnement ou dans le marché des organismes génétiquement modifiés. Elle peut être contrôlée, volontaire ou accidentelle. La loi définit les conditions de dissémination. Ainsi, tout opérateur qui souhaite se livrer à la dissémination d'un organisme génétiquement modifié doit le notifier par écrit à l'Agence nationale de biosécurité[35]. De même, dans l'optique de maîtriser les impacts de la dissémination, l'article 62 de la Loi exige que : « Avant toute utilisation des organismes génétiquement modifiés dans l'environnement, l'Agence nationale de biosécurité ordonne, en collaboration avec les autres administrations concernées, une étude des impacts d'ordre éthique, socioéconomique sur les populations locales ou riveraines ». L'article 17 précise à cet égard que: «Avant toute dissémination intentionnelle dans l'environnement, les organismes génétiquement modifiés sont soumis à des mesures appropriées de confinement pour les besoins d'évaluation et de gestion des risques».

En cas de dissémination accidentelle, le plan d'urgence biotechnologique doit être immédiatement mis en application et l'Autorité Nationale de Biosécurité informée. Il incombe alors à celle-ci de s'assurer que:

- un plan d'urgence est établi en vue de la protection de la santé humaine et animale, de la diversité biologique ainsi que de l'environnement situé en dehors de l'aire de dissémination ou d'utilisation en milieu confinée en cas d'accident ;
- les services d'urgence compétents sont conscients des dangers et en sont informés par écrit ;
- les personnes susceptibles d'être affectées par l'accident sont informées, d'une manière appropriée et sans avoir à en faire la demande, sur les mesures de sécurité et sur le comportement à adopter en cas d'accident. Ces informations sont répétées et mises à jour à intervalle approprié. Elles sont également rendues accessibles au public ;

[35] Article 32.

- toutes les mesures possibles ont été prises pour neutraliser les risques pour la santé humaine et animale, la diversité biologique et l'environnement.

L'Agence doit également informer les organisations gouvernementales et non-gouvernementales compétentes des pays voisins susceptibles d'être affectés par la dissémination accidentelle.

La Loi portant régime en matière de biotechnologie traite aussi de la commercialisation des produits OGM. Elle insiste sur la transparence à ce niveau et exige que ces produits (importés ou nationaux) soient emballés et étiquetés de manière indélébile et infalsifiable afin d'assurer la sauvegarde des valeurs éthiques et d'éviter les risques sur l'environnement, la santé humaine et animale[36]. Son article 66 exige de surcroît qu'ils portent la mention «Produits à base d'organismes génétiquement modifiés» ou «Contient des organismes génétiquement modifiés».

Elément tout aussi important contenu dans la Loi, c'est sa conformité avec les engagements internationaux auxquels le Burkina Faso a consentis, notamment la Convention sur la diversité biologique et le Protocole de Cartagena. Ainsi en est-il de l'interdiction des mouvements transfrontières d'OGM susceptibles de provoquer une dégradation de l'environnement. Ainsi en est-il également de l'autorisation préalable ou des règles de d'accès et de partage des bénéfices en ce qui concerne les OGM produits sur la base du patrimoine génétique national. L'article 68 dispose à cet égard que:

> *«Les organismes génétiquement modifiés mis au point à base de ressources génétiques prélevées du patrimoine national sont soumis à la réglementation relative à l'accès aux ressources génétiques et au partage des bénéfices. A ce titre, l'opérateur doit:*
>
> - *rechercher le consentement en connaissance de cause préalablement à l'accès aux ressources génétiques conformément aux dispositions de l'article 15, paragraphe 5 de la Convention sur la diversité biologique;*
> - *tenir compte des coutumes, des traditions, des valeurs et des pratiques coutumières des communautés autochtones et locales;*
> - *n'utiliser les ressources génétiques qu'à des fins compatibles avec les modalités et conditions auxquelles elles ont été acquises;*
> - *veiller au partage juste et équitable des avantages, y compris le transfert de technologie aux pays fournisseurs, en application de l'article 16 de la Convention sur la diversité*

[36] Article 65.

> *biologique et conformément à des conditions convenues d'un commun accord avec les communautés autochtones et l'Agence nationale de biosécurité.*
>
> *Le développement de l'organisme génétiquement modifié ci-dessus cité se fait en collaboration avec les structures nationales de recherche. Il est soumis à autorisation préalable».*

La Loi traite enfin du régime de responsabilité liée à des dommages biotechnologiques et prévoit les modalités de réparation y afferents.[37]

Pour conclure, force est de constater que la Loi n°064-2012/AN portant régime de sécurité en matière de biotechnologie régit un secteur très délicat de l'environnement. Les domaines qu'elle couvre illustrent la volonté réelle des autorités nationales d'encadrer rigoureusement l'utilisation des OGM. Reste, comme pour toutes les lois environnementales, l'application effective, efficace et efficiente.

Tout compte fait, l'amélioration du cadre législatif relatif au foncier, aux biotechnologies et à la sûreté nucléaire marque un tournant décisif dans la mise en œuvre des engagements internationaux que le Burkina Faso a contractés. Qu'il s'agisse de l'application des principes de participation, de précaution et de prévention, ou de l'insertion dans l'ordre interne des normes internationales, le droit de l'environnement burkinabè tend vers une mise en conformité avec les instruments adoptés au plan international, continental et régional. Toute chose qui contribue à le dynamiser davantage et à lui permettre de tendre vers une plus grande effectivité. L'adoption future d'un nouveau code de l'environnement et des lois relatives au développement durable et à la gestion des catastrophes naturelles sera un nouveau tremplin pour atteindre cette ambition.

[37] Article 72 et suivants.

COUNTRY REPORT: BARBADOS

Caribean Region Report: The Caribbean An Emerging Framework for Renewable Energy in The CARICOM Region

ALANA MALINDE S.N. LANCASTER*

Abstract

The Caribbean Community (CARICOM) comprises a group of 15 Caribbean small island developing states (SIDS) united in a regional trading agreement (RTA). The group – as well as its sub-regional RTA of the Organisation of Eastern Caribbean States (OECS) – is vulnerable to the effects of their heavy reliance on fossil fuels, as well as the pernicious effects of the global phenomenon of anthropogenic climate change. In the wake of the economic downturn since 2008, and in an effort to foster economic and environmental sustainability in the region, CARICOM states have identified the use of indigenous sources of renewable energy as a viable alternative to achieve improved economic and environmental conditions. While challenges exist in fulfilling this objective, efforts have been ongoing at the regional and sub-regional level, and to a lesser extent the national level, to incorporate renewable energy into the energy equation. This Report explores the background and framework of fossil fuel and renewable energy use in the CARICOM region, before outlining examples of existing policy on renewable energy, and concluding with the future possibilities and continuing challenges to incorporating renewable energy into a formula for the energy security and sustainability of the region.

Introduction

Located in the region of the West Indies, the CARICOM Caribbean, as depicted in Map 1, may be considered to be a geo-political construct of Caribbean states which are members of

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the Caribbean Community (CARICOM) regional trading agreement. Guided by means of the 2001 *Revised Treaty of Chaguaramas*,[1] its members[2] are all Small Island Developing States (SIDS) – largely low-lying coastal countries that tend to share similar sustainable development challenges, including small but growing populations, limited resources, remoteness, susceptibility to natural disasters, vulnerability to external shocks, excessive dependence on international trade, and fragile environments.[3] Combined with the Organisation of Eastern Caribbean States (OECS)[4] – a sub-regional trading agreement comprising 7 of its members – CARICOM has become a forum for advancing efforts in renewables – primarily as a means to pursuing alternatives to petroleum, and to mitigating the effects of climate change.[5] At the OECS level, efforts are also ongoing under the aegis of the 2011 *Revised Treaty of Basseterre*, as well as Principle 16[6] of the 2006 *St. George's Declaration*.[7]

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[1] *Revised Treaty of Chaguaramas Establishing the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy*, 7 May, 2001, entry into force 4 February, 2002, 2259 UNTS 293, online : http://www.caricom.org/jsp/community/revised_treaty-text.pdf.

[2] Art. 3 of the 2001 *Revised Treaty of Chaguaramas*. CARICOM is made up of the following member states: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, Suriname and Trinidad and Tobago. The Community also includes the following associate members: Anguilla, Bermuda, British Virgin Islands, Cayman Islands and the Turks and Caicos Islands.

[3] United Nations General Assembly, Five-year Review of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States : Report of the Secretary-General, A/65/115, 6 July 2010, online : http://www.un.org/en/ga/search/view_doc.asp?symbol=A/65/115, para 12.

[4] The OECS is a regional trading agreement, comprising of 7 of CARICOM's members. Guided by the 2011 *Revised Treaty of Basseterre*, Art. 3 lists the members of the union as Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines. The chain is 'broken' by the French overseas territories of Martinique and Guadeloupe, which lie between St. Lucia and Dominica and Dominica and Montserrat respectively on the Lesser Antillean chain. The two most geographically isolated members, Anguilla and the British Virgin Islands, have only associate membership of the organisation, and although diplomatic missions of the OECS do not represent these two states, they are part of the Eastern Caribbean Supreme Court, and for the purposes of further discussing the membership, they are treated as equals of the full members. All full members of the OECS are also full members of CARICOM.

[5] See for example, the 2009 *Port of Spain Accord*, 2 June 1989, online: http://www.islandvulnerability.org/docs/portofspain1989.pdf; Arts. 15, 55, 58, 60, 61, 65 and 141 of the 2001 Revised Treaty of Chaguaramas; 2009 *Liliendaal Declaration On Climate Change and Development*, iissued by the Thirtieth Meeting of the Conference of Heads Of Government of the Caribbean Community, 2-5 July 2009, Georgetown, Guyana, online : http://www.caricom.org/jsp/communications/meetings_statements/liliendaal_declaration_climate_change_development.jsp.

[6] Manage and Conserve Energy.

[7] *St. George's Declaration of Principles for Environmental Sustainability in the OECS*, revised 2006, online: http://www.iadb.org/intal/intalcdi/PE/2009/03209.pdf.

Map 1

Map of the CARICOM Caribbean)

Source: http://www.thehabarinetwork.com

This trend occurs for a variety of reasons. Firstly, with the exception of the petroleum producing state of Trinidad and Tobago,[8] CARICOM's non-oil producing States are vulnerable to fluctuations in global energy prices, given their high dependence on fossil fuels.[9] The goods and services exports of these countries are insufficient to offset the costs for oil imports,[10] which therefore constitute a considerable fiscal burden.

Accordingly, the use of renewable energy sources has emerged as a viable course of action to reduce the percentage GDP spent on fuel by CARICOM states, and to channel this revenue into other sectors of their developing economies. Secondly, in the wake of warnings concerning the impacts of climate change,[11] the region has embraced the objective that

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[8] UNEP. *Caribbean: Environmental Outlook*, 2004 (Nairobi, United Nations Environment Programme, 2004), online: http://www.pnuma.org/deat1/pdf/GEO%20Carribean%20Environment%20Outlook%20Ing%202004.pdf.

[9] See Caribbean Renewable Energy Development Programme. Final Evaluation Report. (UNEP/GEF, 2011); Zia Mann, "Energy Options for the Caribbean," *Jamaica Gleaner*, 6 October 2013, online: http://jamaica-gleaner.com/gleaner/20131006/focus/focus3.html .

[10] CARICOM. Caribbean Community Regional Aid for Trade Strategy 2013–2015, (Georgetown: CARICOM, 2013), online: http://www.caricom.org/Caribbean_Community_AfT_Strategy_final.pdf, p. 5.

[11] See for example, Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (Switzerland: IPCC, 2013), online: http://www.climatechange2013.org/images/uploads/WGI_AR5_SPM_brochure.pdf

adaptation and mitigation measures must be immediately[12] employed to reduce the pernicious effects of climate change.[13] The effects of global warming for CARICOM states are potentially catastrophic, and therefore cannot be ignored. It is no surprise therefore, that CARICOM states are concordant in their ratification rate of both the *United Nations Framework Convention on Climate Change*[14] and its *Kyoto Protocol*.[15] These agreements jointly comprise the basis of the majority of the bloc's strategies to counter the effects of climate change.[16]

This Report outlines the existing background of energy policy in the CARICOM region, delineates the regime of fossil fuel use in the region, and identifies the potential avenues for renewable energy in the region. Against this background, the current law and policy on renewable energy in the CARICOM region – at the regional, sub-regional[17] and national levels – are examined, and a general conclusion made on the emerging paradigm for the region.

Background on Energy Policy in the Caribbean Region

Apart from the notable exception of the twin-island Republic of Trinidad and Tobago,[18] the CARICOM region's heavy dependence on fossil fuels is directly linked to the lack of oil, natural gas and coal resources in the region. More than 90% of the power supply in the region is dependent on imported fossil fuels,[19] which makes the region one of the most

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[12] See generally, Nicholas Stern, *The Economic of Climate Change: The Stern Review* (London: HM Treasury, 2006).
[13] Martin L. Parry *et al*, Summary for Policymakers in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge Printing Press, 2007) at 11
[14] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, entered into force 21 March 1994, online: UNFCCC http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.
[15] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148, entered into force 16 February 2005, online: United Nations Treaty Series http://unfccc.int/resource/docs/convkp/kpeng.pdf.
[16] See for example, Climate Change and the Caribbean: A Regional Framework for Achieving Development Resilient to Climate Change (2009-2015) (Belize City: CCCCC, 2009), online: http://www.iadb.org/intal/intalcdi/PE/2013/10773.pdf.
[17] At the level of the OECS.
[18] Trinidad and Tobago. Trinidad and Tobago has abundant sources of oil and gas, which have earmarked it as a major fossil fuel suppler in the region.
[19] Angelika Wasielke, Energy-policy Framework Conditions for Electricity Markets and Renewable Energies: 23 Country Analyses (Eschborn, Germany 2007) at 2.

import-dependent in the world where petroleum is concerned.[20] The region's high dependence is directly related to providing for the needs of domestic, commercial and the principal economic activities in the region, such as tourism and related industries.[21] In some states such as Trinidad and Tobago, Jamaica and to a lesser extent Barbados, there are also industrial activities which require constant and reliable sources of power.[22] The grim consequences of chronic dependence on imported energy are reflected in the expenditure by many CARICOM governments of as much as half of their export revenues on imported fossil fuels.[23] Expending a significant percentage of their GDP on the importation of fossil fuels, means that much of the financial resources of CARICOM states are diverted away from progress on health, education and other developmental agendas. Specifically, it has been recognized that high energy prices stifle economic growth in the Caribbean region, especially in light of the trade policies where the region needs to maintain competitiveness in the production of goods and services. The unavailability of readily available and reliable sources of energy can also stymie the development of industry in a state – for example, the high energy requirements of maintaining an aluminum smelter proved unsustainable, and the facility was forced to close in the 1980s. Most recently, the Canadian owned Reunion Gold, which is operating a manganese mine in Guyana, has had to explore possibilities with neighbouring Trinidad to build a processing plant, primarily because of the cheaper cost of power there.[24] As these examples illustrate, the majority of CARICOM countries have recognised that pursuing energy independence is important progress towards national development.[25]

In an effort to address this issue, states have embarked on a variety of short to medium term policies, to either address their acquisition of fossil fuels, or to pursue alternatives to fossil fuels. With respect to the former, a notable example is the Petrocaribe Agreements between

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[20] See, Joseph Williams, "A Strategic Regional Approach to Sustainable Energy: Challenges, Solutions & Role of CARICOM" (slide show presented to the Caribbean Renewable Energy Forum, 15 October 2009).
[21] See, Glenn J. Berger & J. Alexander Cooke, "Procuring Cost-Effective and Climate-Friendly Electrical Generation in the Caribbean: A Primer" (2009) 7 Industry Journal 14 at 14.
[22] Jamaica and Trinidad & Tobago are the loci of the region's manufacturing sector, including industries based on oil and natural gas in Trinidad & Tobago and the extraction of bauxite and the smelting of aluminum in Jamaica. Barbados, which is primarily service based economy, has progressively expanded its manufacturing sector over the last 10 years.
[23] See, Commission on Sustainable Development, Renewable Energy Essential for the Well-Being of Small Island Developing States, Commission on Sustainable Development Told, ENV/DEV/893, 8 May 2006, online: http://www.un.org/News/Press/docs/2006/envdev893.doc.htm.
[24] Cheaper Power Matthew's Ridge Firm Signs MoU with T&T for Manganese Processing Plant, Kaieteur News, 21 January 2014, online: http://www.kaieteurnewsonline.com/2014/01/21/cheaper-powermatthews-ridge-firm-signs-mou-with-tt-for-manganese-processing-plant/.
[25] See Maxine Nestor, "Energy Policy in the Caribbean" (2009) 1 CARICOM Energy, online : http://www.caricom.org/jsp/community_organs/energy_programme/cc_energy_1_1.pdf, 4.

Venezuela and some Caribbean territories[26] to purchase 185,000 barrels of oil *per* day at market value. Beneficiary states pay a percentage of the cost up front, with the balance over 25 years at 1% interest. Additionally, these nations could settle their debt to Venezuela using goods and services.[27] With respect to pursuing alternatives to fossil fuels, some states have implemented incentives to encourage the use of alternative sources of energy, while others have begun tentative moves to foster investment in alternative sources of energy. Barbados, which has one of the lowest domestic electricity rates in the Caribbean region, due in part to a more diverse fuel mix,[28] is an example of a CARICOM state which has long embraced incentives. From as far back as 1980, the island state has incorporated incentives to encourage the use of solar energy,[29] and most recently, introduced the Renewable Energy Rider, as a pilot programme. Under the Rider, customers with renewable resource generation facilities utilising a wind turbine, solar photovoltaic or hybrid (wind/solar) power source, can enter into a power-purchase agreement to provide the national grid with electricity generated.[30] With respect to fostering an environment which is friendly to investment in renewable energy, Nevis – the smaller of the two islands comprising the state of St Kitts-Nevis, has drafted the 2008 *Geothermal Resources Development Bill*. The *Bill* was tabled as the first step to encouraging investment in geothermal energy, while providing a regulatory framework in the twin-island state. The OECS states of Grenada and Dominica are also pursuing geothermal energy – Grenada has conducted a renewable energy readiness assessment,[31] also has legislation in draft.[32] Dominica has announced that it is taking steps to become the first carbon negative economy in the hemisphere by developing geothermal energy.[33]

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[26] The countries that are signatories to this agreement are: Antigua and Barbuda, the Bahamas, Belize, Cuba, Dominica, the Dominican Republic, Grenada, Guyana, Jamaica, Nicaragua, Suriname, St Lucia, St Kitts and Nevis, and Saint Vincent and the Grenadines. Cuba, the Dominican Republic, Haiti, Honduras and Guatemala are also party to the agreement. Barbados and Trinidad & Tobago are not parties to the agreement.

[27] Robert Buddan, In Search of Development: Chavez and PetroCaribe, in Jamaican Gleaner, 28 August 2005, online: http://jamaica-gleaner.com/gleaner/20050828/focus/focus2.html.

[28] CARILEC. Tariff Survey Among Member Electric Utilities (Castries: CARILEC, 2010).

[29] The 1980 *Homeowner Tax Incentive* was introduced in the 1980 budget, and has been cited as the watershed event in encouraging the now widespread use of solar energy in Barbados

[30] See Barbados Power and Light, Renewable Energy Rider, online: http://www.blpc.com.bb/bus_energyrider.cfm.

[31] IRENA. Grenada Renewable Energy Assessment (IRENA, 2012), online: http://www.irena.org/DocumentDownloads/Publications/Grenada_RRA.pdf.

[32] 2011 Geothermal Resource Development Bill and 2011 Geothermal Resources Environmental and Planning Regulations.

[33] Geothermal Project Moves to Next Level, Dominica News Online, 13 November 2013, online: http://dominicanewsonline.com/news/homepage/news/economy-development/geothermal-project-moves-next-level/.

Additionally, for quite some time governments in the region have been raising concerns over the negative environmental impacts of the use of fossil fuels.[34] While the region contributes to the global phenomenon of anthropogenic climate change because of the *res communis* nature of the resource, CARICOM states, as compared to developed and industrialised states, produce markedly lower levels of greenhouse emissions. This is primarily because the largely developing economies have effected a shift away from agriculture to services,[35] and with few exceptions, are not considered industrialised nor urbanised.[36] However, because of their geographic location, and as SIDS, CARICOM states are severely vulnerable to the effects of climate change and the associated sea-level rise. This is primarily as a result of their size, proneness to natural hazards, external shocks, and low adaptive capacity,[37] which all translate into impacts on marine and coastal systems, freshwater resources,[38] ecosystems,[39] crop productivity[40] and low-lying areas.[41] These impacts comprise persistent and pervasive threats for the countries of the region, which will adversely impact on the region's overall tourism product, reduce the amenity value for the coastal populace, as well as for tourists,[42] and inherently shock other economic activities such as the fishing industry. Socio-cultural norms of coastal populations will also undoubtedly be disrupted.[43]

One of the main efforts at the CARICOM level has been to launch the Caribbean Community Climate Change Centre (CCCCC), whose objective is to coordinate the region's response to climate change, and work on effective solutions and projects to combat the

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[34] See, Fanz Gerner, "Towards a Regional Caribbean Energy Market" (slide show presented to the Caribbean Renewable Energy Forum, 15 October 2009) online: http://www.caribbeanenergyforum.com.

[35] Caribbean Community Regional Aid for Trade Strategy 2013–2015, *supra* note 5.

[36] Jamaica and Trinidad & Tobago with populations of approximately 2.8 million and 1.3 million respectively are the union's second and third most populated members (Haiti with a population of 9.9 million is by far the most populated), and are also the most urbanised and industralised members of the union. Other members have populations either under 100,000 or a few 100,000 (Barbados, Guyana, Suriname), and are largely dependent on service industries such as tourism, banking, agriculture and fisheries.

[37] See, Nobuao Mimura *et al*, "Small Islands" in Martin Parry *et al*, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 2007* (Cambridge: Cambridge University Press, 2007) 687 – 716 at 689.

[38] Martin L. Parry *et al*, *supra* note 13.

[39] Ecosystems will be affected including the destruction of coastal and marine ecosystems through ocean acidification, coral bleaching and the demolition of coastal barriers.

[40] Extreme weather affect the ability of natural resources to regenerate, rising temperatures themselves will have a massive impact and the ability to continue growth of foods associated with particular climates.

[41] Coasts are projected to be exposed to increasing risks, including coastal erosion, due to climate change and sea-level rise. The effect will be exacerbated by increasing human-induced pressures on coastal areas.

[42] Martin L. Parry *et al*, *supra* note 13 at 12.

[43] Caribbean Community Regional Aid for Trade Strategy 2013–2015, *supra* note 10.

environmental impacts of climate change and global policy. The development of the Centre followed 3 main projects – Caribbean Planning for Adaptation to Climate Change (CPACC)[44] Project; Adapting to Climate Change in the Caribbean (ACCC) Project,[45] and the Mainstreaming Adaptation to Climate Change (MACC) Project[46] – all of which were aimed at mitigating and adapting the effects of the phenomenon in the region. To date, the Centre has coordinated several projects, including the 2011–2015 Caribbean Regional Resilience Development Implementation Plan and the 2009–2021 Regional Planning for Climate Change Development in the Region.[47]

For their part, the OECS states have been the beneficiaries of the 5-year US 2.5 million Reduce Risks to Human & Natural Assets Resulting from Climate Change (RRACC) Project.[48] The project aims to reduce climate risks and foster adaptation in 11 OECS states, including those who are also members of CARICOM.[49] The OECS has also identified renewable energy as a thematic area falling under the shared competency[50] of the union, and has embarked on several efforts including the establishment of an Eastern Caribbean Energy Regulatory Authority (ECERA),[51] the Eastern Caribbean Energy Labeling Project[52] and *Policy Framework Options and Elements for Enhanced Efficiency of Energy Use in the OECS States.*[53]

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[44] Lasting from 1997 to 2001, the goal of the CPACC project was to build capacity in the Caribbean region for the adaptation to climate change impacts, particularly sea level rise. See CARICOM Secretariat, online: http://www.caricom.org/jsp/projects/macc%20project/cpacc.jsp.

[45] The Adaptation to Climate Change in the Caribbean (ACCC) Project, succeeded the Caribbean Planning for Adaptation to Climate Change (CPACC) project. ACCC, which lasted from 2001 to 2004, the project was designed to sustain activities initiated under CPACC, and to address issues of adaptation and capacity building not undertaken by CPACC, thus further built capacity for climate change adaptation in the Caribbean region, See CARICOM Secretariat, online: http://www.caricom.org/jsp/projects/macc%20project/accc.jsp.

[46] Scheduled for 2004 to 2007, the project's main objective is to mainstream climate change adaptaion strategies into the sustainable development agendas of the small island and low-lying states of CARICOM. MACC adopted a learning-by-doing approach to capacity building, consolidating the achievements of CPACC and ACCC. It will build on the progress achieved in these past projects by furthering institutional capacity, strengthening the knowledge base, and deepening awareness and participation. See CARICOM Secretariat, online: http://www.caricom.org/jsp/projects/macc%20project/macc.jsp

[47] See, Caribbean Community Climate Change Centre, Projects, online: http://www.caribbeanclimate.bz/projects/projects.html

[48] International Institute for Sustainable Development, OECS' RRACC Newsletter Highlights Progress in New Reducing Climate Risks Project, January 2012, online: http://climate-l.iisd.org/news/oecs-rracc-newsletter-highlights-progress-in-new-reducing-climate-risks-project/

[49] Ibid.

[50] Art. 14.2 of the 2011 *Revised Treaty of Basseterre* identifies issues concerning the environment as an area of shared competence under the union.

[51] See Eastern Caribbean Energy Regulatory Authority, online: http://www.oecs.org/our-work/projects/ecera.

[52] See Eastern Caribbean Energy Labeling Project, online: http://www.ecelp.org/.

[53] See OECS. Identification of Policy Framework Options and Elements for Enhanced Efficiency of Energy Use in the OECS States (OECS, 2001).

Taken holistically, renewable energy may be viewed as a medium to long-term solution to both the region's energy quandary, and a means of furthering the objectives of the 1992 *Climate Change Convention*. However, as will be outlined in the next section, there exists a gap between the region's desire to move toward renewable alternatives, and the ability to realise this objective.

Renewables – A Move Away from Oil & Natural Gas in the CARICOM Caribbean:

Overview of the Law and Policy of the CARICOM Caribbean

Reducing the dependence on fossil fuels will have a direct effect on the balance of payments deficit of CARICOM states, and will also reduce the vulnerability of the energy system in light of the international geopolitical climate.[54] Coupled with the objective of mitigating and adapting to climate change, there has emerged the recognition that CARICOM needs to embrace the development of renewable sources of energy indigenous to the region.[55] Renewable energy refers to all forms of energy that are "alternative" to "conventional" fossil and nuclear fuels.[56] Within the context of the CARICOM region, these include biomass, geothermal energy, hydropower, wave, tidal, ocean thermal energy, offshore wind, solar energy, and wind energy.[57]

While the CARICOM group of countries has embarked on an agenda for pursuing renewable energy as one strategy to mitigate and adapt to climate change, there exist considerable obstacles to the deployment of renewable energy in the Caribbean. These generally comprise a lack of baseline data on resource potential, limited technological awareness, inadequate financing, limited capacity and inadequate policy, and regulatory and legislative frameworks to encourage renewable energy development.[58] For the most part, efforts to address these hurdles at the regional level have inadequate financing.[59] However, in the last 5 years, efforts at both the policy and technical level have proceeded against the premise that for any significant advancement of the development of renewable energy in the

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[54] See, David Ince, "The Use Regulation in Promoting the Development of Renewable Energy Technologies in the Caribbean" (2006) Industry Journal 13 at 14.
[55] Ibid.
[56] See, Paul Kruger, *Alternative Energy Resources: The Quest for Sustainable Energy* (New Jersey: John Wiley & Sons Inc., 2006) at 137.
[57] See generally UNDP/GEF. Caribbean Renewable Energy Development Programme (CREDP): Final Evaluation Report (UNDP/GEF, 2011).
[58] Williams, *supra* note 20.
[59] See, David Ehrhardt, "Promoting Efficient Renewable Energy Generation in the Caribbean: Jamaica's Renewables Tender and Possible Alternatives" (slide show presented to the Caribbean Renewable Energy Forum, 15 October 2009) online: http://www.caribbeanenergyforum.com.

region to occur, there needs to be more political, regulatory, legal and institutional initiatives, which will in turn address the financial challenges.[60]

To address these challenges, the region has slowly, but steadily embarked on a suite of measures to provide an enabling environment for renewable energy and attract investment for the sector. At the CARICOM level, the forum for elaborating policies and strategies on renewable energy identified by the supreme organs[61] of the union, is at the Council of Trade and Environment (COTED).[62] By the *Treaty*, COTED is mandated by the Conference[63] and the Community Council of Ministers[64] to "promote measures for the development of energy and natural resources on a sustainable basis."[65] Under the aegis of COTED, in 2008, CARICOM commenced the Energy Programme and elaborated a regional policy in the form of the 2009 Draft *Liliendaal Declaration* on Climate Change and Development.[66] The *Declaration* was endorsed by the CARICOM Conference at its Thirteenth Meeting, and sets out broad commitments relating to *inter alia,* satisfying commitments under the 1992 *Climate Change Convention*, support for the development of renewable energy in the Caribbean and addressing both the immediate, as well as long-term adaptation needs[67] of CARICOM SIDS and LDCs.[68] In March 2013, at the Forty-First Special Meeting of COTED under the theme of energy, a CARICOM Energy Policy was approved.[69]

The efforts of the organs[70] of CARICOM have been complemented by efforts through institutions and programmes of the union specifically mandated to address particular issues such as energy, climate change, *et cetera*. An example is the CCCCC, through which the

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[60] See, Fanz Gerner, supra note 34.
[61] By Arts. 11, 12 and 13, these are the Conference of Heads of Government and the Community Council of Ministers.
[62] Art. 15, 2001 Revised Treaty of Chaguaramas.
[63] The Conference of Heads of Government is the supreme decision making organ of CARICOM, the Heads of Government of the Member States or a Minister or other person to represent him or her at any Meeting of the Conference.
[64] The Community Council of Ministers which shall be the second highest organ of CARICOM
[65] Art. 15(2)(f), 2001 Revised Treaty of Chaguaramas.
[66] The *Liliendaal Declaration On Climate Change and Development*, issued by the Thirtieth Meeting of the Conference of Heads Of Government of the Caribbean Community, 2-5 July 2009, Georgetown, Guyana, online: http://www.caricom.org/jsp/communications/meetings_statements/liliendaal_declaration_climate_change_development.jsp.
[67] The Liliendaal Declaration on Climate Change and Development *supra* note 66.
[68] Haiti is actually the only lesser developed country (LCD) in CARICOM.
[69] CARICOM. CARICOM Energy Policy, 1 March 2013, online: http://www.caricom.org/jsp/community_organs/energy_programme/CARICOM_energy_policy_march_2013.pdf and CARICOM. CARICOM's Energy Policy in a Nutshell, online: http://www.caricom.org/jsp/community_organs/energy_programme/CARICOM_energy_policy_in_a_nutshell.pdf.
[70] Art. 10 of the 2001 Revised Treaty of Chaguaramas.

bloc has developed a regional framework to achieve development resistant climate change pursuant to the *Liliendaal Declaration*,[71] and to seek sustainable solutions for its implementation.[72]

While renewable energy is on the agenda of the region, given the benefits to energy security, the reduction in greenhouse gas emission, the creation of jobs and opportunities for saving foreign exchange,[73] a 1999 study[74] found that the current amounts of electricity generated from these renewable sources are nowhere near the region's potential. Since then however, there have been a number of energy policy reports that have promoted the advancement of renewable integration.[75] In 2012 and 2013, the Caribbean Renewable Energy Forum (CREF), released annual editions of the CREF/Castalia Renewable Energy Index.[76] The Index, which utilises 3 parameters,[77] is meant to be a useful tool which CARICOM governments can utilise to attract renewable energy investment, and adjust their policies and plans relating to renewable energy.[78]

Another effort to address the lack of baseline data and awareness within the region is the establishment of the Caribbean Information Platform on Renewable Energy (CIPORE).[79] CIPORE, which forms part of the Caribbean Energy Information System (CEIS),[80] was developed for the provision of information on renewable energy in the region, and acts as a clearing house, network and capacity building forum for renewable energy in the region.

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[71] *Climate Change and the Caribbean: A Regional Framework for Achieving Development Resilient to Climate Change* (2009-2015) (Belize City: CCCCC, 2009), online: http://www.iadb.org/intal/intalcdi/PE/2013/10773.pdf .

[72] At the Twenty-Third Inter-Sessional Meeting of the Conference of Heads of Government of the Caribbean Community, held in Suriname 8 – 9 March, 2012, the Heads of Government approved the 'Implementation Plan for the Regional Framework for Achieving Development Resilient to Climate Change' which defines the Region's strategic approach for coping with climate change for the period 2011 – 2021.

[73] Daniel Kammen and Rebekah Shirley. "Renewable Energy Sector Development in the Caribbean: Current Trends and Lessons from History" (2013) 57 Energy Policy, 244.

[74] Caribbean Council for Science and Technology, *Renewable Energy in the Caribbean, Where We Are; Where we should be* (LC/CAR/G.565/CCST/99/1) (4 June1999) at 2, online: Economic Commission for Latin American http://www.eclac.org/publicaciones/xml/3/10253/carg0565.pdf.

[75] For example, D. Loy, Energy-Policy Framework Conditions for Electricity Markets and Renewable Energies (Caribbean Chapters), (Eschborn, Germany: Division Environment and Infrastructure, TERNA Wind Energy Programme. CREDP Caribbean Energy, 2007).

[76] Gianmarco Servetti, Castalia-CREF Renewable Energy Islands Index, 10 October 2013, online: http://www.caribbeanenergyforum.com/themes/cref/pdf/cref-castalia-index-2013.pdf.

[77] The 3 parameters are 1. Enabling environment for renewable energy investments; 2. Renewable energy projects already implemented and 3. Potential renewable energy projects.

[78] Notes to the Castalia-CREF Renewable Energy Islands Index, 10 October 2013, online: http://www.caribbeanenergyforum.com/themes/cref/pdf/cref-castalia-index-2013-notes.pdf, 1.

[79] See Caribbean Information Platform on Renewable Energy, online: http://www.cipore.org/home/.

[80] The Caribbean Energy Information System (CEIS) is the energy information arm of the Caribbean set up to provide a regional energy information service through a network of Caribbean countries in support of planning and decision making. See CEIS, online: http://www.ceis-caribenergy.org/.

For its part, the University of the West Indies, Cave Hill Campus, is collaborating with various universities on renewable energy initiatives, including an international project spearheaded by the Small Developing Island Renewable Energy Transfer project (DIREKT).[81] The general objective of the project is to strengthen Cave Hill's science and technology capacity in renewable energy by means of technology transfer, information exchange and networking. It has enabled UWI to host renewable energy workshops and foster partnerships with regional businesses and universities in other small-island states that face similar development problems to Barbados.[82] The University also offers a Master's Degree in Renewable Energy Management,[83] and there exist programmes and courses aimed at building the capacity of the region's professionals, policymakers and public on related topics such as climate change, energy, oil & gas law and renewable energy law. These include the Climate Change stream of the Masters of Natural Resource and Environmental Management[84] and the Caribbean Energy & Gas Law course available by the Faculty of Law.

From a Regional to a National Agenda? Future Possibilities and Continuing Challenges

Renewable energy has clearly been identified as a crucial component for contributing to environmental sustainability, as well as to energy security. For CARICOM states, the utilisation of renewable sources of energy is seen as a viable course of action to safeguarding a sustainable future[85] by reducing the effects of deforestation, desertification, biodiversity loss and climate degradation commonly associated with conventional methods of energy generation. On the other hand, while fossil fuels continue to play a major role in energy supply in the region, it is broadly recognised that Caribbean economies are vulnerable to market pressures and volatile costs. Accordingly, as the demand for energy, as well as the amount expended on energy, continues to increase, so do the energy security concerns of the region. It is against this reality that one alternative to paying higher fossil fuel

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[81] Campus Out Front on Renewable Energy, Press Release of 23 January 2012, online: http://www.cavehill.uwi.edu/news/releases/release.asp?id=380.
[82] Ibid.
[83] See University of the West Indies, Faculty of Pure and Applied Sciences, MSc. Renewable Energy Management, online: http://www.cavehill.uwi.edu/gradstudies/resources/programmes/documents/prospectus/msc-renewable-energy.aspx.
[84] See Centre for Resource Management and Environmental Science, online: http://cermes.cavehill.uwi.edu/gradprogs.htm.
[85] See, the International Renewable Energy Agency, Vision and Mission, online: The International Renewable Energy Agency,http://www.irena.org/menu/index.aspx?mnu=cat&PriMenuID=13&CatID=9

costs, which the region has come to consider, is reducing import demand or increasing indigenous supply through the development of renewable forms of energy.[86]

However, despite the benefits of pursuing renewable energy as a tool in energy and environmental management, CARICOM states still face formidable obstacles to surmount in their quest for a renewable energy agenda. Most CARICOM states do not have an established national energy policy, long-term energy strategy nor energy action plan.[87] Further, there is a universal monopoly on the part of governments for electrical utilities in CARICOM states,[88] which can directly hamper private sector participation in pursuing alternative energy strategies. The involvement of private sector, especially in the form of technical assistance and investment, is a necessary framework condition for large scale renewable energy investment and development.[89] However, this has proven to be a measure states have been reluctant to make.

Thus far, renewable energy initiatives have all been elaborated within the context of the existing regulatory structure – most of which were developed around traditional forms of energy generation, or by creating subsidiaries to manage the specific initiative. This is true of the Renewable Rider Project in Barbados, and the Wigton Wind Farm Project located in St. Elizabeth, Jamaica. Wigton is registered by the *Climate Change Convention* under the clean development mechanism, and since 2005, has been successfully trading carbon credits under an emission reduction purchase agreement (ERPA) with the Dutch government.[90] There is also the proposed Amaila Falls Hydropower Project in Guyana, where the construction of a new 165MW hydroelectric is slated to be constructed at the confluence of the Amaila and Kuribrong Rivers meet, and provide electricity to Guyana's capital, Georgetown, and its second largest town, Linden, by an electric transmission line.[91] Amaila is envisioned to meet approximately 90 % of Guyana's domestic energy needs, and

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[86]For example, the 2009 *Liliendaal Declaration*. See also Barry Barton *et al*, "Energy Security in the Twenty-First Century" in Barry Barton *et al Energy Security: Managing Risks in a Dynamic Legal and Regulatory Environment* (New York: Oxford University Press, 2004) at 469 for further discussion of the issue.

[87] "Energy Situation in the Caribbean Region: Main Characteristics of Electricity Markets (2)" in Detlef Low, *Energy Policy and Planning Approaches throughout the Region*, slide show presented to the Caribbean Renewable Energy Forum (Dominica March 25 2009). See Also Thomas M. Scheutzlich, *Existing and Future Opportunities for Investment in Caribbean Renewables*, slide show presented to the Caribbean Renewable Energy Forum.

[88] CARILEC, online: http://www.carilec.com/.

[89] Thomas M. Scheutzlich, Existing and Future Opportunities for Investment in Caribbean Renewables, (slide show presented to the Caribbean Renewable Energy Forum, 15 October 2009) online: http://www.caribbeanenergyforum.com.

[90] Wigton Windfarm Project, Wigton II Project, online: http://www.pcj.com/wigton/about/factsheet.html

[91] Guyana REDD+ Investment Fund, Amaila Falls Hydropower Project, online: http://www.guyanareddfund.org/index.php?option=com_content&view=article&id=93&Itemid=119.

is viewed as the flagship[92] of Guyana's *Low Carbon Development Strategy*.[93] Jamaica and Guyana have been able to secure a larger quantum of investment utilising mechanisms under the climate change regime – the clean development mechanism (CDM) in the case of Jamaica,[94] and a bilateral arrangement[95] patterned on REDD+ in the case of Guyana. However, neither of these countries has elaborated a legal framework which specifically addresses this new paradigm in energy production and management. In Belize, after many legal challenges,[96] the Chalillo Dam was constructed, and energy is supplied through a subsidiary under a power purchase agreement with Fortis-Canada for energy derived from the hydropower facility at the Chalilo Dam.[97] Kentish has also suggested that OECS states may consider the use of the marine environment to establish their renewable energy projects,[98] but has pinpointed that this strategy will require a revamping of the current institutional and legal framework relating to energy in OECS states.

Perhaps the most ambitious renewable energy schemes in the CARICOM region to date, is the proposed construction of a fully commercial OTEC plant in the Bahamas – a project that will reportedly cost US$100m.[99] Cold water will be pumped from the ocean depths to provide cooling for a holiday resort, and eventually, the plan is to turn this into a full-fledged 10MW power station, as well as a desalination and aquaculture facility.[100] The agreement also includes a power purchase agreement, which means that the electricity and potable water generated from the facility will be sold to the Bahamian utility companies.

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[92] Ibid.
[93] Guyana's Low Carbon Development Strategy was launhed in 2009 and outlines Guyana's vision to promoting economic development, while at the same time combatting climate change. See Low Carbon Development Strategy, online: http://www.lcds.gov.gy/index.php?option=com_content&view=article&id=404&Itemid=157.
[94] Guyana REDD+ Investment Fund, Amaila Falls Hydropower Project, online: http://www.guyanareddfund.org/index.php?option=com_content&view=article&id=93&Itemid=119.
[95] In 2010, Guyana and Norway signed a bilateral memorandum of understanding, where Norway committed to providing Guyana with up to US$ 250 M by 2015 for avoided deforestation, provided certain performance indicators were met. See Guyana-Norway Parthnership, online: http://www.lcds.gov.gy/index.php?option=com_content&view=article&id=405&Itemid=158.
[96] See Belize Alliance of Conservation Non-Governmental Organizations v. DOE and Belize Electricity Company Limited,(No. 1), 2003, Privy Council 47 and Belize Alliance of Conservation Non-Governmental Organizations v. DOE and Belize Electricity Company Limited (No. 2), 2004, UKPC 6.
[97] Belize Produces Electricity at Chalillo Dam, The San Pedro Sun, 26 January 2006, online: http://www.sanpedrosun.com/old/06-043.html.
[98] See Kerith T. Kentish, A New Governance to Designing an Effective Arrangement for the Sustainable Management of Renewable Marine Resources in the OECS Region, Masters of Laws thesis, Dalhousie University (Halifax, Nova Scotia, 2010)
[99] Power from the Sea … Second Time Around, *The Economist*, 7 January 2012, online: http://www.economist.com/node/21542381.
[100] Ibid.

Conclusion

The Caribbean region is currently heavily dependent on fossil fuel combustion, with petroleum products accounting for the lion's share of its commercial energy consumption. These conventional methods of electricity production have occasioned drastic economic and environmental effects on the region – *inter alia*, difficulties with balance of payments, contributing to air, land and water pollution, as well as comprising a primary source of greenhouse gas (GHG) emissions. The exploitation of renewable energy resources indigenous to the region is therefore viewed as a prospective alternative for the sustainable development of CARICOM states. This is because the use of renewables can address economic, social and environmental issues associated with the expenditure and use of fossil fuels. However, despite the Caribbean's substantial renewable energy resources, exploitation lags far below their potential, due to policy, financing, capacity and awareness barriers. While efforts are moving ahead on the regional and sub-regional levels, these efforts need to be translated into more robust strategies, which can be utilised to revolutionise the renewable energy paradigm at the national level.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA

Human Rights Protection in Ecological Conservation in China: Progress, Problems and Prospects

MIAO HE*

Introduction

The myriad declarations, international conventions and agreements that address human rights and environmental protection – separately and jointly – reflect the international community's recognition that international actors, particularly States, have obligations in these areas; and that individuals, as well as groups of peoples, have a number of rights.[1] Although there is uncertainty as to whether a human right related to the environment will ever be recognized,[2] and several existing approaches[3] to link human rights and the environment are still being debated, environmental protection is undoubtedly an essential prerequisite to the effort to secure the effective enjoyment of human rights.[4]

The last three decades of rapid industrialization, urbanization and socio-economic development in China is well-known and discussed, as is the fact that the transition to a

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[1] Marie Soveroski, "Environmental Rights versus Environmental Wrongs: Forum over Substance?" (2007) 16 Review of European Community and International Environmental Law, 262.
[2] Alan Boyle, "Human Rights and the Environment: Where Next?*"* (2012) 23 European Journal of International Law.
[3] See Sarah C. Aminzadeh, "A Moral Imperative: The Human Rights Implications of Climate Change" (2006-2007) 30 Hastings International and Comparative Law Review, 231; Dinah Shelton, "Human Rights, Environmental Rights and the Right to Environment" (1991-1992) 28 Stanford Journal of International Law, 103; Thomas Greiber *et al*, *Conservation with Justice - A Human rights-based approach*, (IUCN, Gland, 2009).
[4] Dinah Shelton, 2010, *Linkages between Human Rights and Environmental Protection*, http://www.ttenvironmentalcommission.org/lectureseries/2010/dinah_shelton.pdf accessed 10 October 2013, p.6.

market economy has caused wide-spread environmental degradation.[5] China has taken, and is taking, various measures to improve ecological conservation to guarantee the citizens' environmental interests. After the concept of human rights was successfully enshrined in China's Constitution and national economic and social development plans in 2009, the Chinese State Council released the first *National Human Rights Action Plan of China* (2009-2010) in which there are several positive signals, such as the statement that environmental protection as a human right is a long-pursued goal of the Chinese government and people.[6] However, it contains few actual commitments.[7] One of the goals set by the 18th National Congress of the Communist Party of China in November 2012 was 'To respect and protect human rights'. More importantly, the white paper 'Progress in China's Human Rights in 2012' was issued by the Information Office of the State Council in May 2013. This white paper introduces the new development of human rights protection in China. For the first time an independent chapter is concluded on the 'Protection of Human Rights in Ecological Improvement'. This chapter can be regarded as a milestone to combine human rights protection and environmental conservation in China.

This country report focuses on the chapter on 'Protection of Human Rights in Ecological Improvement' in the 'Progress in China's Human Rights in 2012' paper. It provides details about the contents of the chapter and its progress, problems and prospects in China.

The Contents of Human Rights Protection in Ecological Progress

The chapter on 'Protection of Human Rights in Ecological Improvement' is one of the key chapters in the 2012 paper. This chapter specifically deals with: (1) the legal and policy framework which has been established to protect citizens' environmental rights; and (2) the fact that the right to live in a clean and healthy environment has been further protected.

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[5] Bjarne Andreasen, 2011, *Protection of Environmental Rights in China*, https://community.iucn.org/rba1/projects/Pages/Protection%20of%20environmental%20rights%20in%20China.aspx accessed 19 August 2013.
[6] State Council, 2009, *National Human Rights Action Plan of China (2009-2010)*, Information Office of the State Council, http://english.gov.cn/official/2009-04/13/content_1284128.htm accessed 18 September 2011.
[7] Supra No.5.

1. The Legal and Policy Framework to Protect Citizens' Environmental Rights[8]

Thanks to efforts in recent years, China has established a rather complete legal framework for environmental conservation, covering pollution control, resources conservation and preservation of protected areas and biodiversity. Since 2010, China has formulated 12 policy documents, which have included the *Strategy and Action Plan for Biodiversity Preservation in China (2011-2030)* and the *Plan on Energy Conservation and Emission Reduction during the 12th Five-year Plan Period*. China amended the *Law on Water and Soil Conservation* and *Ambient Air Quality Standard (AAQS)*, and promulgated administrative regulations such as the *Regulations on the Management of Ozone-depleting Substances* and *Regulations on the Administration of the Taihu Lake Basin*. All of these steps have significantly improved China's legal guarantee of the environmental rights and interests of Chinese citizens and made some invaluable contributions to the building of an eco-friendly country. For example, the first pioneer field of the *Strategy and Action Plan for Biodiversity Preservation in China (2011-2030)* [9] is specifically to improve the policy and legal system for biodiversity conservation and sustainable utilization, including completely reviewing the law and regulations to solve the conflicts regarding them; researching on the law and regulations on protected areas management; strengthening the implementation system for the law and regulation. In addition, Action 29 of this Strategy and Action Plan emphasizes that it should establish a broad public participation mechanism to guarantee the implementation of relevant policy.

Further Protections for the Right to Live in a Clean and Healthy Environment[10]

As the white paper indicates there have been a number of other improvements: Environmental assessment and monitoring have been strengthened at both a national and local level through routine monitoring of environmental elements, supervisory monitoring of pollution sources and early-warning monitoring of emergencies. In addition, an early-warning system of environmental monitoring, a supervision system of environmental emergency response and law enforcement, and a nuclear and radiation safety supervision system have

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[8] Chapter V. 'Protection of Human Rights in Ecological Improvement' in the "*Progress in China's Human Rights in 2012*", Paragraph 2, http://www.scio.gov.cn/zfbps/ndhf/2013/Document/1322524/1322524.htm accessed 20 September 2013.

[9] The Strategy and Action Plan for Biodiversity Preservation in China (2011-2030), issued by the Ministry of Environmental Protection of the People's Repbulic of China on 17 September 2010, http://www.mep.gov.cn/gkml/hbb/bwj/201009/t20100921_194841.htm, in Chinese, accessed 13 December 2012.

[10] Supra No.8, Paragraph 3.

been built. New environmental agencies, such as new water resource protection agencies in seven major river basins have also been established and by the end of 2011, there were 144 environmental assessment agencies with about 2,000 professionals in China.

Progress, Problems and Prospects in China

This white paper 'Progress in China's Human Rights in 2012' provides a lot of statistics and facts to introduce and explain the new progress on human rights in China from the economic, political, cultural, social and ecological perspectives, supplemented with international communication and cooperation in the human rights' field. Compared with the previous 9 white papers, which have been issued respectively since 1991, this tenth white paper draws a broader picture to reflect on progress on human rights in China, especially from the ecological perspective.

It is fair to say that the chapter on 'Protection of Human Rights in Ecological Improvement' in the white paper demonstrates progress in several aspects. It is the first time that there has been a formal introduction and explanation as to what Chinese governments from different levels have done in order to protect the environment and human rights. Secondly, China has established a rather complete legal framework for environmental conservation from several aspects. Thirdly, in order to improve the citizens' living environment, Chinese governments from different levels have offered a large amount of money for environmental protection projects. For instance, the fund from central and local governments was 293.2 billion in 2012, which was more than 1.5 times in 2009. Fourth, from 2008 to 2012, energy saving and emissions reduction has made significant progress, especially in relation to energy consumption per unit of GDP which fell by 17.2 per cent and in relation to sulfur dioxide emission which was reduced nationwide by 14.29 per cent. Fifth, the standards guaranteed as part of the right to live in a clean and healthy environment have been greatly improved. For instance, about 5,333 km² of wetlands have been restored and about 10,667 km² of forest-covered area have been created, effectively improving the water quality and self-recovery capability of these lakes. Sixth, regional ecological treatment and protection has been increasingly intensified. Notably among the 2640 protected areas, there are 363 national protected areas (94.15 million km²).

Besides detailing impressive progress in relation to addressing various sources of pollution as well as establishing new laws and administrative bodies, the white paper also points out that as a developing country with a huge population, and limited natural resources under serious ecological strain, as well as problems posed by unbalanced and unsustainable

development, China is still facing many challenges. For example, there is no definition of 'a clean and healthy environment'. There is little international consensus on the correct terminology about 'a healthy environment'.[11] Because of the vaguely defined term 'clean and healthy', it is not easy to give the same standards for 'a clean and healthy environment' in different regions in China. We could however make similar levels of improvement towards a clean and healthy environment based on the different original levels.

Secondly, how should the established legal and policy framework be put into practice? Laws are present but not enforced, which is especially true at the local level where economic growth is what matters the most.[12] Some Chinese legal scholars pointed out that it is difficult to find a specific provision from the existing environmental laws and regulations to solve a specific environmental issue in practice.[13] In addition, in 2008 the State Environmental Protection Administration (SEPA) was upgraded to ministerial level under the name Ministry of Environmental Protection (MEP) emphasizing the increased prioritization of the environment as issued by the central government.[14] This is indeed a good sign, however, the MEP is understaffed and the budget destined to these people is low.[15] This would also negatively affect the supervision for implementing the relevant laws and regulations.

Thirdly, this chapter in the white paper emphasizes the various measures taken by governments from different levels to protect the environment, but pays less attention to the roles of citizens and NGOs. NGOs are the vanguard of the growing non-governmental activity in China today. The question is not only whether non-governmental actors can shape the future of environmental protection in China, but also whether they can play a role in effecting broader change in the context of the on-going transformation of state-society relations in China.[16] The role of public participation is mentioned several times throughout the Chapter, however there is not as much information about how this can be achieved procedurally. Lessons could, however, be drawn from other areas. For instance, Article 13

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[11] Alan Boyle and Ben Boer, *Human Rights and the Environment*, 13th Informal ASEM Seminar on Human Rights, 21-23 October 2013, Copenhagen, Denmark, http://asef.org/images/docs/13th%20Informal%20ASEM%20Seminar%20-%20Background%20paper%20%28FINAL%29.pdf accessed 1 November 2013, p. 16.
[12] Simona Alba Grano, 2008, *China's Enivornmental Crisis: Why Should We Care?*, Working Paper No.28, Centre for East and South-East Asian Studies, Lund University, Sweden, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=3128517&fileOId=3128730 accessed 23 August 2011.
[13] For example, Jing Wang, 2009, "Thirty Years' Rule of Environmental Law in China: Retrospect and Reassessment", *Journal of China University of Geosciences (Social Sciences Edition),* no.5.
[14] Elizabeth C. Economy, "The Great Leap Backward?" (2007) 86 *Foreign Affairs*, 38.
[15] Sitamaran Srini, "Regulating the Environment: Assessing China's Domestic Environmental Law and Participation in International Treaties", 92006) 6 *The China Review*,183.
[16] Elizabeth C. Economy, "The River Runs Black", *The Environmental Challenge to China's Future*, (Ithaca: Cornell University Press 2004).

of the *Special Marine Protected Areas Management Approach* (2010), Action 29 of the *China Biodiversity Conservation Strategy and Action Plan (2011-2030)* and the *National Human Rights Action Plan of China (2012-2015)* addressed the importance of public participation in environmental issues. Lessons may also be drawn from existing practice by NGOs. For example, in 2011, Friends of Nature,[17] a Chinese Environmental NGO, sent an application to the Ministry of Environmental Protection to ask for more information about why the relevant department wants to reduce the area of the national protected areas for rare and endemic fish of the upper reaches of Yangtze River.[18] And the first landmark case of environmental information disclosure administrative litigation was decided by Guizhou Qingzheng Environmental Court in January 2012.[19] In addition, the draft Amendment of the Civil Procedural Law (submitted to the Standing Committee of the National People's Conference on 24 October 2011) proposed that "*the relevant agency, social groups can sue against the actions which harm social public interests, such as environmental pollution (…).*"[20]

Although these are small steps forward, they do reflect the prospect of human rights protection in the form of ecological improvement in China.

Conclusions and Outlook

The Chapter on 'Protection of Human Rights in Ecological Improvement' in the white paper is a remarkable step forward for human rights protection and ecological conservation in China. As mentioned in the white paper, a large effort is still required to solve the numerous problems in China. Even though no other country in the world has experienced a growth rate as rapid as that of China (taking into consideration the size of its population), there still are many opportunities for it to learn from the rest of the world's decades of environmental and developmental experience.[21] The key concern is how to balance potential conflicts regarding human rights protection and environmental conservation with the support of various parties.

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[17] "Friends of Nature" is the first Chinese environmental NGO approved by Chinese government in 1994, http://zh.wikipedia.org/wiki/%E8%87%AA%E7%84%B6%E4%B9%8B%E5%8F%8B, accessed 14 June 2013.
[18] China Youth Daily, published on 13 May 2011, http://env.people.com.cn/GB/14625045.html, accessed 4 August 2011.
[19] *The First Successful Environmental Information Disclosure Public Interest Litigation in China* (ACEF website) http://www.acef.com.cn/html/xwdt/11057.html accessed 16 October 2012. See also Shouqiu Cai, Lizhao Wen, 2013, "The Latest Development of Environmental NGOs In China", *4 IUCN Academy of Environmental Law eJournal,* http://www.iucnael.org/e-journal/current-issue-.html#sthash.ASc7fKos.dpuf accessed 23 April 2014.
[20] Detail information see http://roll.sohu.com/20120613/n345438748.shtml accessed 23 September 2013.
[21] Supra No.12.

That is to say, how do we deal with potential conflicts among various interests? A rights-based approach to conservation, as a relatively new and comprehensive approach, would help to solve these issues. We cannot expect China to solve all of its problems in one day, but it is worth expecting it to find a better way to achieve harmony between human rights protection and ecological conservation in China. Broadly speaking, nature conservation and human rights protection can be achieved at a relatively high level at the same time.[22]

[22] Miao He, An Cliquet, 2013, "Sustainable Development through a Rights-based Approach to Conserve Protected Areas in China", *China-EU Law Journal*, DOI: 10.1007/S12689-013-0031-7, http://link.springer.com/article/10.1007%2Fs12689-013-0031-7 accessed 4 November 2013.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA

China's New National Rules on Wetland Protection

LIN YANMEI* AND CHEN YUE#

Introduction

Conservation of wetlands in China is crucial. Wetlands not only serve essential ecological functions, such as maintaining biodiversity, controlling floods and removing of pollutants, but also serve necessary economic functions in rice and fish production, as a source of drinking water, and for transport and hydropower energy.[1] China is ranked fourth in the world in terms of wetland surface area.[2] China's wetlands occupy 65.9 million hectares and account for 10% of the world's wetland areas.[3] However, as has been reported by other commentators, "…under the pressure of population growth and rapid economic development of the last 60 years, China has lost 23% of freshwater marshes, 16% of lakes, 15% of rivers and 51% coastal wetlands".[4]

In order to better address the degradation of wetlands, China became a party to the Ramsar Convention on Wetlands in 1992.[5] Since then, the Chinese government has designated the State Forestry Administration (SFA) as the lead agency for the implementation of the

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[1] U.S. EPA: Wetland Overview, available at http://water.epa.gov/type/wetlands/outreach/upload/overview.pdf.
[2] Wang, Z, Wu, J, Madden M, Mao D. 2012, China's Wetlands: Conservation Plans and Policy Impacts, *Royal Swedish Academy of Science,* AMBIO 2012, 41:782-786.
[3] Ibid.
[4] Gong, P., Z., Niu, X. Cheng, K. Zhao, D. Zhou, J. Guo, L. Liang, X. Wang, D. li *et al* 2010. China's Wetland Change (1999-2000) Determined by Remote Sensing. *Science China Earth Science* 53:1-7.
[5] The Ramsar Convention (formally, the Convention on Wetlands of International Importance, especially as Waterfowl Habitat) signed in Ramsar, Iran, in 1971, is an intergovernmental treaty which provides the framework for national action and international cooperation for the conservation and wise use of wetlands and their resources. There are presently 168 Contracting Parties to the Convention, with 2,168 wetland sites, totaling more than 206 million hectares, designated for inclusion in the Ramsar List of Wetlands of International Importance. See http://www.ramsar.org/cda/en/ramsar-home/main/ramsar/1_4000_0__.

Ramsar Convention. In October 2000 the SFA, together with 16 other government ministries and institutions, issued a *National Wetland Conservation Action Plan* for China.[6] In 2004, the Chinese government established *a National Wetland Conservation Program (2004-2030)*.[7] The program set the long-term goal of establishing 713 wetland reserves or wetland conservation sites by 2030, including 80 wetland sites of international importance and to effectively protect more than 90% of natural wetlands by 2030.[8] In August 2005 the SFA established the Convention on Wetlands Management Office.[9] According to the SFA's most recent country report to Ramsar COP 11, China has designated 41 wetlands as Ramsar sites, established 550 wetland nature reserves (both national and local) and established 260 wetland parks (both national and local), totaling more than 18.2 million hectares and representing 50.3% of the total natural wetland area in China.[10]

Despite these efforts, the National People's Congress and its Standing Committee have not yet passed a national wetland protection law, nor has the State Council passed national regulations on wetland protection. The lack of national law on this subject matter poses great challenges to "effectively regulate the behavior of and relationships between the various stakeholders (for example, different levels of governments, the industrial sector, and the public)".[11] Although 18 out of 34 provinces in China have issued local regulations for wetland protection as of November 2013, it will be difficult to enforce them due to the lack of national laws.[12] In order to push for passage of a national law, the SFA adopted national rules on wetland protection titled the *Management Rules on Wetland Protection* on March 28, 2013. This country report seeks to provide an introduction to this new legal tool for wetland protection in China.

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[6] Ministry of Environment Protection: Country Report of Implementation of Convention on Biological Diversity, October, 2008, 10, available at www.cbd.int/doc/world/cn/cn-nr-04-zh.doc.
[7] Ibid, 11.
[8] Ibid.
[9] Ma Guangyuan: Wetlands Conservation in China, 2011, 12, available at: http://www.ramsar.org/pdf/cop11/Pre%20COP11%20Asia%20Reg%20mtg%20PDFs/Presentations/26-%20Wetlands%20Conservation%20in%20China_%20Ma%20Guangren_China.pdf.
[10] Ibid.
[11] Supra note 2.
[12] Ibid.

The State Forestry Administration's New Management Rules on Wetland Protection

The *Management Rules on Wetland Protection* entered into force on May 1, 2013 (hereinafter referred to as the Wetland Rules).[13] This is the first set of national rules focusing on wetland protection. *The Wetland Rules* provide a definition of the term 'wetland' and set out the basic approaches to regulating wetland utilization, conservation and restoration. However, *the Wetland Rules* are ministerial rules, 规章（guizhang), which have lower legal status than Laws passed by the National People's Congress or its Standing Committee and Regulations adopted by the State Council.[14] The Wetland Rules are not allowed to stipulate new administrative permit programs[15] or provide new administrative sanctions other than warnings or fines that should be no more than 30,000 yuan.[16] The Wetland Rules are rather short, comprising only 37 articles in total, and do not contain any specific enforcement provisions and programs. The SFA considers these rules as a preparatory step in the passage of a comprehensive *National Law or Regulations on Wetland Protection*.[17]

The Wetland Rules have two basic aims: to strengthen wetland protection, and to implement *the Ramsar Convention on Wetlands*.[18] The Rules provide that the State shall apply principles of prioritizing conservation, scientific restoration, reasonable use and sustainable development in decisions that affect wetlands.[19] *SFA's Wetland Rules* define the term wetlands as:

> *the perennial or seasonal areas of water, water and areas of marine water that the depth of which at low tide does not exceed six meters, including marshes, lake wetlands, river wetlands, coastal wetland and other natural wetlands and artificial wetlands that are habitat for key protected wildlife and wild plants.*[20]

[13] The full Chinese text of the Management Rules on Wetland Protection (2013) is available at http://www.forestry.gov.cn/portal/main/s/72/content-594660.html.
[14] Legislation Law of P.R. China (2000), Article 71.
[15] Administrative License Law of P.R. China (2003), Article 14 & 16.
[16] Administrative Penalty Law of P.R. China (2009), Article 12.
[17] State Forestry Administration: Key Assignments of 2013 Work Plan of Wetland Conservation and Management Center, February, 2013.
[18] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 1.
[19] Ibid, Article 3.
[20] Ibid, Article 2.

Wetland Conservation Planning

Article 7-9 of *the Wetland Rules* provide that the SFA and local forestry bureaus shall develop a plan for wetland conservation. The wetland conservation plan shall have the following content:

- Distribution, types and characteristics of wetland resources and the situation of the water resources and wildlife and plants resources;
- Guiding ideology, principles, objectives and tasks of wetland conservation and utilization;
- Key construction projects related to wetland conservation and the distribution of the construction projects;
- Investment estimates and benefits analysis;
- Measures to safeguard the implementation of the plan.[21]

In the past ten years, the Chinese government has developed one long term plan and two five-year implementation plans on wetland conservation. In October 2004 China's State Council approved the *National Wetland Conservation Program (2004-2030) (NWCP)*, which set the goals of establishing 713 wetland reserves, including 80 wetland sites of international importance, with more than 90% of natural wetlands effectively being protected by 2030.[22] The Chinese government completed the first implementation plan of the NWCP (2006-2010),[23] implementing 205 projects on wetland conservation, restoration, sustainable use and capacity building with a total investment of 3.1 billion Yuan from the central and local governments. [24] In August 2012, the State Council approved the *12th Five-Year Implementation Plan of the NWCP* (2011-2015).[25] The plan sets out four objectives: 1) initially establish a wetland conservation and management system with wetland nature reserves and national wetland parks; 2) carry out comprehensive wetland restoration projects with an aim to restore 116,500 hectares of wetlands and reverse the trend of degradation of natural wetlands and losses of important wetland functions; 3) implement a

[21] Ibid, Article 8.
[22] Ibid, Article 11.
[23] The full Chinese text of the implementation plan of the National Wetland Conservation Program (2006-2010) is available at http://www.shidi.org/sf_234BA5FBA6964C9296E74F89D5A2859C_151_shidi.html.
[24] The Office of Wetlands Conservation and Management at State Forestry Administration of China: National Report for Ramsar COP11, 8.
[25] The full Chinese text of the 12th Five-Year Implementation plan on Wetland Protection is available at http://wenku.baidu.com/view/b84def41ad02de80d4d8401d.html.

number of reasonable use of wetlands demonstration projects to promote the reasonable use of wetland resources; 4) strengthen the capacity of wetland protection at both the national and provincial levels.[26] The plan estimates that the central government and local governments will invest a total of 17 billion Yuan in projects for wetland conservation, research, capacity building and public awareness-raising.[27]

Survey and Monitoring

Article 10 of *the Wetland Rules* provides that the SFA shall organize national surveys on wetland resources and carry out monitoring and assessment of the status of wetland resources. The SFA, in coordination with other ministries and local governments conducted two national surveys with one completed in 2003, and the second one expected to be completed by the end of 2013.[28]

Wetland Conservation System

The *Wetland Rules* urge local governments and local forestry bureaus above the county level to establish wetland nature reserves, wetland parks, wetland protected plots and multi-unitization management areas to improve the wetland conservation system and strengthen wetland conservation and management institutions.[29] The key approach that the SFA and local governments employ to protect the natural wetlands is to establish various types of protected areas over wetlands. In fact, *the Wetland Rules* divide wetlands into wetlands of importance and general wetlands. Wetlands of importance include wetlands of national importance and wetlands of local importance. Wetlands that are not listed as wetlands of importance are general wetlands.[30] The SFA, in cooperation with other ministries, is responsible for listing wetlands of national importance and developing the standards for determining the wetlands of national importance; while local governments are responsible for listing wetlands of local importance and enacting rules governing wetlands of local importance and general wetlands in their jurisdictions.[31]

The following kinds of protected areas are of particular interest:

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[26] The 12th Five-Year Implementation plan on Wetland Protection (2012), 15
[27] Ibid, 42.
[28] Supra note 23, 8.
[29] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 11.
[30] Ibid, Article 12.
[31] Ibid, Article 13.

Ramsar Sites and Wetland Nature Reserves

Wetlands of International Importance (Ramsar sites) will be automatically considered as wetlands of national importance. Since acceding to *the Ramsar Convention on Wetlands* in 1992, China has designated 45 wetlands as Wetlands of International Importance (Ramsar sites), with a surface area of 3,858,240 hectares.[32] *The Wetland Rules* provide that the SFA shall provide guidance and supervise the conservation work at Ramsar sites and conduct regular monitoring and assessment of the ecological status of the Ramsar sites.[33] The Conservation and Management Institutes of the Ramsar sites shall have management plans, establish ecological warning mechanisms, carry out monitoring, research and create and maintain a database of information about the wetlands of international importance.[34]

Wetlands that meet the conditions to establish national natural reserves in accordance with *China's Regulations on Nature Reserves* will also be automatically considered as wetlands of national importance. The establishment and management of the wetland nature reserves shall follow relevant provisions stipulated in *the Nature Reserves Regulations*.[35] At the end of 2010, there were 109 national wetland natural reserves, 110 provincial wetland nature reserves that overlap with the areas of wetlands of international importance and national importance, and 197 other provincial wetland nature reserves.[36]

Wetland Parks

The other type of wetland conservation site is a Wetland Park. The Wetland Rules provide that Wetland Parks, including national wetland parks and local wetland parks, can be established for the purpose of protecting a wetland ecological system, reasonable use of wetland resources, conducting scientific research and education programs and ecological tourism.[37] China approved its first pilot National Wetland Park, the Huangzhou Xixi National Wetland Park in February 2005. Since then, a total of 247 Wetland Parks have been established for different types of wetlands, with a total area of 1.161 million hectare.[38] The

[32] China: The Annotated Ramsar List of Wetlands of International Importance, October 22, 2013, http://www.ramsar.org/cda/en/ramsar-documents-list-anno-china/main/ramsar/1-31-218%5E16477_4000_0__.
[33] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 16.
[34] Ibid, Article 17.
[35] Ibid, Article 19.
[36] The 12th Five-Year Implementation plan on Wetland Protection (2012), 19.
[37] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 20.
[38] The Office of Wetlands Conservation and Management at State Forestry Administration of China: National Report for Ramsar COP11, 10.

Chinese government plans to designate 221 new national wetland parks during the 12th Five Year period (2011-2015).[39]

The Wetland Rules provide that in order to qualify as a national wetland park, the wetland site shall meet the following two requirements:

- *"The wetland ecosystem is typical in the country or region; or locates in an important area; or its ecological function is representative; or it is rich in biodiversity or there are unique species;*
- *The wetland has an important or special value for scientific research, education and culture."*[40]

Before the promulgation of *the Wetland Rules*, the SFA issued guideline and evaluation criteria for the pilot national wetland parks program in 2008 and published the *National Wetland Parks and Assessment and Accreditation Measures of Pilot National Wetland Parks* in 2010.[41] The Wetland Rules further require the management unit of the national wetland park shall develop national wetland park master plan.[42] The SFA will conduct inspections and assess the management of national wetland parks and is empowered to revoke the name of a National Wetland Park if the park cannot meet the requirements.[43]

Prohibited activities in Wetlands

Article 31 of *the SFA's Wetland Rules* stipulates the following activities are prohibited in all wetlands except for exemptions provided by special provisions in other laws and regulations:

- Reclamation, grazing and fishing;
- Discharging filling materials to, draining the wetlands or changing the use of wetland without approval;
- Use and cut off the water source of the wetlands;
- Dredging, digging soil and mining;
- Discharge untreated sewage and industry waste water;

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[39] The 12th Five-Year Implementation plan on Wetland Protection (2012), 25.
[40] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 21.
[41] The Office of Wetlands Conservation and Management at State Forestry Administration of China: National Report for Ramsar COP11, 10.
[42] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 22.
[43] Ibid, Article 24.

- Destruction of wildlife habitat, fish migration channels, collecting wild plants or hunting wildlife;
- Introduction of alien species;
- Other activities that will destroy wetlands and their ecological functions.

Challenges and Future Development

The promulgation of *the Wetland Rules* is an important first step for China in moving towards a clear national legal system for wetland regulation. The Rules provide a legal basis for the experimental declaration of wetland national parks across China. They also support efforts to develop wetland conservation strategic planning which will assist in channeling more funds to wetland conservation. However, *the Wetland Rules* fail to provide for strong enforcement mechanisms. There are no clear provisions on legal liability for violations of the Rules. It is foreseeable that the enforcement of the rules, in particular rules prohibiting development activities in wetlands, will be very challenging.

Moreover, the definition of 'wetland' in *the Wetland Rules* conflicts with the definitions in at least four provincial regulations on wetland protection. For example, Yunnan provincial *Regulations on Wetlands* provide that only wetlands that are areas listed by the State, provincial government and other local government as wetlands.[44] This means that under the *Yunnan Provincial Regulations*, natural wetlands will not be protected unless they are listed as "wetlands". But according to *the SFA's Wetland Rules*, the natural wetlands in Yunnan Province that are not listed will still be protected against the prohibited activities. [45] China's Legislation Law provides that administrative rules and regulations issued by local people's congresses and governments have the same legal authority.[46] The conflicts between *SFA's Wetland Rules* and local regulations on wetland protection will need to be resolved. The way to solve this conflict might be to have the National People's Congress to decide which rules should apply.[47]

[44] Regulations on Wetlands of Yunnan Province, Article 3.
[45] State Forestry Administration: Management Rules on Wetland Protection (2013), Article 31.
[46] Legislation Law, Article 82.
[47] Article 86 (2) of the Legislation Law provides that when there is a difference between an administrative rule and a local regulation, the State Council shall give its opinion. If the State Council deems that the local regulations should apply, and then the local regulation shall be applied in the local jurisdiction; where the state council deems that the administrative rule shall apply, it shall request the Standing Committee of the National People's Congress to make a ruling.

The critical challenges posed by lack of enforcement mechanisms for prohibited activities and identifiable conflicts between local regulations and the national wetland rules might eventually lead to the adoption of China's national law on wetlands.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA

Chinese Government's Latest Position on Global Environmental Issues

NENGYE LIU*

Introduction

As the world's most populous country and a leading economic power, China has a natural place at the heart of global dialogue and cooperation. China is growing fast and, as it grows, it is faced with urgent environmental challenges. Climate change, species loss, pollution, water scarcity and environment damage are not problems confined to one country: they are challenges that concern all the world's citizens, but the rise of China gives them a new urgency.[1] The impact on the global environment created by China's economic growth has resulted in widespread concern in the rest of the world. So what is the view of the Chinese government towards global environmental problems?

China's first foray into the international environmental arena was at the 1972 United Nations Conference on the Human Environment (the Stockholm Conference). China's "open door" policy commenced 1978. Since then, China has gradually become an active player in international environmental law-making process. The United Nations Conference on Sustainable Development (Rio+20) took place in Rio de Janeiro, Brazil from 20 to 22 June 2012. The Chinese government published its third National Report on Sustainable Development in 2012 (hereinafter 2012 National Report) immediately prior to the Rio+20 conference.[2] Chapters 7 (International Cooperation) and 8 (Principles and Positions) of the 2012 National Report provide Chinese government's latest positions on global environmental issues. This report introduces and comments on the 2012 National Report.

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[1] http://www.chinadialogue.net/static/about.

[2] China published its first National Report on Sustainable Development in 1997, just before the Earth Summit Rio+5. The second National Report on Sustainable Development was published in 2002, before the World Summit on Sustainable Development (Earth Summit Johannesburg 2002).

2012 National Report on Sustainable Development

Cooperation with Developing Countries

For decades the Chinese government has been promoting the transfer of funding and technology from developed countries to developing countries for the protection of the environment. In the 2012 National Report, the Chinese government for the first time published its cooperation projects with other developing countries. This shows that the Chinese government has recognized China's changing role as an economic power and the consequent need to take more responsibility to deal with global environmental problems. However, it is believed by the Chinese government that economic development and poverty alleviation are the primary tasks for developing countries. Poverty can be seen as one major cause of deterioration of the environment in developing countries.

To 2010, the Chinese government had offered zero tariff treatment on more than 60% of products from 38 of the least developed countries.[3] The Chinese government had also provided other developing countries 287 billion yuan of financial assistance. 30 billion yuan of debt owed by 50 heavily indebted poor countries and least developed countries has also been waived by the Chinese government.[4] In recent years, in order to help other developing countries cope with the international financial crisis, the Chinese government has provided some African countries with 10 billion U.S. dollars in preferential loans, and committed to providing 15 billion U.S. dollars in credit to the least developed country members of the Association of Southeast Asian Nations (ASEAN) (Laos, Cambodia and Myanmar) to support their infrastructure construction projects.[5] China has also signed "Memorandums of Understanding on Poverty Reduction Cooperation" with Mexico, Argentina, Venezuela, Colombia and other Latin American countries to jointly promote the eradication of poverty.[6]

Moreover, the Chinese government has conducted personnel training programs for developing countries in more than 20 areas such as agriculture, health, education, economics and environmental protection. By 2010, a total of 130,000 management and technical personnel in developing countries had been trained in China.[7] China signed documents such as "the Memorandum of Understanding for Cooperation in Technology and

[3] Para.2, Section 1, Chapter 7, 2012 National Report, 72-73.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Para.4, Section 1, Chapter 7, 2012 National Report, 73.

Mechanism Concerning Africa's Environment", and "the Implementation Agreement of Environmental Cooperation Projects in Africa" in order to promote cooperation among developing countries.[8]

Cooperation with Developed Countries

The Chinese government has established a regular exchange and cooperation mechanism with developed countries in environmental protection, climate change, energy and resource conservation and sustainable use and disaster prevention, so as to jointly promote global sustainable development.

China has signed several memoranda of understanding with developed countries such as the United States, Canada, the European Union, Germany, the United Kingdom, France and Singapore on building energy efficiency, green buildings and low-carbon eco-cities.[9] One recent example is the *"Memorandum of Understanding on the Continuous Cooperation in Energy Saving and Environmental Protection"* signed by China and Japan. China maintains dialogue on environmental protection issues with several developed countries. For example, in 2001, China and the EU agreed to establish a ministerial-level dialogue mechanism on China-EU environmental policies and so far the ministerial meetings have been held four times. In 2008, China and the United States held the fourth Strategic Economic Dialogue and signed a *"Ten-Year Framework for Cooperation on Energy and Environment".* In addition, China has established the China Council for International Cooperation on Environment and Development to study the major issues surrounding the environment and development, and to share and spread successful international experience.

China and International Organizations

China is willing to be actively involved in the activities of various international organizations and institutions.[10] China is interested in strengthening multilateral international exchanges and cooperation on environmental protection.[11] Attracting funds and technologies from international organizations and institutions are important for China's economic and social sustainable development.[12]

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[8] Para.5, Section 1, Chapter 7, 2012 National Report, 73.
[9] Para.2, Section 2, Chapter 7, 2012 National Report, 74.
[10] Para.1, Section 3, Chapter 7, 2012 National Report, 75.
[11] Ibid.
[12] Ibid.

China benefits hugely from working together with international organizations on environmental protection. China has made full use of loans from the World Bank, the Asian Development Bank, the European Investment Bank, the International Fund for Agricultural Development and other financial organizations, to build a large number of demonstration projects covering the fields of agriculture, forestry, soil and water, energy, environment, urban construction, disaster prevention and mitigation.[13] From 2001 to 2010, the Global Environment Facility (GEF) approved a total of 77 projects in China and promised 565 million U.S. dollars in grants to improve the ability of China to comply with international environmental conventions.[14] In addition, the Chinese government has also worked with United Nations Development Program (UNDP), Food and Agriculture Organization (FAO), World Wildlife Fund (WWF) and was granted more than 20 million U.S. dollars.[15]

Chinese Government Views on Sustainable Development

In the 2012 National Report, much attention is paid to the concept of 'green economy'. It is believed that a green economy is positive for the alleviation of poverty in developing countries.[16] However, it is emphasized that developed countries should take the lead on developing green economies and set a model for developing countries. Moreover, developed countries should help developing countries to establish a green economy by providing funds, technology, capacity building and widening market access for goods from developing countries.[17] The international community should take all necessary measures to compensate the cost of economic transition towards a green economy in developing countries.[18] Furthermore, the concept of the "green economy" should not be used as an excuse for trade barriers or a prerequisite for providing funding or technology.[19]

It is suggested by the Chinese government that an effective institutional framework for sustainable development is important for the full implementation of *"Agenda 21"* and *"the Plan of Implementation of the World Summit on Sustainable Development"* and the response to new and emerging challenges.[20] Such an institutional framework should coordinate economic development, social development and environmental protection, increase the

[13] Para.3, Section 3, Chapter 7, 2012 National Report, 75.
[14] Ibid.
[15] Ibid.
[16] Para.2, Section 1, Chapter 8, 2012 National Report, 82.
[17] Ibid.
[18] Para.3, Section 1, Chapter8, 2012 National Report, 82.
[19] Para.4, Section 1, Chapter 8, 2012 National Report, 82.
[20] Para.5, Section 1, Chapter 8, 2012 National Report, 82.

voice and decision-making power of developing countries and solve their practical difficulties concerning capital, technology and capacity building.[21]

When it comes to how to establish an effective institutional framework, the focus is upon the role of the United Nations (UN). The core leadership role must be given to the UN.[22] The policy guidance and coordination functions of the UN need to be strengthened, so that it can coordinate and guide various agencies of the international community, multilateral institutions and control treaty mechanisms to take consistent actions for sustainable development.[23] The existing role of the UN's specialized agencies should be strengthened as well.[24] For example, the role of the United Nations Economic and Social Council and the Commission on Sustainable Development should be strengthened so as to promote the implementation of *Agenda 21 and the Plan of Implementation of the World Summit on Sustainable Development*.[25] The role of United Nations Environment Program (UNEP) should be enhanced in global environmental governance and more capital and technical support ought to be rendered to it.[26]

China is also willing to contribute to multi-level global environmental governance. The report argues that *"Agenda 21"* should be used as the basic framework to strengthen governance, encourage all states to develop their comprehensive strategies to strengthen the coordination of various government departments, and mobilize public participation and improve the implementation capacity.[27] It is suggested that international financial institutions, the World Trade Organization and multilateral development banks should incorporate the agenda on sustainable development into their planning and projects, and coordinate and cooperate with relevant UN bodies to form synergies and support the sustainable development governance at the regional, national and local levels.[28]

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[21] Ibid.
[22] Para.6, Section 1, Chapter 8, 2012 National Report, 83.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Para.7, Section 1, Chapter 8, 2012 National Report, 83.
[28] Ibid.

Selected Specific Issues

Funding and Transfer of Technology

Transfer of funding and technology from developed countries is always a policy priority. It is stated that the international community should take full account of the differences between developing countries and developed countries in terms of development stages and basic needs.[29] It is necessary to establish and implement long-term, effective funding and technology transfer mechanisms between developed and developing countries.[30]

Water

China adopted a stringent water management system[31] on 12 January 2012. China's objective is to achieve rational development, efficient use, comprehensive management, optimal allocation, comprehensive conservation, protection and scientific management of water resources.[32] In the mean time, China hopes that developed countries will support developing countries and improve developing countries' capacity to cope with flood and drought disasters and achieve sustainable hydrological development.[33]

Ocean

In relation to ocean governance, China hopes that the UN could encourage member states to develop and implement sustainable marine development strategies in line with their national conditions; take joint actions to ensure the fair, sustainable use of marine resources; and maintain or restore the structure and functions of marine ecosystems.[34] The international community should support the development of the marine economies of developing countries.[35] It is also necessary for developed countries to cooperate with developing countries in the restoration of marine ecosystems, the protection of the marine environment, and responses to sea level rise and ocean disaster prevention and reduction,

[29] Para.1, Section 2, Chapter 8, 2012 National Report, 83.
[30] Ibid.
[31] State Council's Opinion on the Implementation of the most stringent water management system, State Council of P. R. China Gazette, 6 (2012), 5-8.
[32] Para.6, Section 2, Chapter 8, 2012 National Report, 85.
[33] Ibid.
[34] Para.7, Section 2, Chapter 8, 2012 National Report, 85.
[35] Ibid.

with an aim of improving the capacity of developing countries in relation to the sustainable use of marine resources.[36]

Climate Change

China is fully supportive of *the United Nations Framework Convention on Climate Change* and *the Kyoto Protocol*. China follows the principles of fairness and "common but differentiated responsibilities". Declarations have been made that developed countries should take the responsibility for their historical emissions and current high per capita emissions and make a change to their unsustainable lifestyles and consumption patterns.[37] Developed countries should take the lead in substantially reducing greenhouse gas emissions, ensure a proper space for development for developing countries, and at the same time, provide funds and transfer technology to the developing countries.[38] Developing countries also need to take active measures and actions for climate change mitigation and adaptation. It is believed that mitigation and adaption should be given equal attention for dealing with climate change.[39]

It is also admitted by the Chinese government that China benefits greatly from the international cooperation on the reduction of GHG emissions. By 2010, China had ratified 3,241 clean development mechanism projects, of which 1,718 projects successfully registered with the United Nations Clean Development Mechanism Executive Board.[40] For the registered projects, the certified emission reductions are expected to be about 351 million tons of carbon dioxide equivalence, accounting for 63.78% of the global total.[41]

Biodiversity

Sovereignty issues surrounding biodiversity within China's jurisdiction are not addressed in the 2012 National Report. It is only mentioned that biological diversity conservation is a common responsibility of mankind.[42] It is reaffirmed that developed countries should support developing countries in biodiversity conservation without mentioning any specific

[36] Ibid.
[37] Para.8, Section 2, Chapter 8, 2012 National Report, 85.
[38] Ibid.
[39] Ibid.
[40] Para.4, Section 4, Chapter 7, 2012 National Report, 79.
[41] Ibid.
[42] Para.10, Section 2, Chapter 8, 2012 National Report, 86.

suggestions such as transfer of funding and technology.[43] The Chinese government is also willing to promote research and development of sustainable development technologies of biological resources to realize the scientific and rational use of biological resources, and promote the access to and benefit-sharing of biological genetic resources and associated traditional knowledge.[44]

Concluding Remarks

The Chinese government has always seen China as a developing country. The transfer of funding and technology from developed to developing countries has been China's key concern. It hopes to gain more funding, technology and other capacity building resources from developed countries so as to improve its work on environmental protection. For example, regarding climate change, the Chinese government has insisted that developed countries bear more responsibility for the reduction of GHG emissions. Meanwhile, the Chinese government has argued that developed countries should provide funding and technology to help developing countries establish a green economy. However the 2012 National Report, for the first time, does not criticize developed countries for not fulfilling their obligations to help developing countries. The Report also acknowledges that China benefits significantly from international environmental cooperation. Moreover, willingness has also been expressed to assist other developing countries.

The Chinese government's stance on the relationship between environmental protection and economic development is clear: economic development has been the priority for decades. Since it first adopted its market reform and open door policies, the belief in China has been that a good economy provides the foundation for better environmental protection. Although China would like to avoid the western model of 'pollution first, restoration later', it has failed to create a new path to develop the economy while protecting the environment.

To some extent, developed countries are responsible for their historical emissions and should play a lead role in promoting a greener economic model. Meanwhile, it is time for China to make a more significant contribution to combating global warming and other environmental problems. Domestically, it is essential for China to pay more than lip service to environmental protection and the concept of sustainable development.

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[43] Ibid.
[44] Ibid.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA

The Prevention and Control of Atmospheric Pollution in China

JINGJING ZHAO*

Introduction: Air Pollution in China

The People's Republic of China has recently suffered episodes of severe air pollution. According to statistics from the Ministry of Environmental Protection, long-lasting and large-scale hazy weather affects 600 million people living in 17 provinces covering one quarter of China's total land mass.[1] In response to the intense pressure on the Chinese government to address the issue, the Ministry of Environmental Protection and the General Administration for Quality Supervision and Inspection and Quarantine (AQSIQ) issued the *Ambient Air Quality Standards* ('the Standards') on 29 February 2012.[2] The Standards take effect nationwide from 1 January 2016, however provincial governments can adopt them before then. The *Standards* include two classes of limit values on the density of air pollutants. Class 1 standards apply to special regions including reservation parks, scenic areas and other specially protected areas. Class 2 standards apply to all other regions, such as urban, rural, and industrial areas.[3] According to the Standards, the air quality in nearly two thirds of the 330 major cities fails to meet Class 2 standards.[4]

On 4 November 2013, the China Meteorological Administration and the Chinese Academy of Social Sciences released the *Annual Report on Actions to Address Climate Change* ('the Green Book').[5] The Green Book reported a constant increase in the number of smog days over the last five decades. It also stated that China experienced more smog days in the first

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[1] Found at: http://news.xinhuanet.com/energy/2013-06/05/c_124812258.htm.
[2] Ambient Air Quality Standards (GB 3095-2012), available at http://kjs.mep.gov.cn/hjbhbz/bzwb/dqhjbh/dqhjzlbz/201203/W020120410330232398521.pdf. It replaces Ambient Air Quality Standards (GB 3095-1996).
[3] Ibid, at 2-3.
[4] Found at: http://www.mep.gov.cn/zhxx/hjyw/201302/t20130201_245846.htm.
[5] Found at: http://www.cma.gov.cn/2011xzt/2013zhuant/20131107/.

10 months of 2013 than in any other similar period since 1961 (29.9 in total).[6] Severe smog can affect air quality and human health, and cause economic loss for businesses affected by the forced closure of roads, airports and schools. The Green Book linked increasing smog days to changing weather patterns and a rise in human fuel consumption and air polluting activities.

Relevant Law and Policy

Air pollution in China is primarily regulated by the *Law on the Prevention and Control of Atmospheric Pollution 1987* ('the LPCAP').[7] The aim of the LPCAP is to prevent and control air pollution. The LPCAP was last amended in 2000. Some affected people are concerned that LPCAP provisions are based on out-of-date data. For example, the LPCAP focuses on regulating activities that release large particulate matter into the atmosphere, such as coal burning and certain waste disposal.[8] The LPCAP is less concerned with regulating activities that release fine particulate matter into the air, such as metal processing and smelting. This raises concerns for some affected people who feel that fine particulate matter may pose a greater risk to human health than large particulate matter. The Ministry of Environmental Protection began a review of the LPCAP in 2006. The Ministry submitted a revised version of the law to the State Council in 2010. On 31 October 2013, the 12th National People's Congress Standing Committee announced that the revised version was scheduled for deliberation within the Committee's term of office.[9]

In addition to the LPCAP, there are numerous policies dealing with air pollution in China. On 29 October 2012, the State Council published its 12th *Five-Year Plan on the Prevention and Control of Atmospheric Pollution in Key Areas*. The Plan addresses fine particulate matter and introduces a new policy focus on improved air quality. This indicates a shift away from a focus on control of pollution causing activities.[10] On 10 September 2013, the State Council issued the *Action Plan on the Prevention and Control of Atmospheric Pollution* ('the Action Plan').[11] The broad aim of the Action Plan is to improve China's overall air quality within five years. Other aims include a significant reduction in smog days and a dramatic improvement in regional air quality. Targeted regions include Bejing-Tianjin-Hebei, Yangzi River Delta and

[6] Found at: http://society.people.com.cn/n/2013/1104/c86800-23427944.html.
[7] As amended by the Standing Committee of the National People's Congress respectively in 1995 and 2000.
[8] Found at: http://www.gov.cn/ziliao/flfg/2005-08/05/content_20945.htm.
[9] Found at: http://www.npc.gov.cn/npc/xinwen/syxw/2013-10/31/content_1812101.htm.
[10] Found at: http://www.mep.gov.cn/gkml/hbb/bwj/201212/t20121205_243271.htm.
[11] Found at: http://www.gov.cn/zwgk/2013-09/12/content_2486773.htm.

Pearl River Delta. The Action Plan sets 2017 as the achievement date for two major goals: a 10 percent reduction in concentrations of large particulate matter in major cities; up to a 25 percent decrease in concentrations of fine particulate matter in targeted regions.

The Action Plan contains 10 major sections. Each section sets out measures to address specific problems or further certain goals. The following provides a brief overview of each section.

Section 1: Increase the effort of comprehensive control, reduce multi-pollutants emissions

The aim of Section 1 is to reduce the discharge of pollutants by:

- regulating the use of small coal-fired boilers
- accelerating desulfurization, de-nitrification and dust removal
- retrofit projects in key industries
- improving the quality of fuels
- controlling urban dusts
- eliminating high polluting yellow-sticker vehicles and old vehicles

Section 2: Adjust and optimize the industrial structure, promote industrial upgrading and restructure

This section introduces measures to:

- regulate new capacities in high energy consuming and high polluting industries
- accelerate the elimination of backward productivity in 21 key industries, such as iron and steel, cement, electrolytic aluminium, glass*, et cetera*
- reduce excess capacity
- halt illegal production projects in industry with over capacity

Section 3: Accelerate industrial technology transformation, improve the innovation capability

Section 3 promotes:

- the strengthening of scientific and technological development and promotion
- clean production
- a 30 percent reduction of emission intensity in key industries by 2017
- the development of a circular economy
- the fostering of energy saving and environmental protection industries

Section 4: Accelerate the adjustment of energy structure and increase clean energy supply
The plan here is to:

- limit the overall consumption of coal
- decrease the share of coal in total energy consumption to less than 65 percent by 2017
- accelerate clean energy utilization by increasing the supply of alternative energies like natural gas and coal-based methane
- promote the clean use of coal
- improve energy efficiency

Section 5: Strengthen energy-saving environmental thresholds and optimize industrial layout
Section 5 aims to strengthen the use of energy-saving environmental protection indicators by regulating industry actions. For example, projects which have not passed energy audits and environmental impact assessments will not be approved for construction, provided with land or credit support or supplied electricity or water.

Section 6: Elaborate the role of market mechanism and improve environmental economic policies
Tasks here include:

- the active promotion of new energy-saving and emission reduction mechanisms that integrate constraints with incentives
- increasing pollution charges
- encouraging banking and financial institutions to increase credit support for projects concerning the prevention and control of air pollution

Section 7: Integrate law and regulation systems, supervise and manage strictly based on the law
Section 7 is designed to achieve the Section 2 aim of 'promoting industrial upgrading and restructure' through the improvement of law and regulations. The focus here is on accelerating revision of the LPCAP and:

- considering possible criminal penalties for those who cause malicious pollution
- accelerating the establishment and revision of emission standards in key industries
- strictly implement environmental disclosure requirements

- publishing urban air quality ranking at provincial level

Section 8: Establish a regional corporation mechanism and integrate regional environmental management

This section establishes a 'Beijing-Tianjin-Hebei-Yangzi River Delta-Pearl River Delta Regional Corporation Mechanism'. The Regional Mechanism allows provincial governments and State Council to:

- collaboratively resolve significant regional environmental problems
- better implement air pollution prevention and control measures
- report on the progress of prevention and control measures
- determine periodical work requirements, priorities and major tasks

Section 9: Establish monitoring and warning system, and properly cope with heavy pollution weather

Section 9 requires local governments to include a Heavy Pollution Weather Emergency Response in their emergency management system. Responses may include:

- production limits
- temporary closure of heavy polluting enterprises
- temporary closure of primary and secondary schools
- control over motor vehicle use
- relevant meteorological interventions

Section 10: Clarify the responsibilities of the government and society, encourage the public to participate in environmental protection

Section 10 vests local governments with responsibility for air quality within their jurisdictions. It requires relevant governmental sectors to closely corporate with one another and to take unified action against air pollution. It acknowledges the role of enterprises and the public in tackling air pollution.

Joint Efforts to Combat Air Pollution

The Action Plan is the Chinese government's toughest plan so far to combat air pollution. It is likely to serve as the political benchmark for the nation's efforts to improve air quality.

Several challenges may arise in the implementation of the Plan. Firstly, implementation requires coordination and cooperation at the national, provincial, municipal and public level. In addition, implementation may require significant economic investment and industry reform. Consequently, it is uncertain to what extent the Action Plan will be implemented and to what extent it will deliver practical value to the people of China. On the positive side, the Ministry of Environmental Protection argues that the Plan is likely to benefit some industries, such as manufacturing and clean energy, and increase Gross Domestic Product by 1942.2 billion RMB ($319 billion).[12]

Just after the Action Plan was published, the Ministry of Finance allocated 5 billion RMB ($820 million) to the elimination of air pollution in six cities and provinces including Beijing, Tianjin, Hebei, Shanxi, Shangdong, Neimenggu and Hebei.[13] Several national Ministries and administrative bodies cooperated to develop and issue *Detailed Rules on the Implementation of the Action Plan in Beijing-Tianjin-Hebei and Adjacent Regions*. The Detailed Rules specifically address actions to reduce fine particulate matter. On 5 September 2013, Hebei province issued a document outlining 10 specific measures to eliminate air pollution.[14] One of these measures is the establishment of an Environmental Police team comprised of public security and environmental protection personnel.[15] Regional governments have also worked to review or create laws that complement the Action Plan. For example, the Shanghai Municipal Council has passed the *Measures for the Implementation of LPCAP*. The draft document is yet to be deliberated by the Standing Committee of Shanghai Municipal People's Congress.[16] On 20 November 2013, the Standing Committee of Beijing Municipal People's Congress considered the *Regulations on the Prevention and Control of Atmospheric Pollution in Beijing* for the third time. The *Regulations* will be deliberated by Beijing Municipal People's Congress in early 2014.[17]

As recognized by Section 10 of the Action Plan, air pollution cannot be eliminated without public participation. Effective public participation requires proper access to relevant

[12] Found at: http://news.xinhuanet.com/fortune/2013-11/27/c_125768942.htm.
[13] Found at: http://www.gov.cn/jrzg/2013-10/14/content_2506559.htm.
[14] Special Projects and Measures, found at: http://env.people.com.cn/n/2013/0905/c1010-22811817.html.
[15] Ibid. The recent progress of the projects can be found at http://www.gov.cn/gzdt/2013-10/13/content_2505855.htm.
[16] Found at: http://fzb.sh.gov.cn/fzbChinese/page/legalinfo/locallegalinfo24449.htm.
[17] Found at: http://news.xinhuanet.com/local/2013-11/23/c_118265138.htm.

information. To facilitate this access, the Chinese government has set up an official air quality monitoring programme and made relevant data available to the public.[18]

Conclusion

Air pollution poses an incredible challenge for China. The recently published Action Plan looks at the prevention and control of air pollution at the national level. Its implementation depends upon different groups at different levels working successfully together. These groups include:

- central, provincial and municipal governments
- industry bodies
- commercial entities
- the public

Should this cooperation be achieved, the Action Plan can play an important role in the elimination of air pollution. The next step is to consider translating this policy into law. The stabilization, nominalization and institutionalization of air pollution control and prevention also depend upon the strengthening of environmental law. China is currently in the process of revising its *Environmental Protection Law*. These revisions may help address China's air pollution problem. Similarly, the revised LPCAP is likely to have a significant impact on China's approach to the problem of air pollution.

[18] Found at: http://113.108.142.147:20035/emcpublish/; China National Environmental Monitoring Centre (CNEMC) under the auspices of the Ministry of Environmental Protection started to publish detailed information on the air quality of 74 national-wide cities from 28 December 2012 through its Real-Time National Urban Air Quality Publishing Platform; Report on the 74 Cities' Air Quality for October 2013, found at http://www.cnemc.cn/publish/totalWebSite/news/news_38965.html.; Real-time statistics on the density of SO2, NO2, CO, O2-1h, O2-8h, PM10, PM2.5 and Air Quality Index are accessible to the public at any time. The CNEMC also publishes monthly report on the monitored cities; also found at: http://www.mep.gov.cn/zhxx/hjyw/201309/t20130904_259477.htm.; In addition, China Meteorological Administration started to provide the public with forecast on the meteorological conditions for air pollution from 1 September 2013.

COUNTRY REPORT: DEMOCRATIC REPUBLIC OF CONGO

DIGNITÉ BWIZA*

Introduction

The Democratic Republic of Congo (DRC) is home to one fifth of Africa's total forest area and an estimated 60 percent of all Congo basin forests.[1] Past research suggests that Congo basin forests as a whole sequester and store 10 to 30 billion metric tons of carbon.[2] This sequestration is an ecosystem service that is becoming increasingly important as concerns about human-induced climate change grow. The tropical forests of the DRC are the second largest in the world after the Amazon. The DRC ranks fifth in the world for plant and animal diversity and harbours five natural World Heritage sites.[3] About 62 percent (1.45 million square kilometres) of the national territory of the DRC is covered by forests,[4] among which 45 percent (850,000 square kilometres) is composed of primary rainforest or dense humid forests.[5] The DRC Government estimates that 60 million hectares of forest are suitable for timber extraction, and that the timber production potential is 6 million cubic metres per year. These facts highlight the crucial role of DRC forests in the global climate and help explain the intense international attention on these forests.[6]

This country report focuses on the management of DRC forests. It begins with an overview of the legal and policy framework for DRC forest management. It concludes with a critical analysis of current status of this framework.

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[1] FAO Global Forest Resources Assessment, 2000 - chapter 15: Central Africa.
[2] Dkamela GP *et al* "Voices from the Congo Basin: Incorporating the Perspectives of Local Stakeholders for Improved REDD Design" (2009) *WRI Working Paper*, Washington DC: World Resources Institute.
[3] Nelson J, Kipalu P & Vig S "Field Dialogue on Free, Prior and Informed Consent 21-25 May 2012 Bas Congo and Kinshasa" (2012) Kinshasa: The Forest Dialogue.
[4] Approximately 86 million ha. Forest Monitor "The timber sector in the DRC: A brief overview" available at www.forestsmonitor.org (accessed 10 October 2013).
[5] UNEP "Africa Atlas of Our Changing Environment" (2012) available at http://www.unep.org/dewa/africa/africaAtlas/ (accessed 28 October 2013).
[6] Streck C Climate Change and Forests: Emerging Policy and Market Opportunities (2008) London: Royal Institute of Internal Affairs 202.

Legal Framework for Forest Management in the DRC

The International Context

There is no single, binding international treaty covering every environmental, economic and social aspect of forest management.[7] In 1992, United Nations member states approved the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests* ('the Forest Principles'). Sustainable forest management principles are also partially addressed by provisions in the *United Nations Framework Convention on Climate Change* (1992), the *Convention on Biological Diversity* (1992) and the *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification* (1994). The DRC has ratified each of these treaties.[8]

The Regional Context

The absence of an international sustainable forest management (SFM) treaty has not prevented the adoption of binding regional treaties. The *Southern African Development Community Protocol on Forestry* (2002)[9] and the *Treaty on the Conservation and Sustainable Management of Forest Ecosystems in Central Africa* (2005) exist alongside African regional treaties on environmental protection.[10] These treaties represent a regional commitment to, among other things:

- strengthen national forest law and governance
- develop national policies that can support and influence the sustainable use of forest and woodland resources
- develop national environmental action plans and sustainable development strategies

National Legislation

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[7] Ruis BMGS "No forest convention but ten tree treaties" (2001) FAO, available at http://www.fao.org/docrep/003/y1237e/y1237e00.htm (accessed 13 October 2013).
[8] UNFCCC ratified 9 Jan 1995, CBD ratified 03/12/1994, UNCCD ratified 12/09/1997.
[9] Ratified by the DRC in 1998, http://www.sadc.int/about-sadc/overview/history-and-treaty/.
[10] Such as the East African Protocol of Environment and Natural Resource Management (2005), the Phyto-Sanitary Convention for Africa (1992); the African Convention on the Conservation of Nature and Natural Resources (1968) and its Revised Version of 2003.

The DRC adopted the *Forestry Code* in 2002. The Code was the first forest management law to be adopted by the DRC since independence in 1960. The last forest management law dated from the colonial era and was no longer pertinent.[11] The *Code* contains several innovations including:

- a requirement that the State adopt a national SFM policy
- a requirement that logging companies and local communities enter into social responsibility contracts; and
- a requirement that all DRC projects undertake mandatory environmental impact assessment.

In 2006, the new DRC Constitution introduced advanced environmental obligations and provided for the creation of various national laws on environmental protection. [12] Subsequently, the DRC has adopted nearly 20 general environmental protection laws and eight forest management laws.[13]

National and International Forest Management Programmes

Other improvements to DRC forest management are occurring through the National Forest Fund and international donor programme. The DRC created the National Forest Fund in 2009. [14] The Fund's objective is to sponsor reforestation activities and support the enforcement of national SFM law and policy. In 2013, the Fund supported reforestation activities in Orientale province.[15] National funds also supplemented international donor programme funds in the following forest management projects:

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[11] Consell S "Forest Governances in Africa" (2009) *South African Institute of International Affairs*.
[12] "Without prejudice to the other provisions of this Constitution, statutory law determines the fundamental principles concerning: …. c) the regimes pertaining to real estate, mining, forestry and immovable property; … o) the protection of the environment and tourism;" (article 123).
[13] http://www.leganet.cd.
[14] provided for by article 81 Forestry Code of 2002; "Focus sur le Fonds Forestier National de la RDC" available at http://www.climat-forum.com/site/index.php?option=com_content&view=article&id=182:focus-sur-le-fonds-forestier-national-de-la-rdc-&catid=35:reportages--enquetes&Itemid=37 (accessed 12 September 2013).
[15] See RADIO OKAPI/ ENVIRONEMENt available at http://radiookapi.net/environnement/2013 (accessed 20 November 2013).

Name and date	Partners	Objectives
Reducing emissions resulting from deforestation and forest degradation – REDD (2009-2013)[16]	UN-REDD, Forest Carbon Partnership Facility, UNDP, FAO	To enable direct payments for slow forest loss, to enable provision of funding to establish protected areas and to plant trees
National Forest Mapping (2011-)	Ministry of environment and nature conservation in partnership with World Resource Institute	To improve the quality and availability of information in the forest sector and support transparent and participatory decision-making in SFM[17]
Conservation of Biodiversity and Sustainable Forest Management (2005-2017)[18]	GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit) german cooperation	To address the lack of adequate environmental institutions and the lack of suitable concepts to preserve forest and biodiversity in the DRC

Critical Analysis of Current Framework

Continuous Decline of Forest Areas

The aforementioned law reforms and funding initiatives have failed to prevent the decline of total forest areas. In 2012, the deforestation rate was estimated at 0.25 percent (double the 1990 rate). This percentage is expected to increase substantially as a result of infrastructure, farming, mining and biofuel development activities.[19] Between 2000 and 2012, two million hectares of forest were depleted.[20] This was partially due to the widespread non-observance of felling laws and a lack of clear legal guidance on management issues such as forest zone subdivision and illegal felling.[21]

[16] Created by Ministerial order n° 004/CAB/MIN/ECN-T/012 of 15 February 2012, completed by Decree n° 09/40 of 26/11/09 on additional details on REDD-DRC structures of implementation.
[17] Atlas Forestier Interactif (AFI) de la République Démocratique du Congo "Lancement officiel de l'Atlas Forestier Interactif de la République Démocratique du Congo" (2011) *forêt&vie* 18.
[18] Decree n° 09/40 of 26/11/09 on additional details on the composition and organisation of the REDD-DRC structures of implementation, Ministerial order n° 004/CAB/MIN/ECN-T/012 of 15 February 2012, UNREDD annual report 2011.visit http://www.giz.de/themen/en/16089.htm (accessed 9 October 2013).
[19] Ministry of Environment, Conservation of Nature and Tourism. UNEP "Democratic Republic of the Congo: Readiness Plan for REDD (R-PP)" (2010) at p.37-42; and "Des pays se liguent pour limiter la deforestation" (2013) http://www.digitalcongo.net/article/91945 (accessed 17 November 2013).
[20] "The timber sector in the DRC: A brief overview" available at www.forestsmonitor.org (accessed 30 October 2013).
[21] Resource Extraction Monitor "Mise en application de la loi forestière et de la gouvernance analyse de la législation forestière de la RDC" (2011) Cambridge: REM.

Non-Observance of Forest Laws

Local communities living adjacent to forest areas are reportedly responsible for illegal timber exploitations amounting to around 50 million cubic meters of wood.[22] The wood is cut for activities such as local and international trade, charcoal production, agriculture and the exploitation of other natural resources.[23] Other reported infringers include logging companies and states (primarily China, France, Portugal, Belgium, Italy and the Netherlands). Logging companies operate with impunity. The states import illegal timber and fail to enact measures to stop the trade and import of illegal timber on their territories.[24]

The DRC government itself has failed to take even the most basic measures to improve logging governance. This is noticeable in the reports of government violations and in the lack of government action on third party violations. For example, the Ministry of Environment and Nature Conservation (MECNT) continues to violate a 2011 law requiring it to publish logging contracts.[25] Consequently, information on the legality of wood exploitation cannot be verified.[26] This failing is compounded by the civil society outcry over a lack of reforestation programmes notwithstanding the reception of 'reforestation taxes' by the National Forest Fund.[27] It also sits uncomfortably alongside a failure to act to stop the illegal exploitation of timber in Bandundu. The Minister of Environment has stated that no timber exploitation permits have been issued in Bandundu for 2013. This statement fails to explain why logging activities have continued since January 2013 and no known action has been taken to address this situation.

Non-observance of forest law has also been displayed by members of the national army (the FARDC). Radio Okapi reported that in August 2013, FARDC soldiers refused to stop the illegal cutting of forest wood for the purpose of making charcoal in *Moba* (Katanga Province).

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[22] Global Witness *L'art de l'exploitation industrielle au Congo* (2012) at p.4; SODEFOR "les forets en R.D. Congo" (2013) available at http://www.sodefor.net/home.php?page=les-foret-en-rd-congo (accessed 8 October 2013).
[23] Radio Okapi "Province Orientale: les orpailleurs de Banyali kilo accusés de détruire l'écosystème", reported 13 August 2013, available at http://radiookapi.net/environnement/2013/08/13/province-orientale-les-orpailleurs-de-banyali-kilo-accuses-de-detruire-lecosysteme/ (accessed 7 October 2013).
[24] Green peace Africa "Cut it Out: illegal logging in the Democratic Republic of Congo" (2013); REM "Independent Monitoring of Forest Law Enforcement and Governance (IM-FLEG) in the Democratic Republic of Congo" (2013) Kinshasa: EU.
[25] Decree n° 11/26 of 20 May 2011 on obligation to publish all contracts regarding any DRC's natural resources.
[26] Green Peace Africa "Cut it out" at p.11.
[27] Available at http://radiookapi.net/emissions-2/parole-aux-auditeurs/2012/12/12/comment-se-deroulent-les-activites-de-reboisement-dans-votre-milieu/ (accessed 24 October 2013).

The FARDC soldiers argued that this activity helped them provide for their families since their salaries had been delayed for a long period of time. They allegedly told MECNT employees that they would not stop cutting wood until their salaries were paid.[28]

The above discussion outlines a variety of actors violating national and international SFM rules and principles. The following section critically analyses the contribution of DRC forest laws to the continuous decline of DRC forests.

DRC Forest Laws – Critical Analysis

It is well known that a variety of economic and political factors create barriers to the effective implementation of forest laws in the DRC. The question is to what extent are the problems rooted in the laws themselves? A critical analysis of the *Forest Code 2002* ('the Code') reveals that forest laws in the DRC are maladaptive for three reasons.

First, the structure of the current legal framework lacks context sensitivity. For instance, article 127 of the Code provides that offences are to be investigated and reported by forest inspectors. This assumes that forest inspectors are present in all forest areas. There are, however, no forest inspectors in most DRC forest areas. Further, the Code assumes the existence of fully functioning legal, administrative, infrastructure and personnel systems. In reality, such systems are non-existent. Most institutions essential for the implementation of forest laws were destroyed during the period of armed conflict. Another Code provision lacking context sensitivity is article 126. This article stipulates that an unprosecuted forest offence expires five years after it was perpetrated. The *Forest Code 2002* was developed in the later stages of the 1996-2003 armed conflict. In 2002, almost all DRC legal infrastructures were not functional, and it was not realistic to assume that they would become functional and able to investigate all forest offenses within the next five years. This means that many forest offences perpetrated between 2002 and 2008 will remain unpunished. Moreover, some forest areas remain under the control of armed rebel forces. It is likely that offences occurring in these areas will also go unpunished. Lastly, there are a number of complementary measures necessary for the Code to have full effect in all areas of the country. In many places, these measures are yet to be implemented.

[28]"Katanga: les militaries refusent de respecter interdiction de coupe de bois à Moba" available at http://radiookapi.net/environnement/2013/08/18/katanga-les-militaires-refusent-de-respecter-linterdiction-de-la-coupe-de-bois-moba/#more-158768 (accessed 20 October 2013).

The second reason the Code is maladaptive is that its goal does not sufficiently consider the DRC's development needs. Its primary purpose is to regulate forest exploitation in the interests of environmental protection. This purpose fails to acknowledge the vital role of forests in the economic development of the DRC and in achieving the Millennium Development Goals. Further, the Code does not take into consideration the extensive economic and social values that forests hold for civil society and specific groups. For example, wood is the main source of energy in the DRC, accounting for about 80 percent of national household energy consumption.[29] Also, the exploitation forest resources provides for the livelihoods of millions of forest and rural dwellers.

Finally, the Code is maladaptive because it is monocentric. It proposes only state-based responses to problems arising in the forest sector (via the judiciary). It does not provide for substantial involvement of local authorities or local communities in forest management. The above facts suggest that the *Forest Code* does not effectively address the problems it was intended to solve.

Conclusion

The DRC is part of a global move towards SFM. It has adopted international forest management rules and regional forest management treaties. The DRC has also promulgated national forest laws. It is possible for decentralised funding programmes to offset some of the failures of the national legal framework. However, this possibility is yet to eventuate. The programmes implemented during the last decade have failed to adequately accommodate the particularities affecting forest management in the DRC.

The international instruments to which the DRC have subscribed oblige the DRC to implement a legal framework for the regulation of forests. Although the DRC has complied with this obligation, it is clear that the resulting laws are maladaptive. There is thus an urgent need to review current forest laws. For DRC forest laws to be effective, they must take account of the socio-economic and political particularities prevailing in the country, provide for adaptive and alternative implementation measures and ensure the active participation of local communities in forest management and forest law implementation. Further, it is incumbent upon the Congolese legislature to adopt the complementary laws necessary for implementation of the *Code*. Moreover, all existing laws related to forest management

[29] Debroux L, Hart, T, Kaimowitz, D, Karsenty, A and Topa, G (Eds.) *Forests in Post- Conflict Democratic Republic of Congo: Analysis of a Priority Agenda* (2007) A joint report by teams of the World Bank, Center for International Forestry Research (CIFOR) *et al*.

should be compiled in one document to facilitate easy reference for legal practitioners and others involved in the exploitation and management of forests and the enforcement of forest laws. This task would be greatly assisted by the development and adoption of a global forest policy.

COUNTRY REPORT: CZECH REPUBLIC

Recent Statutory Developments

MILAN DAMOHORSKY*, PETRA HUMLICKOVA#

Our article aims to describe the main changes in the Czech legal regulation of environmental protection in its broad context of the European Union in the last twelve months.

Act on Integrated Pollution Prevention and Control

The Act on Integrated Pollution Prevention and Control (Act No. 69/2013 Coll.) underwent complex amendment following the transposition of *Directive 2010/75/EU on industrial emissions.*[1] The aim of the amendment is to further reduce polluting emissions, and improve the environment, whilst improving the efficiency of the permitting process, reducing unnecessary administrative burdens and optimizing legislative duties. The amendment mainly strengthens the role of 'best available technique' as the basis for the authorization of activities and sets the binding limits of such activities. The Act also puts the emphasis on the exchange of information on 'best available techniques', promoting new technologies and reviewing permits in the light of newly available technologies. It also extends the scope of industrial activities that must be assessed under the Act. The main goal is to protect soil and groundwater against pollution. In response to the restrictive judicial interpretation of 'public concern', the Act redefines the test for public interest groups with the right to participate in the permitting process

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[1] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

No Expropriation for Mineral Reserves

The controversial amendment to *the Mining Act (Act No. 798/2012 Coll.)* was approved. The amendment solves the conflict of interest between the protection of private property and public interest in relation to the exploitation of mineral resources. It significantly enhances the protection of the rights of property owners potentially affected by the designation of mining minerals. Designated mining minerals are owned solely by state. Amongst others they are: coal, radioactive minerals and oil. The ability to expropriate from the private owners for the purpose of mining these strategic mineral reserves was removed by this amendment. As a result, the state, or the operator of mining industry, must always reach an agreement with the concerned owners. This amendment was accepted after several years of painstaking efforts and it is a key instrument enhancing protection of municipalities facing demolition due to new mining. The Czech Ministry of Industry and Trade responded to the amendment by promising to adopt a new mining law that would at least partially return the possibility of expropriation.

Protection of Trees Outside Forests

After several years without the necessary decree, the Ministry of the Environment issued a *decree on the protection of trees and authorization for felling (No. 189/2013 Coll.).* The decree is valid and effective from 15 July 2013 and further implements section 8 para 3 and 5 of *Act No. 114/1992 Coll., on the Protection of Nature and Landscape*. A permit from the nature conservation authority is required for the felling of a tree or trees that are part of an 'alley', regardless of the circumference of the trunk of the tree. 'Alley' is defined as a continuous series of at least ten trees with regular spacing. If there are some trees missing in a continuous row of trees, it is still an alley. Trees growing in orchards and plantations of trees are not considered as part of an alley.

The owner of a garden can cut trees without any permission. 'Garden', for the purpose of the Decree, is defined as the site connected to a residential premises in a built-up area of a village, which is fenced and inaccessible to the public. All these conditions must be fulfilled at the same time.

Compensatory measures may be part of the nature protection authority's permitting decision. For example, there can be a requirement that the cutting of trees is offset by their replacement (planting the new ones) under section 9 of the Act on the Protection of Nature and Landscape. The nature protection authority can impose a requirement on applicants

who are permitted to cut trees that they plant new trees and care for them for the required period of time (not exceeding a period of five years).

Waste Act

The amendment of *Waste Act No. 169/2013 Coll*. will enter into force in three stages during 2013 and 2014. One of the main objectives of the amendment is to eliminate or mitigate certain requirements - mainly of an administrative nature - without any negative impact on the protection of the environment. Small and medium-sized businesses should primarily benefit from the amendment. The major changes include changes in the classification of waste by category. The list of hazardous waste will be deleted in the relevant decree (*No. 381/2001 Coll., on Waste Catalogue*) and *Annex 5 of the Waste Act* will also be revoked. Only municipalities will be obligated to prepare a waste management plan. It will be possible to perform the function of waste manager for unlimited number of operators.

Producers of hazardous waste do not have to apply for permission for their collection. Changes are planned also for control of transboundary transport of waste. The integrated system of reporting compliance environment (ISPOP) will be utilized for the assessment of waste, records on transporting waste will be kept also by this system.

Natura 2000

The Government also approved *Decree no. 318/2013 Coll*. which establishes a national list of Sites of Community Importance (so-called “SCI”). This Decree replaces the previously existing government decree. The reason for the adoption of a new government decree was the need to adjust the appropriate forms of national protection for individual SCIs. In accordance with this amendment, there is protection based on the basic protection conditions set by decree as well as protection in the form of specially protected areas, i.e. contractual protection.

The conditions of basic protection are directly defined in section 45c para 2 of *the Act on Nature and Landscape Protection.* The conditions of basic protection do not, therefore, need to be promulgated in further provisions The adoption of the new Decree allows the government to ensure protection of the entirety of 189 SCIs through the basic protection conditions and of part of a further 210 SCIs. The practical consequence will be the reduction of the number SCIs protected by specially protected areas and a reduction of the administrative burden whilst the necessary protection is maintained at all sites.

Building Act and EIA

In 2013, *the Construction Act (No. 350/2012 Coll.)* was amended at more than 250 different points. Detailed explanation of these changes goes far beyond the scope of this article. Changes are made to all phases of construction permitting - from land-use planning, through zoning permit, to building permits. Importantly however, even this extensive amendment did not solve the gaps in the transposition of *the Directive 2011/92/EU of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment.* The Aarhus Convention Compliance Committee has described the transposition as poor *(No. ACCC/C/2010/50)* and its findings and recommendations, which are already freely available, comprehensively describe the failure of the Czech system (concerning mainly the absence of a definition of 'public concern', ineffective public participation and lack of access to the courts). The infringement process of the European Commission was also initiated in April 2013 against the Czech Republic. Further drawing on European funds by the Czech Republic is subject to proper amendment of the impact assessment process. The Czech Republic is therefore working on an amendment to the EIA Act, which is closely linked with the Building Act and other laws in the field of environment, and it will probably be one of the biggest changes in this area in recent years.

New Civil Code

From 1 January 2014, the new *Civil Code (Act No. 89/2012 Coll.)* will enter into force. The new code, with more than three thousand sections, brings an unprecedented amount of changes, especially in the areas of property law, contract law, family law and tort law. Some of them are also related to the environment.

The Civil Code (under section 81 para 2) stipulates for a human right to a healthy environment. "The protection especially enjoys the life and dignity of man, his health, and right to live in a favourable environment (…)".

New Civil Code on Animals

One of the most important environmental provisions is the provision that living animals will no longer be considered as things, but as a sentient, gifted, living creatures which must be adequately and sensitively handled (under section 494). The provisions on the thing shall apply mutatis mutandis on the living animals only to the extent in which it does not contradict the animal's nature. If someone injures an animal, he or she is then obliged to pay the owner for all necessary costs associated with its healing, even if they were substantially higher than the value of the animal (under section 2970).

The existence of property rights in animals is somewhat inconsistent with the concept of the animal as a sentient being. Under section 1046 a wild animal is without a master until it no longer lives in freedom. The captured animal will become an animal without a master as soon as it has its freedom and the owner is not promptly and consistently searching in an attempt to re-capture it. Such an animal is not considered as without a master if it is labelled in such a way that it is possible to find its owner. Under section 1047, the tamed animal becomes an animal without a master, and it will then become possible to appropriate it on the private property by the owner of that property, in cases where the owner of the tamed animal has not searched for the animal, and the animal does not return within a reasonable time (six weeks). This does not apply if the animal is identified in such a way that it is possible to find its owner. Under section 1048, a domestic animal is to be considered abandoned if it is obvious from the circumstances that the owner has the intention to dispose of or expel the animal. This also applies to pet animals. Under section 1049, animals bred in a zoo and fish bred in pond, which are not public property, are not without a master.

New Civil Code on property rights

The new *Civil Code* narrows the definition of the term "thing" to "everything different from human and serving the needs of the people". It is interesting that the term "thing" will also cover controllable forces of nature which are traded (for example, electricity) (under section 497). The *Civil Code* also firmly establishes that all plants grown on land are an integral part of that land (under section 507).

The new *Civil Code* also restricts property rights under section 1013. The owner has to refrain from all that causes the pollution to trespass on the land of another owner (for example, waste water, smoke, dust, gas, odour, light, shadow, noise, vibration, entering

animals and other similar effects). The thresholds are local conditions and normal use of land. The direct emission on the land of another owner is forbidden regardless of the extent of such impacts and the level of nuisance of neighbour, unless it is based on specific legal grounds. *The Civil Code* now allows only for pecuniary compensation for harmful emissions caused by industrial operations. In case of emissions resulting from the business operation, which has been officially approved, neighbours have rights only for compensation in money, even if loss was caused by circumstances that during official negotiations had not been taken into account.

The new *Civil Code* then broadly analyses the different options relating to and situations which may arise concerning the ownership of things, including damages as compensation in relation to those things. Stock animals or bees, for example, may be legally sought on neighbouring land owned by another without previous permission of that owner, if the owner of those animals considers that they ran away or were blown away (under section 1014).

All the foetus of nature (trees, shrubs) which fall on property can easily be picked up and consumed by the owner of that "victim" land. At the moment they land they will become his property (under section 1016). The Civil Code also addresses other similar disputes, for example, the roots, branches and other parts of trees and shrubs. If an owner fails within a reasonable time after being asked by a neighbour to remove roots and branches, the neighbour may remove by sound manner and at appropriate time of year roots or branches of tree beyond his land when they caused him damage exceeding interests in maintaining the pristine tree.

The land owner may also require the neighbour to maintain land boundaries free from trees and shrubs in a reasonable way (trees usually growing at a height exceeding 3m have allowable distance from the common land boundary 3m and other trees 1.5m) (under section 1017). This does not apply if the neighbouring land is forest, or orchard, or when the trees are specially protected under other legislation.

The new *Civil Code* also attempts to solve problems with trickling water, snow or ice from adjacent land or buildings. A landowner has (with some exceptions caused by nature) the right to require a neighbour to modify construction of the neighbouring property so that the building does not trickle water or so that snow and ice do not fall on his land (under section 1019).

New Civil Code on Damages

The new *Civil Code* also regulates liability regimes for all types of damages and losses. Section 2924 provides the operational activities. The operator is held strictly liable. The Liability shall be relieved if evidence of having taken any care which may be reasonably required in order to prevent the damage. Section 2925, which imposes liability for harm from damage from particularly hazardous operations, held the operators also strictly liable. The operation is particularly hazardous, if the possibility of serious damage cannot be reasonably ruled out in advance by the exercise of due care. The liability is relieved, if the damage was caused by external force majeure or unavoidable act of a third party.

COUNTRY REPORT: DENMARK

New Policy Initiatives, Rules and Case Law

BIRGITTE EGELUND OLSEN[*] ANITA RØNNE[#] & HELLE TEGNER ANKER[ϕ]

New Policy Initiatives – Overview

'Denmark Without Waste' – Waste Management Strategy

'Denmark Without Waste' (October 2013)[1] sets out the Danish Government's waste management objectives, the primary objective being a move away from waste incineration and towards waste recycling.[2] The strategy also states an intention to limit landfill to materials that are uneconomical to recycle or incinerate. The 2013 strategy moves Denmark beyond the 1990s focus on waste incineration. This focus was driven by a 1997 ban on the use of waste as landfill if the waste was suitable for incineration.

The 2013 waste management strategy is partially motivated by a political view that far too many valuable materials end up in waste incineration plants. It is also influenced by the European Union's Environmental Action Programme[3] and roadmap for a resource-efficient Europe.[4] The strategy outlines six initiatives for implementing the new waste management approach. The first initiative requires more recycling of materials from households and the service sector. The goal here is for Danes to be recycling 50 percent of their household waste by 2022. This goal mirrors the European Union's 2020 target. Its success depends

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[1] The Danish Government: Denmark Without Waste: Recycle more – incinerate less, 2013/14:2.
[2] Denmark is 8th on the list of EU Member States for recycling waste collected by municipalities, Eurostat & EEA (2010).
[3] COM(2012) 710 final. On 20 November 2013 the Decision on the Action Programme was signed into law.
[4] COM(2011) 571 final.

upon Danish households more than doubling their current recycling rate in less than 10 years.[5] This initiative is supported by the second initiative which aims to increase collections of waste electronic equipment from Danish households.[6] The third initiative relates to the exploitation of waste nutrients such as phosphorus and biogas. For example, one strategy goal is to quadruple the use of certain food wastes for biogas by 2018. Another is to promote the horticultural use of phosphorus from incineration sludge. The fourth initiative focuses on construction and demolition waste which accounts for by far the largest percentage of total waste volumes in Denmark. The fifth initiative concerns the need to improve the quality of the recycling, for example, through the removal of environmentally harmful materials from waste. The last initiative is to intensify the development of new technologies for the purpose of ensuring better waste management solutions and increasing the export of Danish technology and knowhow.

The instruments introduced to implement the strategy will be based on the EU waste management hierarchy, which prioritizes how waste should be treated.[7] They will include:

- control instruments
- methods to decide on best treatment
- investigations of environmental and economic factors
- identification of waste with possibilities for recycling

The new initiatives themselves will be outlined in a waste management plan and waste prevention strategy. The Government has indicated that local municipalities will be vested with much of the responsibility for developing waste management solutions.

The 'Denmark Without Waste' strategy has been met with some scepticism, especially by local municipalities and the owners of incineration installations. For example, several municipalities have asked for documentation which proves that it makes environmental sense to switch to recycling. The Government intends to conduct an evaluation of the strategy's implementation in 2016. This evaluation will be used to assess the need for further efforts.

[5] Article 11(2)(a), Directive 2008/98/EC on waste.
[6] Article 7(1), Directive 2012/19/EU.
[7] See Article 4, Directive 2008/98/EC on waste.

'Towards a Low Carbon Society' – Climate Policy Plan

The Danish Government seeks to set a good example for ways to combat climate change in the climate policy plan *'Towards a low carbon society'* (August 2013). The plan aims to contribute to the European Union's target of an 80-95 percent reduction of greenhouse gas emissions by 2050 by targeting a 40 percent reduction in greenhouse gas emissions by 2020 (when compared to 1990 emissions). Current projections indicate that without new initiatives, Denmark will emit about 4 million tonnes more than the climate plan target.

One goal of the plan is to ensure that all energy consumption is based on renewables by 2050. This goal is to be achieved by ensuring all electricity and heating is powered by renewables by 2035. If this goal is realised, total Danish greenhouse gas emissions in 2035 will be 50 percent less than those emitted in 1990. With regards to transport and agriculture, only moderate reductions are anticipated in the absence of new policies. Implementation of the plan will be assisted by the *Climate Change Act*, due for adoption in 2014. One aim of the Act is to establish a framework for monitoring reductions through measures such as regular status reports on climate change mitigation efforts.[8]

'Intelligent Energy System of the Future' – Smart Grid Strategy

There is political agreement that by 2020, 50 percent of electricity consumption in Denmark will be met by wind turbines. To help achieve this goal, the *'Smart Grid Strategy'* (May 2013) aims to reduce the need to expand electricity infrastructure by enabling Danish consumer's greater management over their energy consumption. The strategy allows consumer access to data hubs that record, among other things, hourly electricity meter readings. This information will help consumers use energy more efficiently and identify when power is cheapest to use. Another strategy measure to incentivise electricity use during low demand times is the wider application of variable tariffs. The *'Smart Grid Strategy'* introduces new products and digital services that are likely to help move Denmark towards a smart energy future.[9]

[8] http://www.ens.dk/sites/ens.dk/files/policy/danish-climate-energy-policy/danishclimatepolicyplan_uk.pdf.
[9] http://www.kebmin.dk/sites/kebmin.dk/files/klima-energi-bygningspolitik/dansk-klima-energi-bygningspolitik/energiforsyning-effektivitet/smart/smart_grid_strategy_uk_summary_web.pdf.

Strategic Environmental Assessment of Offshore Oil and Gas Licensing and CO_2 Injections

The Danish Energy Agency (DEA) is in the midst of planning the 2014 round of oil and gas exploration and production licenses in the western Danish part of the North Sea. The DEA are also considering the possibility of a permit scheme for CO_2 injections into existing oil fields in the area. CO_2 injections aim to stimulate the production of hydrocarbons that in turn enhance oil recovery. While the permit scheme is expected to generate more activity in the area, it is not expected to lead to new types of activity. No CO_2 injections have occurred in the area to date.

A Strategic Environmental Assessment of the scheme has been prepared and published in accordance with the *Environmental Assessment of Plans and Programmes Act 2013*.[10] The assessment concludes that the scheme is unlikely to have a significant impact on marine mammals, birds and fish. The assessment also considers the impact of the scheme on nearby Natura 2000 sites, being sites designated under European Union directives for the purpose of ensuring 'the long-term survival of Europe's most valuable and threatened species and habitats'.[11] The assessment concludes that the scheme is unlikely to lead to any significant effects on nearby Natura 2000 areas.

The Strategic Environmental Assessment was submitted for public consultation in July 2012 and open to submissions from authorities in Norway, Germany, the Netherlands and England. The DEA received 839 responses, including two from the UK, eight from Denmark and 829 from Germany (many identical). Submission concerns related to:

- oil and gas mining in general
- CO_2 injections in general
- effect of noise levels of CO_2 injections on marine mammals
- fear of major environmental accidents and resulting impact on neighbouring German habitats

The DEA have prepared a summary report on how these submissions will be taken into account in the final permit scheme. It is expected that oil and gas exploration licenses will be

[10] Consolidated Act No 939 of 7 March, 2013.
[11] http://ec.europa.eu/environment/nature/natura2000/.

granted separate to CO_2 injection licenses. Before any 2014 licenses can be granted, the Minister must present a statement on the area and any licensing scheme conditions to the Parliamentary Climate, Energy and Building Committee. An invitation to apply for a license will then be published in the Official Journal of the European Union and the Danish Official Gazette.[12]

Recent Statutory Developments

Renewable Energy Act (Revised) – Promoting Local Acceptance of Onshore and Near-Shore wind Energy Projects

In many countries, wind energy projects are increasingly confronted with local opposition that extends the project development period, raises costs and in some cases brings otherwise viable projects to a halt. As a result, there is a need for incentives to enhance local support. One such incentive may be the introduction of regulatory financial obligations that allow those living close to renewable energy installations to buy-in to the project or be compensated for the loss of value to property. In 2009, Denmark introduced such a mechanism through the *Renewable Energy Act*.[13] Legislated measures include:

- support for the financing of preliminary investigations by local wind turbine owners' groups
- an option for local citizens to purchase between 20 to 50 percent of the shares in wind turbine projects (the co-ownership scheme)
- a right of property owners to be compensated for the loss of value of their property due to the erection of wind turbines (the compensation scheme)
- a fund to enhance local scenic and recreational values

The *Renewable Energy Act* was reviewed in 2011. The review included an assessment of the effectiveness of the above schemes. While the assessments were generally favourable, the review did recommend some changes to the scope of compensation claimants. Other changes were recommended so as to bring the schemes into line with the Energy Agreement settled on 22 March 2012. This agreement, the result of broad political consensus, prioritised wind energy installations in near-shore areas. The review led to

[12] http://www.ens.dk/undergrund-forsyning/olie-gas/miljo/strategisk-miljoevurdering-plan-olie-gas-co2-injektion-eor.
[13] Act No 1392 of 27 December 2008 on the promotion of renewable energy.

Parliament adopting an amended *Renewable Energy Act* in June 2013.[14] The amendments limit compensation claimants to dwelling owners and expand the application of the schemes to near-shore developments.

In regard to compensation claimants, the previous scheme obliged developers to compensate every property owner for any 1 percent decrease in property value. This entitled owners of farm land to compensation despite the fact that wind farms are unlikely to affect the value of cultivated land. Under the revised *Renewable Energy Act*, only dwelling owners can claim compensation for such a loss. Concerning an expanded application of the Act, the revisions extended the schemes to near-shore wind farms. That is, the Act now recognises that although most wind turbine nuisances occur in relation to onshore wind turbines, near-shore wind turbines may also impact the value of coastal dwellings. The revised Act also extends the co-ownership scheme to near-shore projects. This allows locals located less than 16 kilometres from any offshore development to purchase a minimum of 20 percent of shares in the project. The scheme is open to citizens who permanently reside in the municipality where the wind farm is located or, in the case of near-shore wind parks, residents in municipalities that have a shoreline within 16 kilometres of the nearest wind turbine. Citizens who live within 4.5 kilometres of the site have preferential rights to purchase a maximum of 50 shares.[15] To promote local ownership specifically for near-shore projects, an additional incentive has been introduced into the revised Act. Now, developers who can document that at least 30 percent of a project is locally owned (by enterprises and citizens) receive an extra price supplement (DKK 0.01/kWh) during the subsidy period.

Recent Case Law

Danish River Basin Management Plans Declared Invalid by the Appeals Board

The heated controversy surrounding the implementation of the Danish Water Framework Directive resulted in significant delays to the development of River Basin Management Plans (RBMPs). The Ministry for the Environment finally published the RBMPs in December 2011, more than two years after the Water Framework Directive deadline. In December 2012, following an appeal from a number of farmers, the Nature and Environment Appeals Board declared the RBMPs invalid on the grounds that an 8-day public consultation period was inadequate to allow landowners and others to comment on adjustments made to the RBMPs

[14] Consolidated Act No 1274 of 11 November 2013.
[15] Renewable Energy Act, s 15(1).

by the Ministry.[16] The dispute concerned the status of watercourses, specifically whether watercourses should be categorised as 'natural' or 'artificial or heavily modified'. It was well known that the Ministry for the Environment had categorised most watercourses as 'natural' even though some of them fulfilled the criteria for 'artificial or heavily modified'. A categorisation of 'natural' meant that the watercourse was subject to the more onerous objective of 'good ecological status' rather than the less ambitious objective of ensuring 'good ecological potential'. In the draft RBMPs, the Ministry had categorised about 2 percent of RBMPs as 'artificial or heavily modified'. After a 6-month period of public consultation, the Ministry made adjustments concerning about 27 percent of RBMPs watercourses. The Nature and Environment Board of Appeals found that while the adjustments were not so significant as to constitute a new plan, landowners and others should have been given an adequate opportunity to comment. A supplementary consultation period of 8 days was insufficient for this purpose.

The Nature and Environment Appeals Board decision was a major blow to the Ministry for the Environment. In July 2013, the Ministry opened new draft RBMPs up to another 6-month consultation period. In the meantime, the Ministry drafted an entirely new legal framework for the implementation of the Water Framework Directive. This framework was presented to Parliament in November 2013. The basic idea of the new framework is that the new RBMPs will only serve informative purposes and the categorisation of water bodies will be established in separate executive orders. This would, in the Government's view, justify the abolition of any right of administrative appeal to the Nature and Environment Appeals Board.

[16] Nature and Environment Appeals Board, 4. December 2012, NMK-400-0063, NMK-400-00067, NMK-400-00069.

COUNTRY REPORT: ETHIOPIA

Green Growth, Investment, Environment and Sustainable Development in Ethiopia

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Introduction

In the last two decades, Ethiopia has put in place environmental policy, strategies and laws and has established the requisite institution in charge of environmental protection. However, there have been some notable developments in recent years regarding the policy and legal regime in relation to the environment. Ethiopia issued a *Climate Resilient Green Economy Strategy* in 2011, which aims at transforming Ethiopia into carbon-neutral middle-income country by 2025. Even though there has not been a major legislative development with regard to the environment in the last two years, Ethiopia issued a new investment law in 2012 which could have important ramifications in relation to the environment and sustainable development.

In terms of institutional infrastructure, one notable development has been the transformation of the Ethiopian Environmental Protection Authority (EPA) to a new Ministry, the Ministry of the Environment and Forests in 2013. The creation of this new institution, by upgrading the former agency to a Ministry, appears to be an indication of an increased willingness on the part of the government to give more attention to environmental protection. The expectation is that the new Ministry will be able to make a meaningful difference in environmental protection in the country by addressing the institutional and capacity challenges of the former EPA.

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The Constitutional, Policy and Legal Basis for the Protection of the Environment

The Constitution of the Federal Democratic Ethiopia (the FDRE Constitution)[1] and *the 1997 Environmental Policy of Ethiopia statement (the EPE)*[2] provide a broad constitutional and policy basis for environmental protection in Ethiopia. *The FDRE Constitution* recognizes the right to live in a clean and healthy environment under Art 44(1), which is part of the chapter dealing with 'Fundamental Rights and Freedoms.' Similarly, Art 43(1) of *the FDRE Constitution* guarantees the peoples of Ethiopia 'the right to sustainable development' and envisages development through rational and prudent use of environmental resources (Article 43.4). *The FDRE Constitution* further requires that international agreements and relations, concluded or established by the country, should uphold the right to sustainable development (Article 43.3).

The environmental objectives of *the FDRE Constitution* under Article 92 prescribe, *inter alia*, that the design and implementation of programs and projects of development should not damage or destroy the environment; that the people have the right to full consultation and to express their views in the planning and implementation of environmental policies and projects that affect them directly; and that government and citizens have a duty to protect the environment.

The Environmental Policy of Ethiopia Statement (the EPE) provides more specific guidelines on environmental governance in Ethiopia. While the overall policy goal of EPE is the improvement and enhancement of the health and quality of life of Ethiopians and the promotion of sustainable development, there is also a long list of specific objectives.[3] According to the 'key guiding principles' of the EPE the development, use and management of renewable resources needs to be based on sustainability, and the use of non-renewable resources needs to be minimized and where possible their use should be extended through recycling. More importantly, the key guiding principles state that when a compromise

[1] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995.
[2] Environmental Protection Authority and Ministry of Economic Development and Cooperation, *Environmental Policy* (1997).
[3] The specific objectives include: to ensure that essential ecological processes and life support systems are sustained; that biological diversity is preserved; and that renewable natural resources are used in such a way that their regenerative capabilities are maintained and that the needs of future generations are not compromised; to ensure that the benefits of exploitation of non-renewable resources are also extended to the future generation; to prevent the pollution of land, air and water in the most cost-effective way so that the cost of effective preventive intervention does not exceed the benefits; to ensure peoples' participation in the eco-management; to improve the environment of human settlements in such a manner that satisfies the physical, social, economic, and cultural needs of the inhabitants; and to enhance public awareness and understanding about the link that exists between development and environment.

between short-term economic growth and long-term environmental protection is necessary, the compromise should be in favor of protection of the environment, and environmental protection should be made an integral part of development planning.

With a view to translating the objectives and guiding principles of the EPE into practice, the country has issued specific laws relating to different aspects of environmental protection. The main environmental laws of the country were issued in the same year and include: the *Environmental Organs Establishment Proclamation* No. 295/2002, the *Environmental Impact Assessment Proclamation* No. 299/2002 and the *Environmental Pollution Control Proclamation* No. 300/2002.

The FDRE Constitution, the EPE and the environmental protection laws when taken together appear to suggest that Ethiopia follows a cross-sectorial rather than a sectorial approach where protection of the environment should be mainstreamed in all policies, laws, programs, projects and activities based on the idea of sustainable development. Sustainability is a key element in development where environmental protection should be given precedence over mere economic growth.

Ethiopia's Climate Resilient Green Economy Strategy

Ethiopia is a country that has suffered and continues to suffer from the negative effects of climate change. For a long time the country has been struggling with drought and the unpredictable patterns of rain including rain failures which have resulted in food shortages and famine in the country. Climate change is often taken to be the culprit behind this and other similar problems in the country.

With a view to overcoming the effects of climate change and promote green growth, Ethiopia adopted *the Climate Resilient Green Economy Strategy (CRGE)* in 2011.[4] The CRGE is built on the five-year national Growth and Transformation Plan (GTP) which was adopted in 2010 and carries the ambition of transforming Ethiopia into a middle income country by 2025. The CRGE makes a brief assessment of the challenges of conventional economic growth in the context of Ethiopia. It forecasts that greenhouse gas emissions would more than double to 400 million tonnes of CO_2 equivalents (Mt CO_2e) in 2030 if Ethiopia were to pursue a conventional economic development path. It also states that conventional economic growth

[4] Federal Democratic Republic of Ethiopia (2011), "Ethiopia's Climate Resilience Green Economy Strategy: the Path to Sustainable Development." Addis Ababa, Ethiopia.

could lead to other challenges, such as depleting the natural resources that Ethiopia's economic development is based on, locking it into outdated technologies.

The CRGE states that Ethiopia is committed to building a climate-resilient green economy rather than pursuing a conventional economic growth model which does not take into account sustainability. This is to be achieved through two complementary and mutually-reinforcing measures: actions to reduce greenhouse gas emissions while safeguarding economic growth ("green economy") as well as initiatives to reduce vulnerability to the effects of climate change ("climate resilience"), thus addressing both climate change adaptation and mitigation objectives. Reading the CRGE and the GTP together suggests that by transforming the country's development model from the conventional development course to a modern energy-efficient development route Ethiopia aims to achieve carbon-neutral middle-income status by 2025.

Ethiopia is planning to develop the green economy strategy based on four pillars:

- Improving crop and livestock production practices to increase food yields, leading to food security and stable farmer income, while reducing emissions;
- Protecting and re-establishing forests for their economic and ecosystem services, including their operation as carbon stocks;
- Expanding electric power generation from renewable sources of energy fivefold over the next five years for markets at home and in neighbouring countries; and
- Leapfrogging to modern and energy-efficient technologies in transport, industry, and buildings.

With regard to agriculture the measures to be taken include improved crop and livestock practices, reduction of deforestation by agricultural intensification and irrigation of degraded land, and the use of lower-emitting techniques. In the area of forestry, actions to be taken include protecting and growing forests as carbon stocks, reducing demand for fuel wood via efficient stoves, increased sequestration by afforestation/reforestation, and forest management and area closure. Deploying renewable and clean power generation, building renewable power generation capacity and switching-off fossil fuel power generation, and exporting renewable power to substitute for fossil fuel power generation abroad are some of the measures foreseen in the area of power. When it comes to industry, transport and buildings, the actions to be taken include the use of advanced technologies, improved industry energy efficiency, improved production processes, tightened fuel efficiency of cars,

the construction of an electric rail network, the substitution of fossil fuel by biofuels, and improved waste management.

An institutional mechanism has also been put in place to enable the successful implementation of the CRGE. A Ministerial Steering Committee led by the Office of the Prime Minister and comprising the Ministers and senior officials from a range of ministries is in charge of the overall direction and sector-specific initiatives has been established. The successful implementation of the CRGE requires a financing of about 150 Billion US Dollars which is expected to be raised from government resources, development partners and the International Carbon Finance Mechanism.

It remains to be seen how quickly or effectively Ethiopia will be able to implement the CRGE. Nearly three year after its adoption, the CRGE has not yet been implemented, partly because of a lack of funding, but recently the government has reportedly ramped up its efforts towards implementation following the commitment made by some donors to make available a limited portion of the required funding.[5]

Investment Laws

Following the change of government in 1991, Ethiopia has taken several measures to attract investment and promote economic development. As such it has issued different laws with a view to provide incentives for investors and regulate investment. The latest investment law was issued in 2012 as *the Proclamation on Investment* (the Proclamation)[6] followed in the same year by the implementing regulations.[7] The ultimate goal of investment, as can be gathered from the preamble of the Proclamation, is accelerating the economic development of the country and improving the living standards of its people. Within the ambit of this overarching goal, the preamble also makes reference to specific goals, such as encouraging and expanding investment, strengthening domestic production capacity, increasing inflow of capital, and speeding up of transfer of technology.

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[5] The Ethiopian Reporter (Amharic Version), "The Country's Green Growth Strategy Implementation in Sight?" October 2013.
[6] Investment Proclamation No.769/2012.
[7] Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation No. 270/2012. The prior legal regimes on investment were Proclamation No. 280/2002 as amended by Proclamation No. 375/2003 and the Investment Regulation No.84/2003 as amended by Proclamation No. 146/2008.

The Proclamation outlines the general as well as the specific objectives of investment in the context of Ethiopia. The general objective, as stated under Article 5 of the Proclamation is 'to improve the living standard of the peoples of Ethiopia through the realization of sustainable economic and social development,' while the specific objectives include accelerating economic development, exploiting and developing the natural resources of the country, developing the domestic market, increasing foreign exchange earnings, encouraging balanced development, enhancing the role of the private sector in economic development, and creating ample employment opportunities.

The general objective of investment in Ethiopia is thus the realization of a desire for sustainable economic and social development which would result in the improvement of the standards of living of the people in Ethiopia. This appears to suggest the recognition of a distinction between economic development and sustainable development. Sustainable development represents a paradigm shift in the development discourse which was premised on economic growth indicators as a mark of progress toward development, with little attention to the environment and other social issues. Central to the concept is 'changing unsustainable patterns of production and consumption, and protecting and managing the natural resource base of economic and social development.'[8] The concept of sustainable development has three elements: 'economic development, social development and environmental protection.' [9] The inseparability of environment, social and economic objectives is the central tenet of the concept of sustainable development.

While economic and social sustainability has been taken as the ultimate goal of investment in Ethiopia, sustainability does not feature prominently in the specific objectives outlined under Article 5 which emanate from the general objective. The specific objectives appear to capitalize on economic growth with the 'sustainability' aspect not clearly articulated. At any rate, whether or not the declared objective relating to sustainability has been translated into the specific provisions of the Proclamation is an issue that requires further scrutiny of the provisions of the law.

Part Four of the Proclamation deals with investment permits. The provisions in Part Four cover issues such as application, issuance, renewal, and suspension of permits. Among other things, they prescribe the conditions and requirements for issuance, renewal, suspension and revocation of investment permits. Environmental impact assessment or

[8] World Summit on Sustainable Development (2002), Plan of Implementation, para.2.
[9] Ibid.

compliance with environmental standards is required neither as a condition for issuance of permits nor for renewal, suspension, or revocation of permits. It appears the Proclamation has left environmental issues to the environmental laws mentioned above.

Article 23 states that areas eligible for investment incentives will be specified by regulations to be issued by the Council of Ministers. This was issued in 2012. But the Regulation provides incentives on the basis of factors such as export performance, sector (manufacturing, industry, information and communication technology *et cetera*.) and the region where the investment takes place. Environmental sustainability does not appear to be a justification for an incentive.

An important addition to the new Proclamation with regard to the environment is Article 38 on the duty to observe other laws and to have regard to protection of the environment. It states as follows:

> *Any investor shall have the obligation to observe the laws of the country in carrying out his investment activities. In particular, he shall give due regard to environmental protection.*

This is an important development, as the previous investment laws did not include such provisions. However, important as these provisions appear given their direct reference to the environment, are nonetheless formulated in a weak language, and it is not clear if they in fact add any meaningful obligation related to the environment in the context of investment. The first sentence does not add anything since it is the obligation of an investor to respect the laws of the country where he/she operates regardless. Although the second sentence makes a direct reference to the environment, the way the sentence is constructed raises issues. First, the way the obligation is formulated ('give due regard to environmental protection') appears to be weak. The sentence does not unequivocally state that an investor must respect the environmental laws of the country. Second and more importantly, the provisions do not specify the legal consequences of a failure to give due regard to environmental protection. What if an investor fails to discharge his/her obligation with regard to the environment? There is no any consequence provided for by the Proclamation. The consequences of failure are regulated by environmental laws. Article 38 is thus at best a reminder for the investor to protect the environment. In so doing, the Proclamation has failed to make the connection between environmental protection obligations and the content of investment permits by making environmental impact assessment a condition for a grant of a permit, or failure to observe environmental laws of the country as a possible ground for revocation or suspension of a permit. From the perspective of protecting the environment

and sustainability, as envisaged by the Proclamation, it would have been helpful to create a link between environmental protection and the provisions on permits as stated above. This approach would also make sense of the entire efforts to mainstream protection of the environment into the different policies, strategies and laws of the country, particularly the ambitious CRGE.

The creation of environmental protection and permits is not without precedence in Ethiopian investment related legislation. Indeed a parallel can be made between the *Investment Proclamation* and the *Proclamation on Mining Operations, Proclamation No.678/2010 (*the Mining Proclamation) which regulates investment in mining. The Mining Proclamation has tried to mainstream protection of the environment into the areas of regulation of mining operation rather than leaving the issue entirely to the environmental laws. This is in spite of the fact that the environmental laws had existed before this law came in to being, and hence a simple reference to those laws would have been acceptable. Under Article 60 of the Mining Proclamation any applicant for a license shall submit an environmental impact assessment and obtain all the necessary approvals from the competent authority required by the relevant environmental laws of the country (except in case of for reconnaissance license, retention license or artisanal mining license). Similarly, according to Article 18, a mineral exploration license can only be granted, *inter alia*, if the environment impact plan submitted by the applicant has been approved. The same is true for the grant of a license for a large scale mining license under Article 26, as well as small scale mining licenses under Article 28. One of the grounds for the suspension and revocation of a mineral license under Article 44 of the proclamation is when the licensee is in breach of the approved environmental impact assessment.

Conclusion

Ethiopia has made a stride in terms of putting in place the necessary policies, strategies, laws and institutions for environmental protection. The recent decision of the government to upgrade the EPA to a full-fledged Ministry is a move in the right direction, as this new institution will play a more active role in environmental protection by addressing the capacity and institutional challenges facing environmental protection efforts in the country. Similarly, the adoption of the CRGE is an important development from the perspective of the environment and sustainable development, but it is yet to be implemented in earnest, and implementation will continue to be a challenge if finance is not forthcoming from donors in the way anticipated. As far as the Investment Proclamation is concerned, it has clearly recognized sustainable economic and social development as an ultimate objective of any

investment in the country and also included a provision requiring investors to protect the environment. However, it does not prescribe consequences for a failure to protect the environment, nor does it attach incentives based on environmental sustainability. It has thus failed to fully mainstream protection of the environment into investment governance as envisaged by the different policies and strategies of the country including the CRGE.

COUNTRY REPORT: FEDERATED STATES OF MICRONESIA

Nagoya Protocol

DR. JUSTIN ROSE*

On 30 January 2013 the Federated States of Micronesia (FSM) became the fifteenth party to *the Convention on Biological Diversity (CBD)*[1] to ratify *the CBD's Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (*the *Nagoya Protocol).*[2] The Nagoya Protocol, building upon the 2002 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization,[3] aims to implement in a binding agreement the CBD's third objective: the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The text of the *Nagoya Protocol* was adopted by the CBD's tenth Conference of the Parties in October 2010 and will enter into force on the ninetieth day after the date of deposit of the 50th instrument of ratification, acceptance, approval or accession.[4]

This report is divided into three parts. The first summarises core elements of the *Nagoya Protocol*, the second describes steps undertaken and planned by the Government of the Federated States of Micronesia aiming to implement the Protocol, and the final section briefly discusses aspects of the FSM experience indicating legal and cultural issues that other Pacific island countries are likely to encounter when implementing the *Nagoya Protocol*.

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[1] *Convention on Biological Diversity*, signed 5 June 1992, 1760 UNTS 79, entered into force, 29 December 1993.
[2] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, not in force, text: UNEP/CBD/COP/DEC/X/1 of 29 October 2010.
[3] CBD COP 6 Decision VI/24.
[4] Nagoya Protocol Article 33.

Core Elements of the *Nagoya Protocol*

The central purpose of the *Nagoya Protocol* is to regulate the process of 'access and benefit sharing' typically referred to by the acronym ABS. ABS indicates the process of accessing genetic resources found in biodiversity and sharing the benefits arising out of the utilization of those resources in a fair and equitable manner. ABS relates to all three of the CBD's objectives, but is of most relevance to the third objective.

In the context of the *Nagoya Protocol*, 'genetic resources' means any genetic material of actual or potential value, and 'genetic material' means any material of plant, animal, microbial or other origin containing functional units of heredity.[5] To 'utilize' genetic resources in these contexts is to conduct research and development on the genetic or biochemical composition of the resources, including through the application of biotechnology as defined in Article 2 of the Convention.[6]

In essence, the *Nagoya Protocol* seeks to strike a balance between the interests of users of genetic resources (the institutions and individuals who engage in biotechnological research and related activities using genetic material) with the needs and interests of the providers of genetic resources. In simple terms, users are typically interested in having a set of transparent rules and processes to follow when seeking access to genetic resources in a given jurisdiction. Providers, who sometimes include local and indigenous communities, are interested in receiving a fair and equitable share of benefits that might flow from the resource utilization. An important aspect of the *Nagoya Protocol* is that it also encompasses traditional knowledge associated with genetic resources that are accessed and utilized. An example of this traditional knowledge would be that related to plants used in traditional medicinal practices.

In terms of institutional arrangements, Parties to the *Nagoya Protocol* must designate both a National Focal Point (NFP), and one or more Competent National Authorities (CNAs). A single agency may perform the role of both an NFP and a CAN, the roles of which are set out in Article 13. NFPs are responsible for liaison with the CBD Secretariat as well as providing information for applicants seeking access to genetic resources and related traditional knowledge. This may include information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing. NFPs

[5] Convention on Biological Diversity Article 2.
[6] Nagoya Protocol Article 2.

also provide information on CNAs as well as relevant indigenous and local communities and other relevant stakeholders.

CNAs are responsible for advising on requirements for obtaining prior informed consent (PIC) and mutually agreed terms (MAT), for granting access or facilitating the granting of access by resource providers, and for issuing written evidence that access requirements have been met.[7] It is not compulsory for Parties to require PIC before granting access, but if they choose to do so it is the CNAs that are responsible for providing information regarding the process by which this must be done.

MATs are legally binding agreements setting out conditions of access and benefit-sharing that are negotiated between users and the providers, and possibly involving other relevant stakeholders. MATs may:

- Identify the agreed applicable law under which the agreement is to be understood and administered;
- Include a dispute settlement clause, including options for alternative dispute resolution;
- Identify the jurisdiction under which the dispute resolution process is to be conducted;
- Include detailed terms on benefit-sharing including intellectual property (IP) rights;
- Ensure Indigenous and local communities' PIC or approval is upon mutually agreed terms
- Include provisions setting out rules or protocols for any subsequent third-party use; and
- Include terms regulating changes in intended use, if applicable.[8]

Importantly in the FSM context, where a Party designates more than one CNA, it must convey to the Secretariat relevant information on the respective responsibilities of its various CNAs. Where applicable, such information must, at a minimum, specify the geographical or sectoral division of responsibilities between the various CNAs so that users are able to understand which CNA will be responsible for the genetic resources sought.[9]

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[7] Nagoya Protocol Article 13.
[8] Nagoya Protocol Article 6.
[9] Nagoya Protocol Article 13.

To summarize the above, Parties to the Protocol must decide whether to require PIC for access and use of their genetic resources and of any associated traditional knowledge. If they do choose to require PIC, Parties must establish clear and fair processes setting out how PIC can be obtained by users, and also how MATs can be reached. These processes are administered by CNAs. The NFP can also assist in advising which CNA a particular user should deal with and on other matters related to a country's ABS systems.

Article 5.1 describes core obligations of the Parties with respect to benefit sharing:

> *[B]enefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms.*

Article 5.2 provides Parties with the capacity to protect the interests of indigenous and local communities, in the following terms:

> *Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.*

Article 5.5 provides that benefits from the use of traditional knowledge associated with genetic resources subject to MATs are shared with the indigenous and local communities that provided the knowledge:

> *Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.*

Article 5.4 makes it clear that benefits may be monetary or non-monetary, and there is an annex to the Protocol providing a non-exhaustive indicative list of possible benefits.

A final core element that Parties are required to address in their administrative or legal systems implementing the *Nagoya Protocol* is that of compliance and monitoring. The Articles most relevant to compliance and monitoring are Articles 15, 16, 17 and 18. In the context of the *Nagoya Protocol* compliance means meeting the requirements and obligations of national (domestic) ABS legislative, administrative, or policy measures on access and benefit-sharing to genetic resources and traditional knowledge associated with genetic resources of both the provider and user countries. In both cases, compliance also requires meeting the requirements and obligations documented in MATs.

Compliance is thus addressed at two levels: compliance with the MATs, and compliance with any applicable national law, policy or administrative measures on ABS. Parties are obliged to take action to support compliance with the ABS requirements of providers of genetic resources, including establishing one or more checkpoints to monitor or enhance transparency in the use of genetic resources. Article 17.1 of the *Nagoya Protocol* specifies obligations of Parties regarding the designation of 'checkpoints' to assist in monitoring the utilization of genetic resources. Examples of possible checkpoints include customs authorities, patent offices, market approval offices, research funding agencies, and indigenous and local community representatives. Other aspects of Article 17 relate to the production and issuance of internationally recognized certificates of compliance as mechanisms of monitoring compliance.

Implementing the *Nagoya Protocol* in the Federated States of Micronesia

The nation state of FSM was created in the mid 1980s through the joining of four societies that had, since the conclusion of WWII, been administered by the United States as districts of the former Trust Territory of the Pacific Islands. FSM's founding fathers consciously and intentionally drafted a National Constitution allocating a high degree of autonomy to the four states: Kosrae, Pohnpei, Chuuk and Yap.[10] The aim of this was to create a country whose national government was sufficiently empowered to represent its citizens in international contexts, while preserving most authority to the states thus allowing them to determine their own policies, laws and programs on most issues.[11] This constitutional history has direct bearing upon how FSM can implement the *Nagoya Protocol* in that the outcome of the constitutional division of authority in FSM is that the state governments are the primary custodians of matters relating to environmental conservation and natural resource

[10] Glenn Petersen, "The Federated States of Micronesia's 1990 Constitutional Convention: Calm before the Storm?" (1994) 6 *Contemporary Pacific* 337-69, 340.
[11] Ibid, 342.

management within their jurisdictions.[12] While the FSM Constitution empowers the National Government to ratify treaties, ratifications do not expand or alter national legislative capacities, i.e. ratification of the *Nagoya Protocol* does not empower the National Government to legislate to implement the Protocol's requirements where such authority resides with the states.[13]

A review and consultation process pursuant to implantation of the *Nagoya Protocol* was undertaken from February to May 2013, the outcome of which was a fifty-page report titled 'Gap Analysis on the Implementation of the *Nagoya Protocol* in the Federated States of Micronesia' (Gap Analysis).[14] In preparing the Gap Analysis officers of FSM's Department of Resources and Development and the Office of Environment and Emergency Management visited each state, in the process conducting 46 meetings with more than 150 key stakeholders. The purpose of the consultation process was twofold. Firstly, to share information with key stakeholders about the *Nagoya Protocol* and the implications of FSM putting in place mechanisms to fulfill its obligations under the Protocol. Secondly, to receive comments, advice and feedback from stakeholders on any ABS-related issues of concern to them, as well as guidance regarding how the *Nagoya Protocol* might best be implemented in FSM or in specific FSM states.[15] The remainder of this section summarises key findings of the Gap Analysis.

An initial finding of the Gap Analysis is that there is currently in FSM, with some exceptions of specific agencies of the National and Kosrae State Government, a low level of awareness of ABS issues generally and very low level of awareness of *Nagoya Protocol* specifically.[16] Despite this, many stakeholders in FSM's states indicated high levels of concern regarding the activities of international researchers within FSM.[17] These concerns typically focused on firstly, ensuring that FSM stakeholders are adequately informed about the activities of non-citizen researchers, and secondly that there is some sharing of benefits of the research with FSM and FSM stakeholders (in many cases the core benefit sought by stakeholders was simply copies of the publications or other material stating the outcomes of the research).[18]

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[12] FSM Department of Resources and Development, Gap Analysis on the Implementation of the Nagoya Protocol in the Federated States of Micronesia, (Policy Paper, Palikir, 2013), 10.
[13] Ibid.
[14] Ibid.
[15] Ibid, 11.
[16] Ibid.
[17] Ibid, 20. These concerns are substantially broader than Nagoya Protocol issues and include all forms of research undertaken by non-citizens in the country.
[18] Ibid.

Upon receiving briefings and summaries of the objectives and core elements of the *Nagoya Protocol*, most stakeholders and all key stakeholders expressed high levels of support both for FSM's ratification of the Nagoya Protocol and for the full and expeditious implementation of the Protocol in FSM. Finally, many key stakeholders emphasized strongly that the State Governments should be the primary decision-makers in relation to regulating ABS in FSM, and specifically that each state operate their own CNAs.[19]

The Gap Analysis concluded that there is a substantial gulf between the current situation in FSM and a future situation in which FSM is fully compliant with the *Nagoya Protocol*. The related gaps fall into two broad categories: knowledge and capacity gaps, and institutional gaps.[20] Somewhat obviously, to address knowledge and capacity gaps there will need to be training and capacity building addressing all of the relevant issues associated with implementing an effective national ABS regime. This might include building better local understandings of biotechnological research and its purposes and methods; capacities for negotiating realistically to reach equitable MATs; capacity-building in the fields of ABS policy and law (both international and domestic), as well as ABS-related intellectual property law.[21]

Key institutional gaps are that FSM currently has no National Focal Point for the Nagoya Protocol, no Competent National Authorities, or any ABS checkpoints. Over the coming months and years these institutions will need to be identified and commence implementing the functions required of them by the *Nagoya Protocol*. There is also an absence of policy on ABS, and the development of policy should precede the development of administrative or legal regimes. There is some relevant law and policy in each jurisdiction, but this is limited in scope and is not designed to address ABS obligations. Pohnpei State has the most comprehensive administrative and legal structures relevant to ABS, whereas Chuuk State has the least comprehensive.[22]

Consistent with stakeholder feedback in all five jurisdictions, the Gap Analysis recommended that CNA responsibilities be allocated to the state governments. Not only is this probably the only option conforming to FSM's five Constitutions, it is also consistent with the wishes and expectations of all key stakeholders.[23]

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[19] Ibid, 24.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

It was also recommended that FSM stakeholders consider prioritizing and rapidly implementing an *Interim National ABS Policy*. An interim policy would enable substantial (if not fully complete) compliance with FSM's Nagoya Protocol obligations within a comparatively short time period and would provide relevant offices and other stakeholders an opportunity to engage in a 'learning-by-doing' exercise that would inform future development of more permanent policy and law.[24] Fully implementing the *Nagoya Protocol* in FSM will be a complex undertaking and any undue rushing of the process may result in resistance from key stakeholders, or suboptimal institutional design; an interim policy may help in avoiding these negative outcomes.

In the medium to long term all five jurisdictions will need to develop and adopt Nagoya-consistent policy and administrative systems, and they will also consider developing legislation specifically addressing ABS issues. Whether this means amendments to existing researcher permitting provisions or new ABS-specific laws is an issue that stakeholders in each jurisdiction will consider more fully during coming months. It is likely that compliance, enforcement and monitoring in particular will be more fully effective if supported by ABS-specific provisions.

It would be possible, but not necessary, for each of the four states to adopt the same or very similar ABS policies, administrative systems and laws. Consistent policy and law across all FSM's states would assist the interests of users, and the idea of having the same or very similar laws in each jurisdiction is likely to be advocated or preferred by external experts and donors. Nevertheless, observers fully familiar with FSM's cultural, political and legal context are aware that the disadvantages of attempting to achieve nationwide consensus may outweigh the real or perceived benefits of doing so. This is particularly the case given there are obligations contained in the *Nagoya Protocol* relating to indigenous and local communities. That is, each state has its own protocols and approaches to liaising with local communities and traditional leaders in decision-making processes. [25]

Finally, the Gap Analysis recommended that all FSM's future ABS policies and administrative procedures ensure that negotiation of MATs is a not only a whole-of-government activity, but one also involving non-governmental organizations (NGOs). An advantage of involving multiple government agencies in this stage of the ABS process, as well as NGOs, is that the full spectrum of potential needs and opportunities be properly

[24] Ibid, 24-25.
[25] Ibid, 25.

identified. Also, NGOs in FSM and throughout the Pacific are often crucial in playing the role of institutions that can mediate between the spheres of government and science, and the interests and perspectives of traditional and local communities.[26]

Pacific-Wide Issues for *Nagoya Protocol* Compliance

The federal structure of government in FSM provides additional legal and institutional complexities to many governance challenges, including that of implementing the *Nagoya Protocol*. While other Pacific island countries do not have to deal with the issues of national – state jurisdictional divisions, the FSM experience in commencing implementation of the Nagoya Protocol does indicate a number of challenges that will be experienced by most of its regional neighbors as they ratify and address the task of implementing this treaty.

The first issue in this context is that low levels of technical and administrative capacity are common to most governments and public agencies throughout the region. Accordingly, capacity-building in the sphere of ABS and *Nagoya Protocol* procedures and requirements will be much needed in coming years. The Secretariat of the Pacific Regional Environment Program and the Secretariat of the CBD are among the organisations and donors to have commenced addressing this need.[27]

Another, perhaps less obvious, factor that will complicate *Nagoya Protocol* implementation in Pacific island countries is the plural nature of the Pacific's legal landscapes. While a full discussion of legal pluralism in the Pacific region is beyond the scope of this report, it is simply noted that the systems of law upon which Pacific island governments are founded continue to co-exist with ancient systems of customary law that are deeply embedded in Pacific societies.[28] Often, the everyday lives of Pacific islanders, particularly in rural areas, are more responsive and more directly determined by customary than government norms, rules and procedures. This is particularly evident in relation to matters of natural resource ownership and use, as well as the control and distribution of traditional knowledge linked to

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[26] Justin Rose 'Le défi de déterminer un "espace légal" pour la gouvernance localisée de la biodiversité dans la région des iles du Pacifique'. In: Carine David and Nadege Meyer *L'integration De La Coutume Dans L'elaboration De La Norme. Environnementale: Eléments d'ici et d'ailleurs* (Bruylant, 2012).

[27] For example, SPREP and the CBD Secretariat co-hosted the *Pacific Sub-Regional Workshop on Access and Benefit Sharing* in Suva, Fiji, 25-29 November 2013.

[28] Justin Rose "Community-Based Biodiversity Conservation in the Pacific: Cautionary lessons in regionalising environmental governance" in Jeffery M, Firestone J and Bubna-Litic K (eds.) *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide* (Cambridge University Press, 2008), 204.

natural resources.[29] These matters of course are at the centre of *Nagoya Protocol* implementation.

[29] Ibid.

COUNTRY REPORT: FRANCE

Rapport national pour l'Académie de droit de l'environnement: France 2013

MARION BARY*

Summary

In April 2013 France adopted legislation recognizing the right to whistleblow and providing whistleblower protection in order to prevent serious harm to public health and the environment, as long as the statements by the whistleblower do not constitute defamatory libel. If the whistleblower is an employee, he/she must first inform his or her employer. If the latter fails to take action within a month or is of the view that that there is no basis to act, the employee can then inform government officials. No punishment of any type can be imposed on a whistleblower by an employer or other persons. A commission on ethics was also set up to address matters dealt with in the legislation.

Reconnaissance d'un Droit d'Alerte en Matière de Santé Publique et d'Environnement

La loi n°2013-316 du 16 avril 2013 constitue une innovation importante en consacrant un droit général d'alerte en matière de santé publique et d'environnement et en garantissant la protection du lanceur d'alerte. Cette évolution découle de la Charte de l'environnement,[1] adoptée en 2004 et ayant acquis valeur constitutionnelle.[2] D'une part, la loi du 16 avril 2013 est une manifestation de l'article 2 de la Charte, disposant que «Toute personne a le devoir de prendre part à la préservation et à l'amélioration de l'environnement». D'autre part, la loi du 16 avril 2013 s'inscrit dans le cadre de l'obligation de vigilance environnementale reconnue par le Conseil constitutionnel dans sa décision n° 2011-116 QPC du 8 avril 2011. Les Sages ont en effet affirmé l'existence, sur le fondement des articles 1 («Chacun a le

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[1] M.-P. Blin-Franchomme, «L'alerte en matière de santé publique et d'environnement: regards sur la loi du 16 avril 2013», *RLDA* 2013, n° 89, pp. 59 et suivantes.
[2] Loi n° 2005-205 du 1er mars 2005.

droit de vivre dans un environnement équilibré et respectueux de la santé») et 2 de la Charte, que «chacun est tenu à une obligation de vigilance à l'égard des atteintes à l'environnement qui pourraient résulter de son activité».

Par la loi du 16 avril 2013, le législateur a reconnu un droit d'alerte en matière de santé publique et d'environnement, appartenant à tous et devant être exercé en dehors de toute diffamation ou injure. Ainsi l'article 1 de la loi énonce que:

> *«Toute personne physique ou morale a le droit de rendre publique ou de diffuser de bonne foi une information concernant un fait, une donnée ou une action, dès lors que la méconnaissance de ce fait, de cette donnée ou de cette action lui paraît faire peser un risque grave sur la santé publique ou sur l'environnement. L'information qu'elle rend publique ou diffuse doit s'abstenir de toute imputation diffamatoire ou injurieuse».*

La formulation générale permet d'englober toute information («fait, donnée, action»). L'existence d'un risque grave sur la santé ou sur l'environnement semble relever de l'appréciation du seul lanceur d'alerte («lui paraît»).[3]

Le droit d'alerte en matière de santé publique et d'environnement s'exerce différemment dans le cadre de l'entreprise afin de concilier les intérêts de l'employeur et ceux de la santé publique ou de l'environnement. L'alerte est nécessairement interne dans ce cas, c'est-à-dire que le travailleur doit informer l'employeur. L'alerte devient externe uniquement si l'employeur ne donne pas de suite à l'alerte dans un délai d'un mois ou s'il estime que l'alerte est mal fondée. Le travailleur a alors la possibilité de saisir le représentant de l'Etat dans le département, soit le préfet.

Une véritable protection du lanceur d'alerte, travailleur ou non, a été organisée en interdisant de le sanctionner de quelque manière. Ainsi l'article 11 de la loi dispose qu'

> «*aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation professionnelle, ni être sanctionnée ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, de traitement, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat, pour avoir relaté ou témoigné, de bonne foi, soit à son employeur, soit aux autorités judiciaires ou administratives*

[3] F;-G. Trébulle, «Alertes et expertises en matière de santé et d'environnement, les enjeux de la loi du 16 avril 2013», *Env.* 2013, étude 21.

> *de faits relatifs à un risque grave pour la santé publique ou l'environnement dont elle aurait eu connaissance dans l'exercice de ses fonctions»* (art. L. 1351-1 du Code de la santé publique).

Le législateur français a enfin créée une Commission nationale de la déontologie et des alertes en matière de santé et d'environnement, chargée, entre autres, de veiller aux règles déontologiques s'appliquant à l'expertise scientifique et technique. Elle peut se saisir d'office ou être saisie par un membre du gouvernement, un député ou un sénateur, ou, sous certaines conditions, par un groupement (association, organisation syndicale…).

La loi du 16 avril 2013 instaurant le droit d'alerte devrait contribuer à la préservation de l'environnement et de la santé publique en permettant des mesures rapides et efficaces, destinées à éviter ou à limiter les atteintes environnementales. Les décrets d'application n'ont pas cependant été à ce jour adoptés.

COUNTRY REPORT: GERMANY

ECKARD REHBINDER*

Introduction

The year 2013 was characterised by two peculiarities: a confrontation between the two chambers of Parliament brought about by the gains of the opposition in provincial elections which resulted in different majorities in the two chambers, on the one hand; and the approaching federal elections that took place in September on the other. These peculiarities resulted in fewer legislative activities than usual - although some important laws were adopted - and some business was left unfinished. In particular, this is true for the problem of ever increasing electricity prices for end-users caused by the German fixed-tariff system for the promotion of renewable energy. The judiciary was, however, quite active, especially regarding the impact of international and EU environmental law on national law.

Statutory Developments

In April 2013, the German Parliament adopted major changes to *the Environmental Remedies Act (ERA)*.[1] This is a response to the landmark judgment of the European Court of Justice of 12 May 2011 in the "Trianel" case.[2] This judgment had declared the German limitation of association standing with regard to the vindication of individual rights to be inconsistent with EU law. The new law now introduces a fully-fledged association suit in environmental matters whereby environmental associations can invoke the violation of any legal provision for the protection of the environment which may be relevant for the decision. However, association standing is limited to decisions that are subject to an EIA, integrated pollution control or environmental liability under EU law.

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[1] Law of 8 April 2013, *Federal Gazette* 2013 (Part 1), p. 734; consolidated version: *Federal Gazette* 2013 (Part 1), p. 753.
[2] Case 115/08, Bund für Umwelt- und Naturschutz/Bezirksregierung Arnsberg, available at www.curia.europa.eu . This case was analysed in the German Country Report for 2011.

Moreover, the law retains the controversial German concept of limited relevance of procedural errors for the legality of official action. In particular, procedural errors regarding EIAs are only relevant where an EIA or screening as to the need for an EIA was not carried out or – in the latter case – was not carried out pursuant to the requirements of the EIA Act. This means that only an incomplete or insufficient screening, but not an incomplete or insufficient EIA can be challenged by associations. In contrast, the European Court of Justice[3] has held that all procedural errors related to an EIA are relevant unless it can be demonstrated that they could not have had an effect on the outcome of the administrative decision.[4] Finally, the law also specifies the depth of judicial review of the merits of administrative decisions challenged by association suits and reduces the traditional balancing concept of interim judicial protection.

Another field of legislative activity was public participation regarding major infrastructure projects. It is safe to say that developments in this field since the early 1990s have been characterized by amendments which aim to speed up proceedings at the expense of effective participation. The criticism has focused on long-lasting tiered procedures for infrastructure projects. It has been asserted that the tiered procedures are too complex, lack sufficient transparency, do not provide an opportunity to discuss the project in its entirety (including the need for it), and do not allow the public to influence the relevant decisions at an early stage when alternatives are still open.

A rebellion by local communities against a major railway station and track extension project in Stuttgart in the State of Baden-Württemberg ("Stuttgart 21") has directed public attention to these deficiencies. As a means for promoting public acceptance of such projects, the new Act for the Improvement of Public Participation and Harmonisation of Planning Permission Procedures (Planning Harmonisation Act)[5] was promulgated.[6] The Planning Harmonisation Act now includes provisions which call on the project proponent to inform the public voluntarily about the project before submitting an application and hence before the beginning of the formal administrative proceedings. Project proponents should consult the public regarding the objectives and the expected impacts of the project ("whether at all, where and how"). The project proponent should also provide the public with an opportunity to comment

[3] Judgment of 7 November 2013, Case C-72/12, Gemeinde Altrip, available at http://www.curia.europa.eu.
[4] This was decided on a reference by the Federal Administrative Court as to whether this limitation is consistent with EU law.
[5] Act of 31 May 2013, *Federal Gazette* 2013 (part 1), p. 1381.
[6] This Act amends Section 25 of the Administrative Procedure Act, Consolidated version of 23 January 2003, *Federal Gazette* 2003 (Part 1), p. 102, as amended.

on and discuss the project and its impacts through an informal, self-organized procedure. The result of this voluntary public participation must be communicated to the public and the competent authority when applying for planning permission. Moreover, the Act tries to improve public participation by obliging the competent authority to publish applications, accompanying documentation and relevant administrative decisions on the internet.

A major achievement of the legislative process in the year 2013 has been the new *Act on the Search and Selection of a Site for High Level Radioactive Waste (Site Selection Act)*.[7] This Act was adopted by Parliament on 23 June 2013 after lengthy negotiations with the opposition parties and State governments.[8] The new Act introduces a tiered and highly complex site selection procedure which ranges from the decision on waste management options to the final site selection. The procedure includes the establishment of a pluralistic commission which is to develop criteria and make proposals in the initial phase. The procedure also envisages the establishment of a societal body which shall accompany the whole tiered process. The Act provides for early, transparent, pluralistic and structured participation of the public, including municipalities, at all stages. The administrative competences for site selection and the operation of the depository are to be separated. The First Chamber of Parliament, the Bundestag, decides by law at the end of each step of the procedure. For example, the highly controversial salt dome at Gorleben in Lower Saxony which, subject to interruptions, has already undergone quite extensive underground investigations, shall remain in the basket of potential sites but must meet the relevant selection criteria in order to "survive".

Recent Case Law

The German judiciary continues to draw on the jurisprudence of the European Court of Justice on the implementation of the *Aarhus Convention*.[9] Article 9(2) of the *Aarhus Convention* and the EU *Aarhus Directive*[10] are limited to listed facilities (subject to mandatory participation, i.e. subject to an EIA or integrated pollution control) and, following the Trianel decision of the European Justice,[11] were implemented by the amendment of the German Environmental Remedies Act. Now, the more comprehensive Article 9(3) of the *Aarhus Convention* has come into focus. The latter provision encompasses all other

[7] *Federal Gazette* 2013 (Part 1), p. 2553.
[8] *Federal Gazette* 2013 (Part 1), p. 2553.
[9] 2161 U.N.T.S. 447.
[10] Directive 2003/35/EC, as amended.
[11] Supra note 2; see Country report for 2011.

decisions and omissions and even includes private action. It requires the Parties to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.

In the "Slovak Brown Bear" case,[12] the European Court of Justice had denied a direct legal effect of Article 9(3) of the Convention, but held that it required an interpretation of national standing rules in conformity with the Convention with respect to official action or inaction not subject to mandatory participation under the *Aarhus Convention.* Moreover, the Court held that under the Convention environmental associations had a particular status that required granting them standing. Due to the limited competence of the Court this was qualified by the proviso that the subject matter needed to be at least partly covered by EU law.

In a landmark decision of 5 September 2013,[13] the Federal Administrative Court applied the holding of the Brown Bear case to decisions not covered by Article 9(2) of the Aarhus Convention but at least partly subject to EU environmental law. At first glance it would seem that the distinction between a direct legal effect and mere interpretation of law was blurred by the decision. Section 42 paragraph 2 of *the German Administrative Court Procedure Act*[14] requires the plaintiff to assert that the decision or omission violates his or her subjective rights (notwithstanding special laws which have introduced broader statutory standing). However, the Federal Administrative Court recognised that the *Aarhus Convention* conferred on environmental associations a subjective right that could be violated, at least to the extent that individuals were protected under EU law. In the case at issue, the question was whether an environmental association could require the competent authority to establish an air quality plan in order to secure compliance with ambient air quality standards set by the *EU Air Quality Framework Directive.*[15]

Another decision by the Federal Administrative Court[16] reflects the more recent judicial trend towards being more responsive to obligations established by EU environmental law. At issue was the interpretation of the prohibition of deterioration of water quality as established by

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[12] Judgment of 8 March 2011, Case C-240/09, Lesoochranárske zoskupenie VLK/Ministerstvo životného prostredia Slovenskej republiky, available at www.curia.europa.eu .
[13] 7 C 21.12, available at www.bverwg.de/entscheidungen/entscheidungen.php .
[14] Consolidated version of 19 March 1991, *Federal Gazette* 1991 (Part 1), p. 686, as amended.
[15] Directive 2008/50/EC.
[16] Decision of 11 July 2013, 7 A 20.11, available at www.bverwg.de/entscheidungen/entscheidungen.php.

Article 4 of the *EU Water Framework Directive*.[17] This Directive is transposed by Section 27 of *the Water Resources Management Act.*[18] In particular, the questions were: whether the prohibition is merely a planning principle or also a permit requirement; whether a deterioration constitutes only a change to a lower quality category as established by the Directive or any deterioration of actual water quality; and, in the latter case, whether there was any threshold of significance.

Departing from the view that the German legislature intended to merely transpose the Directive and not create more stringent law, the Federal Administrative Court referred these questions to the European Court of Justice for a preliminary ruling.[19] In doing so, the Federal Administrative Court developed a very broad interpretation of Article 4 of *the Water Framework Directive* which disregarded the wording and systematic structure of this provision. The Court's interpretation was more aligned with the idea that in spite of the general "paste and copy" transposition concept, the German legislature intended to adopt a more stringent law regarding the prohibition of deterioration (which would have been permissible under Article 193 TFEU). Indicators for this intention of the national legislature can indeed be found in the wording, systematic structure and legal history of Section 27 of the Act. However, without reliance on Article 4 of *the Water Framework Directive* the Federal Administrative Court might have risked a rejection of the case for irrelevance of European law.

Critical Consideration of Recent Developments

As regards the amendment of the ERA it is safe to state that it is satisfactory if one only considers association standing. However, the law must be criticized for its attempt to deteriorate substantive judicial review in environmental matters – the more so since the relevant rules do not only concern association suits but also suits brought by individuals. Arguably, these curtailments of judicial review constitute a violation of the requirement of effective judicial protection set out in the *Aarhus Directive* and the *Aarhus Convention.* Thus, Germany may face another judicial defeat before the European Court of Justice.

The new Planning Harmonisation Law has been hailed by some commentators as a "turning point" in the field of administrative decision-making and an important step towards a "new

[17] Directive 2000/60/EC, as amended.
[18] Act of 31 July 2009, Federal Gazette 2013 (Part 1), p. 2585, as amended.
[19] The referral took place under under Article 267 of the Treaty on the Functioning of the European Union.

administrative culture". However, the voluntary nature of the process is criticised. Earlier drafts proposed to introduce mandatory early participation, patterned on the mandatory early participation on projects for new construction plans (zoning ordinances) under *the Federal Building Code*.[20] The EIA scoping process was considered to be appropriate for institutionalizing early and comprehensive mandatory participation on the whole project. However, the legislature accepted the view of the Government that voluntarism and informality are preconditions for engaging in a real dialogue about the envisaged project without formal constraints. This is tantamount to asserting that the mandatory early participation under *the Federal Building Code* does not work. There is no empirical evidence which could support this proposition.

Finally, the new Site Selection Law certainly improves the chances of selecting and constructing a site for a repository for high level radioactive waste in Germany. However it remains to be seen whether the trust in organised participation as a means to create legitimacy and public acceptance which underlies the whole Act will prove justified. Moreover, the involvement of Parliament at the end of all procedural steps raises constitutional problems regarding the separation of powers.

As regards the recent case law, there is a clear contrast between the reluctance of the legislature to fully transpose European law in the field of judicial review, and the more open attitude of the German administrative courts displayed in recent cases. Whilst the legislature seems unwilling to surrender traditional positions unless compelled to do so by the European Court of Justice, the administrative courts are much more responsive. It would be in line with the logic of the decision by the Federal Administrative Court on Article 9 (3) of the *Aarhus Convention* not to limit the recognition of association standing to subject matters at least partly governed by EU environmental law, but to also include decisions that are exclusively based on national law. The principle recognised by the European Court of Justice that rules of an international convention which do not have a direct effect can nonetheless influence the interpretation of broad statutory terms is of a universal character.

[20] Consolidated version of 23 September 2004, *Federal Gazette* 2004 (Part 1), p. 2414, as amended.

COUNTRY REPORT: INDIA

KAVITHA CHALAKKAL*

Introduction

In 2013, the National Green Tribunal (NGT) emerged as a force in the Indian environmental law arena. Some of the noteworthy efforts from the Tribunal included a demand for greater involvement and transparency from the governments in environmental decision-making and court cases. The Supreme Court (SC) gave a landmark decision, by ordering the translocation of lions, in an effort to save the subspecies from extinction, and reiterated the state's duty to protect the rights of wildlife. Progress on environmental protection matters in other legal arenas was slow. There were few legal enactments; specifically, climate change matters received little legal attention. Illegal sand-mining and wildlife deaths due to human-wildlife conflicts found a regular presence in the media, but failed to attract the attention of the legislature.

Judicial Bodies and Case Law

National Green Tribunal[1]

A major milestone for the NGT in 2013 was the constitution of the Western Zone Bench of the NGT. The Bench sits at Pune and has jurisdiction over Maharashtra, Gujarat, Goa, Daman, Diu, Dadra and Nagar Haveli. The South and Central Zone Benches were created earlier, in Chennai and Bhopal, respectively.

Throughout 2013, the NGT maintained its strict environmental protection and sustainable development ethos. It cautioned the Indian government against acting indifferently towards

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[1] The National Green Tribunal (NGT) is the specialized national body with expertise and jurisdiction over cases relating to environment, including conservation of forests and natural resources. The Forest Bench of the Supreme Court, formed in 2010, deals with forest, wildlife and mining-related cases.

conservation.[2] It warned the Ministry of Environment and Forests (MoEF), who failed to appear before the Tribunal in over 14 matters, to either monitor the trend or face coercive orders. The NGT commented that the "routine absences" were causing considerable inconvenience and delaying cases.[3] Another concern was the lack of public access to Environmental Clearance (EC). The NGT twice directed MoEF to make EC easily available by uploading them onto websites and displaying them on public notice boards.[4] Project proponents were directed to publish EC online and in newspapers, and provide copies to local bodies and departments.

A particular NGT achievement was the upholding of a 2008 ban on the use, manufacture and sale of plastic carrier bags. After checking the constitutionality, legality and correctness of the prohibition,[5] the NGT determined that economic and business interests must give way to the greater good and the interests of society. In another case, the NGT highlighted the importance of trees in urban landscapes and the government duty to protect them.[6] The NGT directed authorities from the National Capital Territory to de-concretize all trees in the area. The work was carried out in a way that caused injury to the trees. Upon becoming aware of this, the NGT directed the authorities to cure the damage and avoid causing injury in the future. The authorities disregarded this order. The NGT then imposed a Rs 50,000 fine on the Municipal Corporation of Delhi, the Corporation being responsible for recovering the money from the authorities involved. In a similar case, the NGT ordered the authorities of Gwalior to remove all signage, advertising, wires, cables, nails and screws from trees, and manually de-concretize their bases.[7] The NGT also rejected around 20 applications to review refusals to operate brick kilns in the 'No Development Zone' around the Kaziranga National Park, Assam.[8]

The NGT explained its approach to environmental protection and the public interest in a case concerning the legality of two mining operations clearances. The NGT said that

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[2] For example, see the NGT decision on *Jeet Singh Kanwar and Another v Union of India and Others* application number 10/2011.
[3] Staff Reporter (2013), "NGT wants severe action if MoEF continues absence from proceedings", *The Hindu*, Nov 28, 2013, Accessed online at URL: http://www.thehindu.com/news/national/ngt-wants-severe-action-if-moef-continues-absence-from-proceedings/article5401692.ece.
[4] Save Mon Region Federation and Another v Union of India and Others , Application No. 104/2012and Medha Patkar and Another v Ministry of Environment and Others, Appeal No. 1/2013.
[5] M/s Goodwill Plastic Industries Anr. v Union Territory Chandigarh Anr. Application No. 53/2013(THC) and Jarnail Singh Anr. v Union Territory Chandigarh Anr.Application No. 53/2013(THC).
[6] *Aditya N.Prasad v Union of India & Ors.,* M.A. No.706/2013 and M.A. No.557/2013 in Application No. 82 of 2013.
[7] Sajag Public Charitable Trust v Municipal Corporation of Gwalior Ors. Application No. 30/2013(CZ).
[8] Rohit Chaudhary v Union of India &Ors (Application No 38 of 2011).

'[p]ublic interest has to be read in conjunction with environmental protection'.[9] The NGT pointed out that the entire process of setting up a mine requires utmost good faith and honesty on the part of the intending entrepreneurs.

One of the most significant NGT decisions of 2013 was its upholding of the ban on sand-mining along river beds and beaches in the absence of a Central government environmental clearance. The NGT order reinforced 2012 SC judgment requiring mineral and sand miners to obtain a MoEF's clearance before proceeding.[10] The NGT rejected a plea from Madhya Pradesh (MP) to bring in newspapers sand-mining under state authorities, finding that state law could not prevail over Central rules.

Supreme Court of India

Arguably, the most important judicial decision of the year came from the Supreme Court of India (SC). The SC directed MoEF to take urgent steps to reintroduce the Asiatic lion (*Panthera leo persica*) to India, by, among other things, relocating a subpopulation of lions from Gujarat to the Kuno Wildlife Sanctuary in MP. The case had been ongoing since 1995.[11] On the one hand a scientific study recommended the relocation; on the other the Gujarat government opposed the idea. The case reached the SC in 2007 and in April 2013, the SC ordered the lions to be moved to the Sanctuary. The court drew on a range of provisions from national law, case law, policy and the *Conventions on Migratory Species and on Biological Diversity*. [12] The Court stated:

> *"…our approach should be eco-centric and not anthropocentric and we must apply the "species best interest standard", that is the best interest of the Asiatic lions… We are committed to safeguard this endangered species because this species has a right to live on this earth… Article 21 of the Constitution of India protects not only the human rights but also casts an obligation on human beings to protect and preserve a specie becoming extinct, conservation and protection of environment is an inseparable part of right to life".*[13]

This case allowed the SC to reiterate the primacy of the "public trust" doctrine. The doctrine imposes a trusteeship duty on government to protect public resources such as water, forests and wild animals. The duty requires government to maintain these things for the benefit of

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[9] *Ms Lithofero v MoEF and others* Application 71/2012 and also in another application 72/2012.
[10] Deepak Kumar v. State of Haryana, 2012; 4 SCC 629.
[11] Centre for Environment Law, WWF-I Vs Union of India & Others, I.A. No. 100 in Writ Petition (civil) NO. 337 OF 1995 and with IA No.3452 in WP(C) No.202 of 1995, decided on 15th April 2013. Accessed online from the website of the Supreme Court of India.
[12] The Convention on Biological Diversity, 1992 (1992) 31 ILM 818 (CBD) and the Convention on the Conservation of Migratory Species of Wild Animals, 1973 1979 UNTS 333 (CMS/Bonn Convention)
[13] Ibid p 42.

the public and in the best interests of the fauna and flora involved. The SC further called on the Indian government to enact exclusive legislation dealing with the conservation of endangered species.

Another important case concerned the role of Village Councils in clearance decision-making. The Orissa Mining Corporation appealed to the SC against a MoEF refusal to allow the clearing of forest land for bauxite mining.[14] The MoEF refused the application after identifying clearance violations and legislative infringements. The SC advised the parties to place the issues before the *Gram Sabhas* (Village Councils). The MoEF could then draw upon the views of the Councils when reconsidering the clearance.

Statutes

New Bills and Acts

The *Wildlife (Protection) Amendment Bill 2013*, introduced in the Rajya Sabha, aims to amend the *Wildlife (Protection) Act 1972* (WPA). The WPA protects wildlife and their habitats. The amendments seek to increase the involvement of grass-root communities in conservation decision-making. Increased involvement is to be achieved by the creation of community-managed Protected Areas (PA).The amendments also aim to bring Indian wildlife law into line with the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).[15] In this regard, the amendments seek to include a CITES Schedule in the WPA and increase penalties for WPA violations. Legal experts are concerned that the amendments might hamper scientific research and the prosecution of offences, a particular problem in a system already plagued by low conviction rates.

The *Biotechnology Regulatory Authority of India Bill 2013* aims to regulate biotechnology in India. Specific aims include the promotion of safe biotechnology, the creation of effective and efficient regulatory procedures and the establishment of a Biotechnology Regulatory Authority. The Authority would be responsible for regulating the research, transport, import, manufacture and use of biotechnology organisms and products.[16] The Bill has attracted

[14] Orissa Mining Corporation. v Ministry of Environment & Forest & Others, WP (Civil) No 180 of 2011.
[15] 993 UNTS 241.
[16] The Biotechnology Regulatory Authority of India Bill, 2013, Accessed online from URL: http://www.prsindia.org/uploads/media//Biotech%20Regulatory/Biotechnology%20Regulatory%20Authority%20of%20India%20Bill.pdf.

staunch opposition from environmental activists.[17] In a similar vein, the *Agricultural Biosecurity Bill 2013* seeks to establish an Indian Authority for the management of agricultural biosecurity and regulation of biological imports and exports of pests and diseases of plants and animals and unwanted organisms for ensuring agricultural biosecurity and to meet international obligations of India for facilitating imports and exports of plants, plant products, animals, animal products, aquatic organisms and regulation of agriculturally important microorganisms" and related matters.[18]

Notifications and Draft Rules

In 2013, MoEF published a Draft Notification on Amendment to Hazardous Wastes (Management, Handling and Transboundary Movement) Rules 2008 and the Municipal Waste (Management & Handling) Rules 2013 (Draft). MoEF also published four guidelines dealing with the diversion of forest land for mining and infrastructure development. The National Board for Wild Life (NBWL)'s Standing Committee approved a Guidelines for Roads inside Protected Areas, prevents the widening or upgrading of roads inside Protected Areas and requires agencies to follow the planning principles of avoidance, realignment and restoration. These guidelines may impact many road-widening and construction proposals awaiting determination,[19] particularly those posing a threat to wildlife habitats in Protected Areas.

In 2013, the MoEF reconstituted the Coastal Zone Management Authorities of Goa, Karnataka, Lakshadweep, Daman & Diu and Andhra Pradesh. The Authorities are the first-level of a two-tier coastal regulation system. Authorities are established under the Coastal Regulation Zone Notification 2011, the only law dealing with the conservation of India's coastal ecosystems. The MoEF also declared the first marine Eco-Sensitive Zone around the Marine National Park and Sanctuary in Gulf of Kutch, Gujarat. The Zone covers up to one kilometer from the coastal boundary towards landward side; an area within 200 meters from the boundary of the PA towards seaward side, and 31 rivers. The Notification prohibits the carrying on of mechanized fishing, polluting industries, pollution from shipping and

[17] Sood, Jyotika (2013), 400,000 people petition parliament panel to withdraw BRAI Bill, *Down to Earth*, August 24, 2013; Accessed online at URL: http://www.downtoearth.org.in/content/400000-people-petition-parliament-panel-withdraw-brai-bill.
[18] The Agricultural Biosecurity Bill, Accessed online from URL: http://www.prsindia.org/uploads/media//Agricultural%20Biosecurity/Agricultural%20Biosecurity%20Bill,%202013.pdf.
[19] For more details, see National Highway Development Project at URL: http://www.nhai.org/WHATITIS.asp.

refineries, effluents, solid-waste disposal, quarrying and felling and trees and mangroves in the Zone.

International Agreements

Since its 2012 declaration as a Natural World Heritage Site, the Western Ghats has become a major source of tension in India. In 2011, the MoEF commissioned one of India's premier conservation scientists to lead an Expert Panel in developing management recommendations for the Ghats; their report was not implemented by the government. In 2012, the government later appointed a High-Level Working Group, led by a renowned space scientist, for developing fresh management recommendations for the Ghats. The government has given 'in principle' support for the Group's report and ordered the implementation of the recommendations. The order has generated significant protest from environmental groups; a primary concern being that the second report waters down the recommendations of the first.

India and China renewed a Memorandum of Understanding (MoU) to share information regarding the Brahmaputra. The Brahmaputra is a trans-boundary river that originates in China and flows through India and Bangladesh. The MoU recognized that trans-boundary rivers are assets of immense value to riparian countries. According to the MoU, China is to provide India with richer hydrological data on the river and data on the massive dams China is currently building on the Brahmaputra. These dams could have serious hydrological, ecological and political impacts on downstream countries. The MoU is particularly important in light of the fact that India and China are not signatories to any international water treaty, especially, the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*.[20]

Common but Differentiated Responsibility on Climate Change

In 2013, India continued to oppose the imposition of binding emission reductions on developing countries. India reiterated its stance that developed countries should take responsibility for their historical emissions before developing countries compromise their economic growth by regulating industrial emissions. India's environment minister reaffirmed support for this principle of common but differentiated responsibility just before the

[20] 1936 UNTS 269.

Conference of the Parties to the Convention on Climate Change met in Warsaw this year.[21] The minister opposed the phasing out a group of greenhouse gases on the basis that there was a lack of 'clarity on identified substitutes, their costs, safety and economic feasibility'. The minister concluded India's contribution to the greenhouse gas discussion by stating that India 'can't take a leap of faith without knowing the exact path and the pitfalls'.[22]

Conclusion

In 2013, the Indian judiciary emerged as a major force in the environmental protection arena. A standout is the steadfastness of the NGT. The Tribunal managed to uphold the spirit of conservation without ignoring the developmental discourses and 'public interest' rhetoric. The SC also starred, particularly in its determination to ensure the rights of wild animals to live, and the duty of the State to act in the best interest of all living beings. Legislative efforts have been less impressive. The proposed amendments to the *Wildlife (Protection) Act to* make it CITES-compatible are unlikely to achieve the desired objective. For example, 59 of the 88 wild tigers found dead in 2012 were poached and the hunting of the one-horned rhino has reached alarming levels.[23] The Protected Area road guidelines of NBWL struggle to save the last of the healthy wilderness, in a country revving to build more guidelines. Perhaps the controversy created by the replacement of a conservation report prepared by one of the country's renowned conservation scientists in favor of another report prepared by a space scientist will go on for some more time. Overall, the above review suggests the Indian judiciary may be the last hope the country's ecosystems and species.

[21] Sethi, Nitin (2013), 'India is not a nay-sayer on climate change', The Hindu, November 7, 2013; accessed online at URL: http://www.thehindu.com/sci-tech/energy-and-environment/india-is-not-a-naysayer-on-climate-change/article5323166.ece.
[22] Natarajan, Jayanthi (2013), "Opening statement by Smt. Jayanthi Natarajan minister environment and forests India", Ministry of Environment and Forests; Accessed online at URL: http://envfor.nic.in/sites/default/files/HLS-STATEMENT-OF-INDIA.pdf.
[23] Dutta, A.P. (2013), "Curse of the horn", *Down to Earth*, Published April 30, 2013, Accessed online at URL: http://www.downtoearth.org.in/content/curse-horn.

COUNTRY REPORT: IRELAND

Inviolability of the Dwelling, Planning Enforcement Actions and Miss Fortune: An Analysis of the Cases Between the County Council of Wicklow and Fortune

SEAN WHITTAKER*

Introduction

In Ireland, the fundamental rights of citizens are guaranteed by *the Irish Constitution*,[1] which aims to protect rights valued within modern societies.[2] The Irish planning regime[3] operates under the overarching framework provided by these rights, and any actions taken under the regime's authority must not breach the rights protected by the Constitution. This Country Report will focus on the recent series of cases between the County Council of Wicklow and Miss Fortune,[4] which has revealed a tension between the individual rights enshrined by the Constitution and the aims of the planning regime, which centre on the community.[5]

The Facts of County Council of Wicklow v. Fortune (No.1)

The case of *Fortune (No.1)* concerned a chalet that was used as a dwelling by Miss Fortune, a single mother who was "effectively destitute."[6] The chalet was built on land owned by Miss Fortune, but was erected without planning permission - contrary to the Irish planning regime.[7] The County Council wished to demolish the dwelling, and was granted leave to do

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[1] Constitution of Ireland, Articles 40-44.
[2] J Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall Ltd, 2000), 386.
[3] Planning & Development Act 2000.
[4] *County Council of Wicklow v. Fortune (No.1)* [2012] IEHC 406 (hereafter referred to as "Fortune (No.1)"), *County Council of Wicklow v. Fortune (No.2)* [2013] IEHC 255 (hereafter referred to as "Fortune (No.2)") and *County Council of Wicklow (No.3)* [2013] IEHC (hereafter referred to as "Fortune (No.3)").
[5] C Miller, "Places or People: What is the Point of Town and Country Planning?" (2005) Journal of Planning and Environment Law, 434, 439.
[6] Fortune (No.1), para 4.
[7] n.3, s.32.

so by the Circuit Court after Miss Fortune failed to obtain retention planning permission.[8] Miss Fortune appealed the decision of the Circuit Court, arguing that demolishing her dwelling would interfere with the inviolability of her home, a right protected under the Irish Constitution.[9]

The significance of this series of cases stems from the High Court's decision not to grant an order to demolish the dwelling. The High Court held that demolishing the chalet was not proportionate and did not justify interfering with Miss Fortune's constitutional rights.[10] In using the proportionality approach, the High Court has followed a similar test applied by the European Court of Human Rights (ECtHR). However, the application of the proportionality test differs from that of the ECtHR. In addition to this divergence, the *Fortune* cases may have a negative impact on future planning enforcement measures, undermining the aims of the Irish planning regime. As *Fortune (No.3)* cannot be appealed to the Supreme Court,[11] the decision in the *Fortune* cases will impact the operation of Ireland's planning regime and is an important series of cases from which to analyse the interplay between the constitutional rights of the citizen and the protection of the community's interests.

The Irish Planning Regime and the *Fortune* Decisions

The Irish planning regime, similar to the UK, is a plan-led system where development plans are used as a framework to direct future development.[12] To be granted planning permission by the planning authority, which is necessary for a development to be lawfully executed,[13] developers must have regard to the development plan.[14] If a development has not obtained planning permission, it can be subject to enforcement measures by the planning authority.[15] This acts to deter citizens from breaking planning laws, ensuring that all developments have a minimal environmental impact,[16] are harmonised with pre-existing developments and provide certainty to other developers and the general public.

[8] n.6, para 4-6.
[9] n.1, art 40.5.
[10] Fortune (No.2), para 32.
[11] Courts of Justice Act 1936, s.39
[12] n.3, s.10(1).
[13] Ibid, s.32(1).
[14] Ibid, s.34(2).
[15] Ibid, s.151.
[16] N Collar, *Planning Law* (3rd edn, W Green, 2010), 12.

In line with this thinking, previous case law has emphasised that courts should only refrain from taking action against unlawful developments in "exceptional circumstances."[17] However, this wide approach has been significantly narrowed in subsequent cases, which have held that it is only in circumstances where planning law has been breached, either through developing without planning permission or executing a development that is in material breach of planning permission, that the court may take action against an unlawful development.[18] The court can decide not to utilise its discretion when the breach is minor[19] or was performed in good faith.[20] Despite this narrowed approach, whether the development was the individual's dwelling was not considered to be a relevant factor.[21]

The judgments in the *Fortune* cases have departed from the previous case law. This is due to these cases being the first to rely on Article 40.5 of the Irish Constitution within the context of the planning regime.[22] In applying the constitutional provision in *Fortune (No.1)*, the High Court held that the County Council had to show that demolishing the dwelling was a proportionate and fair method of achieving the aims of the planning regime to justify interfering with the inviolability of the dwelling.[23] In setting this test, the court made it clear that Article 40.5 did not provide an absolute protection for unlawful dwellings,[24] striking a balance between individual rights and community values.

In *Fortune (No.2)* three justifications were set out by the County Council of Wicklow to argue that demolishing the dwelling was proportionate and fair: the dwelling would undermine the planning regime's ability to protect the environment;[25] the dwelling would set a precedent for future planning permission decisions;[26] and the dwelling negatively impacted the area and the nearby Natura 2000 conservation site.[27] However, the High Court held that these reasons did not justify an interference with the constitutional right to the inviolability of the dwelling. The court considered that the unlawful status of the dwelling, which would prevent it from being sold or used a security, would deter other persons from building unlawful

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[17] *Morris v. Garvey* [1983] I.R 319, 324.
[18] See *Wicklow County Council v. Forest Fencing* [2007] IECH 242, para 50 and *Lanigan v. Barry* [2008] IEHC 29, para 45.
[19] Grimes v. Punchestown Develop Co. [2002] 1 I.L.R.M 409.
[20] Dublin Corporation v. McGowan [1993] 1 I.R 405, 412.
[21] Meath County Council v. Murray [2010] IEHC 254, para 44.
[22] n.6 para 32.
[23] Ibid, para 42.
[24] Ibid, para 40.
[25] n.10 para 13.
[26] Ibid, para 14.
[27] Ibid, para 21.

dwellings and thus ensure the effective operation of the planning regime.[28] This point was further emphasised in *Fortune (No.3)*[29] and it plays a substantive role in the court's attempt to protect the fundamental aims of the planning regime. The High Court also noted that because the dwelling was unlawful, it could not be taken into account in granting planning permission for future developments in the area, minimising the potential for the dwelling to set a precedent.[30] Finally, in analysing the impact on the conservation area, the High Court noted that there was no evidence of any negative impact to the Natura 2000 site[31] or to the area's amenities.[32] As such, the court held that the County Council had failed to meet the proportionality test and that Miss Fortune's dwelling, despite being unlawful, was protected from being demolished under Article 40.5 of the Constitution.

The Proportionality Test in the European Court of Human Rights

While the use of the right to the inviolability of the dwelling is novel in the context of Irish planning law, the ECtHR has heard various cases challenging planning decisions under Article 8[33] and Article 1 of *Protocol 1*[34] *of the European Convention on Human Rights*. Much like the court in the *Fortune* cases, the ECtHR has applied a proportionality test as a method of balancing the rights of the individual and the needs of society. However, the application of the proportionality test differs between the High Court and the ECtHR, which impacts the extent to which local authorities can interfere with the rights of an individual.

Pursuant to the ECtHR case law, few rights guaranteed by the ECHR are absolute.[35] If limiting a right is necessary for the general public interest or protecting the rights of others and is proportionate in achieving this legitimate aim, then the limitation does not violate the protected right.[36] This ensures that an excessive burden is not imposed on any single person.[37] In applying the proportionality test, the ECtHR emphasises the importance of environmental protection as a community need,[38] its legitimacy as an aim which can justify

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[28] Ibid, para 13.
[29] Fortune (No.3) para 29.
[30] n.10, para 17.
[31] Ibid, para 22.
[32] Ibid, para 8.
[33] Article 8 guarantees the right of respect for private and family life, the home and correspondence.
[34] Article 1 of protocol 1 guarantees the right to the peaceful enjoyment of possessions.
[35] A Boyle, "Human Rights and the Environment: A Reassessment", 20, UNEP http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf Accessed 09/10/13.
[36] *Chapman v. United Kingdom* App No. 27238/95 (ECHR 18 January 2001), para 90.
[37] *Brosset-Triboulet and Others v. France* App No. 34078/02 (ECHR 29 March 2010), para 86.
[38] *Turgut and Others v. Turkey* App No. 1411/03 (ECHR 22 September 2009), para 90.

the limitation of human rights[39] and the role of planning regimes as an instrument to protect the community interest.[40] This emphasis places the evidential burden on the individual to prove that the burden imposed by the limitation of their rights is excessive, which provides greater protection for the community interest. This contrasts with the proportionality test applied in *Fortune*, which places the evidential burden on the public authority requiring them to justify the proportionality of their actions. As a result, this application of the proportionality test confers greater protection on the rights of the individual. This difference in approach results in different outcomes between cases with similar facts.

Notwithstanding the contradictory judgments between the two courts, the different applications of the proportionality test are justified by the language used in the ECHR and the Irish Constitution. The wording used to enshrine the right of the dwelling is "inviolable", which, according to European constitutional tradition, confers a greater degree of protection than the similar right granted by the ECHR, which only provides that the right shall be "respected."[41] Since the level of protection granted by the Irish Constitution is greater, it follows that the application of the proportionality test in Irish courts would place greater emphasis on protecting these individual rights. As such, it is difficult to criticise the use and application of the proportionality test as the foundation for the judgment in the *Fortune* cases.

The Impact of the *Fortune* cases in Ireland

Despite the soundness of the proportionality test underpinning the *Fortune* cases, the judgment has not been favourably received by the Irish Planning Institute.[42] This is because the judgments, while protecting the inviolability of the dwelling, have undermined the key aims of the planning regime without providing an adequate defence against potential abuses. Additionally, the reasoning underpinning the cases can be criticised for not considering international instruments beyond the ECHR.

The first issue with the decision in the *Fortune* cases is that it, in essence, rewards Miss Fortune by allowing her to keep her unlawful dwelling despite ignoring the planning regime. This could influence others to do the same, undermining the planning regime and its goals.

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[39] n.36, para 82.
[40] *Pine Valley Developments Ltd and Others v. Ireland* App No. 12742/87 (ECHR 29 November 1991) para 57.
[41] *n.10,* para 36 and E.A v. Minister for Justice and Equality [2012] IEHC 371, para 39.
[42] M Hilliard, "High Court Ruling on Retention of Wicklow Home sets an 'Unhappy Precedent'" (*Irish Times,* 17 June 2013) http://www.irishtimes.com/news/environment/high-court-ruling-on-retention-of-wicklow-home-sets-an-unhappy-precedent-planners-1.1429084 Accessed 09/10/13.

While the High Court considered that the unlawful status of the dwelling would act as an effective deterrent against others following Miss Fortune's example,[43] this is arguably not the case. It is likely that individuals who live nomadic lifestyles and who wish to settle down will benefit most from this decision, as they are likely to place a permanent dwelling without obtaining planning permission.[44] As many pre-existing sites are unsuitable for those living such lifestyles,[45] the unlawful status of their dwelling is unlikely to deter them from settling down in their chosen location.

Another issue arising from the court's reasoning is the further conflict between the planning regime and this extension of the inviolability of the dwelling. As the concept of a dwelling is not restricted to a certain type of building[46] it is possible that homeless people living in disused buildings may be able to claim that the building is their dwelling and protect it from being demolished.[47] While such buildings are unlikely to pass the proportionality test set out in *Fortune*, as disused buildings are likely to have an impact upon the environment and amenities in the area, the possibility still exists. This can be problematic for both the needs of society, as it may contradict the underlying aims of the planning regime, and the individual residing inside the building, it is likely detrimental to their health.

These issues originate from how the inviolability of the dwelling clause in the Irish Constitution has been interpreted in the *Fortune* cases. The ECtHR has recognised that the wording of the ECHR does not extend to allowing individuals to choose where they place their dwelling, but only provides protection to dwellings lawfully placed.[48] While the wording of Article 40.5 of the Irish Constitution grants a greater level of protection than the ECHR, it does not extend the scope of this protection to allow individuals to choose their dwelling place. *Fortune* extends the reach of Article 40.5 to allow individuals to choose dwelling place and, as long as it is their sole dwelling place, protects them from the enforcement actions of the local authority. This distorts the relationship between the right guaranteeing the inviolability of the dwelling and the planning regime, undermining the operation and aims of the planning regime. While this distortion is somewhat limited by the requirement for such

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[43] n.10, para 13.
[44] As was the case in *Chapman* v. UK, n.36.
[45] S Burke, "Over 1,000 Families Still Living in Inhumane Conditions" (11 February 2010) http://saraburke.wordpress.com/2010/02/11/over-1000-traveller-families-still-living-in-inhumane-conditions/ Accessed 10/10/13.
[46] See *People (Attorney-General) v*. Hogan (1972) 1 Frewen 360 and n.2, 516.
[47] John Considine, "Novel Constitutional Argument Succeeds in s.160 Planning Case Involving a Dwelling" (*LinkedIn,* 2013) http://www.linkedin.com/groupItem?view=&gid=28415&type=member&item=252256473&commentID=-1&qid=b4139491-a674-480b-be19-7dcf767fd2c2 Accessed 17/10/13.
[48] n.36, para 113.

dwellings to not inflict damage to the environment, this limitation does not take account of other interests, such as economic development, enshrined by the development plan and the planning regime. This makes the limitation inadequate as a means of protecting the aims of the planning regime and balancing the relationship between an individual's rights and the needs of society.

The final issue with the reasoning behind the *Fortune* cases is how the High Court perceived and applied the definition of environmental harm. As the environmental impact of the dwelling is presented as the sole limitation of the constitutional right at issue, the court took a limited view on what constitutes environmental harm. While not expressly defined in *Fortune (No.2)*, the court analysed the environmental impact on the area where the dwelling was built and the Natura 2000 area separately, and held that because there was no perceivable impact, no environmental harm was caused.[49] By taking this approach to defining environmental harm, the court does not take into account the complexity of biological interactions within ecosystems. This runs contrary to the principles underlying the ecosystem approach enshrined by the Convention of Biological Diversity (which Ireland has ratified) as set out in Decision V/6 of the Conference of the Parties.[50] Principle 8 of COP V/6 recognises that ecosystems operate on a varied temporal scale and any impacts upon the ecosystem may not be seen until long after the damaging event has occurred. As this was not taken into account in the *Fortune* cases,[51] it is possible that the dwelling could have an unseen negative impact upon the Natura 2000 site. This is a defect within the *Fortune* cases, as by not taking this holistic approach the factual analysis of the impact of the dwelling and any future unlawful dwellings may be incorrect, which may result in grant protection to unlawful dwellings that cause environmental damage.

It is these cumulative defects which have led to the judgments of the *Fortune* cases to be badly received by the Irish Planning Institute. The judgments, despite the soundness of the proportionality test, have changed the legal landscape of utilising planning enforcement measures through distorting the balance between individual and community rights without providing adequate safeguards against their potential abuse. This undermines the use of planning permission, which negatively impacts upon the environmental, economic and social concerns embodied through the planning regime

[49] n.10, para 22.
[50] Hereafter referred to as COP V/6.
[51] n.6, para 2.

Conclusion

It has been said that when social policies threaten protected human rights, the underlying aims of planning regimes are suspended.[52] In a fair society this is necessary, as the rights of individuals need to be protected against the general public interest to prevent the imposition of excessive burdens. However, it is also necessary to protect the general public interest, as the rights of the individual cannot always take precedence in a just society. This is reflected in the proportionality test used in the ECtHR, which balances the rights of the individual and the common good. While the proportionality test used in the *Fortune* cases attempts to strike this balance, the emphasis on the rights of the individual guaranteed by the Irish Constitution prevent this balance from being obtained.

This distortion in the balance between these interests, the limited definition of environmental harm that was applied in the cases and the resultant extension of the right to the inviolability of the dwelling have resulted in hindering the planning regime's ability to take enforcement action against unlawful dwellings, undermining the regime's operation and its aims. While in this case the harm was limited, as the County Council was able to negotiate with Miss Fortune, it is likely that the precedent set by this case will impact upon future enforcement actions and the operation of the planning regime as a whole. As this case cannot be appealed, until a similar decision reaches the Supreme Court the rights of the individual will prevail in most planning enforcement actions concerning the sole dwelling of the individual, to the detriment of the common good.

[52] n.5, 439.

COUNTRY REPORT: ITALY

Italian Environmental Law Development in 2013

CARMINE PETTERUTI*

The Difficult Balance Between Economy and Environment: The Role of the Courts

The 2012 Italy country report[1] underlined the important role of the Courts in controlling and interpreting Italian environmental law in a context of economic crisis. This assertion is now confirmed by a recent judgment of the Constitutional Court No. 85 of 9 May 2013. The judgment refers to a conflict of competence between the Government and the Criminal Court. The judgment of the Constitutional Court arose in the context of the Taranto Criminal Court ordering the closure of a major Italian plant, the steelworks firm ILVA Ltd. of Taranto. In this regard, the Government has been accused of adopting laws in conflict with precautionary measures adopted by the Criminal Court to ensure environmental and health protection against industrial air pollution. The Criminal Court of Taranto adopted precautionary measures to stop ILVA's production on the basis that the plant's emissions were exceeding air pollution emission limits. At the same time, precautionary measures were adopted to stop the sale of ILVA's products.

ILVA of Taranto, at first a state-owned company but since 1995 a company in the private sector, is the most important European steelworks firm. The plant was built in the Sixities; initially under public control, and then bought by private parties in 1995. Today, it is an important source of employment for South Italy, especially for the Region Puglia. The court order for the closure of the plant carried with it significant risks for employees as the owners threatened the final closure of the plant.

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[1] C. Petteruti, Italian Environmental Law Developments in 2012, IUCN eJournal 4, 2013.

For this reason, the Italian Government adopted a "Decree-Law" (a regulation by the Government having the force of a law), commonly referred to as "Save-ILVA Decree",[2] providing the appointment of a Supervisor to manage the plant. The Decree provides that the Supervisor must control the adoption of measures for stopping pollution. It introduced the notion of "plant of national strategic interest" identified by a Decree of the President of the Council of the Ministers. In this regard, the Decree provides that the Minister of Environment, when reassessing the integrated environmental authorisation, can authorise to stay production for a period not exceeding 36 months. This authorisation is dependent on the condition that the requirements contained in the reassessment provision of the "integrated environment authorization" (IEA) are fulfilled.[3] In any case, the Decree provides that it must be ensured the most adequate environmental and health protection, according to the best available technology is implemented.

Referring to the Decree-Law, the Criminal Court raised the conflict of competence, requesting a judicial review by the Constitutional Court on the basis that the Decree-Law would expropriate judicial function, inhibiting the effectiveness of precautionary measures. According to the Criminal Court, the Government would have modified a judicial measure through a legal measure which is formally a law but substantially an administrative act regulating a specific case.

Italian Government Action to Support Plants of National Strategic Interest in Crisis

During 2012 and 2013 the Italian Government policy has been characterised by the adoption of an "extraordinary legislation" implemented to address the environmental and employment crisis of the ILVA's plant. At the same time, the Government introduced legislative measures aimed at promoting the recovery of the enterprises in crisis, especially for plants of national strategic interest. *The Decree-Law No. 207/2012* (then transformed into *Law No. 231 of 24 December 2012*), *the Decree-Law No. 61/2013* (then transformed into *Law No. 89 of 3 August 2013*) and *the Decree-Law No. 101/2013* (then transformed into *Law No. 125 of 30 October 2013*) can be located in this sphere of operation.

The first Decree-Law has introduced a review procedure of the IEA. Indeed, the IEA is an administrative authorisation required by law for certain kinds of plant which could have an

[2] Decree-Law No. 207 of 3 December 2012 then transformed into law No. 231 of 24 December 2012.
[3] The Decree-Law No. 207/2012 introduces an administrative act of second degree which is a reassessment of a previous IEA. The reassessed IEA authorizes an industrial plant to carry on the industrial production for a time limit.

environmental impact.[4] The new IEA reassessment procedure is applicable to the plants which are in crisis and have been identified as being of "national strategic interest" by a Decree of the President of the Council of the Ministers. *The Decree Law No. 207/2012* does not provide a definition of the term "crisis" and does not identify the characteristics which would qualify a plant as being of "national strategic interest". It merely provides that the IEA review procedure may be utilised in situations where there is a need to protect jobs. This applies for plants which have provided employment to at least 200 workers during the preceding year. During the IEA reassessment procedure, the Ministry of the Environment is empowered to authorise the continuation of production for 36 months. In this case, the reassessment provisions establish the measures for environmental and health protection according to the best available techniques. These provisions can be applied even in cases of judicial order of attachment. Any violation of the measures contained in the reassessment provision attract the application of a new administrative fine, equal to 10% of the turnover of the last financial statements, in addition to any other administrative sanctions provided by law.

The Decree-Law No. 61/2013[5] was also introduced to address ILVA's emergency, providing for the supervised administration in cases of an environmental emergency caused by the activities of a plant of national strategic interest (as identified by *the Decree Law No. 207/2012*). Indeed, the Decree provides that a plant of national strategic interest can be placed under the administration of an external commissioner should it fail to adopt the IEA measures.[6] It is necessary for this purpose that the plant has no less than 1000 workers,[7] and there must be repeated contraventions of the IEA provisions. The commissioner is appointed by a Decree of the President of the Council of the Ministers. They replace the council board of the enterprise for 12 months (the term of office may be extended for up to 36 months) and are endowed with the power to apply the measures provided by IEA. The same Decree provides for the appointment of three experts[8] who have the task of drafting an environmental and health protection plan and a strategic business plan. The purpose of the

[4] The plants subjected to the IEA are identified by the Law No. 152 of 3 April 2006. The law is flanked by regional laws that identify the authority who has competence to release the authorization for the plans operation.

[5] The Decree-Law has been adopted by the Government as a result of ILVA's violations about the IEA reassessed provisions. These violations have been detected by the National Institute for Environmental Protection and Research and the Regional Agency for Environment which has reported to the Guarantor.

[6] The violations are detected by the National Institute for Environmental Protection and Research and the Regional Agencies for Environment jointly with the involved enterprise.

[7] The Decree-Law No. 61/2013 introduces a dimensional parameter (1000 workers) higher than the Decree law No. 207/2012 (200 workers).

[8] The three experts are appointed by the Minister of the Environment, after consultation of the Minister of Health, among environmental and plant engineering experts.

former plan is to ensure that the IEA measures are implemented, while the latter plan provides for the measures necessary to ensure the continuation of production in respect of health and environmental protection. This last plan is an instrument to ensure the industrial production, whose income is aimed towards financing the actions needed to address the environmental emergency.

The most interesting part of this Decree-Law is article 2. It provides expressly that all ILVA's plants are subjected to the supervised administration in case of environmental emergency.[9] Thus, article 2 provides that the assessment procedure of IEA violations does not apply to ILVA due to evidence of extraordinary need and urgency in this instance.

It is therefore clear that *the Decree-Law No. 207/2012* and *the Decree-Law No. 61/2013*, although they introduce general provisions, contain provisions specifically addressed to the environmental emergency caused by ILVA. Moreover, it is clear that the Decrees-Law provide a combined effect between an administrative act and the law referring to ILVA's plants.[10]

Finally, *the Decree-Law No. 101/2013* (article 12) provides the authorisation of building and managing a landfill waste site inside ILVA's plant. The Decree considers the authorisation useful for the fulfilment of the environmental and health protection plan provided by article 1 of *the Decree Law No. 61/2013*.[11]

[9] The Decree-Law modified the article 3 of the Decree-Law No. 207/2012 (which defines just the ILVA's plant of Taranto as a plant of national strategic interest) extending to all ILVA's plants the qualification of "plants of national strategic interest".

[10] In this regard, E. Frediani, Autorizzazione integrata ambientale e tutela "sistemica" nella vicenda dell'Ilva di Taranto, conference proceedings on "Il caso Ilva: nel dilemma tra protezione dell'ambiente, tutela della salute e salvaguardia del lavoro, il diritto ci offre soluzioni?", 15 March 2013, www.federalismi.it

[11] The authorised landfill waste are provided for the waste disposal produced by ILVA's plant The Decree-Law provides that the construction and management technique of landfill waste are defined by a Decree of the Minister of the Environment to ensure an adequate standard of environment protection.

The Government's Action Reviewed by the Constitutional Court

The judgment of the Constitutional Court No. 85 of 9 May 2013 regarding *the Decree-Law No. 207/2012* confirms the constitutional compatibility of the emergency Government action with respect to:

- the conflict of competence between legislative and judiciary power;
- the juridical nature of the ILVA's integrated authorisation; and
- the balance between constitutional values.

The conflict between legislative and judicial power, from the point of view of the Criminal Court, arose from the introduction of a legal measure which, in the same regulatory framework, would have modified precautionary measures in conflict with the order granted by the Criminal Court. At the same time, *the Decree-Law No. 207/2012* represents a violation of the principle of natural justice, providing only an administrative sanction against IEA violations, which limits the right to judicial protection of health. Simply put, the Decree-Law does not realise an adequate balance between the right to health and environment, on the one hand, and the right of private economic initiative on the other. The last objection is supported by the argument that there is a hierarchy of rights in the Italian Constitution. In terms of this hierarchy the right to health including the right to a healthy environment supersedes that right to private economic initiative. This approach did not find the Constitutional Court's approval. Instead, the Court underlined the fact that in the Italian Constitution there is an integrated relationship between the different fundamental rights. For this reason, it is not possible to identify a hierarchical relationship between constitutional rights. According to the Constitutional Court, it is possible to balance the rights involved. The qualification of health and environmental protection does not imply their supremacy over the other constitutional rights and principles. It means that health and environment protection cannot be sacrificed in the face of others' constitutional rights. Thus, there is a dynamic point of equilibrium between the constitutional rights and principles that must be defined according to the principles of proportionality and reasonableness.[12]

With this "dynamic perspective" of fundamental rights, the Constitutional Court affirmed the dynamic nature of the IEA *as per* the censured *Decree-Law No. 207/12*. IEA contemplates

[12] The Constitutional Court judgment No. 264 of 28 November 2012 states that law protection must always be systemic and unfractionated into a series of uncoordinated rules. In fact, the lack of coordinated rules involves the unlimited expansion of just one right to the detriment of others.

an emission reduction program which requests a periodical review according to latest technologies.[13] Thus, the Court identified the reassessed IEA as the administrative act through which it is possible to balance acceptability and risk management, on the one hand, and human health and environmental protection on the other. Thus, the Court confirmed that when there are critical issues in the first IEA, an administrative procedure of secondary degree is triggered (the reassessed IEA procedure). This situation enables a reassessment procedure aimed at examining the inefficiencies of the first IEA and introducing new measures to ensure pollution reduction.

Therefore, according to the Constitutional Court judgment, *the Decree-Law No. 207/2012* establishes a combination between an administrative act (the reassessed IEA) and a legal provision "which takes as its starting point the new balance between production and environment outlined in the reassessed IEA". For this reason, the Court did not accept the argument that the IEA provided by the Decree-Law would be an act having the force of law.[14] In the same way, the Court confirmed the constitutional compatibility of the Decree-Law. This compatibility must be assessed with reference to the content of the law in order to avoid any unequal treatment.[15] Thus, the criteria for the legislative choices and the implementation modalities to apply must be indicated by the law itself. In this regard, the Constitutional Court considered the Decree Law compatible because it refers to ILVA's plant as being of national strategic interest by virtue of the environmental emergency and employment crisis.

Conclusion

The Constitutional Court acknowledged that *Decree-Law No. 207/2012* and the intervention of the Government were for reasons of employment emergency. The economic crisis prompted the Executive Power to adopt measures to protect the livelihoods of a large number of people. The support of the constitutional judge in the case of ILVA is confirmed by the same judgment of the Constitutional Court which referred to the existence of a dynamic

[13] The article 29-*octies* of the "Legislative Decree" No 152/2006 (in transposition of the Directive 2008/1/EC concerning integrated pollution prevention and control) provides that IEA must be reassessed: i) for emergency pollution; ii) for significant changes about best available technologies (BAT); iii) for requirements related to security plant; and iv) for new national or community law. In this contest, the Minister of the Environment can authorize the operation of the plants which are of the national strategic interest for a time of 36 months.

[14] Among the different arguments proposed by the criminal Court about the unconstitutionality of the Decree-Law No. 207/2012, they refers to the nature of Decree as act having force of a law to underline the violation of the article 113 of the Italian Constitution. Indeed, the article 113 refers to the right of challenging administrative acts in front of the administrative courts.

[15] Constitutional Court No. 20 of 9 February 2012.

relationship amongst the different rights and principles of the Italian Constitution. This would seem to be in accordance with the Government of the Court's acknowledgment that an administrative procedure (the reassessed IEA) which ensures the prosecution of an enterprise causing detriment to health and environment protection is lawful. At the same time, the judgment of the Constitutional Court acknowledged the capacity of an administrative act (the reassessed IEA) to stop the Criminal Courts in suppressing environmental crimes. These elements reveal an unequal approach of the Constitutional Judge to the different fundamental rights involved in the ILVA episode.

In the current historical setting, more so than in the past, economic issues (employment, economy and development) are in a privileged position among fundamental rights. To paraphrase the famous quote, we can say that all fundamental rights are equal but some fundamental rights are more equal than others.

COUNTRY REPORT: MEXICO

Recent Progress in the Development of Mexican Environmental law

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Background

The history of Mexican environmental law can be divided into four stages. The first era of Mexican Environmental law began in 1972 – when the Federal *Act to Prevent and Combat Environmental Pollution*[1] was passed – and ended in 1982 when the Federal *Act of Environmental Protection*[2] repealed the law of 1972. Environmental legislation of those years shows the following characteristics:

1. The law was federal in nature.
2. The objective was to combat environmental pollution more than to protect the environment.
3. It was framed on command and control based approach.[3]

The second stage in the development of environmental law began in 1987 when the Constitution was amended to introduce both: the system of concurrent jurisdictions to legislate in environmental issues (article 73, section XXIX-G) and the concept of ecological balance as a subject of legal protection (article 27). Under this constitutional basis, in 1988 the Federal Congress passed the *General Act for Ecological Balance and Environmental Protection*.[4] For the first time local states adopted their own environmental legislation regulating those matters that the General Act defined as local issues. The environmental legal framework built during these times addressed the environmental problems from a more holistic perspective that considers the environment as a whole and not only as a set of

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[1] Ley Federal para Prevenir y Controlar la Contaminación Ambiental.
[2] Ley Federal de Prevención al Ambiente
[3] In 1982 an Under Ministry of Ecology was created into the Ministry of Urban Development and Ecology. That Under Ministry was empowered to enforce environmental legislation by imposing administrative fines in cases of non-compliance.
[4] Ley General del Equilibrio Ecológico y Protección al Ambiente.

natural resources. Both the Federal law and local environmental laws addressed environmental problems from the perspective of environmental balance but as was the case with the laws of 1972 and 1982, the laws in this era were built on the command-and-control based approach without introducing any innovative instruments of legal protection. In the same way, general and local environmental laws stressed the preventive objective of environmental law and failed to include any provision in regard to the rehabilitation of the environmental pursuant to environmental damage.

Notwithstanding that, during these years and under the influence of the North American Free Trade agreement negotiations, the Mexican government started to enforce environmental laws more rigorously than during the previous years. In 1992 the Attorney General's Office for Environmental Protection was created as the main agency in charge of enforcing environmental laws. This second era drew to a close in 1996 when the *General Act for Ecological Balance and Environmental Protection* was amended for the first time. This amendment also meant that 32 local laws required amendment.

The third period of Mexican environmental law (1996 to 2010) is the era of multiplication of environmental legal bodies. It is characterized by: a) the promulgation of a number of new environmental general laws and their corresponding local laws such as the *General Wildlife Law* of 2000;[5] the *General Act for Sustainable Forest Development* of 2003;[6] the *General Act of Prevention and Integral Management of Waste* of 2003;[7] and the *General Climate Change Act*;[8] b) the introduction of economic instruments for environmental protection; and c) the recognition of a right to information, public participation, and in a limited way, the right to access environmental justice.

Finally, a fourth era of Mexican environmental law started in 2010 with a series of constitutional amendments addressed to facilitate access to environmental justice as well as a number of modifications to secondary legislation implementing such constitutional reforms. In this last stage the emphasis focused on both access to environmental justice and restoration of environmental damage. A legal regime governing environmental liability was implemented in 2013 when the Federal *Environmental Liability Act*[9] was passed by the Federal Congress.

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[5] Published into the Diario Oficial de la Federación 3 July 2000.
[6] Published into the Diario Oficial de la Federación 7 July 2003.
[7] Published into the Diario Oficial de la Federación 8 October 2003.
[8] Published into the Diario Oficial de la Federación 6 Jun 2012.
[9] Ley Federal de responsabilidad Ambiental. Published into the Diario Oficial de la Federación 7 July 2013.

This paper seeks to analyse the last of the four stages. The analysis is divided into three sections. The first part discusses constitutional reforms regarding access to environmental justice. The second part analyses secondary legislation reforms aimed at implementing those constitutional reforms, and finally, part three briefly explains the content of the Federal *Law of Environmental Liability* of 2013.

Constitutional Reforms

Constitutional amendments passed during the period of analysis had the aim of making possible access to environmental justice. In that regard, as explained below, the constitutional basis of a human right to a healthy environment was strengthened by reforming articles 4, 17, 94, 103, 104 and 107 of the *Mexican Federal Constitution*.

The first constitutional reform was passed in July 2010. This amendment added a third paragraph to article 17 of the Constitution.[10] As explained in the next section, the new provision obliged the Federal Congress to pass a law regulating collective actions, including judicial procedures and a mechanism for the restoration of environmental damage. According to this Constitutional reform, jurisdiction to decide on these matters is vested in federal judges.

A second constitutional reform, which modified articles 94, 103, 104 and 107 of the Federal Constitution, was passed in 2011. These articles regulate one of the most important instruments for human rights protection in Mexico: the *Amparo* Trial (injunction).[11] However, these provisions were crafted to protect only individual interests. The reform to article 107 means that for the first time an *amparo* action may be filed not only to protect individual and direct interests, as the original text of the Constitution provided, but also in defence of the so-called 'indirect and collective' legal interests, such as the collective interest in protecting the environment. Article 107 as amended reads as follows:

[10] Published into the Diario Oficial de la Federación 29 July 2010.
[11] Published into the Diario Oficial de la Federación 6 Jun 2011.

> ***Article 107***. *All dispute considered under Article 103 shall be subject of the proceeding and formalities established by the law, in accordance with the following bases':*
>
> *I. 'The amparo trial must always be initiated at instance of injury party, having this character those who argument to have a right or individual or collective legitimate interest, under the condition that the act claimed violets a right recognized by this Constitution and with that it its juridical interest directly or because its especial legal situation.*

The third constitutional reform was passed also in 2011.[12] According to this reform, all individual warranties protected by the Constitution are now considered as human rights. This includes the human right to a healthy environment, which had been already introduced into the Federal Constitution in 1999 as an individual warranty. This is a fundamental change. Individual warranties are those fundamental rights granted by the Constitution to individuals that cannot be affected by any administrative authority; whereas human rights are the fundamental right inherent to persons, including those recognized by international treaties, that the legal order must recognize.

In 2012 article 4o of the Federal Constitution was amended to include two new principles: a) the principle of environmental liability as mechanism to make effective the human right to a healthy environment and b) the principle of access to clean water.[13]
The relevant provisions read as follows:

> *Article 4o, paragraph four: Any person has the right to a healthy environment for his/her own development and wellbeing. The State will guarantee the respect to such right. Environmental damage and deterioration will generate a liability for whoever provokes them in terms of the provisions by the law.*
>
> *Article 4o, paragraph six - Any person has the right of access, provision, and drainage of water for personal and domestic consumption in a sufficient, healthy, acceptable, and affordable manner. The State will guarantee such right and the law will define the bases, supports and modality for the equitable and sustainable Access and use of the freshwater resources, establishing the participation of the Federation, federal entities and municipalities, as well as the participation of the citizens for the achievement of such purposes. Any family has the right to enjoy a decent and respectable house. The law will set the instruments and supports necessary to achieve such objective.*

[12] Published into the Diario Oficial de la Federación 10 Jun 2011.
[13] Published into the Diario Oficial de la Federación 8 February 2012.

Finally, in 2013 the Federal Constitution was amended to include new rules governing the energy sector and its possible negative impacts on the environment. This reform includes amendments to articles 25, 26 and 28 of the Constitution.[14] The main objective of this last constitutional reform is to open up opportunities for private, national and foreign investment into the energy sector, but environmental considerations were also included. In this way, article 25 as amended stresses the principle of sustainability as the cornerstone of economic development. In the same vein, the transitory provisions[15] of this Constitutional reform refer to the environmental effects of energy reform and oblige Federal Congress to pass legal reform in regard to environmental issues associated with the energy sector. For instance, Transitory Article number XIX holds that: "within the period established by transitional quarter of this Decree, the Federal Congress will modify the legal framework in order to create the National Agency of Industrial Security and of Environmental Protection for Hydrocarbons Sector." According to the same provision, the Agency is empowered to regulate and to supervise the activities of the hydrocarbon sector in regard to industrial security and environmental protection. In the same vein, Transitory Article number XVII also provides that the Federal Congress will modify the legal framework in order to establish the basis to protect the environment in all processes related to the hydrocarbon sector. Consequentially, it seems that new laws establishing a specific environmental legal regime for the energy sector must soon be passed by federal Congress, but overall the sector will be regulated by the environmental laws that regulate other economic sectors.

Protection of Environmental Legal Collective Interests by Secondary Legislation

Based on the above Constitutional reforms, a series of amendments to secondary legislation were passed by Federal Congress with the aim of protecting collective interests in environmental issues.

In January 2011 the Federal Congress passed a reform to article 180 of the *General Act of Ecological Balance and Environmental Protection* to grant communities affected by an environmental authority decision legal standing to file a nullification action before the Federal Court of Tax and Administrative Justice. Article 180 as amended states that:[16]

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[14] Published into the Diario Oficial de la Federación 20 December 2013.
[15] Transitory Provisions are those legal provisions whose objective is to clarify how compliance with a new law or with a specific amendment may be achieved. Normally they establish the date a specific provision came into force, but in the case of constitutional reforms they can oblige the Legislature to pass the necessary laws to comply with that reform.
[16] Published into the Diario Oficial de la Federacion on 28 January 2011.

> *ARTICLE 180 – In the case of works or activities that violate provisions of this Act and those to which it is supplementary applied and regulations and NOMs arising therefrom, ecological management programmes, the declarations of protected natural areas or regulations and official Mexican norms derived from it, the individuals and entities with a legitimate interest has the right to challenge administrative acts relating thereto and the requirement to carry out the necessary actions to be observed applicable legal provisions, provided that they prove in the process that those works or activities cause or may cause damage to the environment, natural resources, wildlife or public health.*

This provision adds that all individuals or groups of individuals from the communities that could be affected by work or activities illegally authorized are able to file a petition for revision under the Ministry of Environment, or for the nullification of action before the Federal Court of Fiscal and Administrative Justice.

Further, in August 2011 article 1 of the Federal Code of Civil Procedures[17] was modified to establish that the traditional rule, under which legal standing is granted to file actions for damages to those persons directly affected by environmental harm, is not applicable in cases of protecting diffuse or collective legal interests.[18]

Based on the Constitutional reform of 2010, in August 2011 further reforms were passed with a view to introducing so called collective actions into Mexican law. These reforms have the objective of widening the scope of legal standing in cases of environmental issues.[19] With that aim, among other modifications, this reform introduced a new section into the Federal Code of Civil Procedure (the new Book Five) that governs "Collective Actions" and modified article 202 of the *General Act on Ecological Balance and Environmental Protection* to harmonize its content with the new provision of the Federal *Code of Civil Procedure*.

The new "Book Five" of the *Federal Code of Civil Procedure* is comprised of articles 578 to 626 that are addressed to establish the procedural rules to protect collective rights and interests. According to the new provisions of the Federal *Code of Civil Procedure*, collective rights and interest are:

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[17] Código Federal de Procedimientos Civiles.
[18] Published into the Diario Oficial de la Federación 30-08-2011.
[19] Laws amended by the reform were: Federal Act of Economic Competition; Federal Law of Consumers Protecction; Organic Act of Judiciary Power; General Law of Ecological Balance and Environmental Protection; Law of Protection and defense of Financial Services Users; Federal Code of Civil Procedures and Federal Civil Code.

a) Collective or diffuse rights and interests, or
b) Individual rights or interest with collective incidence.

Those collective interests can be protected through filling a: i) collective diffuse action; ii) collective action in the strict sense or iii) homogenous individual action.

"Book Five" of *Federal Code of Civil Procedure* regulates legal standing, the procedure to file such actions, the scope of the ruling, precautionary measures, the connection between collective and individual actions and the creation of a fund that is sourced from compensation orders made pursuant to collective actions.

On the other hand, Article 202 of *General Act of Ecological Balance and Environmental Protection* as amended holds:

> *Article 202: The Federal Attorney Office for Environmental Protection, in accordance to the scope of its competence, is empowered to file those legal actions, before the competent authorities, when it knows acts, facts or omissions that constitute violations to administrative or criminal legislation.*
>
> *In cases of acts, facts or omissions that affect rights or interests of a collectivity, the General Attorney Office for Environmental Protection, as well as any other legitimate party mentioned by article 585 of Federal Code of Civil Procedure, are allowed to file the collective action in accordance with provisions of Book Five of the mentioned Code.*
>
> *The previous rule is applicable in regard those acts, facts or omissions that violate environmental legislation of local governments.*

Finally, in accordance with the Second Transitory Article of the reform to articles 103 and 107 of the Federal Constitution, a new *Amparo* Law was passed in 2013.[20] This new Law recognizes legal standing to file *Amparo* actions by all those holding an individual, collective or even simple legal interest.

[20] Published into the Diario Oficial de la Federación 2-04-2013.

The New Federal Environmental Liability Act

The Federal *Environmental Liability Act* came into force in 2013.[21] According to article 1(1), this Law regulates liability that arises from damage to the environment. The new law obliges those causing environmental damages to conduct restoration when it is impossible to pay monetary compensation. However, this law regulates environmental liability only in the following cases:

- when restoration or compensation are required by filing any collective actions established in Article 17 of the Constitution;
- when restoration or compensation is required through the alternative dispute resolution mechanisms regulated by the law; or
- when environmental damages result from a criminal behavior.

Article 4 of this law recognizes that environmental damage is different from civil damage caused to owners of natural resources. This type of damage is governed by the Civil Codes. The Federal *Environmental Liability Act* also points out that environmental liability is different from administrative and criminal responsibility.

The Federal *Environmental Liability Act* is comprised of 56 provisions organized into three sections. The first section refers to environmental liability and includes three chapters that govern issues such as: defining the scope of the concept of environmental damage; legal consequences of environmental damage; restoration of environmental damage; judicial procedure to channel environmental liability, including legal standing, precautionary measures, burden of proof and scope of the ruling. This section also creates an Environmental Fund for Restoration. In general, this section introduces a series of modifications to traditional civil liability principles providing for restoration of and compensation for environmental damage.

The second section governs alternative mechanisms for conflicts resolution whereas the third section contains provisions which are intended to complement criminal liability. According to this new law, administrative responsibility is a matter of other environmental general laws. However the Federal *Environmental Liability Act* includes a few provisions which complement regulation the of economic fines (which are provided by other

[21] Published into the Diario Oficial de la Federación 7-07-2013.

environmental laws such as the *General Act of Ecological Balance* and *Environmental Protection or the General Act of Wild Life*).

The analysis of the Federal *Environmental Liability Act* shows that there are a number of reasons to consider it as a regressive law. For instance, it defines environmental damage in article 2º, section III as follows:

> *An adverse and measurable loss, change, detriment, reduction, affectation or modification of a) habitats, b) ecosystems, or c) natural elements and resources and their chemical, physical or biological conditions, interactions among them and the environmental services they provide.*

However, this concept is not so clear given that it does not clarify at which point the adverse change, detriment, reduction, affectation or modification becomes damage. The lack of certainty in this regard could make it difficult to enforce the provisions of the Act.

According to the Constitution, environmental law is ruled by the principle of shared jurisdictions, but in spite of this the new *Liability Act* is a federal law. This means that local governments are not permitted to pass local laws regarding this matter and in consequence the new law could produce results contrary to the Federal Constitution. In the same way, despite the fact that a comparative analysis of environmental liability regimes in other jurisdictions shows a trend of fashioning environmental liability as strict liability, the Federal *Environmental Liability Act* states in article 11 that "Liability for environmental damage shall not be strict liability and it arises from illegal acts or omissions with the exemptions established by this Title". However, notwithstanding this assertion the Act then establishes four exemptions under article 12:

- *Environmental liability will be strict when the damage directly or indirectly arises from:*
- *Any action or omission related to hazardous materials or wastes;*
- *Use and operation of ships in coral reefs*
- *the undertaking of hazardous activities, and*
- *In cases or conduct mentioned by article 1913 of the Federal Civil Code.*

The objective of article 12 is somewhat unclear. In the first instance it seems like sections I, II and III attempt to limit the cases where environmental liability will be considered strict. Nevertheless, *the Federal Liability Act* excludes from the principle of non-strict liability those cases established in article 1913 of *the Federal Civil Code* as well. This provision holds that:

> *Those persons using mechanisms, instruments, devices or substances that are dangerous because of the speed they develop, its explosive or inflammable nature, the energy of power they transmit or analogous causes, are liable for the damage caused even when they do not act illegally except where they demonstrate that the damages is a result of the negligence of the victim.*

The analysis of the above provision shows that it includes all the cases mentioned by paragraphs I, II and II of article 12 of the *Liability Act* and many others because the scope of article 1913 of the Federal *Civil Code* is very wide. It is reasonable to conclude that according to the new *Liability Act*, environmental liability lacks clarity.

Similarly, whereas modern liability regimes around the world have inverted the burden of proof in order to promote environmental justice, article 36 of the Federal *Liability Act* holds that:

> *The link of causation between the damage and the conduct attributed to the defendant must be proven in the trial proceedings.*

The Federal *Environmental Liability Act* gives priority to restoration over economic compensation. Article 13 holds in that regard that restoration of environmental damage will consist of rehabilitating habitats, ecosystems, natural elements and resources to their base line chemical, physical or biological conditions as well as the relationships among them and the environmental services they provide. However, this law does not define any criteria to determine when the damaged environment has been restored.

According to article 14, economic compensation is allowed when restoration is material or technically impossible which is coherent with the trend show by environmental comparative law. However, this provision adds a number of cases where restoration can be substituted by economic compensation which is not straightforward. The cases are described by section II of article 14 which basically holds that damage resulting from activities conducted without having environmental impact authorization or without having land use change authorization can be compensated in order to obtain such authorizations. This is another reason to conclude that the Federal *Environmental Liability Act* is regressive.

Finally, the Federal *Environmental Liability Act* does not modify the provisions of the Federal *Code of Civil Procedure* in regard the scope of ruling.

Conclusions

Despite the series of constitutional and legal reforms aimed at promoting access to environmental justice and in spite of the promulgation of a specific law on environmental liability, Mexican environmental law still has a more preventive rather than restorative character. Even though a law has now been promulgated to regulate rehabilitation of environmental damage, the series of weaknesses of that law means that it has a regressive effect.

COUNTRY REPORT: THE NETHERLANDS

Gearing Up for Wolf Comeback

ARIE TROUWBORST*

Introduction

The focus of this country report is on a noteworthy policy development in the field of wildlife conservation in the Netherlands. One of the hottest topics in this field at the moment curiously involves a species that is, as far as we know, not currently present within the country. There really is no species better capable of causing this effect than the one in question: the wolf (*Canis lupus*). Indeed, wolves may well be 'the most admired, reviled, and controversial carnivores the world over', with opinions on them tending to vary 'from outright hatred and opposition, to deep respect and reverence'.[1] A few decades ago any suggestion that wolves might again roam the Dutch countryside would have been laughed away. Today, the animals are actually on the verge of doing so. In advance of the species' arrival, the competent Dutch authorities have initiated a participatory process which is to culminate in a national *Wolf Plan*. The action is in preparation for when the species really does settle in the Netherlands.

Before focusing on the Netherlands, it is necessary to zoom out and take a look at wolves in the wider European context. This is followed by a description of the Dutch wolf policy process and the legal issues raised by the wolf's imminent return.

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[1] M Musiani, L Boitani and PC Paquet, 'Introduction – Newly Recovering Wolf Populations Produce New Trends in Human Attitudes and Policy' in M Musiani, L Boitani and PC Paquet (eds), *A New Era for Wolves and People: Wolf Recovery, Human Attitudes, and Policy* (University of Calgary Press, Calgary 2009) 1, at 2.

The European Carnivore Comeback

Wolves, brown bears (*Ursus arctos*) and Eurasian lynx (*Lynx lynx*) previously occupied most of Europe before disappearing from large parts of their ranges, chiefly through human persecution. Some populations persisted, mostly on the continent's eastern, southern and northern fringes. Recent decades have witnessed the stabilization and even increase of many populations that then attempt to reoccupy parts of their former ranges, including in Western Europe.[2] Legal protection is often mentioned as one of the likely factors that enabled this 'carnivore comeback', along with land use changes and increases in forest cover and wild prey populations.[3] Large carnivores have long been associated with wilderness. In Europe, however, populations of bear, wolf and lynx have adapted themselves to a variety of modified landscapes with different levels of human influences. Wolves especially have shown themselves capable of surviving in landscapes strongly dominated by human uses, as long as sufficient food is available and persecution levels are not too high. Presently, the three species occur in a few dozen separately distinguishable populations scattered across Europe, some interconnected and others isolated, some robust and others fragile.[4]

Wolves are making the strongest comeback, and they are doing so by themselves, unaided by any active reintroductions.[5] To illustrate, France and Germany – both wolf-less for many years – now harbor swiftly expanding wolf populations. These follow spontaneous re-colonizations in Italy and Poland. The first reproduction in Germany was recorded in 2000, with the country now home to an estimated nineteen breeding packs. The last few years have even yielded reliable records of the first wolves reappearing in Belgium and Denmark.

The considerable ecological benefits of conserving and restoring large carnivores like wolves extend beyond the species themselves. Large carnivores provide a living for

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[2] JDC Linnell, V Salvatori and L Boitani, Guidelines for Population Level Management Plans for Large Carnivores in Europe (European Commission, Brussels 2008); P Kaczensky *et al*, Status, Management and Distribution of Large Carnivores – Bear, Lynx, Wolf & Wolverine – in Europe, Update 2012 (European Commission, Brussels 2013).

[3] JDC Linnell *et al*, 'Predators and People: Conservation of Large Carnivores is Possible at High Human Densities if Management Policy is Favourable' (2001) 4 *Animal Conservation* 345; L Boitani, 'Wolf Conservation and Recovery' in LD Mech and L Boitani (eds), *Wolves: Behavior, Ecology and Conservation* (Chicago University Press, Chicago 2003) 317; L Boitani and P Ciucci, 'Wolf Management across Europe: Species Conservation without Boundaries' in M Musiani, L Boitani and PC Paquet (eds), *A New Era for Wolves and People: Wolf Recovery, Human Attitudes, and Policy* (University of Calgary Press, Calgary 2009) 15.

[4] Linnell *et al* (n 2 above); Kaczensky *et al* (n 2 above).

[5] Ibid. In the recovery of lynx and bear populations in Western Europe, translocations and reintroductions have played a (limited) part.

scavenging species.[6] Their impact on the abundance and behavior of prey species influences plant communities and associated species. Their removal and return alike thus tend to have profound ripple effects through entire ecosystems, influencing biodiversity at large.[7] Well-documented examples concern wolf re-colonization in North America.[8]

From a human perspective, however, returning the missing large carnivore pieces to the European puzzle is a huge societal challenge. 'Conflict between people and large carnivores has been a consistent theme throughout human history'[9] and modern-day Europe is no exception. Human-wolf conflicts spring, *inter alia*, from livestock depredation, human safety concerns and competition with hunters. The reappearance of wolves in areas from which they long ago disappeared can cause 'high animosity, social stress and tense political controversies'.[10]

Preparing for a Return of Wolves to the Netherlands

With wolf populations in Germany and France continuing to expand, the scene appears set for a natural return of wolves to the Netherlands. In 2011, several probable wolf sightings occurred in the east of the country, albeit the sightings did not deliver indisputable proof. Since early 2013, similarly tentative sightings have occurred in another area bordering on Germany. These probably correspond with a wolf that was camera-trapped 30 kilometers across the border into Germany in April 2013.[11] In the summer of 2013, several possible but again not indisputable wolf scats were detected in the center of the Netherlands. Thus the situation at the time of writing this report is a few unconfirmed indications and a few interested people (including the author of the present report) keeping an eager lookout for

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[6] For example, DR Stahler, B Heinrich and DW Smith, 'Common Ravens, *Corvus corax*, Preferentially Associate with Gray Wolves, *Canis lupus*, as a Foraging Strategy' (2002) 64 *Animal Behavior* 283; C Wilmers *et al*, 'Trophic Facilitation by Introduced Top Predators: Gray Wolf Subsidies to Scavengers in Yellowstone National Park' (2003) 72 *Journal of Animal Ecology* 909.

[7] BE McLaren and RO Peterson, 'Wolves, Moose and Tree Rings on Isle Royale' (1994) 266 *Science* 1555; J Berger, 'Anthropogenic Extinction of Top Carnivores and Interspecific Animal Behaviour: Implications of the Rapid Decoupling of a Web Involving Wolves, Bears, Moose and Ravens' (1999) 266 *Proceedings of the Royal Society of London B* 2261; JA Estes *et al*, 'Trophic Downgrading of Planet Earth' (2011) 333 *Science* 301.

[8] See, for example, DW Smith, RO Peterson and DB Houston, 'Yellowstone After Wolves' (2003) 53 *Bioscience* 330; M Hebblewhite *et al*, 'Human Activity Mediates a Trophic Cascade Caused by Wolves' (2005) 86 *Ecology* 2135; Ripple *et al*, 'Trophic Cascades among Wolves, Elk and Aspen on Yellowstone National Park's Northern Range' (2013) 102 *Biological Conservation* 227.

[9] AJ Loveridge *et al*, 'People and Wild Felids: Conservation of Cats and Management of Conflicts' in DW Macdonald and AJ Loveridge (eds), *Biology and Conservation of Wild Felids* (Oxford University Press, Oxford 2010) 161, at 195.

[10] Boitani and Ciucci (n. 3 above) at 28.

[11] The images in question can be viewed at http://www.noz.de/lokales/71490387/junger-wolf-streift-durchs-emsland-videoclip-als-beweis.

conspicuous scats and paw prints in the Dutch outdoors. As it is, the last fully confirmed wild wolf sighting in the Netherlands still dates from 1869.

The wolf's expected re-colonization fits a modern trend of long lost species returning to the Netherlands after absences of a century or more. The wolf is only a few steps behind the otter (*Lutra lutra*), beaver (*Caster fiber*), white-tailed eagle (*Haliaeetus albicilla*) and common crane (*Grus grus*), all of which have recently re-established themselves in the country as reproducing species.[12]

Few now doubt whether the wolf will return to the Netherlands; the questions are when and to what extent the species will do so. Although the country appears to contain quite a bit of potentially suitable wolf habitat,[13] its dense human population and infrastructure network are likely to pose considerable challenges. Any future attempts to re-colonize the Netherlands may therefore provide further insight into the extent of wolves' adaptive capacity. Significantly, the same may be expected regarding *people's* adaptive capacity.

Under these circumstances, the Dutch authorities have taken various steps to prepare themselves and society at large for the wolf's expected comeback. This has involved a fact-finding study,[14] opinion poll,[15] assessment of experiences in other countries and workshops involving all stakeholders ranging from conservationists to sheep farmers. It has also involved a legal study commissioned to assess the viability of various policy options regarding the management of wolves should they return to the Dutch landscape.[16] The process culminated in a national Wolf Plan that is currently being contemplated for adoption. The Ministry of Economic Affairs, being the current national authority dealing with wildlife conservation in the Netherlands, commissioned the development of a blueprint for the Wolf Plan. The blueprint, entitled *Proposal for a Wolf Plan for the Netherlands*, was finalized in October 2013.[17] The blueprint is the result of a participatory process involving national and

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[12] As can be expected, this is also part of a broader European trend, with certain mammal and bird species experiencing notable recoveries across the continent. For a recent overview, see S Deinet *et al*, *Wildlife Comeback in Europe: The Recovery of Selected Mammal and Bird Species* (The Zoological Society of London, London 2013).
[13] See, for example, G Lelieveld, 'Wolven Terug in Nederland? Het Verschil tussen Sprookjes en Potentie' (2012) 23 *Zoogdier* 18.
[14] GWTA Groot Bruinderink, HAH Jansman, MH Jacobs and M Harms, *De Komst van de Wolf (*Canis lupus*) in Nederland: Een 'Factfinding Study'* (Alterra, Wageningen 2012).
[15] Bureau Intomart, *Appreciatie-onderzoek naar de Komst van de Wolf* (Intomart, Hilversum 2012).
[16] A Trouwborst and CJ Bastmeijer, with the cooperation of CW Backes, *Wolvenplan voor Nederland: Naar een Gedegen Juridische Basis* (Tilburg University and Maastricht University, Tilburg/Maastricht 2013).
[17] GWTA Groot Bruinderink and DR Lammertsma, *Voorstel voor een Wolvenplan voor Nederland: Versie 2.0* (Alterra, Wageningen 2013).

provincial governmental bodies, protected area managers, NGOs, livestock farmers' organizations, hunting associations and academics from various disciplines. One NGO initiative, called 'Wolven in Nederland', has been particularly influential in both the *Wolf Plan* process and the societal debate more generally, in the latter respect most notably by informing the public.[18]

The scope of the blueprint is broad. Among other things, it includes guidelines regarding information and communication, monitoring and research and the prevention and compensation of damages to livestock. It also includes a discussion of the applicable legislative framework for wolves, including the species' generic protection through various prohibitions, the designation of protected areas and transboundary cooperation with neighboring states. Nevertheless, the Wolf Plan has not yet been formally adopted by government and it remains to be seen to what degree the blueprint will be transformed into actual policy.

One feature does stand out, namely the proactive manner in which the entire process has been conducted, *in absentia* thus far of the protagonist species itself. In other European jurisdictions, dedicated wolf policies have been developed *after* wolf populations had become established. The Dutch experience so far appears to affirm the intuitive notion that it is easier to reach a level of agreement amongst stakeholders with conflicting views on wolves *before* the animals themselves arrive on the scene. That is, before the first images of sheep (allegedly or actually) killed by wolves appear in the newspapers and the debate heats up.

Legal Issues Raised by Wolf Comeback

The anticipated return of wolves to the Netherlands has given rise to various legal questions, many of which are addressed in the legal study commissioned to assess policy options (mentioned above).[19] Examples of some of the legal questions that arise include:

- What is the legal status of wolves returning to the Netherlands?
- What can be done about wolves preying on livestock?
- Is a zoning policy of 'go and no-go areas' for wolves a viable option?
- At what stage of re-colonization are protected areas to be designated for wolves?

[18] See http://www.wolveninnederland.nl.
[19] Trouwborst *et al* (n. 16 above).

- What is the position of wolf-dog hybrids and of measures to counter hybridization?
- What role is reserved for transboundary cooperation?

There is only space here to concisely reproduce the report's main findings with respect to some of these issues. On a preliminary note, many of the questions involved are linked to international obligations. For example, the Netherlands is a contracting party to the 1979 *Convention on the Conservation of European Wildlife and Natural Habitats*[20] (*Bern Convention*). As a European Union member state, the Netherlands is also bound by the *EU Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora*[21] (*Habitats Directive*).[22]

The first main finding of the report is that as soon as wolves return to the Netherlands on their own feet, they will qualify as a protected species under the Dutch *Flora and Fauna Act*.[23] The Act in principle accords protection to, *inter alia*, 'all mammal species occurring naturally in the Netherlands'.[24] This status entails that the killing, capturing *et cetera* of wolves would be prohibited, save when authorized under special license. Such prohibitions are required, in any event, by the Bern Convention and the Habitats Directive. Both of these instruments prescribe strict protection for the wolf with a set of prohibitions that may only be derogated from under stringent conditions and on a case-by-case basis.[25] In some countries,

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[20] *Convention on the Conservation of European Wildlife and Natural Habitats* (adopted 19 September 1979; entered into force 1 November 1983) ETS 104.
[21] Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1979] OJ L206/7.
[22] For further analysis of the *Bern Convention* and the *Habitats Directive* in respect of wolves and other large carnivores, see Linnell *et al* (n 2 above); A Trouwborst, 'Managing the Carnivore Comeback: International and EU Species Protection Law and the Return of Lynx, Wolf and Bear to Western Europe', (2010) 22 *Journal of Environmental Law* 347; J Darpö, 'Brussels Advocates Swedish Grey Wolves: On the Encounter between Species Protection according to Union Law and the Swedish Wolf Policy' (2011)(8) *SIEPS European Policy Analysis* 1; JDC Linnell and L Boitani, 'Building Biological Realism in to Wolf Management Policy: The Development of the Population Approach in Europe' (2012) 23 *Hystrix, the Italian Journal of Mammalogy* 80; Y Epstein and J Darpö, 'The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law' (2013) 10 *Journal for European Environmental & Planning Law* 250; Y Epstein, 'Population Based Species Management across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf in Scandinavia' (2013) 25 *Georgetown International Environmental Law Review* (forthcoming); A Trouwborst, 'Exploring the Legal Status of Wolf-Dog Hybrids and Other Dubious Animals: International and EU Law and the Wildlife Conservation Problem of Hybridization with Domestic and Alien Species' (2014) 23 *Review of European, Comparative & International Environmental Law* (forthcoming); and A Trouwborst, 'Wilderness Protection under the Bern Convention: The Perspective of Europe's Large Carnivores' in CJ Bastmeijer (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press, Cambridge, forthcoming).
[23] Wet van 25 mei 1998 houdende Regels ter Bescherming van in het Wild Levende Planten- en Diersoorten (Stb. 1998, 402).
[24] Ibid, Art 4(1)(a).
[25] The wolf is listed by default in Appendix II of the Convention and in Annex IV of the Directive.

or parts thereof, more flexible regimes apply due to reservations submitted under the Convention and/or exceptions agreed to under the Directive. Not so for the Netherlands, however, given that wolves were not given much thought by the Dutch authorities back in the 1980s and 1990s when such exemptions could have been created.[26] The report does note a potential downside of the wolf's protected status. That is, the limited scope for killing so-called 'problem wolves' – animals repeatedly targeting livestock and/or displaying undesirably bold behavior towards people – except in rare cases where the animal involved is rabid or a wolf-dog hybrid.[27]

The report found that the designation of 'no-go areas' is apparently incompatible with the wolf's strictly protected status under the Bern Convention and the Habitats Directive. A zoning recommendation set out in an early draft of the proposed *Wolf Plan* was accordingly removed. Fourth, there are strong arguments, including legal ones, in favour of conserving and managing wolves at the level of each (sub)population, virtually all of which are shared between two or more countries. Correspondingly, the adoption of transboundary population level management plans by the states involved is highly recommended in connection with the implementation of the Bern Convention and the Habitats Directive.[28] This makes particular sense for a country like the Netherlands. After all, given the country's size and lay-out, the prospects of a Dutch wolf population that is viable by itself are slim. As pressing as the above issues may appear, for now the discussion is theoretical as there has been no evidence of wolves in the Netherlands.

[26] The Netherlands ratified the *Bern Convention* in 1980, and the *Habitats Directive* was adopted in 1992.
[27] On the avoidance and mitigation of wolf-dog hybridization in relation to the *Bern Convention* and *Habitats Directive*, see Trouwborst 2014 (n 22 above).
[28] See in particular Linnell *et al* (n 2 above).

COUNTRY REPORT: NEW ZEALAND

The Legitimacy of Climate Change Litigation: *Buller Coal* in The Supreme Court

TREVOR DAYA-WINTERBOTTOM*

Introduction

This Country Report focuses on the ongoing debate about the legitimacy of climate change litigation in New Zealand in light of the Supreme Court decision in *West Coast ENT Inc v Buller Coal Ltd*.[1]

The case concerned a suite of resource consent applications, including an application for land use consent, made by Buller Coal under the *Resource Management Act* 1991 (RMA) for the development of an open cast coal mine on the Denniston Plateau in the Buller District of the South Island. At issue was the question of whether climate change effects arising from the end use of burning the coal overseas could be considered by the territorial authority when deciding the land use consent application.[2] The matter was litigated by two environment NGOs, West Coast ENT and the Royal Forest and Bird Protection Society, utilising their submission, hearing, and appeal rights under the RMA regarding the publicly notified applications.[3] To resolve this question, Buller Coal applied to the Environment Court

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[1] [2013] NZSC 87.

[2] While the suite of resource consent applications made by Buller Coal included consents sought from the regional council for disturbing waterways and discharging contaminants into the environment, and land use consent from the territorial authority for coal mining, the litigation focused on other land use consents sought from the territorial authority for ancillary elements of the proposed mining activity. Coal mining is classified as a restricted discretionary activity under the relevant district plan, and the matters to which the territorial authority's discretion was resticted under the rule did not include the climate change effects of burning coal; whereas, ancillary elements of the proposed activity (for example, roading) are classified as discretionary or non-complying activities under the district plan, and the territorial authority's discretion was not similarly restricted.

[3] Where a resource consent application is notified under the RMA any person can make a submission about the application to the relevant consent authority; and submitters may exercise their rights to appear and be heard at a hearing before the consent authority, to appeal any adverse decision by the

seeking a declaration that climate change effects were irrelevant in this context. The Environment Court granted the declaration sought by Buller Coal, and relied on the provisions of the *Resource Management (Energy and Climate Change) Amendment Act* 2004,[4] and the previous decision of the Supreme Court in *Genesis Power Ltd v Greenpeace New Zealand Inc*.[5] This decision was appealed to the High Court by West Coast ENT and the Royal Forest and Bird Protection Society.[6] Dismissing the appeal, Justice Whata said:[7]

> *… The central question remains whether the discharges and their effects are subject to the jurisdiction of a local authority. The starting point must be s 15, as this section controls the need or otherwise to obtain consent. Given that s 15 cannot apply outside of New Zealand's territorial boundary, there is no remit to require consent for overseas discharges. Accordingly the discharge can only be amenable to oversight by way of collateral jurisdiction. But where there is no primary jurisdiction to regulate activities extra-territorially (and nothing in ss 30 or 31 confers such jurisdiction), there can be no collateral jurisdiction to do so. Any endeavour to regulate those activities by the side route of s 104(1)(a) could not have been within the contemplation of the legislators and, in my view, must be impermissible.*

Leave was granted for a further appeal direct to the Supreme Court, bypassing the Court of Appeal, due to "the exceptional nature" of the proceedings".[8]

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consent authority to the Environment Court on both merits and law, and to appeal any adverse decision by the Environment Court to the High Court on questions of law. These submission, hearing, and appeal rights may be exercised without leave. Further appeals to the Court of Appeal and the Supreme Court may be allowed, with leave, in appropriate cases.

[4] The *Resource Management (Energy and Climate Change) Amendment Act* 2004 inserted (inter alia) s 70A and s 104E into the RMA which preclude local authorities from considering the adverse effects of climate change when preparing regional plan rules pertaining to air discharges or when deciding air discharge permit applications.

[5] [2008] NZSC 112, [2009] 1 NZLR 730.

[6] *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552. See: Country Report: New Zealand "Recent Developments in Resource Management and Climate Jurisprudence" (2013) 4 IUCNAEL EJournal 186, 191-193 for previous comment on the High Court decision.

[7] [2012] NZHC 2156, [2012] NZRMA 552 at [52]-[53].

[8] [2013] NZSC 87 at [112]. See also: *West Coast ENT Inc v Buller Coal Ltd* [2012] NZSC 107 granting leave to appeal. Buller Coal had applied for the declaration in "the hope of avoiding what they saw as a potentially lengthy and expensive debate about the climate change effects of the burning of coal": [2013] NZSC 87 at [105].

Supreme Court Decision

The majority decision of the Supreme Court[9] focused on the background context of New Zealand's international obligations under the UN Framework Convention on Climate Change 1992[10] and the Kyoto Protocol 1997,[11] the position before the enactment of the 2004 Amendment Act, relevant RMA provisions, and the Parliamentary history of the 2004 Amendment Act - before turning to the current position post enactment of the 2004 Amendment Act and its effect on the case put forward by West Coast ENT.

Background Context of New Zealand's International Obligations

The Court noted that under the Kyoto Protocol, New Zealand was obliged to reduce its average green house gas emissions by 5 per cent during the 2008-2012 commitment period, and that this obligation will be met. The Court also noted that the *Climate Change Response Act* 2002 had been enacted to comply with these obligations, and that the Act had subsequently been amended to establish the New Zealand emissions trading scheme in 2008, which applies to industrial activities (for example, mining) but does not extend to coal which is exported from New Zealand.[12] However, the Court noted that:[13]

> *New Zealand has … declined to give any further commitment under the Protocol beyond the expiry of that period. Instead it has offered a voluntary pledge that 2020 emissions will be between 10 and 20 per cent less than 1990 levels.*

Position before the Enactment of the 2004 Amendment Act

West Coast ENT submitted that before the enanctment of the 2004 Amendment Act, climate change effects arising from burning coal (mined in New Zealand) overseas would have been a relevant matter to be taken into account by the territorial authority when deciding the land

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[9] Justices McGrath, William Young, and Glazebrook: [2013] NZSC 87 at [95]-[178].
[10] 1771 UNTS 107
[11] 2303 UNTS 148
[12] Climate Change Response Act 2002, s 207(a).
[13] [2013] NZSC 87 at [100]. See: Country Report: New Zealand "Recent Developments in Resource Management and Climate Jurisprudence" (2013) 4 IUCNAEL EJournal 186, 193 for the Minister's comments on this position.

use consent applications under s 104(1)(a) of the RMA. The majority was not persuaded by this argument. They considered that:

- The effects were indirect because the effects of burning the coal were not relevant to deciding the restricted discretionary activity application for coal mining. As a result, the issue was only relevant in the context of ancillary elements of the proposed activity (for example, roading), and that it would be odd if matters that were not relevant to deciding the primary activity were found to be relevant to deciding ancillary elements of the proposed activity.[14]
- The effects were not tangible as the need for coal by overseas industry would remain, regardless of whether it is or is not met by exporting New Zealand mined coal. Further, while they could be classified as cumulative effects under s 3 of the RMA, the *Climate Change Response Act* 2002 provided a strong counter-argument regarding the relevance of these effects as a result of its commitment to establishing "national mechanisms" to address greenhouse gas emissions.[15]

Relevant RMA Provisions

The majority noted the background statutory context,[16] and that the RMA as amended by the 2004 Amendment Act does not expressly preclude regional councils or territorial authorities from having regard to the effects of greenhouse gas dicharges on climate change in other decision making contexts under the RMA. For example, it was unclear whether authorities could have regard to climate change effects when deciding applications for coastal permits, permits for disturbing river beds, water permits, permits for disharges onto land or into water, land use consents, or preparing regional plan rules or district plan rules governing these activities.[17]

Parliamentary History of the 2004 Amendment Act

[14] [2013] NZSC 87 at [117]-[119]. They noted that a similar conclusion had previously been made in *Beadle v Minister of Conservation* [2002] NZEnvC A74 at [91] where the Court emphasised the need to avoid turning consideration of ancillary elements of a proposed activity into an appeal about the primary activity.
[15] [2013] NZSC 87 at [121]-[127].
[16] [2013] NZSC 87 at [128]-[138] referring to: RMA, s 5(2)(c), s 7(i), s 43, s 43A, s 15, s 70A, and s 104E respectively.
[17] Ibid at [139].

Turning to the Parliamentary history of the 2004 Amendment Act for assistance with interpreting its purpose and intent, the Court noted:

- The explanatory note to the Bill which emphasised the objectives of the Bill as (inter alia) removing climate change considerations from decision making concerning "industrial discharges of greenhouse gases".[18]
- The statements in both the explanatory note to the Bill and the regulatory impact and compliance cost statement, that the climate change effects of greenhouse gas discharges were "most" appropriately addressed at national level.[19]
- The confusion caused by the reference in the regulatory impact and compliance cost statement and in the speeches in the first reading debate, which implied that the ability to control land uses for climate change purposes remains unchanged.[20]

The majority rationalised these conflicting references by relying on the fact that territorial authorities sometimes consider the transport effects of development in the context of urban planning and the reference to this in the Select Committee report on the Bill, and also drew comfort from the previous Supreme Court decision in *Genesis Power Ltd v Greenpeace New Zealand Inc*, where the Court concluded that:[21]

> *Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so when making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy.*

Additionally, the Court also noted that the statutory purpose in s 3 of the 2004 Amendment Act was not inserted into the amemded RMA. Section 3 provided that the purpose of the statutory amendment was "to require local authorities":

- to plan for the effects of climate change; but
- not to consider the effects of climate change discharges into air of greenhouse gases.

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[18] Ibid at [143].
[19] Ibid at [143] and [144].
[20] Ibid at [144] and [145].
[21] [2008] NZSC 112, [2009] 1 NZLR 730 at [62]; [2013] NZSC 87 at [150].

The majority considered that had this provision been inserted into the amended RMA that it "would have disposed of the appellant's arguments".[22]

The Majority Decision

West Coast ENT relied on a "literal approach" to the 2004 Amendment Act. It argued that local authority functions under the RMA must be carried out in a way that has regard to the indirect effects of greenhouse gas discharges on climate change, and that the restriction on regional council control of the direct effects of greenhouse gas discharges on climate change was justified by the intention that they would be subject to national regulation. The majority was not persuaded by this argument, which they proceeded to test by reference to a series of examples.[23] For example, in cases where:

- Concurrent resource consent applications to mine and burn coal are made, they found it inconsistent that the RMA could allow the territorial authority to consider indirect effects on climate change, whereas the regional council would be prohibited from considering any direct effects on climate change arising from the same proposed activity. They preferred to interpret the RMA in a way that avoided such inconsistencies.[24]
- Two resource consent applications for mining and burning coal are applied for separately by the miner and an electricity generator, they again found that the territorial authority would be allowed to consider indirect effects on climate change when deciding the land use consent application, but the regional council would be prohibited from considering any direct effects on climate change when deciding the air discharge permit application. They considered that this approach would be "perverse" as it would enlarge the role of territorial authorities while diminishing the role of regional councils.[25]
- A resource consent application to mine coal is made, and where no consent is required to burn coal in New Zealand (i.e. because the discharge will not be emitted from trade or industrial premises or does not contravene a national environmental standard or a regional plan rule), they questioned whether the regional council should consider indirect effects on climate change when deciding any other permits pertaining to the proposed activity. They concluded that a regional council that had

[22] Ibid [2013] NZSC 87 at [97] and [140].
[23] [2013] NZSC 87 at [151]-[156].
[24] Ibid at [157]-[158].
[25] Ibid at [159]-[160].

regard to such effects in these circumstances would "be taking into account irrelevant considerations".[26]

- Regional plan rules purport to control ancillary coal mining activities to address climate change effects, they questioned whether the regional council could adopt such a rule under s 68(3) of the RMA as this would be prohibited by s 70A of the RMA, and concluded that adopting such a rule would likely be ultra vires. However, if the regional council could lawfully adopt such a rule, they considered that this would be contrary to the statutory objective of the 2004 Amendment Act of addressing climate change effects more appropriately at national level.[27]
- A territorial authority adopts a district plan rule pertaining to activities that may give rise to greenhouse gas discharges, they noted the express provision made for the proposed Rodney power station (ultimately allowed as a result of the *Genesis Power* decision), and the fact this rule could have been opposed if the "literal interpretation" advocated by West Coast ENT was applied.[28]
- A resource consent application to build and operate a coal fired power station, they noted that following the approach advocated by West Coast ENT that the regional council would be prohibited from considering climate change effects in relation to the air discharge permit, but would be allowed to consider such effects in relation to any other permits required from the regional council. They concluded that it would be difficult to rationalise why climate change effects would be relevant to ancillary elements of the proposed activity but should be "ignored" regarding the primary activity.[29]

The majority adopted "an overall scheme and purpose approach to the RMA as amended in 2004",[30] which led them to conclude that the drafters did not "envision" that a literal approach to statutory interpretation would allow indirect climate change effects to be considered "by the backdoor".[31] Based on the select list of examples identified in the judgment, it appeared to them that the number of "anomalous outcomes" arising from a "literal approach" could in practice be much wider than the selected "hypothetical situations", and that this could "subvert" both the overall scheme and purpose of the RMA and the national approach to

[26] Ibid at [161]-162].
[27] Ibid at [163].
[28] Ibid at [164]-[165].
[29] Ibid at [166]-[167].
[30] Ibid at [174] and [176].
[31] Ibid at [169].

regulating climate change effects.[32] As a result, climate change effects arising from greenhouse gas discharges likely to result, directly or indirectly, from a proposed activity are not relevant when deciding any type of resource consent application in New Zealand.

Minority Opinion

Notwithstanding the similar approaches to statutory interpretation adopted by the High Court and the majority in the Supreme Court, Chief Justice Elias delivered a minority opinion which (inter alia) concluded that:[33]

> *… the legislation properly construed in accordance with its terms, purpose, scheme, and legislative history does not justify an interpretation [sic] s 104(1)(a) which excludes the consideration of the effects of climate change of the activities for which consents are required under the Resource Management Act.*

Conclusion

The pragmatic approach adopted by the majority in the Supreme Court in deferring to an interpretation of the RMA as amended by the 2004 Amendment Act, consistent with a national approach to climate change under the *Climate Change Response Act* 2002 and the New Zealand emissions trading scheme, should not be surprising. It was foreshadowed by the Environment Court decision in *Environmental Defence Society Inc v Auckland Regional Council* dealing with the efficacy and appropriateness of consent conditions requiring forest planting to mitigate greenhouse gas emissions from a gas fired power station, where the Court held against including such conditions on the grant of resource consent. The Court was persuaded by:[34]

> *… the clear preferred policy of the New Zealand Government to address greenhouse gas emissions as an international issue, and that sectional emissions should be considered at national level to ensure a consistency of approach to guarantee an efficiency compatible with achieveing the best social, environmental and economic outcome …*

It is relevant to note that this decision was made in advance of the *Climate Change Response Act* 2002 being enacted or amended to provide for the New Zealand emissions trading scheme. Overall, the practical effect of the *Buller Coal* decision is that climate

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[32] Ibid at [170].
[33] Ibid at [85] and [94].
[34] [2002] NZEnvC A183, [2002] NZRMA 492 at [88].

change litigation is unlikely to be justiciable in New Zealand in contrast to the position in other jurisdictions (for example, Australia and USA).

COUNTRY REPORT: SOUTH AFRICA

The Spatial Planning and Land Use Management Act 16 of 2013

MICHAEL KIDD*

A very important new Act, *the Spatial Planning and Land Use Management Act (SPLUMA)* was enacted late in 2013. In order to appreciate the substance of the Act, it will be useful to consider the historical and legislative context from which it emerged.

Context

Before the sea change brought about by the new Constitution in 1994, municipal planning (usually referred to as 'town planning') was regulated by provincial laws (Ordinances) and implemented primarily at local government level. In the new Constitution of 1996,[1] municipalities were given *executive* authority and the right to administer the 'functional area' of municipal planning, which was also designated as a 'functional area' of concurrent national and provincial *legislative* competence. Municipal planning and the question of which level of government can carry out the function has been a significant question before the courts in several cases.[2] Precise detail of this jurisprudence is beyond the scope of this note, but the basic finding of the courts is that municipalities have exclusive executive competence in respect of municipal planning. In other words, the individual town planning decisions may only be made by municipalities. In several provinces, town planning decisions are still made in terms of pre-Constitutional provincial Ordinances.

After 1994, one of the major aims the new government adopted was, unsurprisingly, upliftment of those sectors of the population who had been under-resourced in respect of

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[1] Constitution of the Republic of South Africa, 1996.
[2] See, for example, Lagoon Bay Lifestyle Estate (Pty) Ltd vs Minister of Local Government, Environmental Affairs & Development Planning (Western Cape) and Others [2011] (4) All SA 270 (WCC); LagoonBay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape [2013] ZASCA 13; Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning 2012 (3) SA 441 (WCC); and Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning Case 26165/2010 (WCC) paras 55-62.

services, infrastructure and housing. This and related objects were the focus of the so-called Reconstruction and Development Programme (RDP). *The Development Facilitation Act* (DFA)[3] was enacted in order to expedite development decision-making in respect of the types of developments that would further the aims of the RDP, such as low-cost housing and infrastructural development such as roads and water reticulation works and the like. Over time, though, it became apparent that the provisions of the DFA were not confined to so-called RDP developments, but that any physical development (including upmarket housing estates and golf courses, for example) could be approved through the DFA processes. The effect of this was that many 'municipal planning' decisions were being made by the provincial Development Tribunals (the authorising bodies established by the DFA) and not by municipalities, whose approval processes were eschewed by developers in favour of the quicker, cheaper DFA processes. This was challenged in the well-known case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal,*[4] in which certain provisions in the DFA were declared unconstitutional. These provisions were the central operative provisions in the Act. Instead of an order of immediate retrospective invalidity, the Constitutional Court ordered that the declaration of invalidity would be suspended for 24 months in order to allow for the legislation to be amended. This was due to the fact that, in many parts of the country, the only land-use planning decisions were being made by Development Tribunals in terms of the DFA due to lack of appropriate procedures and human capacity in many municipalities.

The Spatial Planning and Land Use Management Act (SPLUMA) repeals the DFA and is primarily aimed at replacing the process and decision-making bodies under that Act, as required by the Constitutional Court order discussed above.

The SPLUMA

The objects of the Act are to –

- provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic;
- ensure that the system of spatial planning and land use management promotes social and economic inclusion;
- provide for development principles and norms and standards;

[3] Act 67 of 1995.
[4] [2010] ZACC 11.

- provide for the sustainable and efficient use of land;
- provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government; and
- redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.[5]

The Act applies throughout the country and 'no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act'.[6] This clearly envisages that there may be other planning measures or mechanisms that are not provided for by the Act itself, but these must be consistent with the Act. Since spatial planning is currently regulated primarily at provincial level (the provincial legislation providing for the powers of municipalities in this regard), SPLUMA does not envisage the repeal of such legislation, although certain amendments will probably be necessary to ensure consistency with SPLUMA.

This is reinforced by section 4, which states that the spatial planning system in South Africa consists of four components:

- Spatial development frameworks to be prepared and adopted by national, provincial and municipal spheres of government;
- Development principles, norms and standards that must guide spatial planning, land use management and land development;
- The management and facilitation of land use contemplated in Chapter 5 through the mechanism of land use schemes; and
- Procedures and processes for the preparation, submission and consideration of land development applications and related processes as provided for in Chapter 6 and provincial legislation.

This appears to envisage a hierarchy of planning mechanisms and procedures, those at the top of the hierarchy being derived from SPLUMA and the detail of the planning decision-making processes being derived from both SPLUMA and provincial legislation.

[5] Section 3.
[6] Section 2.

The courts have recently grappled with the question of how to define 'municipal planning' vis-à-vis other planning functional areas, for which provinces have Constitutional powers.[7] In order (presumably) to provide some clarity as to where the planning functions of the different spheres of government begin and end, SPLUMA sets out three categories of spatial planning – municipal planning, provincial planning and national planning – and sets out the elements of each of these three categories in section 5. This provides some substance to the concepts of 'provincial planning' and 'national planning'. The former, in particular, since it appears in the Constitution[8] and may well have to be distinguished from 'municipal planning',[9] will benefit from legislative meaning since it has not received explicit interpretation in the cases. There may well still be some controversy about the extent of the municipal competence referred to as 'the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest'.[10] This requires drawing a line between a land use which does affect the provincial planning mandate of the provincial government or national interest, and that which does not. In practice, this line will have to be drawn initially by administrative decision-makers, but will doubtless end up in the courts for review at some stage.

Chapter 2 deals with development principles and norms and standards. The principles themselves consist of a long list in section 7 and consist of five 'umbrella' principles – spatial justice; spatial sustainability; efficiency; spatial resilience; and good administration – under which more specific principles are listed. 'Spatial justice' is aimed at the effects of past discrimination and related imbalances, and includes the principle (often a very important one in practice) that a decision-maker may not be impeded or restricted in the exercise of its discretion 'solely on the ground that the value of land or property is affected by the outcome' of the relevant decision-making process.[11]

'Spatial sustainability' principles include the 'triple bottom line' of economic, environmental and social considerations, including protection of agricultural land and limiting urban sprawl. 'Efficiency' encompasses principles of optimising existing resources and infrastructure; and designing procedures to 'minimise negative financial, social, economic or environmental impacts'.[12] 'Spatial resilience' is described as involving 'flexibility in spatial plans, policies

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[7] See, for example, the *Gauteng Development Tribunal* case (n4); and cases referred to in n2 above.
[8] Schedule 5 of the Constitution.
[9] See Gauteng Development Tribunal (n4), for example.
[10] Section 5(1)(c).
[11] Section 7(a)(vi).
[12] Section 7(b)(ii).

and land use management systems [being] accommodated to ensure sustainable livelihoods in communities most likely to suffer the impact of economic and environmental shocks'.[13] 'Good administration' aims at integration of land use management approaches, timely decision-making and public participation.

The role of the principles is much the same as the national environmental management principles in *the National Environmental Management Act (NEMA)*,[14] in that they 'apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land',[15] and guide various decisions and functions in terms of any land use planning law.

The Minister is empowered to make norms and standards after consultation with relevant organs of state in all three spheres of government, and they must not only reflect the principles, but they must, inter alia, include –

- a report on and an analysis of existing land use patterns;
- a framework for desired land use patterns;
- existing and future land use plans, programmes and projects relative to key sectors of the economy; and
- mechanisms for identifying strategically located vacant or under-utilised land and for providing access to and the use of such land;

'Intergovernmental support' (Chapter 3) encompasses primarily 'national support and monitoring' (of provinces and municipalities) and provincial support and monitoring. The former involves support in terms of sections 125(3) and 154(1) of the Constitution respectively; and monitoring by the Minister of aspects related to implementation of the Act, including the capacity of provinces and municipalities to implement the Act.[16] Since the interface between municipal and provincial powers in respect of land use planning has been a fairly frequent area of contestation in the courts, it is likely that this part of the Act will be very important in delineating the relevant powers of support and monitoring. It is also important to bear in mind that municipal capacity is often lacking (as recognised in the *Gauteng Development Tribunal* case) and there are important responsibilities of both provincial and national government in regard to enhancing this capacity.

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[13] Section 7(d).
[14] Section 2 of Act 107 of 1998.
[15] Section 6(1).
[16] Section 9.

National and provincial government's monitoring and supporting of municipalities must take into account the 'unique circumstances of each municipality',[17] and the Act sets out the factors that would apply to this. This is important in order to avoid a 'one size fits all' approach which would fail to recognise differences between, for example, metropolitan municipalities which have been carrying out municipal planning very effectively (as was the case with Johannesburg and Ethekwini in the *Gauteng Development Tribunal* case) and poorly-resourced largely rural municipalities with little or no historic planning capacity and experience.

Chapter 4 provides for a hierarchical network of spatial development frameworks. The Act provides for the mandatory preparation by all three spheres of government of spatial development frameworks, the objectives of which are set out in section 12. These entail coherent, forward-thinking spatial development planning that meets the development principles mentioned above. A spatial development framework (SDF) must 'guide and inform the exercise of any discretion or of any decision taken in terms of SPLUMA or any other law relating to land use and development of land by that sphere of government'.[18] The national SDF 'must contribute to and give spatial expression to national development policy and plans as well as integrate and give spatial expression to policies and plans emanating from the various sectors of national government, and may include any regional spatial development framework'.[19] A provincial SDF 'must contribute to and express provincial development policy as well as integrate and spatially express policies and plans emanating from the various sectors of the provincial and national spheres of government as they apply at the geographic scale of the province'.[20] A municipal SDF must 'assist in integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the spheres of government as they apply within the municipal area'.[21] Sections 13 and 14 provide for the preparation process of the national SDF and its content respectively. The SDF must, inter alia, 'coordinate and integrate' provincial and municipal SDFs.[22] The Act does not make clear whether the national SDF must precede the others or whether this process of co-ordination and integration would take place with the SDFs from other spheres already in existence. There are similar provisions for the preparation and content of provincial SDFs,[23] and their legal effect envisages all provincial development

[17] Section 11(1).
[18] Section 12(2)(b).
[19] Section 12(3).
[20] Section 12(4).
[21] Section 12(5).
[22] Section 14(c).
[23] Sections 15 and 16.

plans, projects and programmes to be consistent with the provincial SDF.[24] The Act notes that the provincial SDF cannot 'confer on any person the right to use or develop any land except as may be approved in terms of this Act, relevant provincial legislation or a municipal land use scheme'.[25]

The regional SDF is established for a 'region', a geographic area which the Minister may declare.[26] At the lowest level, the municipal SDF is required to be part of the municipality's integrated development plan. Its content is set out in section 21.

A Municipal Planning Tribunal (discussed below) or any other authority making a land development decision in terms either of SPLUMA or any other law, may not make a decision inconsistent with a municipal SDF,[27] but the authority may depart from the SDF only if site-specific circumstances justify a departure.[28] Where a provincial SDF is inconsistent with a municipal SDF, the Premier must take the necessary steps, including technical assistance, to support the revision of the SDFs to ensure consistency.[29] The Act is silent as to what happens if there is inconsistency between the national (or regional) SDF with any of the other SDFs. It is not immediately evident why this is not addressed.

In Chapter 5, headed 'land use management', the Act deals with land use schemes. A municipality is required, within five years from SPLUMA's commencement, to adopt and approve a single land use scheme for its entire area. The compulsory components of the scheme include, inter alia, provision for 'appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme'; cognisance of relevant environmental management instruments; incremental introduction of 'land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme'; affordable housing.[30] A municipal SDF may also include, amongst others, provisions relating to use and development of land only with the written consent of the municipality and certain variations of conditions of a land use scheme.[31]

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[24] Section 17(2).
[25] Section 17(3).
[26] Section 18.
[27] Section 22(1).
[28] Section 22(2).
[29] Section 22(3).
[30] Section 24(2).
[31] Section 24(3).

Local municipalities within a district municipality are empowered by agreement to request a district municipality to prepare a land use scheme applicable to the municipal area of the district's constituent local municipalities.[32] This will be useful where there are capacity deficiencies at local municipality level.

A land use scheme must give effect to and be consistent with the municipal SDF and determine the use and development of land within the municipal area to which it relates in order to promote economic growth; social inclusion; efficient land development; and minimal impact on public health, the environment and natural resources.[33] It must include scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone; a map indicating the zoning of the municipal area into land use zones; and a register of all amendments to the land use scheme. The land use scheme is thus essentially the same as current town-planning schemes. The name used is different presumably because schemes under existing legislation are largely urban, whereas SPLUMA provides for wall-to-wall (i.e. urban and rural) spatial planning.

Once adopted and approved, a land use scheme has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of the scheme.[34] In addition, the scheme replaces all existing schemes within the municipal area to which the land use scheme applies; and provides for land use and development rights.[35] As pointed out earlier, a land use scheme may take up to five years to adopt (if the law is complied with – possibly longer as experience suggests), so it is important that the transition period be regulated, which it is in section 26 read with Schedule 2.

There is provision for the change, amendment and review of schemes.[36] Review is mandatory every five years. Alignment of authorisations (where a land use requires authorisation under another law) is provided for in section 30. Enforcement provisions for land use schemes are set out in section 32, including provision for the passing of by-laws and the power of municipalities to apply for appropriate court orders. This section also provides for inspectors and their powers.

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[32] Section 24(4).
[33] Section 25(1).
[34] Section 26(1)(a).
[35] Section 26(1)(b) and (c).
[36] Sections 26(4) and (5); 27(1) and 28.

'Land development management', in Chapter 6 of the Act, deals with the land use decision-making processes. The Act requires every municipality to establish a Municipal Planning Tribunal (MPT) within its area to determine land use and development applications.[37] An alternative process is permitted, whereby a municipality may authorise certain applications to be considered and decided by a municipal official,[38] the municipality determining which type of application to be determined by the MPT and which by the official. The MPT, at least five members, must consist of a combination of municipal officials and persons appointed by the municipal Council 'who are not municipal officials and who have knowledge and experience of spatial planning, land use management and land development or the law related thereto'.[39]

The decision-making process of the MPT is set out in section 40. The factors relevant to the decision, including the SPLUMA's development principles, are contained in section 42, and there is explicit reference to compliance with environmental legislation. Section 45 provides that the land development application may only be submitted by an owner of the land (including the State); a person acting as the owner's agent; 'a person to whom the land concerned has been made available for development in writing by an organ of state or such person's duly authorised agent'; or a service provider responsible for providing infrastructure or utilities. The inclusion of a person to whom the land has been made available for development is interesting. This would appear to include a person who has been granted mineral rights over land that is owned by another person. In the *Maccsand* case,[40] involving the application of the Western Cape Land Use and Planning Ordinance (LUPO), the applicants argued that insistence on a holder of mining rights securing the appropriate zoning of land for mining before commencing with the mining operation would be problematic in that particular case (and similar cases) because only the owner could apply for rezoning in terms of LUPO. A non-owner holding mineral rights would therefore be precluded from applying for rezoning. Section 45(1)(c) of SPLUMA seems to address that concern. The section also provides for participation in the process by an 'interested person', the onus resting on such person to establish his/her status as an interested person. The Act does not specify what this would entail. Development applications 'affecting the national interest' must be referred to the Minister.[41]

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[37] Section 35(1).
[38] Section 35(2).
[39] Section 36(1). Term of office and disqualification from membership of MPTs is dealt with in sections 37 and 38 respectively.
[40] Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC).
[41] Section 52.

The Act provides that a person 'whose rights are affected'[42] by a decision taken by an MPT may appeal against that decision, and the appeal is decided by the 'executive authority of the municipality'[43] (either the executive committee or executive mayor, failing which a committee of councillors appointed by the Municipal Council). A municipality may authorise that a body outside of the municipality or 'in a manner regulated in terms of provincial legislation', assume the obligations of an appeal authority.[44] Currently, most (if not all) provincial planning legislation provides for appeal from municipalities to provincial appeal bodies. This will now not be the default position, but it appears as if the Act envisages such an appeal body only where authorised by a municipality.

Of the general provisions (including the power to make regulations and offences and penalties), there are transitional provisions, which will be important in the immediate future. These primarily deal with transitionary arrangements in respect of decisions under the DFA, which is repealed by SPLUMA, which are to be deemed to be decisions of municipalities taken in terms of the new Act.[45] In addition to the DFA, SPLUMA also repeals the following Acts: *Removal of Restrictions Act 84 of 1967; Physical Planning Act 88 of 1967; Less Formal Township Establishment Act 113 of 1991; and the Physical Planning Act 125 of 1991*.

The manner in which SPLUMA operates alongside the provincial planning legislation and the extent to which the latter will require changes to comply with the requirements of the new Act will be interesting to see. Probably the most intriguing aspect is whether the municipalities that were not carrying out their own planning decisions at the time of the *Gauteng Development Tribunal* judgment are in any better position to do so now. New legislation designed to address the shortcomings of the legislation it is replacing does not automatically ensure that those required to implement it are able to do so, after all.

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[42] See section 51(4).
[43] Section 51.
[44] Section 51(6).
[45] Section 60.

COUNTRY REPORT: SPAIN

Retrocesos en la Protección del Medio Ambiente Versus Revitalización de la Economía

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Abstract

Regulatory activity with respect to environmental protection has been intense over the period examined, with the introduction of numerous legal norms and regulatory standards of which three in particular are highlighted in this report. First is the transposition of Directive 2010/75 of the European Parliament and of the Council, of 24 November 2010, on industrial emissions (integrated pollution prevention and control), implemented in *Law 5/2013, of 11 June, amending Law 16/2002*; and *Royal Decree 815/2013, of 18 October*, which approves *the regulation on industrial emissions and implementation of Law 16/2002*. Second is the reform of *the Spanish Coastal Law by Law 2/2013, of 29 May, on the protection and sustainable use of the coastline, amending Law 22/1988*, which is particularly problematic because of the degree to which it rolls back previous legislation on the protection of coastlines. Third is *Law 11/2012, of 19 December, on urgent environmental matters and Law 15/2012, of 27 December, on tax measures for energy sustainability*. Finally there is the creation of a new national park – the Sierra de Guadarrama – *under Law 7/2013, of 25 June*. In more general terms, environmental actions in Spain continue to be framed by a general context of economic crisis and budget restrictions, and trends identified in previous reports are becoming consolidated. Consequently, new environmental legislation has been introduced and changes have been made to existing legislative provisions with the aim of reactivating the economy, finding justification in the current crisis. Alongside this, processes of liberalisation, deregulation and administrative simplification continue to advance.

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Introducción

La actividad normativa desarrollada por el Estado durante el período objeto de análisis (noviembre de 2012 a octubre de 2013) ha sido amplia y han visto la luz un buen número de normas en materia ambiental, tanto de rango legal como reglamentario. En relación con las normas de rango legal aprobadas, no se trata en realidad de leyes que aborden en su totalidad la regulación de un determinado sector ambiental, sino más bien de normas centradas en la ordenación de determinados aspectos puntuales o en la introducción de nuevos instrumentos o de modificaciones concretas en normas ya existentes, teniendo en cuenta la actual coyuntura económica o la necesidad de incorporar Directivas de la Unión Europea. De las siete leyes aprobadas tres aportan pocas novedades, por cuanto constituyen la materialización como ley de tres reales decretos leyes aprobados en 2012 y que ya fueron objeto de análisis en la crónica precedente (Leyes 11/2012, de 19 de diciembre, de medidas urgentes en materia de medio ambiente; 12/2012, de 26 de diciembre, de medidas urgentes de liberalización del comercio y de determinados servicios; y 14/2012, de 26 de diciembre, de medidas urgentes para paliar los daños producidos por los incendios forestales y otras catástrofes naturales ocurridos en varias comunidades autónomas). Una cuarta Ley, la 15/2012, de 27 de diciembre, de medidas fiscales para la sostenibilidad energética, ha creado nuevos tributos, con el fin de avanzar en el nuevo modelo de desarrollo sostenible. A través de la Ley 5/2013, de 11 de junio, de modificación de la Ley 16/2002, de 1 de julio, de prevención y control integrados de la contaminación –y el Real Decreto 815/2013, de 18 de octubre– se ha procedido a la incorporación al ordenamiento jurídico español de la Directiva 2010/75/UE, del Parlamento Europeo y del Consejo, de 24 de noviembre, sobre las emisiones industriales (prevención y control integrados de la contaminación). La Ley 2/2013, de 29 de mayo, de protección y uso sostenible del litoral y de modificación de la Ley 22/1988, de 28 de julio, de costas, ha procedido a reformar la anterior Ley de costas y se ha convertido, sin duda, en la Ley ambiental más polémica del año. Por último, mediante la Ley 7/2013, de 25 de junio, se crea el Parque Nacional de la Sierra de Guadarrama.

Como viene siendo habitual, también se han aprobado en estos meses varias normas reglamentarias en ámbitos sectoriales diversos (comercio de derechos de emisión, auditorías ambientales, ecoeficiencia en los edificios, aguas, etiqueta ecológica, auditorías ambientales…), en muchos casos para cumplir exigencias derivadas del Derecho de la Unión Europea. Muchos de estos reglamentos estatales tienen el carácter de legislación básica sobre protección del medio ambiente, por lo que su contenido deberá ser respetado

por las Comunidades Autónomas cuando, en ejercicio de sus competencias, elaboren su propia normativa ambiental.

Durante el último año también han visto la luz numerosas Sentencias del Tribunal Constitucional en materia de protección del medio ambiente, en ámbitos diversos (aguas, espacios naturales protegidos, conservación de la flora y la fauna, montes, evaluación de impacto ambiental y subvenciones).

La Actividad Normativa Desarrollada Por El Estado En Materia Ambiental

La Transposición al Ordenamiento Jurídico Español de la Directiva de Emisiones Industriales

Recientemente, se ha incorporado al ordenamiento jurídico español la Directiva de emisiones industriales, que revisa la legislación sobre instalaciones industriales a fin de simplificar y esclarecer las disposiciones existentes. La transposición de esta Directiva se ha producido a través de dos normas: la Ley 5/2013, de 11 de junio, por la que se modifican la Ley 16/2002, de 1 de julio, de prevención y control integrados de la contaminación y la Ley 22/2011, de 28 de julio, de residuos y suelos contaminados, que incorpora las disposiciones básicas de la Directiva; y el Real Decreto 815/2013, de 18 de octubre, por el que se aprueba el Reglamento de emisiones industriales y de desarrollo de la Ley 16/2002, que recoge las disposiciones de carácter técnico. En línea con los establecido por la Directiva de emisiones industriales, esta normativa amplía el concepto de autorización ambiental integrada; introduce nuevos requerimientos para la protección del suelo y de las aguas subterráneas; establece obligaciones tras el cese definitivo de la actividad; establece la obligatoriedad de que los valores límite de emisión de las autorizaciones no excedan de los que figuran en las “conclusiones sobre las mejores técnicas disponibles (MTD)”; introduce una regulación novedosa del régimen de inspección de las instalaciones; e incorpora previsiones para la actualización de las autorizaciones ambientales integradas existentes.

Sin embargo, ni la Ley 5/2013 ni el Real Decreto 815/2013 se limitan a efectuar la transposición de la Directiva de emisiones industriales, sino que aprovechan, además, para revisar y modificar algunos aspectos de la Ley 16/2002, impulsando una mayor simplificación administrativa. Desde esta perspectiva, cabe destacar la supresión del carácter temporal de la autorización ambiental integrada y la introducción de una serie de medidas de agilización y simplificación del procedimiento autorizatorio.

La Cuestionada Modificación de la Ley de Costas: Desarrollo Económico Versus Protección del Litoral

La aprobación de la Ley 2/2013, de 29 de mayo, de protección y uso sostenible del litoral y de modificación de la Ley 22/1988, de 28 de julio, de costas, ha sido muy controvertida. Si bien el Preámbulo justifica la aprobación de esta reforma en la necesidad de "sentar las bases de un uso del litoral que sea sostenible en el tiempo y respetuoso con la protección medioambiental" y considera que "los cambios que se introducen otorgan certeza y claridad, al tiempo que resuelven los problemas que a corto plazo planteaba la legislación anterior, preservando la franja litoral", lo cierto es que esta Ley supone en muchos aspectos de la protección del litoral un retroceso respecto a la Ley anterior y esconde una motivación económica, como es la de revalorizar la costa en término economicistas y no ambientales.

Entre las modificaciones que introduce esta Ley, cabe destacar las que afectan a la delimitación del dominio público marítimo-terrestre y que conducirán a una reducción del dominio público marítimo-terrestre, por cuanto van a conllevar la pérdida de la condición demanial de muchos terrenos; la exclusión por Ley de determinados núcleos de población del dominio público marítimo-terrestre y el establecimiento de criterios de definición del dominio público marítimo-terrestre distintos a los previstos con carácter general para la Isla de Formentera; la ampliación de los plazos de las autorizaciones y concesiones y la previsión de una prórroga extraordinaria de las concesiones y de los derechos de aprovechamiento otorgados al amparo de la normativa anterior; la introducción de la posibilidad de transmisión de las concesiones *inter vivos*; la ampliación de las obras que pueden acometerse en las propiedades situadas en el dominio público y sus servidumbres; y la inclusión de la posibilidad de suspensión por el Estado de los actos y acuerdos de los entes locales que afecten a la integridad del dominio público marítimo-terrestre.

La Ley 11/2012, de 19 de Diciembre, de Medidas Urgentes en Materia de Medio Ambiente

La Ley 11/2012 es el resultado de la tramitación como proyecto de ley del Real Decreto Ley 17/2012, de 4 de mayo, de medidas urgentes en materia de medio ambiente, que modificó cuatro normas de rango legal (el Texto Refundido de la Ley de Aguas, la Ley de patrimonio natural y biodiversidad, la Ley de residuos y suelos contaminados y la Ley del mercado de valores). Este Real Decreto Ley ya fue objeto de análisis en la crónica anterior, por lo que no volveremos a realizarlo. Sí queremos, en cambio, destacar que, durante su tramitación parlamentaria, se han introducido algunas novedades en la redacción originaria del Real

Decreto Ley y que han sido recogidas en la Ley finalmente publicada, en materia de residuos, en relación con el régimen jurídico de los sistemas de depósito, devolución y retorno; en materia de aguas subterráneas; y sobre el régimen de comercio de derechos de emisiones de gases de efecto invernadero.

La Ley 15/2012, de 27 de Diciembre, de Medidas Fiscales Para la Sostenibilidad Energética

La Ley 15/2012, de 27 de diciembre, de medidas fiscales para la sostenibilidad energética, teniendo como fundamento básico el artículo 45 de la Constitución, nace, tal como se pone de manifiesto en su Preámbulo, con el objetivo de "armonizar nuestro sistema fiscal con un uso más eficiente y respetuoso con el medioambiente y la sostenibilidad, valores que inspiran esta reforma de la fiscalidad, y como tal en línea con los principios básicos que rigen la política fiscal, energéticas, y por supuesto ambiental de la Unión Europea". De este modo, "ha de servir de estímulo para mejorar nuestros niveles de eficiencia energética a la vez que permiten asegurar una mejor gestión de los recursos naturales y seguir avanzando en el nuevo modelo de desarrollo sostenible, tanto desde el punto de vista económico y social, como medioambiental". Entre los aspectos más destacables de esta Ley, cabe mencionar la creación de nuevos impuestos: el impuesto sobre el valor de la producción de la energía eléctrica, que es un tributo de carácter directo y naturaleza real que grava la realización de actividades de producción e incorporación al sistema eléctrico de energía eléctrica en el sistema eléctrico español; el impuesto sobre la producción del combustible nuclear gastado y residuos radiactivos resultantes de la generación de energía nucloeléctrica y el almacenamiento de combustible nuclear gastado y residuos radiactivos en instalaciones centralizadas, que son tributos de carácter directo y naturaleza real, cuyo objetivo es compensar a la sociedad por las cargas y servidumbres que debe soportar como consecuencia de dicha generación.

Un Nuevo Parque Nacional: El Parque Nacional de la Sierra de Guadarrama

En 2013 se ha creado en España un nuevo parque nacional, por lo que ya son quince los parques nacionales existentes. Mediante la Ley 7/2013, de 25 de junio, además de modificarse la Ley 5/2007, de 3 de abril, de la Red de Parques Nacionales, se ha creado el Parque Nacional de la Sierra de Guadarrama, con una superficie de 33.960 hectáreas pertenecientes a las Comunidades Autónomas de Madrid (21.714 hectáreas) y de Castilla y León (12.246 hectáreas). La conservación de este espacio se considera de interés general del Estado, y se integra en la Red de Parques Nacionales, de acuerdo con lo previsto en la legislación básica en la materia.

Los Procesos de Liberalización y Simplificación Administrativa Continúan: Los Regímenes de Comunicación y Declaración Responsable Siguen Avanzando

En el informe de 2012 dábamos cuenta de la aprobación del Real Decreto-ley 19/2012, de 25 de mayo, de medidas urgentes de liberalización del comercio y de determinados servicios, que tenía por objeto el impulso y la dinamización de la actividad comercial minorista y de determinados servicios. Este Real Decreto-ley se ha tramitado como Ley y ha dado lugar a la Ley 12/2012, de 26 de diciembre, de medidas urgentes de liberalización del comercio y de determinados servicios. Esta Ley, como ya hiciera el Real Decreto-ley del que trae causa, elimina todos los supuestos de autorización o licencia municipal previa para las actividades comerciales minoristas y la prestación de determinados servicios previstos en su anexo, realizados a través de establecimientos permanentes, situados en cualquier parte del territorio nacional, y cuya superficie útil de exposición y venta al público no sea superior a 300 metros cuadrados. Para estas actividades, las licencias serán sustituidas por declaraciones responsables o por comunicaciones previas, relativas al cumplimiento de las previsiones legales establecidas en la normativa vigente. Es más, para este tipo de establecimientos ya no podrán argüirse razones de protección ambiental para justificar el mantenimiento de la licencia, por lo que desaparece la excepción ambiental.

Recientemente, la Ley 14/2013, de 27 de septiembre, de apoyo a los emprendedores y su internacionalización ha introducido algunas modificaciones en la Ley 12/2012 para extender la exigencia de declaración responsable o comunicación previa a más actividades para las cuales no estaba inicialmente prevista. De este modo, el ámbito de aplicación de esta Ley se extiende ahora “a las actividades comerciales minoristas y a la prestación de determinados servicios previstos en el anexo de esta Ley, realizados a través de establecimientos permanentes, situados en cualquier parte del territorio nacional, y cuya superficie útil de exposición y venta al público no sea superior a 500 metros cuadrados”. Además, se añaden nuevas actividades y nuevos servicios al anexo de la Ley 12/2012. La consecuencia es clara: supresión de más autorizaciones y sustitución por comunicaciones previas o declaraciones responsables, en línea con los procesos de liberalización, desregulación y simplificación administrativa que se están produciendo en el ámbito del Derecho ambiental.

Otras Normas de Interés

En el período analizado, se han aprobado otras leyes. Así, en materia de incendios forestales, la Ley 14/2012, de 26 de diciembre, por la que se aprueban medidas urgentes para paliar los daños producidos por los incendios forestales y otras catástrofes naturales ocurridos en varias Comunidades Autónomas; y en materia de animales, la Ley 6/2013, de 11 de junio, de modificación de la Ley 32/2007, de 7 de noviembre, para el cuidado de los animales, en su explotación, transporte, experimentación y sacrificio. Cabe mencionar también la Ley 8/2013, de 26 de junio, de rehabilitación, regeneración y renovación urbanas.

Asimismo, se han aprobado también un gran número de normas de rango reglamentario, muchas de las cuales tienen el carácter de legislación básica de protección del medio ambiente. Efectivamente, se han aprobado normas reglamentarias, entre otros ámbitos, en materia de comercio de derechos de emisión de gases de efecto invernadero (Real Decreto 1722/2012, de 28 de diciembre, por el que se desarrollan aspectos relativos a la asignación de derechos de emisión en el marco de la Ley 1/2005, de 9 de marzo, por la que se regula el régimen del comercio de derechos de emisión de gases de efecto invernadero), contaminación marina (Real Decreto 1695/2012, de 21 de diciembre, mediante el que se aprueba el Sistema Nacional de Respuesta ante la contaminación marina), ecoeficiencia en los edificios (Reales Decretos 235/2013, de 5 de abril, por el que se aprueba el procedimiento básico para la certificación de la eficiencia energética de los edificios; y 238/2013, de 5 de abril, por el que se modifican determinados artículos e instrucciones técnicas del Reglamento de Instalaciones Térmicas en los Edificios, aprobado por Real Decreto 1027/2007, de 20 de julio), etiqueta ecológicas y auditorías ambientales [Reales Decretos 234/2013, de 5 de abril, establece normas para la aplicación del Reglamento (CE) n.º 66/2010 del Parlamento Europeo y del Consejo, de 25 de noviembre de 2009, relativo a la etiqueta ecológica de la Unión Europea y 239/2013, de 5 de abril, establece normas para la aplicación del Reglamento (CE) n.º 1221/2009 del Parlamento Europeo y del Consejo, de 25 de noviembre de 2009, relativo a la participación voluntaria de organizaciones en un sistema comunitario de gestión y auditoría medioambientales (EMAS)], aguas (destaca especialmente el Real Decreto 670/2013, de 6 de septiembre, se ha modificado el Reglamento del Dominio Público Hidráulico aprobado por el Real Decreto 849/1986) y protección de los animales utilizados en experimentación (Real Decreto 53/2013, de 1 de febrero, por el que se establecen las normas básicas aplicables para la protección de los animales utilizados en experimentación y otros fines científicos).

La Jurisprudencia Ambiental: Algunos Aspectos de Interés

A nivel jurisprudencial, el último año ha sido especialmente prolífico en cuanto a sentencias del Tribunal Constitucional en materia de protección del medio ambiente. Se han dictado numerosas Sentencias que han contribuido a delimitar el alcance de las competencias estatales y autonómicas en materia de protección del medio ambiente. Entre las principales materias objeto de conflicto en sede constitucional destacan el agua, los espacios naturales protegidos, los montes, la contaminación acústica, la evaluación de impacto ambiental y las subvenciones.

En materia de aguas, cabe destacar, en primer lugar, las Sentencias 237/2012, 239/2012 y 240/2012, todas ellas de 13 de diciembre. En la primera de ellas se confirma la constitucionalidad del Real Decreto-Ley 2/2004, de 18 de junio, por el que se modificaba la Ley 10/2001, de 5 de julio, del Plan Hidrológico Nacional y se derogaba el trasvase del Ebro. En la segunda y en la tercera, que versan sobre la nueva redacción dada por la Ley 11/2005, de 22 de junio, que vino a sustituir al indicado Real Decreto-Ley 2/2004 tras su tramitación como proyecto de ley, a los preceptos de la Ley del Plan Hidrológico Nacional que regulaban el Plan de Protección Integral del Delta del Ebro y que había sido recurrida por los Gobiernos de tres Comunidades Autónomas (La Rioja, Murcia y Castilla y León), el Tribunal Constitucional también declara la constitucionalidad de esta norma. Las Comunidades Autónoma recurrentes cuestionaban la excepcionalidad del procedimiento de fijación de los caudales ambientales en el tramo final del Ebro (participación exclusiva de la Generalitat de Cataluña) respecto al procedimiento ordinario de fijación de los mismos en las cuencas intercomunitarias, que garantiza la participación de todas las Comunidades Autónomas incluidas en el ámbito territorial de las cuencas. En este caso, el Tribunal realiza una interpretación conforme a la Constitución, de manera que los preceptos impugnados sólo son constitucionales en la medida en que se interprete que no contienen una excepción al procedimiento general de fijación de los caudales ambientales, sino simplemente un complemento de dicho procedimiento general, que articula un mecanismo singular cuya finalidad es alcanzar un acuerdo sobre una pieza específica del plan hidrológico cuyo objeto es la protección de un espacio de gran singularidad y extraordinario valor ecológico.

En segundo lugar, la Sentencia 36/2013, de14 de febrero, en la que el Tribunal Constitucional considera constitucional la Ley que procedió a la incorporación de la Directiva marco de aguas de la Unión Europea en el ordenamiento jurídico español, modificando diversos aspectos del Texto Refundido de la Ley de Aguas.

En materia de espacios naturales, resulta de gran interés el caso resuelto por la Sentencia 234/2012, de 13 de diciembre, en que se cuestionaba la redelimitación a la baja de ciertos espacios naturales protegidos de la Región de Murcia, operada por la Ley 1/2001, de 24 de abril, del suelo de la Región de Murcia, que modificada la Ley 4/1992, de 30 de julio, de ordenación y protección del territorio de la Región de Murcia, en la medida en que suponía la desclasificación parcial de algunos de los espacios naturales protegidos contemplados en la Ley autonómica 4/1992 y dejaba sin protección bastantes hectáreas de la red básica regional de espacios protegidos. En este caso, el Tribunal Constitucional estima el recurso por vulneración del principio de seguridad jurídica.

En este ámbito también el Tribunal Constitucional ha declarado la constitucionalidad de la Ley 42/2007, de 13 de diciembre, del patrimonio natural y de la biodiversidad, recurrida por el Consejo de Gobierno de la Junta de Castilla y León, en la Sentencia 69/2013, de 14 de marzo. Igualmente, se ha planteado el alcance de las competencias estatales y autonómicas sobre espacios naturales protegidos marinos. En las Sentencias 87/2013, de 11 de abril y 99/2013, de 23 de abril, el Tribunal Constitucional considera que el territorio de la Comunidad Autónoma es el límite natural de las competencias autonómicas y, en el caso de las Islas Canarias, está integrado por los territorios insulares, esto es, las siete islas y se extiende a la zona marítimo-terrestre que forma parte del mismo. Asimismo, ha considerado que es conforme a la Constitución el criterio recogido en la normativa vigente conforme al cual en los espacios naturales protegidos marinos la declaración y gestión por las Comunidades Autónomas se produce cuando exista continuidad ecológica del ecosistema marino con el espacio natural terrestre objeto de protección, sin que sea necesaria la continuidad y unidad física del espacio y ha recordado la competencia exclusiva del Estado sobre las aguas de jurisdicción española.

Asimismo, en la Sentencia 146/2013, de 11 de julio, el Tribunal Constitucional ha declarado que el Catálogo español de hábitats en peligro de desaparición no vulnera competencias autonómicas, aunque incluya especies endémicas de una Comunidad Autónoma, por su singularidad o rareza.

En relación con los montes, en la Sentencia 97/2013, de 23 de abril, el Tribunal Constitucional considera que la prohibición incluida en la normativa estatal de cambio del uso forestal de los terrenos incendiados durante un período mínimo de treinta años y la limitación de circulación con vehículos a motor por pistas forestales situadas fuera de la red de carreteras tiene carácter básico y no vulnera las competencias autonómicas en materia

de ordenación del territorio, protección del medio ambiente, montes, turismo, ocio y protección civil.

En materia de contaminación acústica, la Sentencia 5/2013, de 17 de enero, se ha pronunciado sobre la Ley 16/2002, de 28 de junio, de protección contra la contaminación acústica de Cataluña, declarando la inconstitucionalidad de su artículo 38.2 por incidir ilegítimamente en competencias estatales (este precepto preveía que cuando se sobrepasasen los valores de atención establecidos en la citada Ley, la Administración titular de la infraestructura debía elaborar, dando audiencia a las Administraciones afectadas por el trazado, un plan de medidas para minimizar el impacto acústico que tuviese en cuenta los medios para financiarlo y debía someterlo a la aprobación del Departamento de Medio Ambiente de la Comunidad Autónoma).

Con relación a la evaluación ambiental, se ha cuestionado la competencia sobre las certificaciones de afección de los proyectos y actuaciones a la conservación de la diversidad en las zonas especiales de conservación y en las zonas de especial protección para las aves expedidas en relación con proyectos de construcción, que constituye una técnica de control medioambiental asimilable al estudio de impacto ambiental. En las Sentencias 59/2013, de 13 de marzo, y 80/2013, de 11 de abril, el Tribunal Constitucional considera, reiterando su jurisprudencia anterior en materia de evaluación de impacto ambiental que, dada la función instrumental que desempeña en relación a una obra de competencia estatal, tales certificaciones resultan amparadas por la competencia sustantiva estatal de la que es ejercicio el proyecto en cuestión y, en consecuencia, no supone una invasión de la competencia exclusiva que corresponde a las Comunidades Autónomas sobre los espacios naturales protegidos que se encuentran en su territorio. Igualmente, en la Sentencia 111/2013, de 9 de mayo, ha considerado que la atribución a la Administración del Estado de la evaluación de planes o proyectos que afecten a las zonas especiales de conservación, en aquellos casos en los que el plan o proyecto debe ser autorizado o aprobado por ella tras la realización de la correspondiente evaluación de impacto ambiental, garantizándose la consulta a las Comunidades Autónomas en cuyo territorio se ubique el proyecto en cuestión, no es inconstitucional.

Por último, en cuanto a las subvenciones para fines de interés social de carácter medioambiental, las Sentencias 113/2013, de 9 de mayo y 163/2013, de 26 de septiembre, consideran que se vulneran las competencias autonómicas cuando se produce una centralización absoluta de la regulación, gestión, tramitación, concesión y pago de las subvenciones para fines de interés social de carácter ambiental en órganos estatales. Ni el

carácter supraterritorial de los beneficiarios ni el carácter supraautonómico de las actividades subvencionables son suficientes para justificar tal centralización.

Consideraciones Sobre La Evolución Reciente de la Normativa Ambiental

La normativa ambiental adoptada en el período examinado ha sido muy abundante. Algunas de las normas que han visto la luz en estos últimos meses tienen su origen en el Derecho de la Unión Europea, como se ha destacado en las páginas precedentes. Por ello, el Derecho ambiental español continúa, en buena medida, yendo a remolque del derecho comunitario, uno de los principales motores de innovación para la legislación ambiental española. También prosigue la tendencia bastante generalizada en España en materia ambiental de aprobación de normas básicas con carácter reglamentario, aun cuando en el sistema español, de acuerdo con la jurisprudencia constitucional, sólo excepcionalmente se admite la definición de lo básico en normas reglamentarias. Buena parte de los reglamentos aprobados se consideran legislación básica sobre protección del medio ambiente con arreglo al artículo 149.1.23 de la Constitución.

Este último año se han puesto de manifiesto importantes tensiones entre la protección del medio ambiente y el desarrollo económico y se ha producido la aprobación de normas que, con un claro objetivo de revitalización de la economía, suponen un retroceso importante para la protección ambiental. El caso de la reforma de la Ley de costas es paradigmático en este sentido. Además, continúan avanzando los procesos de liberalización y simplificación administrativa. Se siguen sustituyendo autorizaciones ambientales por comunicaciones y declaraciones responsables, trasladándose los controles a un momento posterior al inicio de la actividad, frente a lo que había venido siendo habitual; y se simplifica la normativa ambiental, con el fin de agilizar los trámites para la puesta en marcha de actividades. Buen ejemplo de ello es la modificación de la Ley 16/2002, de prevención y control integrado de la contaminación.

Como ya advertíamos en crónicas anteriores estos proceso desreguladores, iniciados en primer término con la transposición de la Directiva de servicios y continuados por otras normas y medidas administrativas adoptadas para dinamizar la actividad económica, plantean, en términos de reducción del control público ambiental, una serie de riesgos importantes en el ámbito del Derecho ambiental, como la eliminación injustificada de restricciones o requisitos ambientales necesarios. Las políticas de liberalización no dejan de plantear riesgos de regresión para los logros ambientales que se habían venido produciendo hasta hace poco. Se advierte una tendencia clara a la rebaja de los estándares

de protección ambiental como consecuencia del protagonismo de las medidas políticas y administrativas destinadas a reactivar la economía, existiendo ya algunos indicios de ese proceso. Cabe plantear, en este contexto, dónde están los límites para el retroceso de las normas ambientales en un Estado ambiental de Derecho y hasta qué punto el artículo 45 de la Constitución Española –donde se constitucionaliza el derecho a un medio ambiente adecuado y el principio de desarrollo sostenible– y el principio de no regresión ambiental del que ya empieza a hablar la doctrina (Prieur y López Ramón) pueden actuar como límite efectivo y frenar la adopción de determinadas medidas en materia ambiental.

COUNTRY REPORT: THAILAND

Potential Conflict Arising in the Context of REDD+ Implementation in Thailand

WANIDA PHROMLAH*

Introduction

While REDD+ is designed to achieve an effective forest governance system, the implementation of REDD+ comes with significant risks, including the risk of conflict. This Country Report discusses recent REDD+ arrangements in Thailand. The Report begins with a brief outline of the current REDD+ implementation followed by a more detailed discussion of predictable conflicts that may arise from REDD+ implementation in Thailand. The conclusion to this Report identifies future research agendas for consideration.

Current REDD+ Arrangement in Thailand

REDD+ is the United Nations (UN) initiative for reducing emissions from deforestation and forest degradation. It offers an opportunity for developing countries, including Thailand, to receive funding from developed countries to conserve their forest resources, and also to manage forests for carbon stocks and other values. These other values may encompass poverty alleviation, the achievement of holistic ecological and social objectives, enhancing social justice, enhanced economic opportunity, and inclusion of communities (particularly forest communities) and indigenous people.[1]

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[1] Randy Bluffstone, Elizabeth Robinson and Paul Guthiga, 'REDD+ and Community-Controlled Forests in Low-Income Countries: Any Hope for a Linkage?' (2012) 87 *Ecological Economics* 43, 44; Anne M. Larson, 'Forest tenure reform in the age of climate change: Lessons for REDD+' (2011) 21(2) *Global Environmental Change* 540, 540.

Thailand participated in the REDD+ partnership in 2010.[2] Then, in the same year, the Office of Natural Resources and Environmental Policy and Planning under the Ministry of Natural Resource and Environment (MINRE) prepared a draft ten-year (2010–2019) national master plan on climate change. This master plan encompasses three strategies, and one of them directly refers to the promotion of REDD+ activities (Work Plan 2.2.2(5)).[3]

In 2011, the REDD+ Taskforce (TF) was established as an inter-ministerial and multi-sectoral committee supervised by the Climate Change Technical Sub-Committee (CCTS). The TF is chaired by the Director General of the Department of National Parks, Wildlife and Plant Conservation (DNP), and includes representatives from key government agencies related to forest management.[4] In 2013, membership of the REDD+ TF was revised to also add local communities, private sector representatives, academics, non-government agencies (NGOs), and research institutions.[5]

In June 2013, the DNP and World Wildlife Fund (WWF) (Thailand) formally launched a joint project titled 'Tracking Reductions in Carbon Emissions through Enhanced Monitoring and Project Support' (TREEMAPS). This project intends to establish Thailand's first forest carbon basemap and monitoring system, as well as establishing a sub-national REDD+ project. TREEMAPS provides an opportunity for Thailand to receive funding from developed countries, to conserve its forest resources, and to exchange knowledge, skills, experiences and lessons learnt with other countries.[6] Thailand is currently establishing the 2013 Readiness Preparation Proposal (RPP) for REDD+ implementation,[7] but the process is quite slow as it requires Cabinet approval before it may proceed.[8]

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[2] REDD+Partnership, *REDD+Partnership Document 2010* (2010) REDD+Partnership http://www.oslocfc2010.no/pop.cfm?FuseAction=Doc&pAction=View&pDocumentId=25019

[3] Asia Indeginous Peoples CCMIN, *REDD+ implementation in Asia and the concerns of Indigenous Peoples* (2011) Asia Indeginous Peoples CCMIN http://ccmin.aippnet.org/ourpublications/article/236/REDD+%20Implementation%20of%20Indigenous%20Peoples%20in%20Asia%20and%20the%20Concerns_web.pdf

[4] Theerapat Praurasiddhi *et al*, *Readiness Preparation Proposal (R-PP) For Country: Thailand* (Forest Carbon Partnership Facility (FCPF), 2013), 18.

[5] Ibid.

[6] WWF-Thailand, *WWF and Thailand government launch TREEMAPS, the first high-precision forest carbon mapping initiative in South-east Asia* (2013) WWF-Thailand http://www.wwf.or.th/en/?208960/WWF-and-Thailand-government-launch-TREEMAPS-the-first-high-precision-forest-carbon-mapping-initiative-in-South-east-Asia.

[7] Theerapat Praurasiddhi *et al*, above n 4, 8-12.

[8] Asia Indigenous Peoples CCMIN, above n 3.

Potential Conflict for REDD+ Implementation in Thailand

Implementation of REDD+ may provide opportunities for Thailand to earn both financial and non-financial support from developed countries, and also to enhance social justice, develop the national economy, and preserve forests. However, it is worth considering the potential role that conflicts may play in hampering REDD+ implementation.

Conflict is one of the major challenges in countries seeking to implement REDD+ programmes. In Asia, it was reported in 2013 that the number and impact of forest conflicts had increased over time and spread across the region. In Cambodia in 2009, 236 cases of forestry conflicts among stakeholders were recorded. There were 359 forest-related conflicts between 1997 and 2003 in Indonesia, with numbers increasing over time. This high number of forest conflicts makes Southeast Asia one of the 'hotspots' of forest conflict in the world. It causes anxiety and fear, disharmony and division among social groups; economic and social costs; and environmental degradation.[9] Local communities are often the most adversely affected and suffer the worst from its consequences.[10]

Understanding potential conflict is important for conflict management in REDD+ implementation. Failure to do so will likely inhibit the implementation process and impact the credibility of REDD+'s aims. Conflict could also lead to significant forest destruction. This would be detrimental to efforts to mitigate greenhouse gas emissions, which is one of the aims of REDD+.[11] Some key conflicts under REDD+ implementation can be identified.[12] This country report focuses on five potential areas of conflict, the consideration of which should be a priority for REDD+ implementation in Thailand.

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[9] Yurdi Yasmi, Lisa Kelley and Thomas Enters, 'Forest conflict in Asia and the role of collective action in its management' (CAPRi Working Paper No. 102, CGIAR Systemwide Program on Collective Action and Property Rights (CAPRi), 2011), 1.; RECOFTC – The Center for People and Forests, *Conflict mediation in Asia's increasingly pressured forests: A tool for getting the positives out of conflicts* (2013) RECOFTC – The Center for People and Forests http://www.recoftc.org/site/uploads/content/pdf/confilct%20research_2_263.pdf.

[10] Ibid; RECOFTC – The Center for People and Forests, *Conflict and Cooperation in REDD+: Which way are we going?* (2013) RECOFTC – The Center for People and Forests http://recoftc.wordpress.com/2013/06/25/conflict-and-cooperation-in-redd-which-way-are-we-going/.

[11] RECOFTC – The Center for People and Forests, above n 10.

[12] Toral Patel *et al*, 'Predicting Future Conflict under REDD+ Implementation' (2013) 4(2) *Forests* 343, 347-348.

Unclear and Contested Tenure[13]

Indonesia, one of the earliest REDD+ supporters, is experiencing an increasing number of conflicts related to land rights across the country. Unclear and contested property rights to forest land contribute to confusion and insecurity about rights to forest resources and ultimately lead to competition among stakeholders and may ultimately undermine the objectives of REDD+. Insecurity and confusion about the status of forest rights encourages communities to extract as much forest product as possible in order to maximise their forestry benefits, resulting in significant loss of forests. This situation is exacerbated by financially attractive alternative land use options such as mining and palm oil plantations. Unclear rights over forest resources, accompanied by an absence of public participation and financially attractive alternative options, promote the rapid clearing of forest lands and an escalation of conflict over the benefits among stakeholders. REDD+ implementation in Indonesia is thus proving very difficult.[14]

Uganda is experiencing similar challenges. Uganda has enthusiastically implemented REDD+, and yet has the highest rates of deforestation in East Africa.[15] The high rate of deforestation may *inter alia* be traced to inadequacies in clarifying the land tenure system which causes boundary disputes around reserved forest areas and conflicts over resource ownership. Ultimately, this makes REDD+ implementation more difficult.[16]

In Thailand, unclear rights to forest resources and land have also been a chronic source of forest-related conflicts. One noticeable instance is revealed by the Centre for People and Forests (RECOFTC). Interviews with some 50 participants about conflict between staff of the national park authorities and local communities in Kanchanaburi province in the west of Thailand highlighted that the underlying cause of the conflict is unclear and contested tenure. The Sueb Nakahasathien Foundation became involved in this conflict and initiated joint management of the preserved forest area. This eventually led to redrawing of boundaries of these reserved lands for resolving the dispute.[17]

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[13] Y. Yasmi *et al*, *The struggle over Asia's forests: Forest conflict in Asia and implications for REDD+* (2012) RECOFTC - The Center for People and Forests http://www.recoftc.org/site/resources/The-struggle-over-Asia-s-forests-Forest-conflict-in-Asia-and-implications-for-REDD-.php; Patel *et al*, above n 12, 348.
[14] Tobias F. Dorr *et al*, 'Missing the Poorest for the Trees?: REDD+ and the Links between Forestry, Resilience and Peacebuilding' (LSE International development and International Alert., 2013), 10-12.
[15] Ibid, 19-21.
[16] Ibid, 19-21.
[17] Yasmi, Kelley and Enters, above n 9, 8-10.

Access and Use Restriction[18]

Access to forest resources is essential in meeting the subsistence needs of forest communities. Laws that limit local access and the ability to utilise forest products can lead to conflict. Implementation of REDD+ may come with the establishment of preserved forest areas to prevent forest clearing. This then restricts access and the use of forest products by forest people leading to loss of income and livelihood opportunities. This could fuel severe hostility between the government and forest communities. The arbitrary herding ban imposed by the Chinese Government, which led to serious conflicts between the Government and herdsmen, is an example of this type of conflict.[19] Similarly, in Thailand, a ban on swidden farming in a newly established national park fuelled serious conflicts between the government and hill tribe people whose livelihoods depend on this farming practice.[20]

Establishing preserved forests not only limits access to and use of forest resources, but may also lead to unfair relocation of forestry communities. In Uganda, it was reported in 2011 that 22,000 people were unfairly and forcedly evicted from forest lands to make way for carbon-offset tree plantations. Such practices foster resistance by communities and eventually may lead to hostility between communities and the government, rendering successful implementation of carbon-offset tree planting projects even more difficult.[21] There is a similar case in Thailand where forests traditionally managed by communities were declared off-limits with accompanying punishment for those who failed to adhere to the prohibition on access and use. This is triggering open antagonism and conflict among stakeholders.[22]

Inequitable Benefit Sharing[23]

REDD+ is a system whereby a developed country provides money to a developing country for emission offsets. Several direct benefits arise from REDD+ projects, including the money received from the developed country as well as benefits derived from a 'share in carbon

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[18] Dharam Raj Uprety, Harisharan Luintel and Kamal Bhandari, 'REDD+ and conflict: A case study of the REDD + projects in Nepal' (Report submitted to The Center for People and Forest (RECOFTC) and ForestAction Nepal, ForestAction, 2011), 23-24; Patel *et al*, above n 12, 347; Yasmi *et al*, above n 13.
[19] Yasmi, Kelley and Enters, above n 9, 11.
[20] Ibid.
[21] Dorr *et al*, above n 14, 21.
[22] Yasmi, Kelley and Enters, above n 9, 8-10.
[23] Uprety, Luintel and Bhandari, above n 18, 21; Patel *et al*, above n 12, 347.

stocks.[24] The money paid to a recipient country for REDD+ activities ought to be equitably allocated among stakeholders and in accordance with REDD+ commitments.[25] Inequitable sharing of benefits emerging from REDD+, on the other hand, may create hostility and conflict among stakeholders.[26]

Benefit distribution is one of the main causes of conflicts related to REDD+ implementation in Nepal – the pioneer country in implementing Community Forest (CF) projects in Asia.[27] One of the conflicts in Nepal is between the government and community forestry groups. As forest land ownership lies with the government, it was able to amend the Forest Act (1993) and impose the rearrangement of income sharing to claim benefits form REDD+.[28] The situation in Nepal provides a lesson for Thailand as forest resources in Thailand are state owned, as is the case in Nepal. The power of decision making for forest management is therefore significantly vested in the government. This, along with several benefits provided by REDD+, could influence the government to implement REDD+ in a manner that favours its own interests, at the expense of those whose livelihoods depend on forest resources. This could fuel conflicts between government and those who are overlooked, which in turn could contribute to the difficulty of REDD+ implementation.

Insufficient or Lack of Genuine Involvement of Forestry Communities as well as Indigenous People[29]

Insufficient or lack of genuine public participation (particularly on the part of women and marginalised groups) in REDD+ arrangements is another key source of conflict related to REDD+ implementation. The Federation of Community Forestry Users, Nepal (FECOFUN) has a rule that requires at least 50 per cent of representatives in all decision-making bodies to be female. However, the participation of women and community forestry groups is usually ignored, while elite groups are favoured. This issue is exacerbated by the fact that many

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[24]Patel *et al*, above n 12, 350; Gabrielle Kissinger, Martin Herold and Veronique De Sy, *Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers* (Lexeme Consulting, August 2012), 18-21.
[25] Kaisa Korhonen-Kurki *et al*, 'Multiple levels and multiple challenges for REDD+' in Arild Angelsen et al (eds), *Analysing REDD+: Challenges and choices* (Center for International Forestry Research (CIFOR), 2012) 91, 95.
[26] Patel *et al*, above n 12, 347.
[27]Juan M. Pulhin, Anne M. Larson and Pablo Pacheco, 'Regulations as Barriers to Community Benefits in Tenure Reform' in Anne M. Larson, Deborah Barry and Ganga Ram Dahal (eds), *Forests for People : Community Rights and Forest Tenure Reform* (Earthscan, 2010) 139, 146 ;FAO, 'Reforming forest tenure: Issues, principles and process' (FAO Forestry Paper 165, FAO, 2011), 36.
[28] Patel *et al*, above n 12, 349-350.
[29] Patel *et al*, above n 12, 348.; Ruben de Koning *et al*, 'Forest-Related Conflict: Impact, Links, and Measures to Mitigate' (Rights and Resources Initiative (RRI), 2008), 10-12.

communities lack knowledge or information about REDD+. This is a major challenge to their genuine and meaningful participation in proposed REDD+ projects and these situations effectively fuel conflict among stakeholders.[30]

Thailand's Constitution recognises rights of community and indigenous people to participate in forest management together with the Government.[31] Forestry laws have, however, not been revised to implement this provision in the Constitution. At present, the Government makes an effort to initiate the Community Forest Projects with an aim to involve community and indigenous people in forest management.[32] In practice, however, decision-making power remains vested in the Government.[33] The result is a tightly controlled and restricted version of community involvement, which fails to meet the constitutional intent. The lack of participation and community involvement could lead to the same kinds of conflicts as those experienced in Nepal.

Cross-Border Conflicts

Cross-border conflicts are more likely to occur when a state with poor governance mechanisms experiences resource depletion and in instances where a key resource is shared between two states. These cross-border conflicts can be a significant cause of deforestation and also impact the livelihood of those who live on or adjacent to the border, particularly community and indigenous people. These can consequently undermine the goal of REDD+.

The violent direct-use resource conflict within the forests sector on the Afghanistan/Pakistan border is a good illustration of this kind of conflict. There is an absence of collaboration between the two countries in this area, exacerbated by lack of oversight and the failure to implement sound resource governance. This failure has led to unhindered illegal logging, contributing to significant loss of previously forested land. Furthermore, the forest communities in the area lack protection, and reportedly fall victim to the activities of the criminal logging industry.[34]

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[30] Patel *et al*, above n 12, 355.
[31] Constitution 2007 s 66-67 (Thailand).
[32] The Community Forest Management Bureau, 'The Manual of Implementation of Community Forest Project' (Royal Forest Department, 2011), 1.
[33] Eliana Fischman K., 'The Relevance of Tenure and Forest Governance for Incentive Based Mechanisms: Implementing Payments for Ecosystem Services in Doi Mae Salong' (View of Doi Mae Salong, International Union for Conservation of Nature (IUCN), 2012), 8-9.
[34] Alice Blondel, 'Climate Change Fuelling Resource-Based Conflicts in the Asia-Pacific' (Asia- Pacific Human Development resource: Background Papers Series 2012/12, UNDP, 2012), 17.

Thailand should take note of this cross-border conflict as it shares two large protected forest areas – Thung Yai Naresuan Wildlife Sanctuary and theTaninthayi (Tenasserim) Mountain Range - with Myanmar. These protected forest areas, covering 320,000 hectares, are a World Heritage Site situated in the Kanchanaburi and Tak provinces of Thailand alongside the western international border with Myanmar.[35] It was reported in 2013 by the International Tropical Timber Organization (ITTO) that the forests in the Taninthayi Range are vulnerable to degradation due to poaching, fragmentation and encroachment for agriculture, illegal logging, settlements inside and around the park, and human-elephant conflicts.[36] These causes of forest degradation, exacerbated by poor forest governance, such as corruption at the border,[37] can contribute to more forest loss, unless Thailand and Myanmar collaborate and establish sound forest governance.

Future Research Agenda

The above discussion raises a number of possible research agendas for consideration, as set out below.

Conflict Transformation: While considering sources of conflicts is necessary for REDD+ implementation, an approach that aims not only to minimise conflicts, but also to promote conditions that establish long-term collaborative relations, ought to be implemented. Conflict transformation through training and field activities, capacity building of stakeholders in community forestry together with other kinds or relevant natural resource management (such as involving a mediator who is credible, neutral, and able to develop participatory processes) could be alternative approaches that effectively engage stakeholders in collaborative conflict resolution.[38] Conflict transformation should not only be conducted within the country, but should also involve bilateral approaches, such as enhancing cross-border negotiation in the planning and management of transboundary sites through 'Transfrontier Conservation Areas'

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[35] United Nations Environment Programme-World Conservation, *Thung Yai Naresuan Wildlife Sanctuary, Thailand* (2008) The Encyclopedia of Earth http://www.eoearth.org/view/article/156625/;Reiner Buergin, *Conflicts about Biocultural Diversity in Thailand : Karen in the Thung Yai Naresuan World Heritage Site Facing Modern Challenges* (2002) Working Group Socio-Economics of Forest Use in the Tropics http://www.sefut.uni-freiburg.de/pdf/Buergin10.pdf.

[36] Government of Myanmar, 'Capacity Building for strngthening transboundary biodiveristy conservation of the Taninthayi range in Myanmar' (ITTO Project Proposal No. PD 723/13 Rev.1 (F), ITTO, 2013), 1.

[37] Burma News International:Burma, 'Corrupt officials earning 100 million baht a month from illegal trade in Three Pagodas Pass', *Burma News International* (Burma), 2008.; Bangkok Post:Thailand, 'DSI uncovers timber scam tied to Burma', *Bangkok Post* (Thailand), 2011 http://www.illegal-logging.info/item_single.php?it_id=5106&it=news&printer=1.

[38] RECOFTC – The Center for People and Forests, above n 9.

(TCAs). This could increase security and build trust between countries. The broader international community could facilitate these processes through the provision of mediators, capacity strengthening and appropriate funding to enable collaborative forest resources. [39]

Mediation Using a Multi Interest-Based Approach[40] - such as taking into account many criteria in developing a formula for REDD+ payment – might be useful. The mediation results in a determination as to those who can be paid from REDD+ benefit. This would be a worthwhile consideration in planning the implementation of REDD+ in Thailand. It would include the payment for carbon sequestration and the payment based on social criteria, such ethnic diversity (number of indigenous people and households), on women's participation, and on number of poorest households.[41] Taking into account many areas to be paid based upon the interests of all relevant aspects related to REDD+ would help ensure equitable benefit sharing and this could help minimise claims and conflicts among stakeholders.

Conclusion

This Report has discussed the recent arrangements regarding REDD+ implementation in Thailand focusing on the potential conflicts that may arise in the context of REDD+ implementation. Several conflicts under REDD+ implementation were identified. In particular, this Country Report focuses on five key conflicts as a priority for consideration, including: unclear and contestable tenure; access and use restriction; inequitable benefit sharing; insufficient or lack of genuine involvement of forestry communities; and cross-border conflict in the forest sector. Considering potential conflicts and conflict management mechanisms, including conflict transformation and mediation using a multi interest-based approach may prove critical for Thailand if it is to achieve the intended outcomes of REDD+ - which include addressing the interests of less powerful people who depend on the forests for their livelihood

[39] FAO, 'Forests and Conflict' (FAO, 2009), 5.
[40] Uprety, Luintel and Bhandari, above n 17, 24-25.
[41] Patel *et al*, above n 12, 350.

COUNTRY REPORT: TURKEY

Turkey's Climate Change Dilemma

ALI KEREM KAYHAN*

Introduction: Turkey's Global Climate Change Position

Turkey has a special position in the global climate change regime, which in turn influences Turkey's climate change law and policy. This country report begins by considering Turkey's position in the global climate change regime.

When the *United Nations Framework Convention on Climate Change*[1] (UNFCCC) was established, Turkey was included in Annex I and Annex II. Annex I lists developed countries and economies in transition (EIT). Annex II lists the 24 Organisation for Economic Co-operation and Development (OECD) countries required to provide financial and technical support to economies in transition (EIT) and developing countries. Developing countries are not listed and are referred to as non-Annex I parties. Turkey objected to being listed as an Annex I *or* II party. It refused to sign the treaty and failed in its attempts to be removed from both Annexes. One of Turkey's main arguments in relation to the listings was that Turkey was neither a fully developed country nor a country in economic transition.[2]

In 2000, Turkey changed its policy and sought to be removed from Annex II while remaining on Annex I (with special circumstances). The Conference of the Parties (COP) accepted this approach in 2001[3] but the term 'special circumstances' remains undefined.[4] Although Turkey

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[1] 1771 UNTS 107.
[2] See the Statement of Nursel Berberoglu Head of Department, Permanent Mission of Turkey to the UN, New York, 1 August 2007: http://www.un.org/ga/president/61/follow-up/climatechange/statements/statementTurkey.pdf.
[3] The COP is the supreme decision-making body of the Convention. All States that are Parties to the Convention are represented at the COP: http://unfccc.int/bodies/items/6241.php); UNFCCC, Report of the Conference of the Parties on its Seventh Session, held in Marrakesh from 29 October to 10 November 2001, FCCC/CP/2001/13, 26/CP.7.

became a party to the UNFCCC in 2004 it maintains an expectation that the Annexes will be re-categorised on the basis of state social and economic levels.[5] Turkey became a party to the Kyoto Protocol[6] in 2009, but is not yet subject to emission reduction or limitation obligations.

The above provides a brief outline of Turkey's problematic position in the global climate change regime. The following section considers the domestic legal framework for climate change actions in Turkey.

Turkish Climate Change Legal Framework

Turkish Climate Change Administration

In Turkey, the Ministry of Environment and Urbanization is responsible for climate change action at the administrative level. In 2011, the Cabinet adopted a new Decree on the organization and functions of the Ministry.[7] According to the Decree, the Ministry should take measures to combat global climate change and implement climate change plans and policies.[8] The Decree requires the General Directorate of Environmental Management, a division of the Ministry, to coordinate with other institutions in the implementation of climate change and ozone depletion plans and strategies.[9]

The Turkish government established the Climate Change Coordination Committee in 2010 for the purpose of enabling the wider participation of government agencies in the development and implementation of climate change measures.[10] In 2013, the Committee was reorganized and rebranded as the Climate Change and Air Management Cooperation Committee.[11] Most importantly, the 2013 restructure opened Committee participation to private organizations in addition to government agencies such as the Union of Chambers and Commodity Exchanges and the Industry and Business Association.[12] The Committee meets at least once a year. Its main purpose is to coordinate the implementation of climate

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[4] Even though the term is undefined, it may be interpreted that Turkey is in a position different from the other Annex I countries and follows the typical pattern of developing countries. For further information: UNFCCC, Technical Paper, FCCC/TP/2013/3, 30 May 2013.
[5] UNFCCC, Submission by Turkey on Work Stream 1 of ADP, 29 August 2013.
[6] 2303 UNTS 148.
[7] Decree no. 644, 29 June 2011, Official Gazette, n. 27984, 4 July 2011.
[8] Ibid Article 2.
[9] Ibid Article 8.
[10] Circular 2010/18, Official Gazette, n. 27676, 18 August 2010.
[11] Circular 2013/11, Official Gazette, n. 28788, 7 October 2013.
[12] Ibid.

change actions. The Committee may invite universities and other public entities to participate in meetings.

Turkish Climate Change Laws

Unfortunately, Turkish law contains no clear references to climate change. However, some existing laws can be interpreted in support of climate change actions. First of all, the *Constitution of Turkey* states that 'everyone has the right to live in a healthy, balanced environment'. It further provides that it is the duty of the State and citizens to improve the natural environment and prevent environmental pollution.[13]

Turkey's *Environment Law* is the nation's most important tool in terms of environmental protection.[14] The *Environment Law* was adopted in 1983 and amended in 2006. Despite the law being the most important in regards to environmental protection, only one provision refers directly to climate change. The provision concerns the State's right to approve climate change action budgets.[15] It is possible to apply other provisions to climate change actions. For example, article 3 states that sustainable development is a principle of Turkish law and that decision-makers should take environmental protection into account when making environmental decisions. Article 9 provides for biodiversity, wetland, and natural resource protection. While it does not specifically mention climate change, conservation measures might double as climate change actions. Although the *Environment Law* was amended in 2006 when Turkey was not a party to the Kyoto Protocol, it is clear that necessary references to climate change should be included in the *Environment Law*.

Climate Change and Energy

A 2007 UNFCCC report noted that Turkey had the lowest per capita primary energy consumption and the lowest per capita greenhouse gas emission rate of all Annex I countries.[16] In 2013, Turkey reported one of the highest global increases in greenhouse gas emissions. Recent data shows an increase of 118 percent in greenhouse gas emissions since 1990.[17] This reflects the 171 percent increase in Turkey's Gross Domestic Product

[13] Constitution of Turkey, Article 56.
[14] *Turkish Environment Law*, Law n. 2886, 11 August 1983.
[15] Ibid Article 17.
[16] UNFCCC, Report of the In-Depth Review of the First National Communication of Turkey, 3 December 2009, FCCC/IDR.1/TUR, para. 89.
[17] See, http://unfccc.int/files/inc/graphics/image/jpeg/total_incl_2013.jpg.

since 1990.[18] The increased emissions associated with economic growth would make it almost impossible for Turkey to meet Kyoto Protocol emission reduction obligations as measured against 1990 levels.

Energy is the main contributor to greenhouse gas emissions in Turkey.[19] The energy sector produces 71 percent of all of Turkish greenhouse gas emissions.[20] The demand for energy in Turkey has steadily increased in over the last 10 years with energy consumption during this time nearly doubling.[21] To cope with the demand, Turkey has become a huge importer of energy from neighboring countries. Indeed, more than half of all Turkish energy consumption is based on imported energy, the main import being natural gas.[22] Turkey's search for alternative sources of energy has led to investments in both nuclear and renewable energy.

Turkey began to liberalize the energy industry in the early 2000s with the introduction of the *Electricity Market Law* 2001. This law promoted private entities in the electricity market.[23] The 2013 amendments[24] allow private entities or persons to establish limited renewable energy facilities without a license if the power generation is less than one megawatt or production does not exceed consumption in a particular project.[25]

The *Law on Renewable Energy* 2005, as amended in 2011,[26] seeks to support the expansion of renewable energy sources for the purpose of providing safe and economical electricity and reducing greenhouse gas emissions. Specified renewable sources include hydraulic, wind, solar, geothermal, biomass, biomass gas, wave, tidal stream and other non-fossil energy sources.[27] The 2011 amendments raise the guaranteed prices of renewable energy for certificated holders and private companies'.[28] In addition, the amendments create incentives for renewable energy providers such as license, tax and manufacturing discounts

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[18] See, http://stats.oecd.org/index.aspx?queryid=558#.
[19] International Energy Agency, IEA Energy Statistics, Share of Total Primary Energy Supply in 2009, See, http://www.iea.org/stats/pdf_graphs/TRTPESPI.pdf.
[20] Turkish Statistical Institute Greenhouse Gas Emissions Inventory, 1990-2011. Available at: http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=13482 .
[21] See http://www.eie.gov.tr/document/elektrik_uretim_kaynaklar_2002_2012.pdf.
[22] International Energy Agency, 2011 Energy Indicators for Turkey, See: http://www.iea.org/statistics/statisticssearch/report/?&country=TURKEY&year=2011&product=Indicators.
[23] *Electricity Market Law*, Law n. 4628, 20 February 2001.
[24] *Electricity Market Law*, Law n. 6446, 14 March 2013.
[25] Ibid Article 14(1).
[26] Law on the Use of Renewable Energy Resources in Order to Generate Electricity, Law n. 5346, 18 May 2005, Amendments made in 8 January 2011.
[27] Ibid Article 2.
[28] Ibid Annex I.

and exemptions.[29] However, the *Law on Renewable Energy* limits the production of solar power to a total of 600 megawatts until 31 December 2013.[30]

The effectiveness of these laws is debatable. A matter of contention is that the increase in renewable energies is mostly due to an increase in hydroelectricity power.[31] The hydroelectricity controversy is discussed below.

Renewable Energy Projects and Environmental Impact Assessments in Turkey

Environmental Impact Assessments (EIAs) are directly linked to renewable energy production in Turkey. *Environment Law* article 10 states that 'institutions, agencies and establishments that can lead to environmental issues due to their planned activities will prepare an EIA'. EIAs must consider 'all impacts on the environment and the methods for eliminating…harmful impacts…'.[32]

Turkey adopted the *EIA Regulation* in 1993.[33] The *Regulation* has been revised five times with the last revision taking effect in October 2013.[34] The *Regulation* specifies projects as EIA required or not required, and then either EIA positive or negative.[35] Certain projects are listed as EIA required.[36] After an EIA is conducted the project documents are examined by the Ministry of Environment and Urbanization. The project is then deemed allowed (EIA positive) or not (EIA negative). For projects, the requirement for an EIA is determined on a case-by-case basis.[37] The case-by-case approach has caused much controversy over the last decade, particularly with regards to hydroelectric power plants. This is because the *Regulation* does not automatically require an EIA for hydroelectric power plants with less than 25 megawatt capacity.[38] Further, the case-by-case approach fails to take into account the cumulative impact of other projects in the same river basin and thus fails to consider the total harm that may be caused to ecosystems by many small-sized power plants.

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[29] Ibid Article 6 (B).
[30] Ibid Article 6 (C).
[31] Turkish Electricity Transmission Corporation, Annual Report: 2012, p. 13. Available at: http://www.teias.gov.tr/FaaliyetRaporlari/Faaliyet2012/TEIASfaayilet2012INGLIZCE.pdf
[32] Turkish Environment Law, Article 10.
[33] Official Gazette, Regulation n. 21489, 7 February 1993.
[34] Official Gazette, Regulation n. 28784, 3 October 2013.
[35] Ibid Article 5.
[36] Ibid Annex I.
[37] Ibid Annex II.
[38] Ibid Annex II (46).

Since the first *Regulation* came into force, the EIA process has been heavily criticized by the public due to its apparent ineffectiveness. According to Ministry of Environment and Urbanization data, only 32 EIA reports were rejected between 1993 and 2012. Just as concerning is the fact that 39,649 projects out of 42,994 were not required to undertake an EIA.[39] One reason for the latter fact may be that the *Regulation* exempts projects started before production or operation before 1993 from the EIA requirement.[40] Similar exemptions apply to public projects that entered the tender, production or operation phase before 1997.[41] Many developers attempt to use these provisions to avoid EIA requirements. However, this has created controversy in national courts and many judicial decisions contradict the Ministry's pro-development approach.[42]

Climate Change Policy

Turkey's *National Climate Action Plan*[43] sets different targets for different sectors such as energy, transportation, industry, waste, agriculture and forestry. The Plan does not stipulate any national emission reduction goals and all targets are non-binding. Some of the most noted targets include:

- increased use of renewables in the energy sector
- adoption of new laws regarding energy efficiency
- promotion of recycling
- establishment of a Turkish Carbon Market by 2015
- 100 percent increase in energy efficiency incentives by 2015
- decrease the increase rate of GHG emissions originating from vegetal and animal production
- integration of adaptation to climate change into national development plans, programs and policies
- making legal arrangements and building capacity to increase use of alternative fuels and clean vehicles until 2023
- 18 percent reduction in highway passenger transport by 2023

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[39] See, http://www.csb.gov.tr/db/ced/webicerik/webicerik557.pdf.
[40] Supra n 29, Provisional Article 3.
[41] Ibid Provisional Article 2.
[42] Some examples: Council of State; Plenary Session of the Administrative Chamber, Case n. 2008/1393, 7 May 2009 and Case n. 2008/1490, 7 May 2009, Tenth Chamber, Case n. 2002/2180, Fourteenth Chamber, Case n. 2011/15596, Sixth Chamber, Case n. 2010/3901.
[43] Ministry of Environment and Urbanization, *National Climate Action Plan*, 2011-2023. For further information, See: http://www.iklim.cob.gov.tr/iklim/Files/IDEP/İDEP_ENG.pdf.

- 20 percent decrease in deforestation by 2023
- 15 percent increase in carbon stocks by reforestation by 2023[44]

Conclusion

Turkey's climate change framework is problematic, both globally and domestically. A major concern is that Turkey does not have any national reduction targets. Although reduction targets based on 1990 levels would be difficult to achieve, any target would be better than none. Another concern is the lack of specific climate change legislation. The increasing demand for energy in Turkey requires a sustainable energy management strategy. Such a strategy is thwarted by the limit on solar energy production and an irrational focus on hydroelectricity. The controversy surrounding hydroelectricity production in Turkey might be somewhat alleviated by the adoption of more transparent and accountable EIA decision-making procedure.

[44] Ibid pp.15-19.

COUNTRY REPORT: UKRAINE

Economic and Legal Instruments for Reducing the Negative Environmental Impacts of Shale Gas Development in the Ukraine

SVITLANA ROMANKO*

For environmental law, 2013 was a year of theoretical and practical debate in Ukraine. Discussion focused on shale gas development and the distribution and use of mineral resources rights. The Ukrainian government signed two Production Sharing Agreements for shale gas projects. These Agreements exempt investors from state taxes and fail to provide local governments with sufficient resources to mitigate probable environmental issues and consequences.

On the one hand, shale gas development has the potential to attract investors and help Ukraine secure gas independence from Russia. On the other, there are a number of potential weaknesses in the current arangements. This report addresses some of these beginning with the allocation of revenues raised from fracking activities versus the allocation of responsibility for environmental protection.

The legal basis for Ukrainian local government includes the *Constitution*, the *Budget Code* and *Law on Local Self-Government*. These laws task local governments with, among other things, responsibility for the local environment and regional development. Local governments are given a budget to help them fulfill these responsibilities and act with economic independence. The local budget allows the local self-government body to develop infrastructure and expand the economic potential of the region. Ultimately, the local budget allows the local government to fulfill its legal duties and in doing so, maintain the trust of the local people.

The *Tax Code* article 335.2 requires investors who are party to a production sharing agreement to pay value added tax, income tax and fees for the use of subsoil in mineral resource production.[1] The *Budget Code* requires all value added and income taxes to be

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transferred to the state budget. Up to 50 percent of subsoil fees can be transferred to the local budget. The state budget also receives:

- 50 percent of duties for the special use of water (except duties for the use of water bodies of local importance)
- 50 percent of fees for the use of subsoil in mineral resource production (but 100 percent of fees for the use of subsoil off the continental shelf or in the exclusive maritime economic zone)
- 100 percent of permit fees to use mineral resources, and 100 percent of funds from the sale of such permits

A *Law for the State Budget* is adopted each year.[2] This law specifies how taxes and duties will be distributed between state and local budgets in the following year. For example, the state budget law for 2011-2012 specified that 20 percent of all environment contamination taxes are to go to the Oblast councils and 50 percent to the city and village councils. These percentages are to be significantly reduced in later years. In 2013 Oblast councils are to receive 13.5 percent and city, settlement and village councils 33.5 percent. From 2014, Oblast, city, settlement and village councils must share 35 percent of contamination taxes (article 69 of the *Budget Code*). Percentages are not determined by need or by where contamination has occurred. Set percentages are dispersed equally between all local governments. This means that some local governments may not have the necessary funds to pay for social, economic, environmental and infrastructure issues arising as a result of shale gas development.

There are two ways to improve this situation. The first is to adopt a National Program of shale gas development in Western Ukraine. If adopted, it would make this issue high priority, and provide an avenue for state budget funding to be channeled to Local Councils. The second way is through the "targeted and voluntary contributions of enterprises, institutions, organizations and citizens in the local environmental funds". These contributions are envisaged by article 69 of the *Budget Code*. Investments in local communities could minimize the possibility of social protests. Contributions should be made directly into the local budget to ensure that local communities get the funds. If the money is paid to the state budget, there is high probability it will be used for other purposes. Contributors should also require a publicly-released accounting of how the money was spent.

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[1] Tax Code of Ukraine // Official Bulletin of Ukraine. - 10.12.2010. - № 92, Vol.1, p. 9, art. 3248
[2] Budget Code of Ukraine // Information of Verkhovna Rada of Ukraine. - 24.12.2010. - № 50, p. 1778, art. 572; The Law for the State Budget // Voice of Ukraine : Official publication. – 1012. – Vol.193.

As a conclusion, excessive centralization of budgetary resources, inadequate methods of distribution, insufficient local budgets and low efficiency in intergovernmental transfers substantially inhibit the ability of local governments to provide quality services and improve social and economic outcomes for the Ukrainian people. The main problems faced by local authorities in discharging their functions include:

- inadequate local government funding due to excessive centralization of revenue
- depletion of local funds due to the heavy financial costs of providing social services
- a lack of flexibility in how funds may be spent due to a complex and confusing reporting system

To address these problems, local budgets should be allowed to be more independent and self-financing. Increasing the local government share of fixed income will encourage local authorities to find sources to replenish the tax-base and in doing so, increase their own resources. It is necessary to strengthen the role of local taxes and fees in the formation of local budgets. This will require the development and implementation of regional tax policy. The policy must be based on a clear division of state, territory and local legislative powers, responsibilities and finances. In the process of extraction and use of natural resources, the affected local council should be able to ensure the environmental, social and financial interests of the local community.

Similarly, while Article 69 of the *Budget Code* provides for the division of fines for damage caused by violations of Environmental Protection law, the divisions do not match the harm caused. Instead 50 percent goes to local, settlement and city budgets, 20 percent goes to the Oblast budgets, and the remaining 30 per cent goes to the State budget. However, these amounts go to all local governments regardless of whether the violation occurred within their jurisdiction. Moreover, the fines are arbitrary and do not correspond to what is actually needed to mitigate the effects of shale gas development. A more rational approach would be to highlight some areas that need protection (for example, the territories with shale gas development) and then direct most of the money to those local budgets for the period of that activity. The legal basis for that reform could be grounded in the adoption of a National Program of shale gas development by the Cabinet of Ministers. This would mean that the territories affected by shale gas development are being observed by the state, and the state could offer financial help where necessary (for example, subsidies).

A second potential weakness relates to the obligations on producers to meet certain conditions contained in the *Law on Production Sharing Agreements.*[3] For example, the agreement must require the investor to return the subsoil areas, and any lands granted for purposes related to the use of subsoil, after the termination or completion of certain phases of work. The agreement must also require investors to work towards efficient and integrated use and protection of mineral resources and the environment. In accordance with Part 5 of Article 8, agreements must stipulate the duties of investors in prioritizing the national interest. For example, agreements must require investors to:

- show a preference for products, goods, works, services and other material of Ukrainian origin
- utilize a hiring preference for Ukraine citizens
- provide adequate training for all levels of management

These provisions can deliver protections and benefits for local populations. However, an issue arises when the Cabinet of Ministers is party to an agreement and all the basic functions of coordination and enforcement are assigned to central authorities. In these instances opportunities for local government participation in these agreements are minimal and so too then may be the opportunity to benefit from these provisions. This goes against the Ukrainian history of making so-called "social contracts" or "agreements on social partnership". Such agreements may be concluded between public or local authorities on the one hand, and legal entities or individual entrepreneurs on the other. Legal entities may undertake, for example, to ensure that local residents have priority in hiring or that sufficient funds are allocated for local social and economic development (for example for the construction of public roads or development of social infrastructure). Local government administrations should make more use of these agreements rather than leaving it to authorities from the central government, particularly as they, the local government authorities are in a better position to understand the needs of the area and local population than central government authorities.

A third potential weakness lies in addressing the significant adverse ecological effects associated with shale gas activities. Here the proper settlement of investor environmental obligations is important. In production sharing agreements, specific environmental commitments and clear sanctions for their failure ought to be prescribed. There is potential for this under the *Law on Oil and Gas* which states that an investor should conclude an

[3] Law on Production Sharing Agreement // Official Bulletin of Ukraine/ - 22.10.1999. – Vol. 40. p. 2.

agreement about use conditions with the State Service of Geology and Mineral Resources.[4] This agreement becomes an inalienable part of the special permit for mineral resource use. The agreement should include all technical, technological, organizational, financial, economic, social and environmental obligations.[5] These agreements allow the state to specify the environmental commitments of the subject-subsoil users. However, a detailed analysis of some existing use condition agreements leads to the conclusion that they only include the general investor responsibilities already required in the *Code of Ukraine on Mineral Resources*. Use of condition agreements would benefit from the involvement of local government authorities. Local involvement in structuring these agreements would provide more detailed investor obligations to local communities, and mechanisms for implementation and oversight of environmental and social programs.

[4] Article10 of Resolution of the Cabinet of Ministers "Procedure for special permits for mineral resources use" 05/30/2011.
[5] The definition of the agreement about the use conditions is in Articles 1, 28 of the Law on Oil and Gas.

COUNTRY REPORT: UNITED KINGDOM

OPI OUTHWAITE*

A number of separate but related threads have, over the past year, drawn attention to questions about accountability, transparency and accessibility of environmental law in the UK. This country report on the UK provides a summary of some of these issues focusing on: changes to judicial review procedures, complaints about the failure of the UK government to fulfil its obligations under *the Aarhus Convention*[1] and, more generally, some of the assessments being carried out on the state and future of UK environmental law.

Judicial Review Procedures and Access to Environmental Justice

The 2011 edition of this country report discussed a report by the Aarhus Convention Compliance Committee (ACCC) regarding alleged non-compliance by the UK with provisions of the Aarhus Convention, in particular Article 9 (access to justice). The complainants, ClientEarth, the Marine Conservation Society and an individual; Robert Lattimer, argued that the applicable judicial review procedures precluded their challenge of a licence allowing the disposal and protective capping of dredge materials from Port Tyne to an existing offshore disposal site.[2]

It was noted in that update that access to environmental justice is central to the attainment of the precautionary principle and sustainable decision making. In the UK, judicial review is one of the most significant means by which governmental decision making can be challenged and scrutinised. It is, or can be, a crucial mechanism for ensuring that environmental legislation and objectives are respected and is one of the key tools by which environmental justice can be pursued.

The ACCC found in that case that by failing to provide defined timeframes for judicial review applications and also failing to ensure that costs were not prohibitively expensive, the UK

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[1] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25th June 1998 2161 UNTS 447.
[2] Bates, Rebecca, (2011), 'Country Report: United Kingdom', *IUCN Academy of Environmental Law e-Journal*, 2011: 1.

had breached its obligation to provide 'adequate and effective remedies, including injunctive relief as appropriate, and that these be fair, equitable, timely and not prohibitively expensive' under Art 9(4). The UK's arrangements for judicial review led to further breaches of Art 9(3) and (5).[3]

Recommendations were made to the effect that the UK overcome these barriers and create a clear and transparent framework. The government response that followed asserted that the Civil Procedure Rules (CPRs) were already being addressed and that those reforms would address some of the issues identified by the ACCC.[4] It also contended that the requirement to file applications 'promptly' was not in breach of Art 9 (4) and was not inherently unfair.

In 2013 further developments to securing access to justice in environmental law have been seen both in terms of the Aarhus Convention and in relation to Judicial Review.

Changes to the Civil Procedure Rules and Questions of Cost

As per the Department for Environment, Food & Rural Affairs' (DEFRA) response, a number of reforms to judicial review have now been introduced. New codified rules on Protective Costs Orders – cost capping orders - took effect as of 1st April 2013.[5] These arrangements apply where the applicant, in the 'letter before claim' identifies the claim as falling within the scope of *the Aarhus Convention*.[6] The new rules mean that challenges can be brought without fear of indeterminate costs because rather than an unsuccessful applicant being

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[3] Ibid.

[4] Ibid and see *UK Response to Draft Compliance Committee Findings in Cases 2008/27 and 2008/27*, dated 22 September 2010 available at http://www.unece.org/env/pp/compliance/Compliancecommittee/27TableUK.html. The Sullivan Report addressed access to environmental justice specifically. Later, the Jackson Report addressed the cost of civil litigation more widely, including recommendations for cost shifting in judicial review to ensure compliance with the Aarhus Convention. See, respectively, Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (May 2008) [the *Sullivan Report]*; Right Honourable Lord Justice Jackson (2010) *Review of Civil Litigation Costs: Final Report [the Jackson Report].*

[5] *The Civil Procedure (Amendment) Rules 2013 3.19.—(1) a costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.*

[6] Rule 45.41 provides:
'(1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.
(2) 'In this Section, "Aarhus Convention claim" means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.'

ordered to pay the costs of the successful party, upper limits to those costs will now apply. The new rules apply a limit of £5000 to individuals or £10000 to organisations.[7] These reforms change the position of the parties with the aim of ensuring that the procedure is not 'prohibitively expensive'. In principle, this should improve access to environmental justice by reducing the potential financial barriers to applicants. Although rules on PCOs address an important criticism of the ACCC, a number of issues remain with respect to the UK's compliance with *the Aarhus Convention*.

Costs recoverable from an unsuccessful defendant are now capped at £35,000 (the 'reciprocal cap' arrangement).[8] This again provides a level of certainty and protection (for the other party) from awards that could be financially much more significant, addressing another problem with costs. Whether this achieves the aims of the Convention is not as straight forward as it may seem however. In her opinion regarding Commission v. UK,[9] Attorney General Kokott was critical of reciprocal caps:

> *The Commission criticises the fact that in certain cases protective costs orders may be structured on a reciprocal basis such that, in addition to capping the applicant's risk in relation to the costs of the opposing party in the event that he is unsuccessful, they also cap the risk for the opposing party, in the event that the action is successful, of an order to pay the applicant's costs.*[10]
>
> *...Either the applicant's lawyers agree to accept this capped level of fees or, in the event that the applicant's action is successful, he must top-up these fees at his own expense. Such additional costs may also have a dissuasive effect. Consequently, reciprocal protective costs orders have the potential to undermine the objective of costs protection."*[11]

AG Kokott noted that in judicial review cases – as distinguished from those involving only private parties – one-way protective costs (where only the upper limit of exposure for the applicant is capped) could be an initial protective step towards equality of arms. A reciprocal arrangement, on the other hand, could exploit a defendant authority's advantage: 'the Order could constitute an incentive for the Public Body to widen unnecessarily the subject-matter

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[7] Rule 45.43 and Practice Direction 45, Section VII 5.1.
[8] Practice Direction 45, Section VII 5.2.
[9] Part of a series of decisions concerning judicial review proceedings, cost orders and their compatibility with Art 9 of the Convention. See *Edwards v Environment Agency* [2008] UKHL 22; *Edwards v Environment Agency (No 2)* (Case C-260/11) [2013] 1 WLR 2914; *Commission of the European Communities v Ireland* (Case C-427/07) [2010] Env LR 123; Opinion of Advocate General Kokott delivered on 12 September 2013, Case C-530/11: *European Commission* v *United Kingdom of Great Britain and Northern Ireland; R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents) (No 2)*, [2013] UKSC 78.
[10] Opinion of Advocate General Kokott, 12 September 201, supra, n 9 at 66.
[11] Ibid at para 70.

of the dispute such as to increase the applicant's own legal costs to the point that they exceed considerably the level at which costs have been capped'.[12]

The consequence of this position was that, in the opinion of the Attorney General, the UK failed to fulfil its obligations under Articles 3(7) and 4(4) [of *Directive 2003/35/EC*][13] regarding the application of reciprocal costs protection. Although the opinion considered the rules pre-April 2013, as noted, arrangements for a reciprocal cap apply in the revised rules. This therefore continues to be a cause for concern in terms of costs and access to environmental justice.

The new statutory rules on costs – though not without critics, including environmental lawyers – clearly do limit the exposure of applicants to very high and uncertain costs and so address some of the problems identified by the ACCC.[14] The rules on PCOs have however been introduced within a wider political landscape which has as an objective the 'streamlining' of judicial review and a reduction of the impact of JR including on development and in relation to planning applications.[15] Some further specific changes to the CPRs are relevant to this discussion.[16] Under rule 54.5 the time limit for filing a claim has been reduced from three months to six weeks where the application relates to 'the planning acts'. Since it pertains to planning rules, this will clearly apply to many applications with an environmental dimension. The opportunity to have an application heard orally has been restricted. Where an application for permission to bring a judicial review claim is refused and is considered by the court to be "totally without merit" the claimant may not request the decision be reconsidered at a hearing.[17] A small increase in application fees was also applied.

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[12] AG Kokott, supra, n 9 at para 79.
[13] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice. Council Directives 85/337/EEC and 96/61/EC. Art 3(7) and Art 4(4) include amendments to existing Directives to include access to a review procedure, which is fair equitable, timely and not prohibitively expensive.
[14] See for instance Copithorne, Adrienne, 'Update: Environment: Amendments to the civil procedure rules and the Aarhus Convention', *Solicitors Journal, Vol* 157 no 29 23-07-13.
[15] The full text of the speech is available through the CBI website: http://www.cbi.org.uk/media/1849566/prime_minister_speech_to_cbi_annual_conference_2012.pdf Prime Minister Cameron's speech, was also widely reported in the news media for example, Wintour P and Bowcott O, 'David Cameron plans broad clampdown on judicial review rights', *The Guardian* (London) 19 November 2012 available at http://www.theguardian.com/politics/2012/nov/19/david-cameron-clampdown-judicial-review .
[16] For a more in-depth analysis see Stech, Radoslaw (2013) 'A Carrot and Stick Approach? An Analysis of the UK Government's Proposals on Environmental Judicial Review' *Environmental Law Review* 15 2 (139).
[17] Rule 54.12.

On the one hand, these changes were justified as being necessary to speed up the judicial review process, increasing its effectiveness, and to reduce 'time-wasters' and weak claims.[18] On the other hand it might be argued that access to environmental justice has been limited in other ways, on the basis of the changes described. The overall impact on the number and nature of claims remains to be seen. A key issue here will be whether the impact of the reforms when taken as a whole are seen to serve as a further barrier to environmental justice. It will be interesting to see whether new complaints about the compatibility of the judicial review process with the *Aarhus Convention* are made.

DEFRA is due to publish its report on the UK's implementation of the *Aarhus Convention* for 2013 in December 2013. A consultation ran from September – October 2013.[19] Further reform of Judicial Review is also being considered, in light of the government's position that its use has expanded to too great an extent and that the system is open to abuse.[20] Three particular issues are noted as the focus of the proposals: (i) the impact of judicial review on economic recovery and growth, (ii) the inappropriate use of judicial review as a campaign tactic, and (iii) the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.[21] Of particular relevance here are plans to further streamline planning challenges.[22] These proposals build on arrangements put in place in 2013 to enable planning challenges to be 'fast tracked', in order to avoid delays and uncertainty for major infrastructure projects. The proposals suggest taking these developments further by introducing a Specialist Planning Chamber in the Upper Tribunal. The Chamber would hear statutory appeals and judicial review challenges related to planning and would be overseen by specialist planning judges. Consideration of whether further restrictions on the ability of local authorities to challenge decisions on nationally significant planning projects are also put forward as well as suggestions to reduce State funding for statutory challenges to decisions under particular sections of *the Town and Country Planning Act 1990* (in this case a statutory appeal rather than judicial review). The proposals also raise government concerns about the test for standing, noting that 'judicial review should not be used to undermine this [public interest] role by putting cases before the courts from individuals with no direct interest in the outcome'. In previous cases, NGOs and other organisations have been found to have standing even though its members were not

[18] See Prime Minister Cameron, supra n 15.
[19] See https://www.gov.uk/government/consultations/aarhus-convention-national-implementation-report.
[20] See Ministry of Justice, Judicial Review Proposals for further reform, Cm 8703, September 2013 available at http://www.official-documents.gov.uk/document/cm87/8703/8703.pdf.
[21] Ibid at 6-7.
[22] Ministry of Justice at section 3, supra, n 20.

directly affected by the decision in question.[23] However, the implications of such restrictions on Aarhus compliance are expressly recognised:

> *'The Government accepts that the requirements of EU law and the Aarhus Convention would mean that cases which raised environmental issues would need to be approached differently. NGOs which campaign for environmental protection are guaranteed rights of standing under the Convention and EU law, even if they are not directly affected.'*[24]

Public Participation

Judicial review procedures and the issue of costs are not the only areas in which the UK has recently been found to be lacking with respect to compliance with *the Aarhus Convention*. The ACCC has recently considered two complaints about the alleged failure of the UK to meet its obligations under the Convention.

The draft findings with regard to communication ACCC/C/2012/68 were adopted in September 2013.[25] The Communication was made by an individual who argued that the UK and EU had failed to comply with their obligations in relation to UK's renewable energy plan and two specific projects, Carriag Gheal wind farm and the West Loch Awe Timber Haul Route. The access route is close to a nesting site of Golden Eagles, a protected species. The communicant was a Community Councillor in the Avich and Kilchrenan area of Argyll, where the two projects have been undertaken.

She argued that, in relation to the projects and implementation of the plan, the UK had failed to provide information, contrary to Arts 4 and 5 of the Convention; that effective public participation was effectively impeded by lack of transparency, in breach of Arts 6 and 7; that there were no adequate procedures to allow members of the public to challenge the decisions contrary to Art 9(1) and (2) and that the costs of engaging with those procedures were prohibitively high contrary to Art 9(4) (para 2). The ACCC did not find a failure to comply with respect to most issues but they did find a failure to comply with Article 7 (Public Participation Concerning Plans, Programmes and Policies Relating to the Environment).

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[23] Including landmark cases such as *Ex p World Development Movement Ltd* [1995] 1 WLR 386 (as recognised in the Ministry of Justice report).
[24] Ministry of Justice at para 81, supra, n 20.
[25] Draft findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the United Kingdom and the European Union, Adopted by the Compliance Committee on 24 September 2013.

EU law required Member States to increase the use of energy from renewable sources and requires them to develop *National Renewable Energy Plans (NREAPs).*[26] *The NREAP* was based on *the UK Renewable Energy Strategy (RES)*. It outlines the objectives and implementation mechanism in the renewable action plans in the different parts of the UK, and the measures that the UK is taking to meet the renewables targets set by the Directive.[27]

The communicant alleged that the consultation prior to adoption of *the NREAP* did not meet the standards required by the Convention because (a) it was subject to a 'fast-track' procedure which precluded effective and open participation and (b) the authorities had failed to take due account of public participation. The UK contended that *the NREAP* does not set the framework for the determination of consent applications for renewable energy projects and an SEA was not required but that anyway, *the NREAP* used content and analysis from the RES which had involved consultation. The ACCC referred to ACCC/10/54 where it was held that an NREAP

> *'constitutes a plan or programme relating to the environment subject to Article 7 of the Convention because it sets the framework for activities by which Ireland [in that case] aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions.'*[28] *Having determined that the complaint could be considered as a communication*[29] *the ACCC determined that NREAPs are plans or programmes under Article 7 of the Convention and are therefore subject to public participation. It concluded that 'the fact that the UK's Renewable Energy Strategy, which informed the NREAP, was subject to public participation does not affect this conclusion, given their different legal status and functions in the EU and UK legal framework respectively.'*[30]

Since *the NREAP* was not subject to public participation, the UK had failed to comply with Article 7. The ACCC recommended that public participation be incorporated.

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[26] See para 16, ibid.
[27] See para 30, ibid.
[28] Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, Adopted by the Compliance Committee on 29 June 20121 at para 75.
[29] Based on the decision that since Community Councils in Scotland did not exercise any regulatory decision-making function and were essentially voluntary bodies and therefore qualified as 'the public' (see paras 81-83, ibid.).
[30] Para 100, supra, n 26.

Although suggestions that these findings question the legality of many wind farm developments that had proceeded under the NREAP[31] are probably stretching their likely implications, the report is significant in highlighting another area in which the UK is seen to be failing in its requirement to provide access to environmental justice. Public participation is one of the foundations of the Convention and a failure to enable such participation in relation to developments which will have clear and significant relevance to local communities is problematic. The complaint does also highlight once again the complexities of environmental law, where in this case conservation and renewable energy concerns are in some sense competing.

Additionally, ACCC/C/10/45[32] involved a further complaint about a number of alleged failures of the UK to comply with the Convention, including with regard to Art 7. In this case the issue concerned Local Investment Plans (LIP) and Local Development Plans (LDP). In this instance the ACCC was more equivocal in its conclusions, stating that 'LIPs, and possibly also LSPs or LEPs, may well be part of the decision on plans or programmes within the purview of Article 7 of the Convention.' This was because, as it is explained in the findings, there is no statutory requirement for authorities to prepare LIPs and LIPs are not part of a statutory development plan. Although there is a 'growing trend' for their use, this is an area in which authorities have some discretion about whether to engage stakeholders.[33] This leaves something of a grey area whereby LDPs and LIPs are widely used including for issues that may have considerable environmental implications but unless they are formalised as a statutory requirement they might not be subject to requirements for public participation.

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[31] For instance, Pagano, Margareta, Tuesday 27 August 2013, 'UN ruling puts future of UK wind farms in jeopardy', London: *The Independant*, http://www.independent.co.uk/news/uk/politics/exclusive-un-ruling-puts-future-of-uk-wind-farms-in-jeopardy-8786831.html.

[32] Findings and recommendations with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, Adopted by the Compliance Committee on 28 June 2013.

[33] Para 79, ibid. The findings continue, at para 80
'Therefore, in order to ensure investment flow for future projects, there is a risk that in preparing the LIPs, authorities consult only with potential developers and do not involve other members of the public. In addition, although LIPs are not material to the actual planning decisions and they *may* be included in the LDF documentation, they seem to be evolving into a de facto element of planning. It is thus highly unlikely that LIPs have no effect at all on subsequent planning decisions, if consultations have already been carried out with prospective investors.'

Assessing UK Environmental Law

These issues and other developments in UK environmental law are taking place against the backdrop of a period of legislative reflection and review which, overall, recognises a need to improve coherence and accessibility.

The UK Environmental Law Association published its assessment of UK environmental law in May 2012. The report, '*The State of UK Environmental Law in 2011-2012: Is there a case for legislative reform?*' highlighted problems relating to coherence, integration and transparency.[34] Particular concerns included the complex and often fragmented nature of environmental law, leading to a lack of clarity in environmental regulation including: problems with overlapping legislation and lack of certainty about the relationship between particular statutory regimes; the implications of frequent modifications and amendments and lack of consolidation; problems with accessibility and transparency, not only because of the aforementioned issues but also arising from problematic approaches to transposition of EU legislation; and a lack of supporting infrastructure to enable access to up to date information, including through DEFRA's website. Accountability was also a problem with respect to the extensive use of secondary legislation and guidance.

Two major government legislative exercises have also been taking place that will shape the direction of environmental law and which also tie in with the themes of the UKELA assessment. One is the 'red tape challenge' which ran from April 2011 – April 2013 seeking to reduce regulatory burdens and 'cut red tape'.[35] All aspects of the environment have been included in the challenge including air quality, biodiversity and land management, energy labelling and sustainable products, industrial emissions and carbon reductions, noise and nuisance, waste, environmental permits, waste and damage, chemicals and other regulations including those relating to agriculture and animal and plant health. One of the outcomes to date is a proposal for simplified wildlife guidance. This is the first in a list of several environmental areas in which 'smarter guidance' will be pursued.[36]

The other is the 'Balance of EU Competencies' review. The review considers the boundaries of domestic and EU legislative competence and in the case of the environment and climate

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[34] *The State of UK Environmental Law in 2011-2012: Is there a case for legislative reform?* UK Environmental Law Association, King's College London and Cardiff University ESRC Centre for Business Relationships, Accountability, Sustainability & Society, May 2012.
[35] http://www.redtapechallenge.cabinetoffice.gov.uk/about/.
[36] This programme runs from May 2013 – spring 2014, see http://guidanceanddata.defra.gov.uk/smarter-guidance/.

change theme recognises also the tension that can arise in balancing protection of natural resources and economic development. The task of the review is to

> *'provide an analysis of what membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. We have not been tasked to produce specific recommendations or to look at alternative models for the UK"s overall relationship with the EU'.*

A call for evidence in relation to environment and climate change was issued in May 2013.[37] A very large majority of UK environmental law stems from EU requirements or directly transposes them and shifts in the balance of competencies could potentially be very influential in shaping future developments in this field.

There is broad agreement on the need to address the problem of complexity, coherence and accessibility in UK environmental law. Disagreement is likely to arise in terms of the outcomes that should follow this assessment. The development of clearer, consolidated legislation and guidance is to be welcomed. Changes which seek to pursue planning and development or other economic objectives at the expense of environmental protection may not be. The balance that will be struck here remains to be seen.

[37] https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review.

COUNTRY REPORT: UNITED STATES

With Gridlock in Congress, Agencies and Courts Take Center Stage

ROBERT V. PERCIVAL*

Introduction

With the U.S. Congress sharply divided on environmental issues, most significant environmental developments in the United States in 2013 occurred in the agencies and the courts. Reinforced by the release of President Barack Obama's Climate Action Plan in June 2013, the U.S. Environmental Protection Agency (EPA) has moved aggressively to regulate emissions of greenhouse gases (GHGs) using its existing regulatory authority under *the Clean Air Act* [74 Fed. Reg. 66,496 (2009); 75 Fed. Reg. 17,004 (2010); 75 Fed. Reg. 25,324 (2010); 75 Fed. Reg. 31,514 (2010)]. These and other regulatory actions by EPA have been challenged by industry groups in the courts. With a few exceptions the judiciary has upheld EPA's actions to strengthen U.S. environmental regulation. However, the U.S. Supreme Court itself remains sharply divided in environmental cases with Justice Anthony Kennedy usually serving as the deciding swing vote with four of the other eight Justices highly skeptical of environmental regulation and four generally supportive of it.

Climate Change and Air Pollution

President Obama's Climate Action Plan

In June 2013, President Obama announced a comprehensive *Climate Action Plan* that concentrates on actions the executive branch can take without new legislation from Congress. Noting that U.S. carbon emissions in 2012 fell to the lowest level in two decades, the Plan promises to build on this progress. The Plan directs the EPA Administrator to expedite the issuance of strict standards to control carbon emissions from new and existing power plants. It pledges to tighten fuel economy standards and to improve energy efficiency

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in American homes and businesses. To promote the goal of doubling electricity generation from renewable sources by 2020, the Plan instructs the Secretary of Interior to issue permits for an additional 10 gigawatts of renewable energy production on public lands by 2020. The Plan also seeks to prepare the U.S. to adapt to the impacts of climate change by improving the resiliency of energy infrastructure, conserving land and water resources, managing drought, reducing wildfires, and preparing for floods. It promises that the U.S. will provide leadership in international efforts to address climate change by promoting free trade in clean energy technologies and a worldwide transition to cleaner sources of energy.

EPA Regulation of GHG Emissions – Supreme Court Agrees to Partial Review

On September 20, 2013, the EPA proposed new source performance standards (NSPSs) for new fossil-fueled powerplants that are widely viewed as precluding the construction of new coal-fired powerplants unless they employ expensive carbon capture and storage technology. The EPA is also preparing to regulate existing sources of greenhouse gas emissions pursuant to §111(d) of *the Clean Air Act*, which allows the agency to require states to regulate a pollutant for which it has established an NSPS if it is not already regulated as a criteria air pollutant with a national ambient air quality standard (NAAQS) or as a hazardous air pollutant subject to a national emissions standard for hazardous air pollutants (NESHAP).

On October 15, 2013 the U.S. Supreme Court announced that it will review one portion of the D.C. Circuit's June 2012 decision that upheld EPA's initial regulation of emissions of GHGs. The Court limited its review to a single question:

> *"Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."*

This means that the Court will not review EPA's crucial finding that emissions of GHGs endanger public health or welfare or its regulation of mobile sources under the Clean Air Act. The focus in the Supreme Court instead will be on whether EPA can use the prevention of significant deterioration (PSD) permit program to regulate new sources of greenhouse gas emissions. The Court has set the date for the oral argument in this case for February 24, 2014. A decision from the Court is expected by the end of June 2014.

Constitutionality of State Actions to Control Greenhouse Gas Emissions

In *Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013)*, a divided panel of the U.S. Court of Appeals for the Ninth Circuit rejected a constitutional attack on California's ambitious effort to reduce carbon emissions in the state. The court found that California's Low Carbon Fuel Standard (LCFS), which requires a ten percent reduction in the carbon intensity of fuels used in the state, did not violate the dormant commerce clause. Even though the LCFS used the location from which fuel was transported as one factor in calculating lifecycle carbon intensity of fuels, the court found that the legislation was not facially discriminatory against interstate commerce because the location where fuels originate is only one factor that is considered and it is considered properly with respect to location's impact on each fuel's carbon footprint. The court found that the law had no protectionist purpose and that it disadvantaged California corn ethanol producers because they had to transport the corn they used into the state while Brazilian ethanol producers were advantaged because their products were efficiently shipped to California by sea even though they traveled greater distances.

The Ninth Circuit panel also rejected the notion that the LCFS tries to control extraterritorial conduct in a manner that violates the dormant commerce clause.

> *"The Commerce Clause does not protect Plaintiffs' ability to make others pay for the hidden harms of their products merely because those products are shipped across state lines. The Fuel Standard has incidental effects on interstate commerce, but it does not control conduct wholly outside the state."*

The court held that §211(c)(4)(B) of *the Clean Air Act*, which waives for California the express preemption provisions of the Act, did not insulate the state from liability if it otherwise violated the dormant commerce clause. Having rejected the facial discrimination claim, the court remanded the case back to the lower court to assess whether the law unduly burdened interstate commerce under the *Pike v. Bruce Church* test. The dissenting judge would have held that the law was facially discriminatory because it used location as one factor in calculating carbon intensity.

The Role of Science in Revising Air Quality Standards – the Ozone NAAQS

On July 23, 2013, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld EPA's revised primary national ambient air quality standard (NAAQS) for ozone. Primary NAAQS are required by law to be set at a level "requisite to protect the public health" with "an adequate margin of safety." In Mississippi v. EPA, 723 F.3d 246 (D.C. Cir. 2013), the court rejected industry claims that it should not have replaced the old 8-hour primary standard of 0.08 ppm with the lower standard of 0.075 ppm that it promulgated. It also rejected arguments by environmental groups and state governments that EPA should have accepted the lower level of 0.070 ppm recommended by its Clean Air Scientific Advisory Committee (CASAC), instead of the 0.075 ppm standard it promulgated.

The court explained that:

> *"Although CASAC stated that 'overwhelming scientific evidence' supported its recommendation that the standard be set no higher than 0.070 ppm, it never explained whether this proposal was based on its scientific judgment that adverse health effects would occur at that level or instead based on its more qualitative judgment that the range it proposed would be appropriately protective of human health with an adequate margin of safety."*

The court stated that if CASAC had concluded that adverse health effects were like to occur at the 0.070 level, then EPA would have been required "to explain why it disagreed with this scientific conclusion." However, "because CASAC never made clear the precise basis for its recommendation, all we know for certain is this: both CASAC and EPA believed the existence of adverse health effects to be certain at the 0.08 ppm level and reached differing conclusions about what level below 0.08 ppm was requisite to protect the public health with an adequate margin of safety."

The court went on to remand for reconsideration EPA's secondary standard for ozone, which the agency had set at the same level as the primary standard. Secondary standards are required by law to be set at a level "requisite to protect the public welfare from any known or anticipated adverse effects". The court concluded that the agency had failed to explain why the standard was requisite to protect public welfare, as required by the statute.

U.S. Supreme Court Upholds EPA Regulation of Interstate Transport of SO_2 and NO_x

For more than a decade EPA has sought to implement new rules to require further reductions in emissions sulfur dioxide (SO_2) and nitrogen oxide (NO_x) to reduce interstate transport of pollutants that interfere with the ability of downwind states to meet their NAAQSs. In May 2005 EPA adopted the Clean Air Interstate Rule (CAIR) that directed 28 states in the eastern and Midwestern parts of the country to reduce their emissions of SO_2 and NO_x. After the CAIR was struck down in court in 2008, EPA replaced it in July 2011 with new regulations that came to be known as the *"Cross-State Air Pollution Rule" (CSAPR)*. The *CSAPR* was adopted by EPA to correct the deficiencies the court found in the CAIR. In August 2011 it also was struck down in what some observers believed to be a breathtaking example of judicial activism. *EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012).* At the behest of EPA, the U.S. Supreme Court agreed in June 2013 to review the decision striking down the CSAPR. On April 29, 2014, the Court reversed the lower court and upheld EPA's regulations. The decision in EPA v. EME Homer City Generation, L.P., 134 S.Ct. 1584 (2014), represents a huge victory for the agency. Observers believe that it is particularly significant that Chief Justice Roberts and Justice Kennedy, who often are part of a conservative block of five Justices, joined the four other Justices who usually are sympathetic to environmental regulation to make the decision a 6-2 ruling (Justice Alito was recused from the case). The Court held that EPA had not violated the Clean Air Act by basing states's obligation to control transboundary pollution on what measures could be undertaken most cost-effectively.

D.C. Circuit Upholds EPA's Regulation of Mercury and Air Toxics from Power Plants

On April 15 a divided panel of the U.S. Court of Appeals for the D.C. Circuit upheld EPA's regulations limiting emissions of mercury and other air toxics from oil- and coal-fired power plants. White Stallion Energy Center, LLC v. EPA, 2014 WL 1420294 (D.C. Cir. 2014). The regulations, issued in 2012, require power plants to reduce emissions of mercury, chromium, arsenic and other air pollutants. Writing for the majority, Judge Judith Rogers concluded that the agency properly focused on the public health hazards caused by these emissions. In dissent, Judge Brett Kavanaugh argued that the agency erred by failing to consider the costs of the regulations.

Impact of Clean Air Act on State Common Law Actions

On August 20 the U.S. Court of Appeals for the Third Circuit held that a power plant's compliance with the Clean Air Act does not insulate it from liability for nuisance, negligence and trespass under Pennsylvania common law. The decision in *Bell v. Cheswick Generating Station* reversed a lower court decision that had dismissed a class action lawsuit by 1,500 people living within a mile of a coal-fired powerplant. The plaintiffs initially filed suit in Pennsylvania state court, alleging that emissions from the plant had caused ash and other contaminants to land on their property. The company that owned the plant, GenOn Power Midwest, L.P., had removed the case to federal court and filed a motion to dismiss, arguing that the Clean Air Act preempted the lawsuit because it imposed extensive regulations on the plant's operations. In support of its decision the Third Circuit cited *the Clean Air Act's* "savings clauses" in both the citizen suit provision, 42 U.S.C. §7604(e), and 42 U.S.C, § 7416. While noting that the plant's federal permit mandates that it prevent emissions from harming others, the court also noted that the permit itself has a savings clause providing that it shall not be construed as impairing state common law remedies.

The court concluded that its decision was mandated by the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), which had cited similar savings clause provisions in holding that *the Clean Water Act*, 33 U.S.C. § 1365(e), did not preempt state tort litigation based on the law of the source state. Rejecting the company's arguments that this could cause conflicting state regulatory standards, the Third Circuit concluded that, like *the Clean Water Act, the Clean Air Act* serves *"as a regulatory floor, not a ceiling, ... that states are free to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so."*

Disposal of High Level Radioactive Waste

On August 13, 2013, a divided panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the Nuclear Regulatory Commission (NRC) must decide on whether or not to issue a permit for the Yucca Mountain nuclear waste disposal facility. The court majority held that the NRC "is simply defying a law enacted by Congress" and "doing so without any legal basis." The court took the extraordinary step of issuing a writ of mandamus directing the NRC to act. In dissent, Judge Merrick Garland argued that mandamus was not appropriate and that the court was ordering the NRC to do a useless act because there were insufficient funds appropriated to complete the licensing process. The court majority noted that $11.1

million had been appropriated by Congress for processing the licensing application and deemed this to be a mandate to proceed. It recognized, however, that Congress was under no obligation to appropriate additional funds for the licensing process. (In re Aiken County, 725 F.3d 255 (D.C. Cir. 2013)).

Protection of Water Quality

Federal Jurisdiction to Protect Wetlands

In June 2006 a badly divided U.S. Supreme Court split 4-1-4 in deciding a case, *Rapanos v. U.S.*, involving the breadth of federal jurisdiction to protect wetlands. Because no interpretation of *the Clean Water Act* commanded a majority of the Justices, confusion has reigned concerning the breadth of federal authority under § 404 of *the Clean Water Act*, which requires a permit to discharge dredged or fill material in the "waters of the United States." In September 2013 EPA's Science Advisory Board released for public comment a new draft scientific report on "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." When finalized, the report, which is based on review of more than 1,000 scientific studies, will serve as the basis for a new EPA rulemaking to clarify the scope of federal jurisdiction under *the Clean Water Act*.

Regulation of Stormwater Discharges from Logging Roads

In March 2013 the U.S. Supreme Court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit that had required the operators of logging roads to obtain NPDES permits for stormwater discharges from them. The Ninth Circuit had held that such stormwater discharges were not exempt because they were the product of "industrial activity" covered by the Act. The Supreme Court held that EPA's determination that the term "associated with industrial activity" covers only discharges "directly related to manufacturing, processing or raw materials storage areas at an industrial plant" was entitled to deference*. (Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326 (2013)).*

Wetlands Mitigation and Regulatory Takings – the Koontz Decision

On June 25, 2013, the U.S. Supreme Court decided *Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013).* By a 5-4 vote the Court held that a government agency could not require the funding of offsite mitigation projects on public lands as a condition for obtaining a permit to develop wetlands unless the government's mitigation

demand had an "essential nexus" to, and was "roughly proportional" in magnitude, to the expected impact of the development. This decision extended the "essential nexus" and "rough proportionality" requirements of regulatory takings law that previously had only applied to permit conditions requiring a dedication of a portion of real property to public use to monetary exactions. These decisions are based on the U.S. Constitution's requirement that private property cannot be "taken" by government for public use without the payment of just compensation, known as the Takings Clause. In his majority opinion Justice Alito dismissed arguments that the decision will jeopardize land use regulation, noting that many states already apply similar limits on monetary exactions sought from developers. In dissent Justice Kagan claimed that the decision will subject local government to a flood of litigation by extending the Takings Clause "into the very heart of local land-use regulation and service delivery." Justice Alito emphasized that the decision "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."

International Environmental Law

U.S. Signs and Accepts New Minimata Convention on Mercury

On October 10, 2013 representatives from 92 nations signed the Minimata Convention on Mercury. The signing ceremony was held in Minimata, Japan, site of horrendous mercury poisoning caused by a chemical plant dumping mercury into the harbor of the small fishing village during the 1950s and 1960s. Countries signing the treaty pledged to control emissions of mercury from new power plants and to phase out the use of mercury in many products by the year 2020. All mercury mining is to be ended in 15 years. The treaty will take effect when ratified by 50 countries, which is expected to occur in three to four years. Representatives of the U.S., who helped negotiate the treaty, could not participate in the October 10th signing because of the temporary shutdown of the U.S. federal government due to a budget dispute.

On November 6, 2013 the U.S. signed the Minimata Convention on Mercury, and it also became the first nation to deposit its "instrument of acceptance" of the Convention with the United Nations. The State Department explained why it formally accepted the Minimata Convention without seeking Senate ratification in the following statement:

> *"The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minimata Convention complements domestic measures by addressing the transnational nature of the problem."*

In 2008 Congress passed, and President George W. Bush signed into law *the Mercury Export Ban Act,* Pub. L. 110-414, 122 Stat. 4341, that added §§ 6(f) and 12(c) to the Toxic Substances Control Act to prohibit the sale, distribution, transfer and export of elemental mercury. Coupled with *EPA's Mercury and Air Toxics (MATS) regulations* under *the Clean Air Act*, which set limits on mercury emissions from power plants, the Obama administration does not believe that it needs any new legislation on mercury to implement the Minimata Convention. Thus it can be accepted by the President as an executive agreement that does not require congressional approval.

JOSEPH DIMENTO & ALEXIS HICKMAN: ENVIRONMENTAL GOVERNANCE OF THE GREAT SEAS – LAW AND EFFECT

(Edward Elgar, Cheltenham, 2012): 220 pp
ISBN 978-1-84844-375-4

REVIEWED BY MICHA YOUNG·

The oceans are the source of all life. They provide a source of food for millions of people and provide a home to an unimaginable array of living creatures. They also hold immense economic value in the form of oil, gas and other non-living and marine living resources. Although humanity has always relied on the oceans, it was only during the course of the last century that we began to grapple with the realisation that the oceans are not boundless and that resources are not inexhaustible. This realisation has translated *inter alia* into a growing body of international conventions of a global, regional and sometimes bilateral nature. Despite our best efforts to build an effective governance framework that regulates use of the oceans and provides for the protection of the oceans, however, environmental conditions overall are not improving, prompting UNEP to refer to the environmental outlook of the oceans as 'alarming' (UNEP Regional Seas Programme 2010 *Global Synthesis: A report from the Regional Seas Conventions and Action Plans for the Marine Biodiversity Assessment and Outlook* 5, 12).

In the context of the above, the authors set out to analyse the governance frameworks applicable in a number of regional seas, a term which the authors define as 'areas of water off the coasts of nations that are either enclosed, semi enclosed, or otherwise regionally understood to be geographically distinct water areas' (Dimento & Hickman *Governance of the great seas* 2). In respect of each of the seas examined in the book, the authors provide a description of the physical characteristics of the sea and a description of the *status quo* in respect of both governance systems and environmental conditions. This description is then followed by an analysis of the governance frameworks in terms of three indicators the authors rely on to establish effectiveness of the regimes: (1) physical parameters, including current environmental conditions and trends over time; (2) legal requirements applicable to each of the states falling within the governance cluster; and (3) improved relations and

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collaborations between affected states. The last indicator seeks to assess the degree to which states within the cluster cooperate, exchange information and collaborate in efforts to protect the great seas.

Five regional seas are studied in the book: the Baltic Sea, Black Sea, Mediterranean Sea, East Asian Sea, the West and Central African Seas, and the Wider Caribbean Sea. The case studies were chosen on the basis of a number of factors, including the strategic value of the sea, environmental conditions and challenges, and the desire to investigate a range of governance models. Several of the governance frameworks for these seas fall within the UNEP Regional Seas Programme (RSP) while others do not. Not included in the study are the Polar Regions. With their choice of case studies, the authors have nevertheless succeeded in providing the reader with case studies that exhibit a range of environmental conditions and varied governance systems. For example, the Baltic Sea legal regime represents one of the most comprehensive, and arguably effective, governance systems; while the West and Central African Sea is characterised by severe degradation and poor progress in terms of implementation of applicable conventions.

In the final chapter the authors seek to present 'overarching conclusions' drawn from the case studies and to offer some recommendations on improving environmental governance of the oceans. This chapter provides a clear and concise overview of the three assessment indicators for all of the regional seas analysed in the book. The book concludes with three specific recommendations for improving governance of the seas. Briefly, these three recommendations are: (1) to recognise the importance of and to build upon the strengths of the primary legal framework for ocean governance – the United National Conventions on the Law of the Sea (UNCLOS); (2) to recognise the potential of the RSP as a promising framework and based on this recognition to address weaknesses in the Programme and foster synergies between the RSP and the UNCLOS framework; and (3) to devise management strategies on the basis of the ecosystem approach, thus encouraging ongoing collaboration among nations in ocean management. The authors' recommendations are not necessarily revolutionary and in some form or another have been raised by other commentators in a variety of contexts. Having said that, however, improving governance of the seas depends perhaps not so much on revolutionary new ideas and concepts, but rather on approaches which are capable of extracting more from the systems that are in place already.

The book is informative and educational. It provides a representative sample of governance systems ranging from highly organised, functioning and well-resourced systems to

underfunded systems in which implementation and the political will to do so remain fundamental challenges. The case studies chosen by the authors also display a range of environmental challenges, insofar as this is possible as several of those challenges, such as land-based pollution are evident in all regions of the globe. The inclusion of interviews with representatives of various of the institutions involved in governance of the regional seas and other experts adds depth, colour and pragmatism to the authors' assessments. Viewed holistically, the book should be of interest to all those wishing to build a more in-depth and comparative knowledge of regional seas governance and those wishing to explore the ways in which we might improve governance of the oceans.

CAI SHOUQUIU: JURISPRUDENCE BASED ON ECOLOGICAL CIVILIZATION

ISBN: 978-7-5093-4819-2

REVIEWED BY WEN LIZHAO*

Is industrial civilization suitable for our society? We rethink this question when environmental issues emerge. An advanced civilization, that is an ecological civilization, was made a strategic developing target in China by the 18th National Congress of the Communist Party of China in 2012 when ecological civilization construction was written into the CPC constitution. This placed ecological civilization on an equal footing with politics, economy, society, and culture when environmental quality and pollution issues affect people's well-being and livelihoods.

Since China is undergoing comprehensive change and restructuring, legal developments should adjust and adapt to the rapid changes in society and the economy which are producing significant environmental issues that loom large. Environmental law should respond without any hesitation. *Jurisprudence Based on Ecological Civilization*, published in March, 2014, is thus very timely. The book elaborates a systematic theory of environmental law that supports ecological civilization. It sets forth a research paradigm of subject-object integration, a new legal subject of ecological man, and it articulates the relationship between ecological civilization and environmental law. According to the author, law can not only adjust the relationship between people, but also between humans and nature. The book analyzes the legitimacy of the ecologicalization of the legal system in China, Hume's "is-ought" question[1] and Snow's proposition,[2] and highlights the problem of legal protection of the commons. The book provides both a new theory of jurisprudence of environmental law and a range of profound thoughts on basic questions in environmental law.

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[1] On Hume's is-ought question, please refer to David Hume, *A Treatise of Human Nature, Clarendon Press,* 1896, translated to Chinese by GUAN Wenyun under the same name (The Commercial Press,1980)p509.

[2] C. P. Snow in the Rede Lecture, Cambridge University, May 7th, 1959, argued that there was a major difference between natural sciences and the humanities, which could not be fused. This lecture was published under the name of The Two Cultures and the Scientific Revolution, translated to China by JI Shuli under the name of Two Cultures (SDX Joint Publishing Company, 1994) pp3-5.

The author, Cai Shouqiu, is a law professor at Wuhan University, and this book was published on his seventieth birthday. Cai has dedicated himself to environmental law, participating in drafting more than ten national environmental laws, and publishing 30 monographs and textbooks, and over 200 articles about environmental law. This book, which covers his new research results in this decade, is suitable for policy-makers, law-makers, environmental practitioners, law students, environmental law researchers, and persons interested in environmental law in China. The book provides essential analysis on a series of environmental issues by research paradigm and theoretical resolution. It will undoubtedly become a landmark for environmental law development.

The book first reviews traditional law theory. The author thinks that both the human-centered and subject-object dichotomy approaches are disadvantageous to environmental protection, and instead the law should focus on both human and natural components of ecological systems. The research paradigms of subject-object dichotomy is the foundation of traditional Chinese civil law, where the private law relationships are the relationship between subject and object; subject is in the first place, then the object. The civil law society consists of person and things, persons are always the subject, and things are always the object, but in the field of environmental law, things may be the subject. The source of subject-object integration traces back to Taoism and old western thoughts, such as Laozi's "syncretism between heaven and man" of Chinese traditional culture, Georg Wilhelm Friedrich Hegel's "the identity of subject and object", and Ludwig Feuerbach's "man is the entity of man and nature." Subject-object integration is materialism actually. However, subject and object can transform mutually under it: things could be the first, and man the second, thereby favoring environmental protection and an environmental law which concerns both human and nature, and their relationship, while subject-object dichotomy is idealism.

The book suggests that the law model of ecological man replaces the legal person as legal subject, where the legal person puts man and nature in unfair position, with man above nature. According to Cai, the idea that "only man could be the subject, and be subject for ever, never be object" is not correct, it comes from the paradigm of subject-object dichotomy. Prof. Cai considers a new concept in China, the commons, which is different from things in civil law. Commons includes air, sunshine, the scene of sunrise or sunset, the beach; no one has ownership, but any of us can use them without excluding all others. Because the manifest character of commons is not exclusive, traditional Chinese civil law cannot resolve this issue, because the real right is completely exclusive. Commons is also different from

shared ownership, where shared ownership means certain persons own same thing. The commons should be protected by public law, to prevent “the tragedy of the commons”, the idea of ownership is not the solution to commons.

Since there is no legislation for commons in China, in order to take good care of them, the right to use commons should be confirmed by law at first. Then access to justice would be available in environmental public interest litigation. When the right to use commons is infringed, environmental courts may accept the cases.

In conclusion, the book reviews basic theory of Chinese environmental law, and proposes a theory of ecological civilization and a legal law system that is ecological. Amendment of Chinese basic environmental protection law adopted in 1989 is being discussed by the National People’s Congress. The public, environmental experts and law researchers hope these amendments could promote environmental protection policy and law which tackles the serious environmental problems associated with Chinese social and economy development. This book also provides important theoretical support for this amendment. Unfortunately, this book is published in Chinese but it is hoped an English version will meet readers soon.

KLAUS BOSSELMANN, DAVID GRINLINTON AND PRUE TAYLOR, EDS.: ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY (2ND EDITION)

(New Zealand Centre for Environmental Law, Monograph Series,
Auckland, New Zealand, 2nd Ed., 2013)
HTTP://WWW.NZCEL.AUCKLAND.AC.NZ/UOA/HOME/NZCEL/ABOUT-NZCEL/PUBLICATIONS/MONOGRAPH-SERIES

REVIEWED BY: GRANT HEWISON*

It is timely, given the shifting landscape of environmental law over the past decade, for Auckland University's New Zealand Centre for Environmental Law to publish the second edition of 'Environmental Law for a Sustainable Society'. This Monograph of nine essays builds on the first edition published in 2002. While the book has a New Zealand focus, it will also be relevant to readers in other countries. New Zealand's experience of its "state-of-the-art" resource management legislation has matured since enactment of the Resource Management Act ('RMA') in 1991, with a number of essays reflecting on this experience, offering opportunities for comparison with environmental law in other countries.

Prue Taylor joins the editorial team of Klaus Bosselmann and David Grinlinton. Among the authors are Taylor, Bosselmann and Grinlinton together with Nicole Bakker, Kenneth Palmer, Benjamin Richardson, Angela Thomson, Andrea Tunks and Krushil Watene. The contributors are leading scholars in the field of environmental policy and law, with most being members or associates of the New Zealand Centre for Environmental Law. Also included is a Bibliography of New Zealand Environmental Writing assembled by Vernon Tava, Caroline Fergusson and Ben Leonard. This is an important resource, and includes a list of student research completed between 2002 and 2012 at the University of Auckland.

The book has been written with legal advisors, policy consultants, educators and students in mind, making it readable and engaging. While the structure and content of the book, at one level, provides an introduction to the law of sustainability for those new to the subject, the essays also challenge those who are more familiar with this field. We are confronted with the

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question of how our legal system should be reformed to recognise that we share one finite planetary ecosystem.

Chapter 1 explores the origins and guiding ideas of environmental law, noting it is a product of scientific discovery, social and economic awareness and political initiative. It ends by discussing New Zealand's recognition of sustainable management, both in the RMA and other legislation, concluding that the concept has proven "elusive to interpret and apply".

Chapter 2 picks up discussion of New Zealand's adoption of the sustainability principle in more detail, especially the systems of integrated environmental management enacted in the RMA and other natural resources legislation. However, a number of "system failures" are also pointed out, with the chapter questioning whether New Zealand will retain its position as an innovator and leader in integrating sustainability into environmental law and policy.

A comparative perspective, evaluating European and North American environmental law, is the essence of Chapter 3, particularly as this relates to biodiversity conservation. The chapter criticises the apparent superior environmental law and performance of these regions. It points to this being due, in large part, to those countries exporting their ecological footprint both spatially and temporally to emerging economies, where the majority of consumer products are manufactured at significant expense to the global environment.

Two chapters question whether the notion of State sovereignty remains appropriate. As suggested in Chapter 4, "[e]cological interdependence … muddies the logic of sovereignty as it relates to environmental issues." This is particularly true in three cases: (1) shared resources such as regional seas, riverbeds, stocks of migratory animals; (2) trans-boundary externalities; and (3) issues of global commons. As a consequence, "… the existing international environmental [legal] regime, amidst a growing interdependence and globalisation of the planet, appears to be failing to grapple with environmental concerns in any substantive way." Chapter 4 suggests a way forward through a less State-centered approach, while Chapter 8 advocates building a new "normative architecture for global environmental law".

Chapter 5 asks a good question – what is sustainable development? While the chapter notes that nobody welcomes 'unsustainable development', when groups as diverse as big corporations, government agencies and environmental organisations find common ground with the term, one has to question its usefulness. And when countries like New Zealand, who have had the concept of 'sustainability' at the core of their environmental legislation for

more than 20 years, have in that time increased their consumption of finite natural resources, rather than developing within the limits of them, "the time seems ripe for genuine SD legislation." The chapter concludes that "[w]ithout a new morality, no legal principle of SD could make any difference to present unsustainable development".

Chapters 6 and 7 explore the role of indigenous values in the conceptualisation of sustainable development. They note that indigenous values challenge the legal, scientific and economic assumptions that currently define global environmental decision-making: "[D]eep conceptual differences remain." The concept of sustainable development "does not yet conceptually 'cross' appropriately into indigenous cultures." As a consequence, these chapters observe, the vision for sustainable development law is likely to remain mono-cultural until its ideology is fundamentally changed.

The book ends with Chapter 9 arguing that the goal of sustainable development must be to promote the 'greening' of the entire legal system. With that in mind, sustainable development should be perceived as focused on three basic concerns: for the poor; for future generations; and for our planetary ecosystem. Finally, "[t]he concept of SD needs to be a guiding principle, defined by its elements, enshrined in law, enforced through institutions and exercised by people. The challenge before us is to advocate this at all levels of the political process."

I have enjoyed the opportunity to read these essays and reassess my own understanding of sustainable development in writing this review. Each essay has challenged my appreciation of the concept in different, but also cumulative ways. Around twenty-five years ago, I first read about 'sustainable development' in the Bruntland report. I recall at the time thinking the definition was so simple and clear: "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Perhaps it is not so much that the concept of sustainable development is elusive, but simply our willingness as a species to restrain ourselves to live by it.

ONITA DAS: ENVIRONMENTAL PROTECTION, SECURITY AND ARMED CONFLICT

(Edward Elgar: Cheltenham, UK, 2013): v; 254 pp
ISBN 978-1-78100-467-8

REVIEWED BY ELAINE C. HSIAO*

As Principles 24 and 25 of the *Rio Declaration* remind us, "warfare is inherently destructive of sustainable development," whereas "peace, development and environmental protection are interdependent and indivisible." We have long watched violent conflicts ravage natural environments and the peoples who inhabit them – water sources poisoned, chemical weapons burning flesh and forest, food stock destroyed and forests cleared. Harm can also flow from the environmental effects of war preparation and readiness, the maintenance of strategic bases internationally, or the unintended consequences of post-conflict reparations. The relation between environmental sustainability, security and armed conflict run deep, as they are indeed interdependent and indivisible.

Despite the many linkages between environmental well-being, security and armed conflict, Onita Das' book, *Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective*, is one of a rather small body of legal scholarship on the topic.[1] It is not that legal scholars have not been concerned with these issues. Contributions to law and armed conflict, or law and security, as well as law and the environment are profuse. Rather, what has been limited are integrations of all of the above. What we find mainly are writings on international humanitarian law protecting the environment and a proposed international crime of ecocide or geocide.[2] Das brings light to this void and argues for the

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[1] See, for example, the 2008 special issue on Environmental Security and International Law by the *Yearbook of International Environmental Law*.

[3] See, for example, J. Austin and C.E. Bruch, *The Environmental Consequences of War: Legal, Economic and Scientific Perspectives* (Cambridge University Press, 2000), and D. Dam-de Jong, "International Law and Resource Plunder: The Protection of Natural Resources During Armed Conflict" *International Environmental Law* (2008) 19 (1): 27. See also, M.A. Drumbl, "Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes" *Fordham International Law Journal* (1998) 22: 122, L. Berat, "Defending the Right to a Healthy Environment:

relevance of sustainable development law to environmental security pre-, during and post-conflict.

Das provides a useful survey of the international law of sustainable development and its primary principles backed by growing international recognition and case law (for example, three pillars of sustainable development, intergenerational and intragenerational equity, common but differentiated responsibilities). She then connects this to early environmental security theories that focused on causal relations between environmental degradation, violent social conflict, and the need for traditional security responses (i.e., military) to this "new" international security threat.[3] According to Das, sustainable development is important in preventing environmental degradation that can lead to violent armed conflicts. She utilizes two case studies, Kosovo and South Sudan, to illustrate how international law has been applied (or could) to protect the environment (the basis of sustainable development) before, during and after international armed conflicts.

In the introductory chapter we are provided an overview of the book. Chapter two begins with a theoretical framework based on the international law of sustainable development. Das outlines a history of international sustainable development law and the status of its primary sub-principles: sustainable use of natural resources, equity and eradication of poverty, common but differentiated responsibilities, precaution, participation, good governance, integration and interrelationship, and polluter pays. Das notes that although these principles are not *erga omnes*, they are referenced more frequently and their definitions and applications have gained greater clarity. She then proceeds to demonstrate the relevance of these principles pre-, during and post-conflict in the chapters that follow.

Chapter three discusses sustainable development in the prevention of armed conflict with examples in Africa: Somalia, Sudan and Sierra Leone, each indicating a failure by the international community to prevent environmentally-induced violence. Chapter four looks at international laws of war or international humanitarian law in protecting the environment. As nearly every scholar who has written on this topic has noted, military deference in such cases nearly always prevails or alternatively, environmental harms are not deemed to be severe enough, long-term enough and/or sufficiently beyond repair to rise to the level of an

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Toward a Crime of Geocide in International Law" *Boston University Law Journal* (1993) 11: 327., and M.A. Gray, "The International Crime of Ecocide" *Cal. W. Int'l L.J.* (1996) 26: 215.

[3] J. Barnett, *The Meaning of Environmental Security: Ecological Politics and Policy in the New Security Era* (Zed Books Ltd., 2001).

international crime.[4] As examples of failed attempts at accountability for wartime environmental violations, Das presents Kosovo and the First Gulf War. Chapter five examines types of post-conflict reparations (for example, restitution, compensation) and implementation. She concludes in Chapter six with an observation on the challenges and with suggestions for integrated early warning systems, greater action by the UN Compensation Commission (UNCC) and UN Peacebuilding Commission, and the use of Post-Conflict Environmental Assessments (PCEAs).

Onita Das' book is a much-needed contribution to literature that draws together the worlds of environmental law and environmental security. Her overview of sustainable development law demonstrates knowledge of environmental legal history, but her foray into environmental security is unusually superficial. The field has evolved from early causal speculations linking degradation to violence. It now reflects more complex political economic descriptions of greed (conflicts over abundant resources), grievance (scarcity-induced conflicts), perceptions of scarcity and injustice (raising questions of absolute scarcity vs. perceived scarcity and the role of governance in both), and a number of intervening characteristics (for example, ingenuity or capacity for endogenous technical change) that can ameliorate conflict escalation.[5] International sustainable development law will similarly need to respond with an ecosystem or systems approach to environmental protection in times of peace and conflict if it is to suffice. There is certainly much more to be explored in this cross-section of human concerns (war and the environment) from a legal perspective (for example, an analysis of environmental laws proven effective in managing resources at various stages of conflict resolution). Thankfully Onita Das has shed light on some important aspects that help us to see where we must venture.

Recognition of sustainability principles, not only in international law and jurisprudence, but in daily life and practice, is essential if sustainable development is to have meaning and value. Onita Das shows us that through international sustainable development law there are ways to protect the environment in times of war or in times of peace, and that environmentally

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[4] See, for example, M. Drumbl, ibid, and M.H.Nordquist, Panel Discussion on International Environmental Crimes: Problems of Enforceable Norms and Accountability, *ILSA J. Int'l & Comp. L.* (1996-1997) 3: 697.

[5] See I. de Soysa, "Ecoviolence: Shrinking Pie, or Honey Pot?," *Global Environmental Politics* (2002) 1, J. Sachs and A. Warner, *Natural Resource Abundance and Economic Growth* (National Bureau of Economic Research, 1995), D. Lal and H. Myint, *The Political Economy of Poverty, Equity, and Growth* (Clarendon Press, 1996), C.H. Kahl, *States, Scarcity, and Civil Strife in the Developing World* (Princeton University Press, 2006), and P. Le Billon, *Wars of Plunder: Conflicts, Profits and the Politics of Resources* (Hurst & Co., Ltd., 2012).

sustainable development can lead us away from war towards greater peace. This book is recommended for anyone with an interest in the environment, security, peace and conflict.

YVES LE BOUTHILLIER, MIRIAM ALFIE COHEN, JOSE JUAN GONZALEZ MARQUEZ, ALBERT MUMMA, SUSAN SMITH, EDS: POVERTY ALLEVIATION AND ENVIRONMENTAL LAW

2012, IUCN Academy Environmental Law Series, Edward Elgar Publ. Ltd., Cheltenham, UK
ISBN: 978 1 78100 328 2

REVIEWED BY JUDITH PRESTON*

Environmental protection, necessary for poverty alleviation, is often seen as an unattainable luxury trumped by survival and the temptation of economic stability promised by investment of transnational corporations and foreign aid. “Poverty Alleviation and Environmental Law” contributes to formulating practical and long-lasting remedies for achieving a balance of prevention and alleviation of poverty with environmental protection. The book is an excellent collection of papers prepared for proceedings of a colloquium organized by the IUCN Academy of Environmental Law from 10-15 November 2008 in Mexico, on the theme of Poverty and the Environment. This book will be an excellent resource for students, academics and other interested persons.

The book is divided into six parts. The first part outlines broad principles linking the intractability of poverty and environmental degradation. Dinah Shelton observes that the ethics of any society can be measured by how it treats its most vulnerable members (p.15). Shelton discusses legal tools to alleviate poverty and address environmental degradation including private law, public regulation, market mechanisms, rights-based approaches found in constitutional protection of quality of life, and protecting human rights through litigation.

Michael Kidd presents a South African case study, based on a series of court decisions, on water entitlement restrictions in an economically challenged town. Kidd highlights the tensions between the constitutional right of access to clean water and the need for conservation of fragile and finite resources. Although the public water restrictions were

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upheld, the judiciary failed to establish legal principles to guide public decision-making where social and environmental outcomes may collide (p.63)

The second part of this book discusses impacts of environmental degradation on indigenous people caused by global factors. Karen Bubna-Litnic discusses the inequity caused by climate change to Aboriginal Australians living in remote communities. The combination of these remote indigenous communities lack of adaptive capacity and government policies can exacerbate the impacts of increased costs caused by reconstruction following natural disasters. Initiatives such as re-afforestation, carbon and fire-stick farming are potential income sources for indigenous people and contribute to mitigation of climate change impacts. Participation by indigenous communities such as gathering impact assessment data is proposed for empowering a contribution to the solution.

Sabzwari and Scott confirm the benefits of indigenous involvement in data collection (for example, bio- and environmental) on the cumulative effects of toxic pollution on the health of the Aamjiwnaang First Nation community in Canada. This model has encouraged other less powerful political communities to collect data to effect social change and form the evidentiary basis for constitutional litigation.

Ed Couzens exposes the tensions between traditional Japanese indigenous hunting and fishing rights and the need to preserve marine stocks, especially vulnerable or endangered species. Couzens exposes the hypocrisy and manipulation of many member countries of the International Whaling Commission (IWC). Japanese aboriginal rights to collect and use whale meat are being played out in the context of Japan's desire to have commercial whaling permitted without the need to justify it on research grounds.

The third part of the book emphasizes the need for public engagement in environmental and planning issues to remedy the adverse environmental impacts on low-income/minority communities. Lee Paddock discusses several jurisdictions in the USA that afford opportunities for active environmental justice public engagement in public decision-making. The local, state and federal examples discussed by Paddock demonstrate effective models for developing proper public engagement. A useful checklist for governments to achieve effective public engagement is included.

A Mexican focus on access to information to underscore public engagement is the subject of Carla D. Aceves-Avila's discussion of electronic tools to retrieve reliable and comprehensible environmental data. The Mexican law for access to information on environmental decision-

making is complex and excludes citizens without sufficient technical skills to utilize the data. Recommended improvements include streamlining the organization and distribution of information, ensuring it is current, reliable, understandable, and accessible in indigenous languages.

The fourth part of the book discusses achieving conservation objectives through environmental regulations whilst accommodating the needs of poorer communities. Paul Martin discusses the social justice implications of environmental regulation of resources. Economically efficient approaches to conservation can be skewed towards those with wealth, power and access to technological skills. Martin's study recommends setting clear principles for achieving social justice and equity in regulatory instruments and transparency to assess their effectiveness. His innovative reform proposals include public participation and social impact assessment tools.

Cohen and Juaregui highlight the need for local governance to enter into environmental agreements to bring about significant improvements for the poor. The agreements can result in local influence on federal and provincial policies and support active involvement in decision-making in urban planning policies in Mexico City.

The fifth part of the book discusses the institutions regulating access to environmental justice. Rock and Catherine Pring consider the effectiveness of specialized environmental courts and tribunals in reducing poverty whilst protecting the environment. They conclude that to be effective green courts and tribunals must include accessible location, flexible standing, understandable and affordable procedures and costs, access to reliable expert and legal assistance and ADR options. Albert Mumma's study of housing disputes in Kenya handled by the National Environmental Tribunal underscore the Prings' argument. The Tribunal gave some weight to environmental factors but priority was given to housing for the poor. The Tribunal allows wide standing to challenge planning decisions, procedural rules to encourage quick and cheap resolution of matters and costs orders awarded only in exceptional circumstances.

Finally, the book discusses global issues such as climate change, heritage laws, and controlling social and economic impacts of transnational corporations. Daniel Behn considers the implementation of Clean Development Mechanisms (CDM) projects which attempt to alleviate greenhouse gases and provide sustainable development opportunities for poorer communities in developing countries. The gulf between the theory and practice for CDM projects is apparent when Behn outlines operational deficiencies and institutional

barriers. Those barriers may be overcome by using both a project quota system that limits range of projects to a nation's operational capacity, and financial instruments that encourage CDM projects in countries with less than 10 registered projects.

Stefan Gruber suggests that heritage conservation, particularly cultural heritage, requires a buoyant environmental protection framework. However, economic support, such as alternative incomes streams for local populations, is needed so they can maintain their heritage and be part of the solution. Gruber recommends that international agencies provide funding and skills to protect heritage and decrease poverty. He assesses the effect of poverty on the preservation of the World Heritage Listed Rice Terraces of the Philippine Cordilleras. Farmers who possess the knowledge and skill to maintain Rice Terraces are being forced to leave the area for economic reasons. With younger people also leaving rural areas, knowledge and skills are not passed to future generations.

Susan Lea-Smith considers the economic power and impacts of transnational corporation; three hundred of the largest global corporations hold a quarter of the world's productive assets. Developing countries often accommodate the transnational corporations through lower regulatory standards, and unenforced corporate violations due to perceived economic and social benefits. Despite a number of laws to regulate and compensate for damage caused by adverse corporate behaviour, major problems continue to impact poorer communities. Smith considers the recent Oregon Model for Chartering Sustainable Corporations as a basis for an enforceable international framework to regulate sustainability of corporations.