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A Word from the Editors:
Putting the Earth to Rights?

This issue of the IUCNAEL e-Journal invites readers to consider multiple dimensions of the developing application of rights-based claims, in a variety of guises, as they pertain to the environment. The profile and purview of international human rights law and more recently international environmental law are now well established. It is therefore of course not surprising to note the emergence of first human rights-based claims with an environmental dimension and now cross-cutting human rights and environmental claims during the past few decades. Perhaps the only real matter that should take us aback is how long they have taken to emerge. The debate is however moving on apace and discussion is now shifting the boundaries of the rights debate beyond human rights-holders towards the idea of rights for other species and indeed for nature itself, through ground breaking documents such as the *Earth Charter* and the *Draft Universal Declaration of the Rights of Mother Earth*.

The articles published in this edition represent diverse spectrums of opinion on the nature, ambit and content of these new emerging rights and the intersection between them. James May and Erin Daly, in 'New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide', examine both the existing and expanding application of human rights-based claims, notably in South Asia and Latin America, with their recognition of the instrumental importance of the environment for human flourishing. Innovative judicial approaches to claims founded on the environment have of course been emerging across the globe, but debate has arguably been in reinvigorated by case law originating in the aforementioned jurisdictions. May and Daly also highlight the emergence of an innovative jurisprudence,

which sees claims based on according intrinsic value to the environment insofar as this is possible within the applicable statutory frameworks.

The above developments resonate with Earth Jurisprudence or Wild Law, the growing global movement that seeks to mainstream rights for the environment and its constituent elements within contemporary legal systems. Cormac Cullinan passionately voices the central tenets underpinning this movement in his note titled 'The Call of the Wild'. This hortatory piece is founded in part on moral considerations attached to the exploitation of nature and the environment, but chiefly on the imperatives imposed by our understanding of the position of humanity in and of the ecosystem, ideas that have proved influential in prompting the drafting of the *Draft Universal Declaration of the Rights of Mother Earth*.

Peter Burdon, in his article 'Earth Rights: The Theory', considers the concept of earth rights in terms of its historical and jurisprudential underpinnings in Western thought. In so doing, he provides a usefully contextualized treatment of, amongst other things, key provisions of the *Draft Universal Declaration*. His discussion of earth rights includes a critique of the concepts involved and the role of legislation and advocacy in progressing them. It however ranges beyond the purely legal and considers the wider societal influence associated with affording greater recognition to earth rights.

Finally, Michel Prieur in his thought-provoking examination of the principle of non-regression draws the reader's attention to the hugely significant question of the entrenchment (or lack thereof) of environmental law in modern legal systems. This goes to the heart of the viability of environmental law, a discipline where the need for reasoned concern and consistent long-term action is so often sacrificed in favour of short-term political expediency. He advocates the adoption of a principle of non-regression, founded on the idea that environmental law should not be modified to the detriment of environmental protection. Professor Prieur arguably provides a tool that could protect not only the hard-won fruits of progress to date, but one which may also serve to promote the more ambitious environmental agenda (regardless of its final form) which will have to develop during this century to secure not only the flourishing of our ecosystem, but arguably its very survival.

Following the above articles and notes you will find a diverse array of country reports from scholars situated in 22 different jurisdictions across the globe. These provide an overview of recent legal, policy and judicial developments in these countries. The nature of these

develops is exceedingly diverse. What is particularly interesting, in the context of the above substantive articles, is the adoption of new constitutions containing environmental provisions in both Kenya and the Kyrgyz Republic in 2010.

Please note that the theme for substantive articles for inclusion in the next issue of the eJournal is ***Innovations in Social Justice and Environmental Governance***. During the past few decades, much attention has been paid to 'efficient' environmental protection, but at what social cost? Market instruments frequently empower the rich. Regulated access is often easier for those who are confident, informed and mobile. Even seemingly benign approaches, such as 'green investment', can have dire social consequences for certain sectors of the society. Innovations in environmental law may show the way towards improved environmental governance that simultaneously significantly improves the lot of the least advantaged in society. The editors are particularly interested in articles that demonstrate how environmental law can fulfill its traditional role in pioneering both environmental protection and social justice. The due date for submitting all contributions (articles, notes, country reports and book reviews) for inclusion in the next issue of the e-Journal is 30 September 2011.

In conclusion, we would like to leave readers with Ama Ata Aidoo's beautifully expressed thoughts which, to our mind, neatly summarise many of the issues that are reflected in the pages that follow:

> After
>
> Each shocking experience
>
> Mother Earth recovers –
>
> That, of course, is true,
>
> But, with some effort
>
> Battered as she is.
>
> It is not bad if we help her
>
> Some of the time.
>
> ('The Plums' in A. Carter (ed.), *Angela Carter's Book of Wayward Girls & Wicked Women* (2010))

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Reviewed by Richard Cadell

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Earth Rights: The Theory

Peter Burdon*

On 22 April 2010 Bolivia hosted a Peoples' World Conference on Climate Change and Mother Earth Rights.[1] The conference was attended by over 35,000 people and concluded with President Evo Morales Ayma adopting a declaration, to be presented to the United Nations. The declaration draws inspiration from other authoritative agreements such as the Universal Declaration of Human Rights and the Earth Charter.[2] The preamble expressly acknowledges our profound dependence on and relationship with the Earth and that the Earth is an "indivisible community of diverse and interdependent beings with whom we share a common destiny and to whom we must relate in ways to benefit Mother Earth."[3] An extract from the declaration reads:

> **Article 2. Fundamental rights of Mother Earth**
>
> Mother Earth has the right to exist, to persist and to continue the vital cycles, structures, functions and processes that sustain all beings.

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1 See 'Peoples Conference on Climate Change and Mother Earth Rights' <http://pwccc.wordpress.com/> accessed 1 April 2010.

2 Universal Declaration of Human Rights 1948 and Earth Charter 2000. See also the Stockholm Declaration 1972; 1983 World Charter for Nature; 1991 Caring for the Earth; Declaration of the Parliament of World Religions 1992, Earth Covenant 1996; Declaration on the Responsibilities of the Present Generations Towards Future Generations 1997; A Manifesto for Earth 2000; Millennium Development Goals 2000; A Manifesto for Life 2002.

3 See 'Peoples Conference on Climate Change and Mother Earth Rights, 'Draft Universal Declaration of the Rights of Mother Earth'' <http://pwccc.wordpress.com/2010/02/07/draft-universal-declaration-of-the-rights-of-mother-earth-2/> accessed 1 April 2010.

Article 3. Fundamental rights and freedoms of all beings

Every being has:

(a) the right to exist;

(b) the right to habitat or a place to be;

(c) the right to participate in accordance with its nature in the ever-renewing processes of Mother Earth;

(d) the right to maintain its identity and integrity as a distinct, self-regulating being;

(e) the right to be free from pollution, genetic contamination and human modifications of its structure or functioning that threaten its integrity or healthy functioning; and

(f) the freedom to relate to other beings and to participate in communities of beings in accordance with its nature.[4]

This declaration is the latest recognition of earth rights and follows the adoption of similar ordinances in the United States[5] and in the constitution of Ecuador.[6] These legal developments provide reason to pause and consider the argument for earth rights in detail. In particular, this paper contends that if the idea of earth rights is to command reasoned loyalty and gain broader political acceptance then it must be built on a secure intellectual footing. In the space available this paper will consider the kind of statement that a declaration of earth rights makes; the relationship between earth rights and human rights; the duties and obligations which earth rights generate and the forms of actions which can be used to promote earth rights. It will also consider importance of open public debate to the theory and practice of earth rights.

1. What kind of statement does a declaration of Earth rights make?

Earth rights can be seen first and foremost as articulating an ethical demand. They are not principally legal or proto legal and even though they have inspired legislation,

[4] Ibid.

[5] See Thomas Linzey and Anneke Campbell, *Be The Change: How to Get What You Want In Your Community* (Gibbs Smith, Utah 2009). The Community Environmental Legal Defence Fund has assisted over 20 communities to adopt ordinances which recognise the rights of nature. See further http://www.celdf.org

[6] Linzey and Campbell (n 5) 133-135.

this is a further fact, rather than their constitutive character. Roderick Nash supports this statement in his historical survey of the origin and philosophical development of earth rights.[7] In particular, Nash credits the natural law tradition as the foundation of modern rights discourse.[8] While natural rights have been criticised as mere "bawling upon paper"[9] there is no denying their role in the formulation of human rights.[10] One important example is the "transforming radicalism"[11] John Locke's natural rights thesis[12] had on the American Revolution, by fuelling the idea that English Parliament and Monarch were denying colonists their natural rights. President Thomas Jefferson argued that the "laws of nature and of nature's God" are the foundations from which reason and conscience reveal "self-evident" truths; namely that "all men are created equal" in their possession of "certain unalienable rights."[13] Following Locke, the rights articulated by Jefferson were, "life, liberty and the pursuit of happiness."[14] Thirteen years later the French declaration of the "rights of man" resolved to "expound in a solemn declaration the natural, inalienable and sacred rights of man".[15] The declaration notes further that all men "are born and remain free and equal" and that the "final end of every political institution is the preservation of the natural and imprescriptible rights of man."[16]

The tendency of natural rights to take on expanded meaning has become "one of the

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[7] Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, Wisconsin 1989) 13. Nash begins his analysis with the Great Charter of Runnymede (or Magna Carta), acceded to by King John in 1215.

[8] Ibid.

[9] Jeremy Bentham, *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792) republished in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, New York 1987) 48.

[10] Commenting on the basis for human rights Dennis Lloyd notes, "[a]lthough the tendency at the present day is to endeavour to formulate these values in specifically positive-law terms, the natural origin of this mode of approach still remains fairly apparent", *The Idea of Law* (Penguin Books, London 1991) 141.

[11] Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge Press, Massachusetts 1967) 184.

[12] John Locke, *Two Treatises on Government* (Cambridge Press, Massachusetts 1967). All references to Locke, unless otherwise stated, are to numbered paragraphs.

[13] Thomas Jefferson quoted in Nash (n 7) 13.

[14] Locke (n 12). Locke notes at 6: "being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possession".

[15] "Declaration of the Rights of Man and the Citizen 1789" in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, New York 1987) 26.

[16] Ibid.

most exciting characteristics of the liberal tradition."[17] The moral argument for expanding natural rights beyond human beings began almost immediately after their first flourishing in the United States and Europe. For example, Jeremy Bentham claimed "[t]he day may come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny."[18] Bentham advanced liberal rhetoric, supported by utilitarian ethics to support this claim. "The question" he noted, "is not, Can they reason? nor Can they talk? but Can they suffer?"[19]

Alongside this utilitarian argument for expanding legal rights one finds a weaker yet persistent notion that also influenced the extension of legal rights to nature. It was the "revolutionary idea that the world did not exist for humanity alone."[20] One important example of this reasoning came from the naturalist Aldo Leopold who in 1966 proposed a "Land Ethic" to influence human interaction with the Earth.[21] Leopold noted "there is as yet no ethic dealing with man's relationship to the land and to the non-human animals and plants which grow upon it."[22] Instead, he noted "we abuse the land because we regard it as a commodity belonging to us."[23] For Leopold, environmental ethics represents a body of self-imposed limitations on freedom, which derive from the recognition that "the individual is a member of a community of interdependent parts."[24] For Leopold, expanding our understanding of moral community was integral to environmental ethics. His land ethic entails the explicit recognition of nature's "right to continued existence"[25] and seeks to "change the role of Homo Sapiens from conqueror of the land-community to plain member and citizen of it."[26] Further Leopold notes that ethical concern for nature "implies respect for [our] fellow-members, and also respect for the community as such".[27] Indeed, he notes "when we see the land as a community to which we belong, we may begin to use it

[17] Nash (n 7) 13.
[18] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Nabu Press, New York 1948) 311.
[19] Ibid.
[20] Nash (n 7) 19-20.
[21] Aldo Leopold, *A Sand County Almanac* (Ballantine Books, New York1966).
[22] Ibid 238.
[23] Ibid.
[24] Ibid 239.
[25] Ibid.
[26] Ibid 240.
[27] Ibid.

with love and respect."[28]

Finally, it is also important to note the influence of "geologian" Thomas Berry to this discourse. Berry is the inspiration behind a growing movement in law termed Wild Law or Earth Jurisprudence.[29] Central to this movement is the understanding that the interdependence of all things provides justification for recognising moral value and legal rights in all of nature. In his influential "Ten Principles for Jurisprudence Revision"[30] Berry argues that "the Universe is composed of subjects to be communed with" and that as subjects "each component of the universe is capable of holding rights."[31] Consistent with the Bolivian declaration, Berry notes further that "every component of the Earth community, both living and nonliving has three rights: the right to be, the right to habitat or a place to be, and the right to fulfill its role in the ever-renewing processes of the Earth community."[32]

This final point introduces an important point of engagement between earth rights, animal rights and human rights. In the context of the Bolivian declaration, the central tension is what is meant by the term "nature"?[33] While clearly a larger topic than can be addressed here, Berry offers a starting point in proposing a flexible and complementary understanding of rights.[34] He notes that "all rights in nonliving form are role-specific; rights in living form are species specific and limited."[35] Thus Berry notes that "rivers have river rights", "birds have bird rights", and "humans have

[28] Ibid.
[29] See further Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, Devon 2002).
[30] Thomas Berry, *Evening Thoughts: Reflections on Earth as Sacred Community* (Sierra Club Books, San Francisco 2006) 149-150.
[31] Ibid 150.
[32] Ibid.
[33] For an important analysis see Neil Evernden, *The Social Creation of Nature* (John Hopkins University Press, Baltimore1992).
[34] The flexible nature of rights was also recognised by Christopher D. Stone who in *Should Trees Have Standing?* (Oxford University Press, Oxford 2010) noted "…to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment."
[35] Berry (n 30) 150.

human rights."[36] The difference is "qualitative, not quantitative" and seeks to integrate human beings and non-human animals into the term "nature".[37]

2. Rights and obligations

In his critique of earth rights, Holmes Rolston III identifies the difficulties in recognising legal rights in nature. He notes that rights are a uniquely human construct and entail a multiplicity of bilateral jural relations.[38] When applied to nature, Rolston notes that framework "proves troublesome".[39] Indeed, outside of human moral or legal analysis, nature does not have rights and it is unable to recognise the rights of others. Thus, a landslide that uproots a small pine forest does not violate the rights of the tree community. Even if the landslide kills human beings, it does not violate human rights. The mountain is not guilty of reprehensible behaviour and one cannot bring it to be shamed in a court of law. Legal rights correspond with legitimate claims and entitlements. Thus, in certain circumstances a mountain climber may have the right to be rescued by a mountain ranger, because of a pre-existing duty of care. If such a duty existed and the mountain ranger stood and watched the mountain slide engulf the mountain climber and he was in a reasonable position to rescue the individual, he could be morally as well as legally responsible. Reflecting on this point, Rolston notes:

> Using the language of rights for rocks, rivers, plants and animals is comical, because the concept of rights is an inappropriate category for nature.[40]

An intellectually sound rights-based discourse must acknowledge and accept Rolston's comments. It is plainly nonsense to speak of nature holding duties or to suppose that rights exist between one part of nature and another. The concept applies *only* in the context of human interaction with nature and would place duties

[36] Ibid.
[37] Ibid.
[38] See further Wesley N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1993) 23 *Yale Law Journal* 16, 18.
[39] Holmes Rolston, 'Rights and Responsibilities on the Home Planet' (1993) 18 *Yale Journal of International Law* 251, 256.
[40] Ibid 257.

only on human beings. Reflecting on the types of rights identified by Wesley N. Hohfeld,[41] it is clear that the most suitable legal category for nature is a claim right, defined as "claims correlative to other persons' duties." Put another way – earth rights generate reasons for action for people who are in a position to help in the promoting or safeguarding of the underlying right.

In discussing human obligations, Immanuel Kant drew a helpful distinction between perfect and imperfect obligations.[42] A perfect obligation is a direct and immediate duty to take a course of action or refrain from a particular enterprise.[43] However, there are also less specific responsibilities in the general form of what Kant called "imperfect obligations". Earth rights entail both of these types of obligation and their legislative recognition would impose on individuals a duty to consider ways through which environmental harm can be prevented (or minimized) and then decide on a reasonable course of action.[44]

It is pertinent to illustrate this distinction with an example. Consider a situation where river rights are recognised in the context of a small community whose major employer pollutes directly into the river. Many of the townspeople do not report this offence for fear of losing their jobs, however it is clear that the pollution is destroying the river ecosystem. In this example, three interrelated things are happening. First, the river's right (or freedom) not to be polluted is being violated. This is clearly the principle wrongdoing in this example. Second, the company is violating the right of the river to be free from pollution. This is a violation of their "perfect obligation". Finally, the townspeople who are doing nothing to stop the pollution are also transgressing their general and imperfect obligation to provide any help that they could reasonably provide.[45] These distinct issues illustrate a complex pattern of rights

[41] Hohfeld (n 38) 18. Hohfeld argued that the term 'right' covered four different kinds of legal concepts. They are rights, liberties, powers and immunities. Hohfeld also offered to sets of connections among legal concepts. Right correlates with Duty, Liberty with No-Right, Power with Liability and Immunity with Disability.

[42] Immanuel Kant, *Critique of Practical Reason* (Bobbs-Merill, New York 1956) 34, and Amartya Sen, 'Consequential Evaluation and Practical Reason' (2000) 97 *Journal of Philosophy* 477.

[43] Ibid 34.

[44] Ibid 36.

[45] One could draw an analogy between this final point and someone who watches a child drown or a group of people who do not intervene when they could reasonably assist someone

and duties and can help explicate the evaluative framework of earth rights, which provides both perfect and imperfect obligations.

In noting this one should also bear in mind that a legal duty is not an absolute undertaking to perform or desist a particular action. Perhaps the most authoritative voice on this point is Ronald Dworkin who conceptualizes rights as "trumps".[46] That is, he argues, rights should be understood in policy matters as always prevailing when competing against considerations of general welfare.[47] However, such claims can be overcome in the face of comparable, competing rights, or when facing the highest or most urgent concerns for the common good i.e. avoiding imminent loss of life. Amartya Sen supports this reasoning, noting that the imposition of a compulsory or absolute duty is "at some distance from the acknowledgment of reasons for action", "lacks cogency" and "internal coherence."[48] Indeed, as in all ethical and political judgments, there is need to assess and understand priorities, as well as room for discrimination in the way the obligation is carried out.[49]

3. Legislation, recognition and advocacy

Finally, a theory of earth rights must consider through what forms of action the rights for nature can best be promoted and, in particular, whether legislation is the principle or even necessary means of implementation. In answer to this question, this paper submits that the implementation of earth rights cannot be sensibly restricted to the juridical model to which it is frequently confined. While important, legislation is supported by at least two other methods – recognition and advocacy. From this perspective earth rights cannot correctly be identified by legislation alone and must be viewed as operating through these three mechanisms.

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being assaulted or tortured. For example, in France there is a provision for criminal liability for omissions. See further Andrew Ashworth and Eva Steiner, 'Criminal Omissions and Public Duties: The French Experience' (1990) 10 *Legal Studies* 153.

[46] Ronald Dworkin describes "rights as trumps". See *Taking Rights Seriously* (Harvard University Press, Cambridge 1977) 184-205. See also <www.nybooks.com/articles/10713>.

[47] Ibid 194.

[48] Ibid.

[49] Ibid.

Legislative recognition of earth rights began in 2006 in the form of municipal ordinances in the United States. These ordinances have been passed in over 20 regions and at present are being debated in the cities of Spokane Washington and Pittsburgh Pennsylvania.[50] Important elements of these ordinances are that they identify specific areas of nature and are not of general application; they empower local communities to assume the role of guardian for nature; and damages are measured with reference to the actual harm caused to the ecosystem rather than a human property owner. For example, the ordinance adopted in Blaine, Washington County provides that local wetlands, rivers and streams "possess inalienable and fundamental rights to exist and flourish within the Township of Blaine."[51] Similarly, an ordinance adopted in Barnstead New Hampshire reads:

> Natural communities and ecosystems possess inalienable and fundamental rights to exist and flourish within the Town of Barnstead. Ecosystems shall include, but not be limited to, wetlands, streams, rivers, aquifers, and other water systems.

Further up the legislative hierarchy, earth rights have been recognised in the constitution of Ecuador, which was adopted in 2008. The provisions relating to the rights of nature read:

> Art. 1: Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution.

[50] See further http://www.celdf.org

[51] Mari Margil, 'Stories from the Environmental Frontier' in Peter Burdon (ed) *Wild Law: Essays in Earth Jurisprudence* (Wakefield Press, Adelaide 2010) 67.

> Article 2: Nature has the right to an integral restoration. This integral restoration is independent of the obligation on natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural system. In the cases of severe or permanent environment impact, including the ones caused by the exploitation of non-renewable natural resources, the State will establish the most efficient mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.
>
> Article 3: The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.[52]

The recognition of earth rights in legislation is clearly an important method for supporting their public enforcement. However, there are other effective ways of advancing the cause of earth rights; the second avenue being what Charles Beitz has called the "recognition route", where there is an acknowledgment, but not necessarily any legislation or institutional enforcement, of a behaviour or action.[53] The proposed Universal Declaration on Mother Earth Rights is perhaps the most important example of this, even though its proponents clearly hope that it ultimately will generate specific and formal legislative recognition. Whether this occurs or not, the proposed declaration could play a similar role in respect of earth rights to that played by the UN Declaration of Human Rights for human rights in the twentieth century. To this day, advocates for human rights point to this declaration as the single most important step in promoting global awareness and activities on human rights.[54] Subsequently, there have been additional international declarations on human rights, which provide recognition, rather than legal and coercive status.[55] This method could prove equally valuable for the promotion of earth rights and is

[52] Linzey (n 5) 134-135.
[53] Speaking in regard to human rights, Beitz notes that they "play the role of a moral touchstone – a standard of assessment and criticism for domestic institutions, a standard of aspiration for their reform, and increasingly a standard of evaluation for the policies and practices of international economic and political organisations." See further Charles Beitz, 'Human Rights as a Common Concern' (2001) 95 *American Political Science Review* 269-82.
[54] Sen (n 42) 343.
[55] For example see the Declaration on the Right to Development 1986.

motivated by the idea that its ethical force is strengthened by giving it "social recognition and an acknowledged status" even when "no enforcement is instituted."[56]

The third avenue for recognising earth rights is advocacy. This route is already well developed in the context of environmental protection and entails organised agitation and urging compliance with certain basic claims regarding earth rights. This can also find expression in the monitoring of present and potential violations of these rights and avenues for social pressure to urge compliance. At the forefront of this avenue is the global NGO movement, which taken collectively, represents the largest social movement in human history.[57] The NGO sector has taken on increased importance in advancing earth rights through public discussion, education programs and most visibly, campaigning against clear violations. While the values invoked during the advocacy route often do not have legal status, few would consider the work useless by reason of its absence of legal backing.[58] Furthermore, even where some identified aspect of nature has a legal right, such as endangered species legislation, enforcement can be enhanced by public advocacy, which is to be distinguished from the process of legislation itself.

4. Conclusion

This paper has sought to provide a basic introduction to the theory of earth rights. In doing so, it is important to emphasise that theories of rights are sustained and progressed through robust intellectual engagement and public discussion. This point was articulated by Amartya Sen who notes:

> …like the assessment of other ethical claims, there must be some test of open and informed scrutiny, and it is to such scrutiny that we have to look in order to proceed to a disavowal or an affirmation. The status of these ethical

[56] Sen (n 42) 343.
[57] Paul Hawkin, *Blessed Unrest: How the Largest Social Movement in History is Restoring Grace, Justice and Beauty to the World* (Penguin Books, New York 2008) 2-3.
[58] See David Suzuki, *Good News for a Change* (Allen and Unwin, Sydney 2003).

> claims must be dependent ultimately on their survivability in unobstructed discussion.[59]

In this sense, earth rights are linked with what John Rawls has labelled "public reasoning" and its role in "ethical objectivity."[60] Indeed, the theory and implementation of earth rights are complementary and their joining is vital for both conceptual clarity and richness of practice.

[59] Sen (n 42) 248-349.
[60] John Rawls, *A Theory of Justice* (1971) 67. See also Amy Guttman and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, Cambridge, 1996).

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New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide

James R. May[*] and Erin Daly[§]

Introduction

This essay provides an overview of the worldwide phenomenon of constitutional environmental rights. Since the Stockholm Convention, nearly 60 countries have constitutionally entrenched environmental rights, according their citizens basic rights to environmental quality in one form or another.[1] The list is diverse politically, including countries with civil, common law, Islamic, and other traditions.[2] Some of the more recent of these include Kenya in 2010,[3] Ecuador in 2007,[4] France in 2005, [5] Afghanistan in 2004,[6] and South Africa in 1996.[7]

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[1] See J. May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 Pace Envtl. L. Rev. 113.
[2] See generally: C. Bruch (ed.), *Constitutional Environmental Rights in Africa* (2008) Envtl. Law Inst.
[3] Constitution of Kenya (Art. 42).

As a result, domestic courts and international tribunals are enforcing constitutionally enshrined environmental rights with growing frequency,[8] reflecting basic human rights to clean water, air, land, and environmental opportunity.[9] Courts have even read environmental rights into constitutions that do not explicitly mention them or where judicial enforcement has been nominally withdrawn. Courts in Southern Asia have led the way, inferring environmental rights from other constitutionally entrenched rights, most commonly a "right to life."[10] This trend has been most notable in India,[11] Pakistan,[12] Bangladesh, and Nepal where such rights have been read in tandem with directive principles aimed at promoting environmental policy to embody substantive environmental rights.[13]

This essay addresses six facets of constitutionally embedded environmental rights. First, what is an actionable 'right' to the 'environment'? This query raises both philosophical and epistemological issues. Second, under what circumstances has an environmental right been violated? This focuses on whether the injury is general – say, to the environment or public at large – or individualized. Third, who can vindicate environmental rights? This question examines who the proponent of the right may be, and whether she may bring a generalized claim or must be among the injured. Fourth, who can be held constitutionally accountable for violating the right? In other

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[4] Constitución Política de la República del Ecuador (Title II, Ch. 2, Art. 14).
[5] 1958 Const. title XVII art. 1 (Fr.) (Charter of the Environment 2004).
[6] Constitution of Afghanistan (Preamble).
[7] Constitution of the Republic of South Africa (1996) (Article 24). See further: H. Ebrahim, *The Soul of A Nation: Constitution-making in South Africa* (1998) Oxford University Press, USA.
[8] See: J. May and E. Daly, 'Vindicating Constitutionally Entrenched Environmental Rights Worldwide' (2010) 11 Or. Rev. Int'l L. 365.
[9] See: D. Shelton, 'Human Rights and the Environment' (2002) 13 Yearbook Intl. Envtl. L. 199; and S. Kravchenko and J. Bonine, *Human Rights and the Environment: Cases, Law and Policy* (2008) Carolina Academic Press.
[10] C. Bruch et al., 'Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa' (2001) 26 Colum. J. Envtl. L. 131, at 133.
[11] See: M. Anderson, 'Individual Rights to Environmental Protection in India' in A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) OUP, at 199-225; S. Chaubey, 'Environmental Law of India' in J. Schlickman, *International Environmental Law and Regulation* (2001) Butterworth Legal Publishers, Ind-1, at § 2.2; and B. Hill et al., 'Human Rights and the Environment: A Synopsis and Some Predictions' (2004) 16 Geo. Int'l Envtl. L. Rev. 359, at 382.
[12] See: M. Lau, 'Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan' in Boyle and Anderson (supra note 11) at 285–302.
[13] See Bruch et al. (supra note 10) at 166-67.

words, is the right vertical (i.e. actionable against the government), horizontal (actionable against other private parties), or both? Fifth, how can courts fashion appropriate remedies? Last, is the claim justiciable? That is, are the domestic courts in the country where the right resides constitutionally and politically equipped to hear and enforce it?

As we shall see, constitutionally embedded rights are both fairly ubiquitous in form, and fairly challenging in function.

What is an Actionable "Right" to the "Environment"?

Constitutional provisions protecting the environment tend to be written in broad and ambitious terms, reflecting that the environment is everything around us and essential for the enjoyment of every other right, and indeed of life itself. While poetic, this expansiveness brings considerable juridical challenges. What would be outside the ambit of a "sound living environment?" If people have a right *not* to live in a "deeply altered environment," then almost every governmental action could constitute a violation because anything can alter the environment. But no constitutional system can survive if every action can be challenged; and no government can survive if every action is subject to judicial review. Because constitutional texts rarely provide limiting principles, it often falls to the courts to limit what constitutes an actionable violation of the right to a healthy environment.

What is an Actionable Violation of an Environmental Right?

Given the potential breadth of environmental rights, courts must ask what constitutes an actionable violation. Is it the dumping of toxic chemicals causing a higher-than-expected incidence of cancer in a local community? Or is it in the rise in the ocean's salinity that will cause changes in the marine population? The problem is not only broad, but deep: whereas every other constitutional right is designed to benefit people – the holders of constitutional rights – environmental rights may also be understood to protect flora and fauna, and even the biosphere itself. This is the only constitutional right that not only encompasses enjoyment of all things, but that can be

understood to protect all things, living and non-living, such as aquatic systems, forests, mountains, and the atmosphere. The Indian Constitution makes this clear: the state is required to "endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."[14] Do the human plaintiffs in environmental rights cases then need to show that harm has occurred or will occur to them, or is it enough to show damage to their local environment, or that the planet's fragile eco-system is under threat?

The Supreme Court of Chile seems to have recognized that harm to the environment itself is sufficient to trigger the court's jurisdiction. *In Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador*, the Court found judicially cognizable harm in:

> [T]he daily accumulation of thousands of tons of contaminants by whose fast and silent chemical action the ecology, along the coast, is destroyed, producing the ecological destruction of all forms of marine life in hundreds of square kilometers . . . a devastation that blossoms over the whole coastal area of the National Park Pan de Azucar, with which dies a piece of Chile.[15]

Recognition of this kind of damage increases the plaintiffs' likelihood of success, and reduces their costs, as it is much less onerous to show that the defendant's actions caused harm to the environment than that they injured the specific plaintiff. For instance, it requires fewer experts and less evidence to prove damage to the mountain than to prove that mining polluted the water which caused the plaintiff's cancer. This approach therefore encourages more claims. Where the court does not recognize harm to the environment as an actionable injury, lack of evidence and limited resources may preclude enforcement of constitutionally protected environmental rights.

In the alternative, some Latin American courts, have allowed a loose showing of personal injury where judicial intervention seemed the only way to protect against severe environmental damage. This approach was utilized by the Chilean court in

[14] Indian Constitution, amended by the Constitution Forty-second Amendment Act, 1976 (Art 48A).
[15] *Pedro Flores v. Codelco, División Salvador, Rol. 2.052* (Sup. Ct. Chile, June 23, 1988) in C. Bohorquez (trans.) (1989*)* 2 Geo. Int'l Envtl. L. Rev. 251, at 253. See further May and Daly (supra note 8) at 392.

what is commonly referred to as the *Trillium* decision. Here, the court held that the Chilean government's approval of the Rio Condor Project, a U.S.-based Trillium Corporation's $350 million project to log 270,000 hectacres of pristine forests in Tierra del Fuego, violated the constitutional environmental "right to live in an environment free from contamination."[16] The Court said that this provision required "the maintenance of the original conditions of natural resources" and was designed to keep "human intervention to a minimum."[17]

Similarly, in *Arco Iris v. Instituto Ecuatoriano de Mineria*, a court in Ecuador concluded that the company's degradation of Podocarpus National Park "is a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chinchipe to have an area which ensures the natural and continuous provision of water, air humidity, oxygenation and recreation."[18] In similar fashion, the Hungarian Constitutional Court in *Case 28/1994*,[19] held that the legislature's efforts to sell formerly nationalized forested lands for cultivation would be unconstitutional, violating constitutional environmental rights.[20] These cases exemplify some courts' willingness to hear constitutional claims even absent evidence of harm to the specific plaintiffs.

Who Can Vindicate a Violation?

Constitutional and other limits can restrict the pool of potential claimants. For example, Namibia's environmental rights provision may only be enforced by an ombudsman,[21] and citizens of Cameroon may not pursue environmental rights before

[16] The "Trillium Case," Decision No. 2.732-96, at 8, Sup. Ct. of Chile, (Mar. 19, 1997), at http://www.elaw.org/node/1310 accessed 16 January 2011. See further: O. Houch, *Taking Back Eden: Eight Environmental Cases that Changed the World* (2009) Island Press, at 151-74; and May and Daly (supra note 8) at 392.
[17] Ibid.
[18] *Case No. 224/90, Arco Iris v. Instituto Ecuatoriano de Mineria*, [Constitutional Court of Ecuador] Judgment No. 054-93-CP, translated in Bruch et al. (supra note 10) at 26.
[19] MK. Case No. 1994/Decision 28 (Hung. Const. Ct. 1994), available at http://www.mkab.hu/admin/data/file/749_28_1994.pdf.
[20] See: S. Stec, 'Ecological Rights Advancing the Rule of Law in Eastern Europe' (1998) 13 J. Envtl. L. & Litig. 275, at 320–21; and S. Kravchenko, 'Citizen Enforcement of Environmental Law in Eastern Europe' (2004) 10 Widener L. Rev. 475, at 484.
[21] E. Brown Weiss et al., *International Environmental Law and Policy* (1998) Aspen Law & Business, 1st edn, at 417.

the country's Constitutional Court.[22] In other jurisdictions, it is not standing that limits litigation, but judicial interpretation of constitutional rights. For example, the Constitutional Court of Turkey has interpreted the constitutional provision that "[e]veryone has the right to live in a healthy, balanced environment,"[23] to permit solely facial challenges to legislation as enacted but not as applied,[24] and Spain's "right to enjoy an environment suitable for the development of the person,"[25] is viewed as falling outside the actionable private "rights" that the constitution guarantees.[26] Other courts are more willing to expand the class of potential plaintiffs precisely to enhance the control that the people have over the government. In many Latin American countries, courts have allowed *amparo* or similar actions, which permit any citizen to enforce constitutional rights.[27] As discussed above, some courts, including those in India, Pakistan, and Bangladesh, provide a form of open standing to vindicate environmental harms on behalf of the public interest under the auspices of other constitutional rights, including a "right to life." These courts exemplify a willingness to open the class of plaintiffs to give full effect to expansive constitutional language.

Who Is Constitutionally Accountable?

Most significant environmental claims result from a combination of public and private actions, and often exhibit transnational dimensions. These facts complicate the attribution of liability in domestic constitutional courts. In *Eurogold*, the Turkish government allowed a giant French mining conglomerate to use cyanide heap-leaching in its operations in a centuries-old olive growing region.[28] After government-paid loggers began to remove olive trees, farmers successfully claimed

[22] Bruch et al. (supra note 10) at 139.
[23] Turkish Republic Constitution (Pt. II, Ch. III, Art 56).
[24] E. Brandl and H. Bungert, 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad' (1992) 16 Harv. Envtl. L. Rev. 1, 72.
[25] Constitución (Title I, Ch. III, Art. 45).
[26] See: Brandl and Bungert (supra note 24) at 65; and A. Herrero de la Fuente, in J. Ebbesson (ed.) *Access to Justice in Environmental Matters in the EU* (2002) Kluwer Law International) at 442.
[27] *An accion de amparo* is a cause of action to enforce constitutional rights, used widely throughout the Spanish-speaking world (Houck (supra note 16) at 306). See for example: *Proterra v. Ferroaleaciones San Ramon S.A.*, Judgment No. 1156-90 (Sup. Ct. Peru, Nov. 19, 1992), cited in Bruch et al.(supra note 10) at 27. See further May and Daly (supra note 8) at 393 (discussing rights of *amparo)*.
[28] A. Sachs, 'What Do Human Rights Have To Do With Environmental Protection? Everything' (1997) Nov-Dec, *Sierra Magazine* (available at http://www.sierraclub.org/sierra/199711/humanrights.asp).

that the government's license contravened Turkey's new constitutional environmental right "to live in a healthy, balanced environment"[29] and Turkey's highest administrative court stopped the operation by assigning responsibility to the government.[30]

Courts have also held private parties accountable for violations of constitutionally embedded environmental rights provisions. For example, a court in Costa Rica invoked the country's fundamental environmental rights provision to stop a transnational banana company from clear-cutting approximately 700 hectares near the Tortuguero National Park that includes nesting habitat for the endangered green macaw.[31] This case settled with an agreement to institute measures to protect the habitat.[32] Indeed, many constitutional environmental cases are settled because, even when the environmental violation has been identified, it is difficult for the courts to fashion and enforce remedies that are sufficiently effective to satisfy the claimants and alleviate environmental damage, but also sufficiently practical to ensure compliance by the defendants.

What Remedies Are Available?

In some environmental cases, as in non-environmental cases, the court can order the defendant to cease or to pay damages to compensate the victim for the costs of medical care or lost employment. But most environmental cases are more challenging for courts to remedy. In one Colombian case, where toxic fumes emanated from an open pit, it was not enough to pay for past damage: defendants were required "to remediate the site and to pay past and future medical expenses to those who became sick",[33] raising questions of the duration and extent of the defendant's obligations and of the court's jurisdiction.

[29] Turkish Republic Constitution (Pt. II, Ch. III, Art. 56).
[30] See Sachs (supra note 28).
[31] See further: Bruch et al (supra note 10) at 26; Environment Law Alliance Worldwide (E-Law), 'Valuing Biodiversity in Costa Rica' (1999) July (available at http://www.elaw.org/node/866); and May and Daly (supra note 8) at 394.
[32] Ibid.
[33] Corte Constitucional, Chamber of Civil and Agrarian Appeals, Nov. 19, 1997, 'Castrillon Vega v. Federación Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar' (CORPOCESAR) / Acción de Tutela Case No. 4577 (Colom.), discussed in Kravchenko and Bonine (supra note 9) at 70.

Even more challenging are the more common environmental cases where the harm is irremediable: if the toxic chemicals have already been dumped, it may not be enough to stop dumping and pay a fine. Remedial relief may also require cleanup and developing and implementing a government program to prevent future damage. For example, the Nepalese Supreme Court prohibited the use of diesel trucks through Kathmandu in the name of environmental rights.[34] Similarly, in Bangladesh, the court banned two-stroke engines in the city of Dhaka.[35] In *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, the Philippine Supreme Court upheld a request for multifaceted injunctive relief to prevent massive pollution discharges from choking Manila Bay and to clean and protect it for the benefit of future generations.[36]

These examples are rare, however, because many courts are wary of entering this environmental thicket. Designing an effective remedy often requires nuanced line-drawing by the court as well as ongoing oversight. But should a court even be making these subtle determinations which often stray into policy matters and which may require the allocation of resources toward one set of goals, invariably at the expense of other social needs? In one early Nepalese case, the Supreme Court prohibited the government from leasing an important archeological site to a medical college. "The environment is an integral part of human life," the Court said, and therefore environmental resources should be protected in order to prevent degradation and maintain a pollution-free environment. But should the courts be deciding whether preserving the archeological site is more important than a medical college? Vindicating environmental rights almost invariably mean burdening industry, diminishing revenue and employment, and imposing higher costs on private enterprises and individuals, whether due to greener production or the cost of cleanup. In another example, the Indian Supreme Court ordered the conditional closure of tanneries, recognizing that "closure of tanneries may bring unemployment

[34] *Advocate Kedar Bhakta Shrestha v. HMG, Dep't of Transp. Mgmt.*, Writ No. 3109 of 1999 (Nepal), in UNEP, *Compendium of Summaries of Judicial Decisions in Environment-Related Cases* (2005) 90, at 134.
[35] See P. Hassan and A Azfar, 'Securing Environmental Rights Through Public Interest Litigation in South Asia' (2004) 22 Va. Envtl. L.J. 215, 244.
[36] *Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48 (Phil. S.C., Dec. 18, 2008).

[and] loss of revenue." Nonetheless, it made the policy judgment that "life, health, and ecology have greater importance to the people,"[37] even though those who rely on the tanneries for their livelihood may not have made the same calculation.[38] Because environmental cases almost invariably present difficult and far reaching policy choices that are ill-suited to judicial resolution, courts often decline to fashion the remedial plan themselves, instead ordering the political branches to progressively realize the right and sometimes maintaining jurisdiction to ensure compliance.

Justiciability: Are Courts Receptive to Constitutional Environmental Rights?

The challenge of fashioning remedies is rooted in the fundamental fact that environmental rights are not absolute but always need to be balanced with other societal needs.[39] As indicated by the language of the Supreme Court of Nepal: "It is beyond doubt that industry is the foundation of development of the country. Both the country and society need development; however it is essential to maintain an environmental balance along with industry."[40] While protecting the environment can help preserve the way of life for some, it can impair the way of life of others. Furthermore, for the government, the cost is felt twice, once in compliance and clean up, and again in the diminution in taxes, fees, and other costs associated with increased regulation.

The judgment of how to balance the competing claims is one that should typically be done politically and not judicially. As the Hong Kong Court has said: "How … can this court decide that this decision fails to reach a fair balance between the duty Government has to protect the right to life and the duty it has to protect the social and economic well-being of the Territory? It cannot do so …"[41]. Nonetheless, "sketchy

[37] *M.C. Mehta v. Union of India, A.I.R.* (1987) 4 S.C.C. 463 (India).
[38] Yogi Narahari Nath & Others v. Honourable Prime Minister Girija Prasad Koirala & Others, 33 N.L.R. 1955 (S.C. Nepal) in *UNEP Summaries* (supra note 34) at 134.
[39] The Philippines Constitution (1987) explicitly requires that: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature" (Art. II(16)).
[40] *Dhungel v. Godawari Marble Indus.*, WP 35/1992 (S.C. Nepal, Oct. 31, 1995) (en banc), reprinted in Kravchenko and Bonine (supra note 9) at 96-97.
[41] Clean Air Found. Ltd. & Another v. Gov't of H.K., 2007 WL 1824740 [2007] HKEC 1356, HCAL 35/2007 (CFI) 42.

input from the legislature, and laxity on the part of the administration"[42] means that it often falls to the courts to protect environmental interests.

Some courts are reluctant to favor the environment at the expense of the individuals before them, or to protect the abstract value of a clean environment over immediate needs for sustenance or jobs. Others have drawn the line where the environmental degradation seems neglectful[43] or vindictive.[44] Still others want to avoid having to make the decision, attributing it to the Executive, which may result in continued environmental deterioration, as it did in *Ng Ngau Chai v. Town Planning Bd.*[45] Courts have been more willing to step in where they have found that environmental degradation implicates other constitutional rights, most commonly the right to life. The Supreme Court of India was one of the first to find that a "right to life"[46] embeds a right to a quality environment.[47] In *Subhash Kumar v. State of Bihar*, the plaintiffs sought to stop tanneries from discharging into the Ganges River.[48] While the Court dismissed the action for lack of standing, it found that the pollutant discharges were sufficient to make the river unfit for drinking and irrigation, which could violate the constitutionally protected "right to life" [49] that "includes the right of enjoyment of pollution-free water and air for full enjoyment of life."[50] Subsequently in *M.C. Mehta v. Union of India*, as noted above, the Court ordered the tanneries to shut down unless effluent was first subjected to pretreatment processes approved by the governing environmental agency.

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[42] B.N. Kirpal, Chief Justice, Supreme Court of India, M.C. Bhandari Memorial Lecture: Environmental Justice in India (2002), in 7 S.C.C. 1 (2002), (available at http://www.ebc-india.com/lawyer/articles/2002v7a1.htm).

[43] See, for example: *Defensoria de Menores Nro 3 v. Poder Ejecutivo Municipal*, Agreement 5, Superior Justice Court. Neuquen. March 2, 1999. (Arg.).

[44] See, for example: *Soc. and Econ. Rights Action Ctr. v. Nigeria, Commc'n 155/96*, African Commission on Human and Peoples' Rights (Oct. 27, 2001), available at http://www.cesr.org/downloads/AfricanCommissionDecision.pdf.

[45] *Ng Ngau Chai v. Town Planning Bd.*, [2007] HCAL 64/2007 (H.K), quoted in *Clean Air Found. et al. v. Gov't of Hong Kong SAR*, [2007] HKEC 1356, HCAL 35/2007 (C.F.I.), at 2007 WL 1824740.

[46] Indian Constitution (Art. 21).

[47] *Bandhua Mukti Morcha v. Union of India*, (1984) 3 S.C.C. 161 and *Charan Lal Sahu v. Union of India, A.I.R.,* 1990 S.C. 1480 discussed in D Shelton and A. Kiss, *Judicial Handbook on Environmental Law* (2005) UNEP, at 8.

[48] *Subhash Kumar v. State of Bihar, A.I.R.*, 1991 S.C. 420. See May and Daly (supra note 8) at 400.

[49] Subash Kumar, A.I.R. 1991 S.C. 420, in *UNEP Summaries* (supra note 34) at 104.

[50] Ibid, cited in Shelton and Kiss (supra note 47) at 8.

The Supreme Court of Pakistan has also held that environmental rights are embedded in the constitutional "right to life." In *In re: Human Rights Case* (Environment Pollution in Balochistan), the Court took judicial notice of a newspaper report that private interests were seeking to buy coastal land for dumping nuclear and highly hazardous waste[51] and ordered the environmental regulator to monitor land allocation in the area and forbid such use.[52] In *West Pakistan Salt Miners v. Directors of Industries and Mineral Development*, the Court upheld a claim that the right to life included a right to water free from contamination from mining activities."[53]

In *Mohiuddin Farooque v. Bangladesh*, the petitioners alleged that the implementation of a substantial flood control plan would so disrupt the affected community's life, property, and environmental security as to violate the right to life.[54] While the Court held that the constitutional right to life included environmental rights, it dismissed the action, reasoning that petitioners were not "person[s] aggrieved" within the meaning of Constitution.[55] The Court has been more receptive to the claim in a series of petitions by the Bangladesh Environmental Lawyers Association (BELA) to enjoin dumping of wastes in a flood zone,[56] to prevent cutting forests for a cement factory,[57] to curtail pollution caused by a polyurethane recycling factory,[58] and to stop operation of a confectionary and party shop in a residential area.[59]

The trend has now spread to other regions. The Constitutional Court of Colombia has read a constitutional "right to life" as encompassing a substantive right to a healthy environment.[60] In *Maria Elena Burgos v. Municipality of Campoalegre (Huila),* the Court upheld a lower court's order to destroy pig stalls that caused neighbors to fall ill

[51] Human Rights Case No. 31-K/92(Q), P.L.D. 1994 S. C. 102 (1992), in UNEP, *Compendium of Judicial Decisions in Matters Related to Environment: National Decisions* (1998) I, at 280.
[52] Ibid, at 281.
[53] 1994 S.C.M.R. 2061 (S.C. Pak.), in *UNEP Compendium* (supra note 51) at 282. See also *Ms. Shehla Zia et al. v. WAPDA*, P.L.D. 1994 S.C. 693, in *UNEP Compendium* (supra note 51) at 323.
[54] *Dr. Mohiuddin Farooque v. Bangladesh,* 48 Dir 1996 (S.C. Bangl. App. Div., Civ.), in *UNEP Summaries* (supra note 34) at 90.
[55] Ibid. See further Hassan and Azfar (n 35) at 242.
[56] See *BELA v. Bangladesh*, (2006) Writ. Pet. 7465.
[57] See *BELA v. Bangladesh*, (2006) Writ. Pet. 2020.
[58] See *BELA v. Bangladesh*, (2006) Writ. Pet. 11594.
[59] See *BELA v. Bangladesh*, (2006) Writ. Pet. 6097.
[60] The Colombian Constitution (1991) now reads: "Every individual has the right to enjoy a healthy environment" (Title II, Ch. III, Art. 79).

with respiratory distress and fever, finding the claims constituted an actionable violation of the country's fundamental environmental right encompassed in a right to life.[61] In so doing, the Court has conceived the right to the environment as "a group of basic conditions surrounding man, which define his life as a member of the community and allow his biological and individual survival,"[62] existing, "side by side with fundamental rights such as liberty, equality and necessary conditions for people's life … [W]e can state that the right to the environment is a right fundamental to the existence of humanity."[63]

It is appropriate to conclude this article with perhaps the most sweeping endorsement of justiciability of constitutionally embedded environmental rights. In the celebrated case of *Minors Oposa v. Factoran*, the Philippine Constitutional Court announced that rights to a quality environment are enforceable whether or not they are constitutionally expressed because they "exist from the inception of humankind"[64] and:

> these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come - generations which stand to inherit nothing but parched earth incapable of sustaining life.[65]

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[61] *María Elena Burgos v. Municipality of Campoalegre* (Huila) (Const. Ct. Colom. Feb. 27, 1997) in *UNEP Summaries* (n 33) 79. See May and Daly (supra note 8) at 403-04.
[62] See A. Fabra and E. Arnal, 'Review of Jurisprudence on Human Rights and the Environment in Latin America' (2002) Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Background Paper No. 6 (available at http://www2.ohchr.org/english/issues/environment/environ/ bp6.htm).
[63] Ibid.
[64] *Minors Oposa v. Factoran*, G.R. No. 10183, 224 S.C.R.A. 792 (July 30, 1993). (Phil.), reprinted in [1994] 33 *I.L.M.* 173, at 187.
[65] Ibid.

Conclusion

There is a discernible trend for nations to constitutionally entrench fundamental rights to the environment and for courts to take them seriously. The six facets involving form, depth, scope, parties, remedies, and justiciability make constitutional environmental rights inherently complex. Nonetheless, courts in an increasing number of countries have been willing to recognize and enforce the fundamental importance of constituted environmental rights.

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De L'urgente Nécessité De Reconnaître Le Principe De "Non Régression" En Droit De L'Environnement

Michel Prieur*

English Abstract

Urgently Acknowledging the Principle of "Non-Regression" in Environmental Rights

In this article Michel Prieur, Emeritus Professor from the University of Limoges, examines the principle of standstill or "status quo" in environmental law (known as "non regression" in French). This principle prevents public authorities from modifying or abolishing existing legislations if to do so would diminish the protection of the environment. In his view, this principle is needed today as environmental law is facing a number of threats such as deregulation, a movement to simplify and at the same time diminish environmental legislations perceived as too complex, and an economic climate which favours development at the expense of the protection of the environment. He notes that the trend to decrease the protection offered by

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environmental law is particularly noticeable in domestic regimes in a number of countries, both in terms of restrictions to the public right to participation and the weakening of substantive norms.

In the first part of the article, the author explores three theoretical bases for the principle. The first one is the purpose of environmental law itself. Its aim is not simply to regulate the environment but to prevent its degradation as well as the depletion of natural resources. In other words, environmental law, as demonstrated by key principles such as prevention, public participation, inter generational equity and precaution, is a law for the constant improvement of the environment. Secondly, for the sake of future generations, environmental law, must be an exception to the rule that legislators can always change the law. Finally, as for social, economic and cultural rights, States must constantly strive to enhance the protection of the right to a healthy environment. The author refers to a number of conventions as well as decisions of regional human rights tribunals to support this analysis.

In the second part of the article the author argues that manifestations of the principle can be found in international environmental law. One can find implicit or explicit references to the concept in a number of important international instruments. These instruments aim to protect the environment and, therefore, one cannot legislate in such a way as to damage the environment.

The author concludes that environment law has an immutable core content closely linked to the fundamental human right to life. Environmental law is a set of norms that are interdependent from one another. The concept of standstill protects this complex, fragile and fundamental construct.

Article

Au nom de la souveraineté des parlements et de la démocratie le temps du droit refuse l'idée d'un droit acquis aux lois : "ce qu'une loi a pu faire une autre loi peut le défaire". N'est-ce pas là, dans le domaine de l'environnement, une contradiction avec la recherche de l'équité environnementale?

L'environnement est une politique-valeur qui par sa portée traduit une recherche permanente d'un mieux être humain et animal au nom d'un progrès permanent de la société. Les politiques environnementales, si elles sont ainsi le reflet du progrès, devraient interdire toutes régressions.

Le but principal du droit de l'environnement est de contribuer à la diminution de la pollution et à la préservation de la diversité biologique sans restrictions territoriales puisque l'environnement n'a pas de frontières.

A l'heure où le droit de l'environnement est consacré par un grand nombre de constitutions comme un nouveau droit de l'homme, il est paradoxalement menacé dans sa substance. Cela pourrait conduire à un retour en arrière constituant une véritable régression préjudiciable pour l'avenir de l'humanité et menaçante pour l'équité environnementale inter-générationnelle.

Le droit de l'environnement ne doit-il pas rentrer dans la catégorie des règles juridiques éternelles, irréversibles et donc non abrogeables au nom de l'intérêt commun de l'humanité?

A l'heure actuelle plusieurs menaces risquent de faire reculer le droit de l'environnement:

- menaces politiques: la volonté démagogique de simplifier le droit pousse à déréguler, voire à délégiférer en matière d'environnement compte tenu du nombre croissant de normes juridiques environnementales au plan international comme au plan national.
- menaces économiques: la crise économique mondiale favorise les discours réclamant moins d'obligations juridiques dans le domaine de l'environnement dont certains considèrent qu'elles seraient un frein au développement et la lutte contre la pauvreté
- menaces psychologiques: l'ampleur des normes en matière d'environnement en fait un ensemble complexe difficilement accessible aux non spécialistes ce

qui favorise le discours en faveur d'une réduction des contraintes du droit de l'environnement.

Les formes de la régression sont diverses:

- jusqu'alors on ne constate pas de régression en droit international de l'environnement. En droit communautaire de l'environnement, elles sont diffuses à l'occasion de la révision de certaines directives.
- par contre en droit national de l'environnement on assiste dans de nombreux pays à une régression croissante mais le plus souvent insidieuse:
    - par des modifications de procédures réduisant les droits du public sous prétexte d'allègement des procédures;
    - par des abrogations ou modifications de règles de droit de l'environnement réduisant des protections ou les rendant inopérantes.

Face à ces menaces de régression, les juristes de l'environnement doivent réagir avec fermeté en s'appuyant sur des arguments juridiques imparables. L'opinion publique alertée ne supporterait pas des reculs dans la protection de l'environnement et donc dans la protection de la santé.

Un groupe d'experts juridiques a été crée en août 2010 au sein de la Commission de droit de l'environnement de l'UICN. Il a pour but de mettre en commun, à l'échelle universelle, les expériences et les arguments juridiques pertinents permettant de stopper les menaces de recul du droit de l'environnement.

Pour décrire ce risque de "non régression", la terminologie utilisée par la doctrine est encore hésitante. Dans certains pays, on parle de principe de standstill. C'est le cas en Belgique.[1] En France on utilise le concept d'effet cliquet ou règle du cliquet anti-retour. Des auteurs parlent "d'intangibilité" de certains droits fondamentaux.[2] On assimile aussi la non régression à la théorie des droits acquis alors que cette

[1] V. Hachez, *Le Principe de Standstill Dans Le Droit Des Droits Fondamentaux: Une Orréversibilité Relative* (2008) Bruylant, Belgique.
[2] O. de Frouville, *L'intangibilité Des Droits de L'homme en Droit International* (2004) Pedone, Paris.

dernière peut être source de régression. On évoque aussi "l'irréversibilité" notamment en matière de droits de l'homme.[3] Enfin on utilise l'idée de clause de "statu quo".[4] En anglais on trouve l'expression "eternity clause" ou "entrenched clause", en espagnol "prohibicion de regressividad o de retroceso", en portugais "proibiçao de retrocesso". On utilisera la formulation de "principe de non régression", pour montrer que ce n'est pas une simple clause, mais un véritable principe général, dans la mesure où est en jeu la sauvegarde des progrès obtenus pour éviter ou limiter la détérioration de l'environnement. En même temps qu'un principe, en raison de sa formulation très générale, c'est aussi l'expression d'un devoir de non régression qui s'impose aux pouvoirs publics. Une formulation positive telle que "principe de progrès" n'a pas été ici retenue parce qu'elle est trop vague et s'applique en réalité à toute législation en tant qu'instrument au service des fins de la société. En utilisant "non régression" à propos spécifiquement de l'environnement , on veut signifier qu'il y a des degrés dans la protection de l'environnement et que les progrès de la législation consistent à progressivement assurer une protection la plus élevée possible de l'environnement dans l'intérêt collectif de l'humanité.

Dans notre ouvrage "Droit de l'environnement" publié chez Dalloz (1°édition de 1984) nous avions consacré la conclusion de façon prémonitoire à: "régression ou progression du droit de l'environnement"? Nous constations alors simplement les reculs du droit de l'environnement déjà détectés dans certaines réformes au nom, notamment de la "déréglementation",[5] sans proposer de remèdes. Désormais, l'environnement ayant été consacrée comme un droit de l'homme, on peut opposer à la régression du droit de l'environnement des arguments juridiques forts au nom de l'effectivité et de l'intangibilité des droits de l'homme.

Pour certains le non respect du droit de l'environnement constituerait une régression. Il en est en effet ainsi sur le plan pratique de l'effectivité du droit. Mais nous considérons que le problème de l'effectivité du droit en relation avec sa non

[3] Théorie de Konrad Hesse.
[4] Expression utilisée par S.R. Osmani, *Rapport pour La Commission Des Droits de L'homme sur Les Politiques de Développement dans le Contexte de la Mondialisation* (7 Juin 2004) E/CN.4/sub.2/2004/18.
[5] M. Prieur, "La Déréglementation en Matière D'environnement" (1987) 3 *Revue Juridique de L'environnement,* à 319.

application ou sa mauvaise application, relève d'autres considérations, telles que la passivité de l'administration ou l'insuffisance des moyens financiers de contrôle du respect du droit existant, ce qui n'est pas propre aux problèmes d'environnement. Aussi nous préférons limiter le champ de la réflexion sur la non régression aux seules situations qui, à partir du droit existant et indépendamment de son application, conduisent les pouvoirs publics à modifier ou abroger le droit existant conduisant à une diminution ou à un recul de la protection de l'environnement.

Pour promouvoir la non régression comme un nouveau principe fondamental du droit de l'environnement, il convient de s'appuyer sur une argumentation juridique qui fonde un nouveau principe s'ajoutant aux principes déjà reconnus: prévention, précaution, pollueur-payeur et participation du public.

Les bases de cette argumentation juridiques reposent sur trois éléments: la finalité même du droit de l'environnement, la nécessité d'écarter le principe de mutabilité du droit et l'intangibilité des droits de l'homme. On constatera alors que du droit international au droit national on trouve déjà des illustrations du principe de non régression, y compris dans la jurisprudence.

Les Fondements Théoriques Du Principe De Non Régression

Le caractère finaliste du droit de l'environnement

Depuis son origine dans les années 1970, l'objectif du droit de l'environnement n'était pas de simplement "réglementer" l'environnement, mais de contribuer à réagir contre la dégradation de l'environnement et l'épuisement des ressources naturelles. Le but poursuivi par les lois sur l'environnement est d'assurer la santé et la sécurité en luttant contre les pollutions et nuisances et en préservant la biodiversité. L'environnement est par nature un droit engagé au profit de la lutte contre les pollutions et la perte de la biodiversité. C'est un droit qui se définit selon un critère finaliste car c'est un droit pour l'environnement[6]. De ce fait cet objectif implique une obligation de résultat c'est à dire une amélioration constante de l'état de

[6] M. Prieur, *Droit de L'environnement* (2004) 5° ed, Dalloz, à 8; A. Van Lang, *Droit de L'environnement* (2007) 2° ed, PUF, la reconnaissance d'une finalité spécifique, à.52 et s.

l'environnement. C'est alors aussi l'expression politique d'une éthique de l'environnement ou d'une morale de l'environnement, selon l'expression du président G. Pompidou dans son discours de Chicago le 28 février 1970. Tout recul du droit de l'environnement serait alors immoral. Mais serait-ce aussi illégal ou inconstitutionnel?

On remarquera que les principes classiques du droit de l'environnement tels qu'ils figurent dans la déclaration de Rio de 1992, dans de nombreux traités internationaux et dans les constitutions ou lois nationales peuvent facilement être envisagés comme des supports de la non régression. La prévention empêche le recul des protections; la durabilité et les générations futures renvoient à la durée et à l'intangibilité pour préserver les droits de nos descendants de pouvoir jouir d'un environnement non dégradé; la précaution permet d'éviter des irréversibilités qui seraient en elles mêmes des régressions définitives ; la participation et l'information du public permet de garantir un niveau de protection suffisant grâce à un contrôle citoyen permanent. Finalement le maintien d'un niveau de protection au moins équivalent à celui qui a déjà été atteint ne fait qu'introduire "la mise en œuvre réfléchie d'un projet de société inscrit dans la durée".[7]

Pour apprécier la finalité environnementale d'un texte on recourt à l'interprétation téléologique de ce texte. Pour vérifier si la modification d'un texte existant conduit ou non à une régression, la recherche de l'interprétation téléologique de ce texte sera fondamentale. Au delà d'un positivisme primaire et techniciste, on doit considérer que le droit de l'environnement , plus que tout autre droit, est porteur de valeurs et de finalités liées à l'humain dans son interdépendance avec la biodiversité. Aussi le contenu du droit de l'environnement et son évolution dans le temps ne peut être dissocié de l'intérêt collectif pour la survie de l'humanité et pour la préservation des biens communs. La Cour internationale de justice constate elle – même: "toute l'importance que la protection de l'environnement revêt … non seulement pour les États, mais aussi pour l'ensemble du genre humain".[8]

[7] F. Ost, *Le temps du Droit*, ed. O. Jacob (1999), à 195.
[8] CIJ, Projet Gabcikovo-Nagymaros, Recueil (1997), à 41 (para. 53).

A priori toute règle environnementale a pour but une meilleure protection de l'environnement. On n'imagine pas qu'une loi nouvelle se présente comme ayant pour effet proclamé de polluer plus ou de détruire la nature. Toutefois bien des lois sur la chasse, notamment en France, ont bel et bien pour but de réduire les droits des animaux sauvages en étendant les périodes ou les techniques de chasse.

Ce qui est en jeu ici c'est la volonté de supprimer une règle (constitution , loi ou décret) ou de réduire sa portée au nom d'intérêts, avoués ou dissimulés, qui seraient supérieurs aux intérêts liés à la protection de l'environnement. Le changement de la règle qui conduit à une régression constitue une atteinte directe aux finalités poursuivies par le texte initial. Le retour en arrière en matière d'environnement n'est pas imaginable. On ne peut envisager une loi qui brutalement abroge les lois anti-pollution ou les lois sur la protection de la nature, ou qui supprime, sans raisons valables, des aires protégées. Aussi, la régression du droit de l'environnement va toujours être insidieuse et discrète pour passer inaperçue. Elle en est d'autant plus dangereuse. Les régressions à petits pas menacent tout le droit de l'environnement. Aussi un principe anti-régression doit-il être clairement énoncé et consacré tant à l'échelle internationale que nationale.

La nécessité d'écarter le principe de mutabilité du droit

Selon les principes de théorie du droit on ne pourrait pas déroger à la théorie de la mutabilité du droit sans porter atteinte aux fondements du système démocratique. Les auteurs classiques considèrent que le droit est nécessairement soumis à une règle d'adaptation permanente reflet de l'évolution des besoins de la société. Toute règle juridique doit pouvoir être modifiée ou abrogée à tout moment, car il ne serait moralement pas pensable qu'une "génération d'hommes ait le pouvoir de lier ou d'astreindre la postérité jusqu'à la fin des temps, ou de décider pour toujours comment le monde doit être organisé" (Thomas Paine, les droits de l'homme, 1792). C'est dans ce sens que l'art. 28 de la déclaration des droits de l'homme du 24 juin 1793 en France proclamait : "une génération ne peut assujettir à ses lois les générations futures". Cet article n'a jamais été en vigueur.

L'environnement et le développement durable nous obligent à penser aujourd'hui différemment et à écarter le principe de mutabilité du droit. L'environnement constitue une exception à cet égard, tout comme d'ailleurs les droits de l'homme. En effet avec le concept de développement durable il s'agit de ne pas oublier les droits à la vie et à la santé des générations futures et de ne pas prendre des mesures qui leur porteraient préjudice. Réduire ou abroger des règles protectrices de l'environnement aurait pour effet d'imposer aux générations futures un environnement plus dégradé. Aussi l'art. 28 précité pris à la lettre et combiné avec le principe du développement durable peut s' interpréter dans le domaine de l'environnement comme plaidant en faveur du principe de non régression puisqu'il interdit d'assujettir les générations futures à une loi qui ferait reculer la protection de l'environnement.

L'intangibilité des droits de l'homme

Selon Rebecca J. Cook "e principe de non rétrogression est implicite dans les conventions sur les droits de l'homme".[9] En réalité la non régression des droits de l'homme est plus qu'implicite , elle est éthique, pratique et quasi judiciaire. Selon la déclaration universelle des droits de l'homme, la finalité de ces derniers est de "favoriser le *progrès* social et *instaurer de meilleures conditions de vie*". Il en résulte donc pour les Etats une obligation positive en particulier dans le domaine de l'environnement. Ainsi, selon la belle formule d'un auteur, la non régression est: "une obligation négative inhérente à toute obligation positive assortissant un droit fondamental". Plusieurs textes internationaux des droits de l'homme mettent en avant le caractère progressif des droits économiques, sociaux et culturels aux quels on rattache généralement le droit à l'environnement. On déduit facilement de cette progressivité une obligation de non régression ou non régressivité.

Le Pacte international relatif aux droits économiques, sociaux et culturels de 1966 vise le progrès constant des droits protégés; il est interprété comme interdisant les régressions. Le droit de l'environnement, devenu un droit de l'homme, peut bénéficier de cette théorie du progrès constant appliquée notamment en matière de droits sociaux. Le Comité des droits économiques, sociaux et culturels des Nations

[9] R. Cook, "Reservation to the Convention on the Elimination of all Forms of Discrimination Against Women" (1990) 30 V.J.I.L., à 683.

Unies dans son observation générale n° 3 du 14 décembre 1990 stigmatise "toute mesure délibérément régressive". L'observation générale n° 13 du 8 décembre 1999 déclare: "le Pacte n'autorise aucune mesure régressive s'agissant du droit à l'éducation, ni d'ailleurs des autres droits qui y sont énumérés". L'idée qu'une fois un droit de l'homme reconnu il ne peut pas être limité, détruit ou supprimé, est commune aux grands textes internationaux sur les droits de l'homme (art. 30, Déclaration universelle; art.17 et 53 de la Convention européenne des droits de l'homme; art. 5 des deux Pactes de 1966).

La Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales interprétée par la Cour européenne des droits de l'homme a intégré l'environnement parmi les droits fondamentaux protégés par ricochet. La formulation de l'arrêt Tatar c/ Roumanie du 27 janvier 2009 conduit à admettre désormais un droit à la jouissance d'un environnement sain et protégé par le biais de l'art. 8 de la Convention.[10] On peut considérer que les articles 17 et 53 de la Convention, en prohibant des limitations allant au delà de celles prévues par la Convention, reconnaît de façon certes prudente, une certaine obligation de non régression ou à tout le moins une obligation de ne retenir que la disposition la mieux disante et la plus favorable. En cas de conflits entre une loi et la Convention ou entre une autre convention et la convention des droits de l'homme, c'est le texte le plus protecteur de l'environnement qui devra l'emporter. L'article 17 inspiré par l'article 30 de la Déclaration universelle des droits de l'homme de 1948, et que l'on retrouve dans les articles 5 des deux Pactes de 1966, revient à interdire à un État d'utiliser les droits existants pour les détruire ou les limiter. La "destruction" ou la "limitation" d'un droit fondamental constitue bien une régression. Aucune jurisprudence ne permet encore de mesurer précisément la façon dont la Cour pourrait réagir face à des reculs d'un droit protégé au-delà des limites normalement admises.

La Convention américaine des droits de l'homme adoptée en 1969 prévoit en son art. 26 d'assurer "progressivement" la pleine jouissance des droits, ce qui implique à la fois, comme pour le Pacte international relatif aux droits économiques, sociaux et culturels, une adaptation dans le temps et une non régression. L'art. 29 sur les normes d'interprétation précise qu'il n'est pas possible de supprimer la jouissance

[10] Voir J.P. Marguenaud, *Revue Juridique de L'environnement* (2010), à 62.

des droits reconnus ou de restreindre leur exercice plus qu'il n'est prévu par la Convention. Le Protocole de San Salvador sur les droits économiques, sociaux et culturels de 1988 comporte un article expressément dédié à l'environnement (art. 11). Bien que cet article ne soit pas justiciable directement devant la Commission et la Cour interaméricaine des droits de l'homme, il est soumis au principe de l'art. 1 relatif à la progressivité conduisant au plein exercice des droits reconnus ce qui implique nécessairement la non régression. Comme le précise un commentaire officiel de l'organisation des États américains, les mesures régressives sont: "… toutes les dispositions ou politiques dont l'application signifie une diminution de la jouissance ou de l'exercice d'un droit proté".[11] Un recul dans la protection de l'environnement constituera donc une régression condamnable juridiquement par les organes de contrôle de la Convention et du Protocole.

Dans l'affaire des cinq retraités c/ Pérou, la Commission interaméricaine des droits de l'homme dans sa décision 23/01 du 5 mars 2001 déclara : "le caractère progressif de la majorité des obligations des États en matière de droits économiques, sociaux et culturels, implique pour ces États, avec effet immédiat, une obligation générale de concrétiser la réalisation des droits consacrés sans pouvoir revenir en arrière. Les régressions en la matière peuvent constituer une violation, entre autres, de l'art 26 de la convention américaine" (para. 86). La Cour interaméricaine des droits de l'homme dans son arrêt n°198 du 28 février 2003 confirma la décision de la Commission sur le fond sans toutefois préciser que la régression est une violation de la Convention.

Cette non régression des droits de l'homme ainsi généralisée de façon très discrète, probablement pour ne pas heurter les positivistes tout en satisfaisant les moralistes, est destinée à se répercuter inévitablement sur le droit de l'environnement en tant que nouveau droit de l'homme. L'apparition de ce nouveau principe applicable à l'environnement est en totale synergie avec le caractère finaliste et volontariste de ce droit et pourrait même soulever peut être moins d'objections et de résistance que la non régression dans le domaine social. Cette idée de garantir un développement continu et progressif des modalités d'exercice du droit à l'environnement jusqu'aux

[11] Conseil Permanent de l'OEA, "Normes pour l'élaboration des rapports périodiques prévues à l'art. 19 du Protocole de San Salvador", OEA/Ser.G.CP/CAJP-222604) 17 Décembre 2004.

niveaux les plus élevés de son effectivité peut sembler utopique. L'effectivité maximale est la pollution zéro. On sait qu'elle n'est pas possible. Mais entre la pollution zéro et l'utilisation des meilleurs technologies disponibles pour réduire la pollution existante, il y a une marge de manœuvre importante. La non régression va donc se situer dans un curseur entre la plus grande dépollution possible (qui va évoluer dans le temps grâce aux progrès scientifiques et technologiques) et le niveau minimal de protection de l'environnement qui lui aussi évolue constamment. Un recul aujourd'hui n'aurait pas été un recul hier.

Une Illustration Du Principe De Non Régression: Le Droit International De L'environnement

De façon perspicace le professeur Maurice Kamto a, dès 1998, constaté que: "le droit international de l'environnement affectionne les obligations de standstill".[12]

En effet la non régression figure d'abord, de manière explicite ou implicite dans des proclamations ou conventions. Les conventions internationales sur l'environnement, universelles ou régionales, visent toutes à "l'amélioration de l'environnement". Le caractère finaliste du droit international de l'environnent se vérifie facilement à la lecture de toutes les conventions internationales sur l'environnement. Il s'agit toujours, comme le précise le principe 7 de la Déclaration de Rio de 1992, "de conserver, protéger et de rétablir la santé et l'intégrité de l'écosystème terrestre". Cet objectif de protection est a contrario une affirmation de l'interdiction de toute mesure contraire. Certaines conventions précisent parfois expressément qu'on ne peut revenir en arrière: il est interdit de réduire le niveau de protection de l'environnement (Accord nord américain de coopération dans le domaine de l'environnement de 1994).

La non régression apparaît également au niveau des clauses de sauvegarde permettant une protection renforcée. L'art. 2 du protocole de Cartagena de 2000 sur

[12] M. Kamto, "Singularité du Droit International de L'environnement", in *Les Hommes et L'environnement, en Hommage à A.Kiss* (1998) Frison-Roche, à 321.

la prévention des risques biotechnologiques permet aux États de prendre des "*mesures plus rigoureuses pour la conservation et l'utilisation durable de la diversité biologique*". Dans la Convention sur le droit de la mer les articles 208, 209 et 210 concernant diverses pollutions marines imposent aux États que leurs lois, règlements et mesures nationales "*ne soient pas moins efficaces que les normes de caractère mondial*". La Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux de 1989 permet aux États dans l'article 11 "*d'imposer des conditions supplémentaires pour mieux protéger la santé humaine et l'environnement*". La Convention de Berne de 1979 sur la conservation de la vie sauvage et du milieu naturel de l'Europe permet aux États à l'article 12 "*d'adopter des mesures plus rigoureuses*" que celles prévues dans la convention. La Convention d'Helsinki précitée de 1992 prévoit que les Parties peuvent adopter, individuellement ou conjointement, des mesures "*plus rigoureuses*" *(article 2-8).*

Dans le même esprit, en cas de conflit entre les dispositions d'une convention et le droit national, certains traités consacrent a priori la supériorité de la règle la plus favorable à l'environnement ou la plus stricte en matière de protection, par exemple : article 12 de la Convention européenne du paysage de 2000; article XII-3 de la Convention de Bonn sur les espèces migratrices appartenant à la faune sauvage; article 12 de la Convention de Berne relative à la conservation de la vie sauvage et du milieu naturel de l'Europe. Parfois même cette supériorité juridique de la règle la plus protectrice de l'environnement vise aussi bien des règles existantes que des règles futures (article 12 de la Convention européenne du paysage).

Enfin dans les clauses de compatibilité entre plusieurs conventions internationales la préférence va être donnée au niveau le plus élevé de protection de l'environnement. Une prime est donnée au traité le mieux disant en matière d'environnement. Il en est ainsi par exemple dans la Convention sur la diversité biologique dont l'article 22-1 fait prédominer son texte sur tout autre accord international existant dont le respect "*causerait de sérieux dommages à la diversité biologique ou constituerait pour elle une menace*". Le Protocole de Cartagena sur la prévention des risques biotechnologiques ne permet des accords régionaux qu'à la condition "*qu'ils n'aboutissent pas à un degré de protection moindre que celui prévu par le protocole (article 14-1)*". La Convention d'Espoo de 1991 sur l'évaluation de l'impact sur

l'environnement dans un contexte transfrontalier prévoit que des accords bilatéraux puissent "*appliquer des mesures plus strictes*" *(article 2-9).* La Convention de Bâle de 1989 sur les déchets permet des accords régionaux à la condition qu'ils énoncent "*des dispositions qui ne sont pas moins écologiquement rationnelles que celles prévues dans la convention*" *(article. 11-1).* La Convention d'Helsinki de 1992 sur les effets transfrontières des accidents industriels dispose en son article 24-2 que les parties peuvent prendre des mesures "*plus rigoureuses"* en vertu d'accords bilatéraux ou multilatéraux.[13]

Par ces clauses les États recherchent l'efficacité maximale de la protection par rapport aux objectifs poursuivis[14]. Si des conventions ou protocoles d'application avaient un contenu moins rigoureux que la convention cadre, elles constitueraient une régression prohibée qui pourrait soit être contestée par une Partie devant la Cour Internationale de Justice soit être soumises à un arbitrage. La règle lex posterior derogat priori se trouve ainsi écartée au profit de la non régression exprimée à travers l'idée d'une recherche de protection la plus stricte.

Conclusion

La non régression est bien entendu présente dans le droit de l'Union européenne à travers la théorie des acquis communautaires et dans le traité lui même du fait de l'obligation imposée aux 27 États membres d'atteindre un niveau élevé de protection de l'environnement. En droit national elle trouve ses sources soit dans les clauses "éternelles" des constitutions qui interdisent expressément un retour en arrière, telle la constitution du Bouthan de 2008 dont l'art. 5-3 proclame que 60% des forêts du pays sont protégées pour l'éternité, soit dans les jurisprudences des juridictions constitutionnelles qui, depuis peu en matière d'environnement, condamnent des lois sur l'environnement supprimant ou réduisant la protection et donc faisant reculer le droit de l'environnement (Hongrie, Belgique). Ces jurisprudences nationales pourront à l'avenir se développer en s'appuyant sur la constitutionnalisation de

[13] La même expression est utilisée à l'article 4-8 du Protocole du 18 juin 1999 sur l'eau et la santé.

[14] Ph. Weckel, *La Concurrence des Traités Internationaux, Thèse Droit* (1989) Université Robert Schuman, Strasbourg,à 356.

l'environnement et sa consécration comme un droit de l'homme, qui permet à l'environnement de bénéficier de la théorie des droits intangibles ou irréversibles applicable en matière de droits humains.

Face à cette montée en puissance, la critique du principe de non régression environnementale ne manquera pas d'évoquer une forme nouvelle d'immobilisme ou de conservatisme. En réalité, on mesurera rapidement combien le droit à l'environnement n'est pas un droit de l'homme comme les autres. Sauvegarder les acquis du droit de l'environnement, ce n'est pas un repli sur le passé, c'est au contraire une assurance sur l'avenir.

Le droit de l'environnement a un contenu substantiel intangible étroitement liée au plus intangible des droits de l'homme : le droit à la vie entendu comme un droit à la survie face aux menaces qui pèsent sur la planète du fait des dégradations multiples du milieu de vie des êtres vivants. Mais cette substance intangible est un ensemble complexe dont tous les éléments sont interdépendants. Aussi une régression locale même limitée risque d'avoir des effets ailleurs et dans d'autres secteurs de l'environnement. Toucher à une pierre de l'édifice peut conduire à son effondrement. C'est pourquoi les juges qui auront à mesurer jusqu'ou on peut régresser sans mettre en cause tout l'édifice, devront ne pas s'enfermer dans les jurisprudences anciennes relatives à l'intangibilité des droits traditionnels, mais imaginer une nouvelle échelle de valeurs pour mieux garantir la survie du fragile équilibre homme-nature en prenant en compte la mondialisation de l'environnement.

Preuve de la force populaire de la non régression, celle-ci a été consacrée démocratiquement par un referendum en Californie le 2 novembre 2010, un majorité d'électeurs ayant refusé de suspendre une loi sur la changement climatique et la réduction des gaz à effet de serre qui avait été demandée par les compagnies pétrolières.

Pour approfondir et discuter de ce nouveau principe du droit de l'environnement, rejoignez le groupe d'experts juridiques de la commission de droit de l'environnement de l'UICN en contactant: michel.prieur@unilim.fr et stephanie.bartkowiak@cidce.org.

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The Call of the Wild

Cormac Cullinan*

"Wild Law" is a term which I coined in my 2002 book of the same name,[1] to refer to human laws which give expression to an eco-centric philosophy and approach to law and governance known as "Earth jurisprudence" (see the text box on the next page). Instead of regarding the human world as the sole reference for establishing systems to govern human beings, Earth jurisprudence recognises that human societies are embedded within natural systems of order and accordingly human societies will not flourish in the long-term unless they are aligned with that universal system of order. Wild laws would be designed to structure societies and regulate human conduct in a manner that ensures that humans pursue well-being by seeking to contribute to the health and integrity of Earth instead of by seeking to dominate and exploit it. This approach is consistent not only with many ancient wisdom traditions and the practices of indigenous peoples around the world, but also with contemporary understandings of quantum physics, ecology, and systems theory. All emphasise the interconnected of all aspects of Earth and that the behaviour of any part of an integrated system (like a human being) is significantly influenced by the entire

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[1] C. Cullinan, *Wild Law: A Manifesto for Earth Justice* (2002) SiberInk, Westlake and (2003) Green Books, Devon. A revised and expanded second edition will be published in South Africa, the United Kingdom and electronically in early 2011.

system, instead of the functioning of the whole being merely the sum of its components, as is the case with a machine.

Legal systems structure the economic and political systems, establish fundamental norms of social behaviour and determine how power is exercised in society. They also reflect a society's beliefs, for example, regarding the role of humans and what is reasonable and just. Contemporary legal systems are based on the beliefs that human beings are the superior species on the planet and that human well-being is best achieved by dominating and exploiting Earth. Just as colonial powers introduced laws that denied the prior rights of indigenous peoples and facilitated the exploitation of them and their land, so most contemporary legal systems do not recognise that any other-than-human indigenous inhabitants are capable of having rights. The law defines land, water, other species, and even genetic material and information as "property" or "natural resources" to be "exploited", bought and sold just as slaves once were. In this way the law entrenches the same exploitative relationship between humans and Nature as existed between a slave owner and a slave.

Principles of Earth Jurisprudence

- The Universe is the primary law-giver not human legal systems.
- The Earth community and all the beings that constitute it have fundamental "rights", including the right to exist,to habitat or a place to be, and to participate in the evolution of the Earth community.
- The rights of each being are limited by the rights of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists.
- Human acts or laws that infringe these fundamental rights violate the fundamental relationships and principles that constitute the Earth community ("the Great Jurisprudence") and are consequently illegitimate and "unlawful".
- Humans must adapt their legal, political, economic and social systems to be consistent with the Great Jurisprudence and to guide humans to live in accordance with it, which means that human governance systems at all times take account of the interests of the whole Earth community and must :
  - determine the lawfulness of human conduct by whether or not it strengthens or weakens the relationships that constitute the Earth community;
  - maintain a dynamic balance between the rights of humans and those of other members of the Earth community on the basis of what is best for Earth as a whole;
  - promote restorative justice (which focuses on restoring damaged relationships) rather than punishment (retribution);
  - recognize all members of the Earth community as subjects before the law, with the right to the protection of the law and to an effective remedy for human acts that violate their fundamental rights.

Environmental laws can play an important role in reducing human impacts on Nature and on prohibiting the most egregious assaults on natural systems. However

because most legal systems are *designed* to entrench and facilitate the exploitation of Earth, environmental laws will never succeed in preventing on-going human degradation of Earth, nor in establishing human societies that live in harmony with Nature. Achieving that requires the redesign of governance systems to reflect the understanding that the role of the human is not to dominate, control and exploit the planet, but to contribute to the integrity, health and evolution of Earth by constantly seeking to establish mutually beneficial (and hence sustainable) relations with all beings who, together with human beings, compose Earth.

Legal systems use the notion of rights to strike a balance between the interests of different members of the human community. Since Nature has no rights, our governance systems are dangerously skewed. In many cases human actions that fundamentally damage Earth's climate and other systems on which life depends, are lawful. Perhaps most significantly, there is as yet no general recognition that if we humans are part of the Earth system, our self-regulating (or governance) systems also need to be integrated into planetary regulatory systems. Climate change is an obvious and dramatic symptom of the failure of human governance systems to regulate human behaviour in a manner that takes account of the fact that human welfare is directly dependent on the health of the biosphere and cannot be achieved by ignoring the fundamental laws of the biosphere or at its expense.

Wild Law seeks to explore what human law and governance might look like if it were designed to reflect the understanding that humans are an integral part of Earth and that human existence and well-being is derived from, and wholly dependent on Earth. If humans are quintessentially members of an Earth community - then the main purpose of human governance systems must be to ensure that we retain our place or "niche" within it. In order to do so we must regulate ourselves in a way that ensures that we satisfy human needs in a way that simultaneously benefits the Earth community as a whole. This means that individual and collective human rights must be contextualized within, and balanced against, the rights of the other members and communities that comprise the Earth community. Just as Cicero pointed out that each of our rights and freedoms must be limited in order that others may be free, the rights of humans must be limited in order to prevent humans unjustifiably preventing non-human members of the Earth Community from playing their part in the on-going story of evolution.

Any legal system designed to give effect to modern scientific understandings of how the universe functions (or indeed ancient wisdom traditions in many cultures) would have to recognize that if humans have inherent human rights then other members of the Earth community within which we evolved also have inherent "rights", such as the right to existence and habitat and the freedom to play their role in the great evolutionary story.[2] This means that humans have a corresponding duty to ensure that they do not unjustifiably infringe on those rights. The concept of recognising all that has come into being (i.e. "beings") as rights-bearing legal subjects makes little sense if the role of humans is to colonise and subjugate Earth. However it is fundamental for those who believe that, as Thomas Berry put it "The universe is a communion of subjects not a collection of objects"[3] and that the role of the human is to play a beneficial role within that community.

A significant milestone was reached in September 2008 when the people of Ecuador adopted a constitution that recognises that Mother Earth (*Pachamama*) has legally-enforceable rights. The constitution also commits the state and citizens to seeking well-being in a manner that is harmonious with nature. These remarkable provisions came into being as a result of the collaboration between indigenous people's organization and environmental organizations in Ecuador, the Community Environmental Legal Defense Fund (CELDF) and certain key individuals in the Constitutional Assembly charged with drafting the new constitution. Ecuador changed the debate from whether or not it was possible to recognise rights for Nature to whether or not doing so would be effective.

On 22 April 2009, Bolivian President Evo Morales Ayma made a speech to the United Nations General Assembly[4] in which he expressed the hope that, as the 20th Century had been called "the century of human rights", the 21st Century would be known as the "century of the rights of Mother Earth".[5] He called upon the member states to begin developing a "Declaration on the Rights of Mother Earth" that, among other rights, would enshrine the right to life for all living things; the right for Mother

[2] Thomas Berry has formulated the basis of what he considers these rights to be. See: T. Berry *Evening Thoughts*, *reflecting on Earth as Sacred Community* (Mary Evelyn Tucker ed), (2006) Sierra Club Books, San Francisco, particularly chapter 9 "Legal Conditions for Earth Survival" and Appendix 2 "Ten Principles for Jurisprudence Revision", at 149-150.
[3] T. Berry, *The Great Work: Our Way into the Future* (1999) Bell Tower, New York, at x-xi.
[4] UN General Assembly Session 63, Meeting 80 (available at http://www.undemocracy.com/A-63-PV.80/page_2).
[5] Ibid.

Earth to live free of contamination and pollution; and the right to harmony and balance among and between all things.

Morales' call was followed on 17 October 2009 by a declaration of the nine countries of the Bolivarian Alliance for the Peoples of Our America (ALBA) supporting the call for the adoption of a Universal Declaration of Mother Earth Rights.[6] The Declaration expresses the fundamental principles of Earth Jurisprudence with great clarity, stating:

> "In the 21st Century it is impossible to achieve full human rights protection if at the same time we do not recognize and defend the rights of the planet earth and nature. Only by guaranteeing the rights of Mother Earth we can guarantee the protection of human rights. The planet earth can exist without human life, but humans cannot exist without planet earth."[7]

On 22 April 2010 (Mother Earth Day), exactly a year after President Morales's speech to the United Nations, more than 32 000 participants in the People's World Conference on Climate Change and the Rights of Mother Earth held in Cochabamba, Bolivia proclaimed the Universal Declaration of the Rights of Mother Earth ("the Declaration"). The Declaration recognises that Earth is an indivisible, living community of interrelated and interdependent beings with inherent rights, and defines fundamental human responsibilities in relation to other beings and to the community as whole. (The Declaration uses the ancient term "Mother Earth" to refer to this community in order to emphasise that humans should relate to the being that gives them life in a deeply respectful manner and not as an inanimate "resource" to be managed.)

The Declaration recognises that all natural entities which exist as part of Mother Earth, including plants, animals, rivers and ecosystems, are subjects who have the inherent and inalienable right to exist and to play their role within the community of beings. The international community and most countries recognise and defend human rights but do not recognise that other beings also have inherent rights that

[6] VII ALBA-TCP Summit: Special Declaration for a Universal Declaration of Mother Earth Rights
(available at http://motherearthrights.org/2009/10/17/vii-alba-tcp-summit-special-declaration-for-a-universal-declaration-of-mother-earth-rights/).
[7] Ibid.

humans must respect. This has created an imbalance in the relationships between humans and other beings and has led to the establishment of political, economic and legal systems that are designed to enable people to exploit other beings instead of to balance the interests of all beings in a way that maintains the integrity and health of the whole community. These exploitative relationships are unsustainable and have already damaged and disrupted ecosystems and natural cycles to such an extent that phenomena such as climate change now threaten the wellbeing and rights of many humans and other beings.

The 1948 Universal Declaration of Human Rights (UDHR) reflects the determination of the signatories to ensure that horrific treatment of human beings that occurred during the Second World War would be universally outlawed. The Declaration is a contemporary response to the abhorrent degradation of Earth which now threatens the future of many humans. It is intended to complement and contextualise the UDHR and expressly recognises that because humans derive everything necessary for a good life from the living communities within which we live, we cannot maintain human rights and the freedom to live well unless we respect and defend the rights of Mother Earth.

Contemporary civilization is unlikely to survive this century (as least in a form recognizable to us) unless we rapidly abandon the doomed imperial project of imposing human domination by force on the rest of the Earth community. Fortunately more and more people are responding to the call for law to be informed by the wild. The emerging movement in support of rights for Nature is now growing rapidly: annual Wild Law conferences are held in England, Scotland and Australia, there is a Center for Earth Jurisprudence in Florida, organisations such as Wild Law (UK) are being formed to join the Global Alliance for the Rights of Nature, and social movements throughout the world are embracing the Declaration as a unifying manifesto.

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Recent Developments in Australian Environmental Law and Policy

Amanda L. Kennedy* and Paul V. Martin§

Murray Darling Basin Plan

As the last Australian 'Country Report' in this e-Journal foreshadowed, a draft *Murray Darling Basin Plan* has been prepared, and the first stages of public consultation has begun. This outlines a long-term plan to address water management problems in Australia's largest agriculturally significant geographical area. The Murray Darling Basin covers over 1 million square kilometres of land, including parts of New South Wales, Queensland, South Australia and Victoria. Water resources in the Murray Darling Basin have been under incredible stress, owing to sustained drought, climate change, and over-allocation of entitlements which, uniquely, are fully tradeable and not tied to land. Prepared under the *Water Act* (2007), a "Guide" to the proposed *Plan* (released in October) is the first stage in a process which aims to restore water flows throughout the Basin by identifying where water is needed, what the limits to extraction are, and setting legally enforceable reductions to water allocations (under which Basin States retain responsibility for setting water use allocations). The Guide to the proposed *Plan* proposes significant cuts to water allocations from Basin rivers, in some areas as much as 45 per cent.

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As anticipated, the release of the *Plan* has generated much conflict amongst stakeholders, which has only been exacerbated by limited opportunities for consultation over the impact of the *Plan* upon Basin communities. One of the major sources of contention is that the *Plan* does not adequately address the social impacts of the proposed cuts to water allocations, placing greater emphasis on environmental concerns and facilitation of the market for entitlements. It was evident that the Murray Darling Basin Authority made their recommendations under the perhaps mistaken belief that the law required them to prioritise the environment as an absolute boundary to water use, then to focus on economic optimisation, and only then to consider some aspects of social interests. However, more recent legal advice tabled in Parliament has revealed that the *Water Act* may require the Authority to consider equal optimisation of economic, social and environmental factors, even in giving effect to international agreements which were previously thought to prevent socio-economic factors from being given a high priority. This new interpretation will require reconsideration of the recommendations of the original plan, taking into account the social and economic impact of these restrictions. The Murray Darling Basin Authority has signalled that they will take this into account in refining the *Plan*, as well as seeking further legal advice. The final version of the *Murray Darling Basin Plan* is to be completed by 2011, with implementation by State Governments to take place between 2012-2019.

The Political Battle over the Wild Rivers

In other water law related developments, Federal Opposition Leader Tony Abbott tabled a private member's bill in mid-November to overturn parts of the state of Queensland's controversial Wild Rivers legislation. The *Wild Rivers Act* (2005) (Qld) was introduced in Queensland to restrict development via statutory declaration along river systems where development activities 'have the potential to degrade the wild river's natural values'. In order to be declared a wild river, the river must have its natural values intact with minimal alteration to the stream's riverine processes. Ten Wild Rivers statutory declarations have been made in Queensland since the introduction of the legislation, including most recently the Wenlock River basin in June 2010. A declaration under the legislation states the types of development which may occur in the catchment, and the conditions under which development may occur.

Indigenous activities (such as hunting, fishing and traditional ceremonies) are not considered as development under the Act.

Tony Abbott's private member's bill seeks to overturn parts of the legislation on the basis that it is claimed by some to be hampering development progress and Indigenous rights. The *Wild Rivers (Environmental Management) Act* (2010) will allow for the use of native title land within a wild rivers area, and will also allow for development. Mr Abbott argues that the *Wild Rivers Act* has prevented Indigenous people from building enterprises on their land that will enable them to enter the economy, and is supported in this view by several Indigenous groups. There are however other Indigenous and environmental groups who remain strongly opposed to the revised Wild Rivers legislation. They suggest that Mr Abbott's bill is badly drafted and will be ineffective in practice, and that it is just an attempt to 'play politics'.[1] The private member's bill has since been referred to the House of Representatives Economics Committee, with a report due by the end of the Autumn sittings in 2011. The terms of reference for the report include consideration of existing legislation, the impact of the proposed bill, if passed, and options for facilitating Indigenous economic development and protecting the environmental values of wild rivers areas.

Highlighting the Essence of Water Law?

These two recent examples from Australia highlight the fact that the human dimensions of conflict over water are often shadowed by the elevation of broader environmental and economic determinism. The next IUCN Academy of Environmental Law Colloquium will provide a good opportunity for legal scholars to deepen our understanding of these issues. In anticipation of this, a workshop on "Water Law through the Lens of Conflict" was held at the University of New England in January 2011. We believe that the lens of legal conflict will enable a reframing of water conflict issues to account for some of the traditional 'human' concerns of the law (such as social justice and procedural fairness), providing further insights into water law and institutions.

[1] See further: http://www.abc.net.au/pm/content/2010/s3066996.htm and http://www.abc.net.au/news/stories/2010/11/11/3063257.htm.

Whilst water issues seem to be dominating the environmental law and policy landscape in Australia at present, there are relevant legal developments in other areas.

Carbon Pricing

Following the shelving of the *Carbon Pollution Reduction Scheme* (*CPRS*) earlier in the year, Australia was left with no direct mechanism setting a price on carbon. This has been a source of some frustration, with industry and environmental groups calling for a price signal on carbon. Research has shown that Australia is lagging when it comes to setting a price on carbon, with our indirect carbon price well below that of other countries. However, the possibility of a direct carbon price now seems to be drawing closer to reality, with the Federal Government asking the Productivity Commission in November 2010 to investigate how other key economies have implemented carbon pricing. The Commission is due to report by May 2011. Explicit carbon prices, such as taxes and permits, and further implicit prices, such as regulation of technologies, subsidies and renewable energy targets, will be considered. The government has announced that it will soon establish a form of carbon pricing for sequestration activities on farmland, but the details are sketchy.

Agriculture vs Coal Seam Gas Exploration

The growing interest in coal seam gas exploration, particularly in the Liverpool Plains and Hunter Valley in New South Wales, and the Surat and Bowen Basins in Southern Queensland, has intensified the conflict between mining and agriculture over natural resource use. Recent concerns amongst Queensland farmers about the impact of the extractive processes, particularly the effect that water pumped from gas wells will have on soil quality and underground aquifers, have prompted calls for an independent Parliamentary inquiry. In the Hunter Valley in New South Wales, local councils have passed resolutions calling for protection of the local farmland and vineyards to be protected from coal seam gas exploration. It will be interesting to see

whether this latest concern results in litigation challenging coal seam gas exploration and development, such as that witnessed in the Liverpool Plains in recent years.[2]

Challenges to Land Clearing Legislation

In September 2010, the High Court overturned a previous decision which had denied farmer Peter Spencer from having his claim relating to property rights and land clearing heard.[3] Mr Spencer famously went on a 52 day hunger strike to draw attention to his plight, after his case was initially dismissed owing to no prospects of success. He was unanimously granted leave to appeal to the High Court, where he will argue that New South Wales land clearing legislation denied him the ability to farm. Spencer claims that restrictions placed upon land clearing after Australia became a signatory to the Kyoto Treaty were akin to seizure of property by the Commonwealth, and rendered his property unviable as he was unable to clear vegetation for farming purposes. This claim will be a difficult one to mount, as essentially Mr Spencer will need to argue that the relevant legislation amounted to an acquisition that resulted in a loss for which he is entitled compensation. This case is a bell-wether for the larger issue of farmers' property rights and legal constraints imposed for the purposes of conservation. We doubt that Mr Spencer can succeed due to constitutional arrangements in Australia, but the issue will bring the issues of environmental constraints into sharper focus. "Red Tape" issues are likely to be featured again.

Corporate Environmental Offenders

New environmental protection legislation has been introduced to the Queensland Parliament, which seeks to 'name and shame' corporate environmental offenders. The bill, introduced by the State Climate Change and Sustainability Minister Kate Jones in late November 2010, empowers the courts to levy harsher penalties for environmental offences, including a range of new court orders such as notification orders where offenders may be 'named and shamed' in the local media. Under the

[2] See for example *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources* [2009] NSWLEC 165 (24 September 2009).
[3] *Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010).

proposed legislation, compliance teams would be able to enter business premises suspected of an offence without a warrant.

Logging of Tasmania's Native Forests

Decades-long conflict over the logging of native forests in Tasmania seems to be drawing closer to resolution, with stakeholder groups recently presenting a *Statement of Principles* to the Tasmanian Premier, David Bartlett. The *Statement*, an in-principle agreement between environment and forest industry representatives, establishes a plan for industry to phase out native forest logging in favour of plantation forestry. Following the release of the plan, Forestry Tasmania have offered a moratorium on some logging, but several environmental groups do not think that this is sufficient, particularly in light of a $22 million 'rescue package' announced by the Federal Government in November to assist logging contractors who wish to leave the industry.

Conclusion

Australia is going through a period of great contest about the environment, and there is a lot of conflict emerging. Thankfully, this conflict is generally played out through the courts and Parliament, rather than on the streets. The types of challenge that we have highlighted raise important questions about the changing role and significance of environmental law.

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Brazilian Environmental Law: 'Green' Development?

Vladimir G. Magalhães[*], Carolina Dutra[§] and Maurício D. dos Santos[±]

A Brief Background to Brazil

Brazil is a federal republic formed by 26 states divided into 5,565 municipalities and a federal district. The country covers an area of 8514876 km² and has a 8,500 km shoreline. In 2009, the size of the Brazilian population was 191.5 million. In 2005, the urban population reached 84.2 per cent.

Brazil comprises of six terrestrial biomes: Amazon; Cerrado; Pantanal; Caatinga; Atlantic Forest; and Pampas. The Amazon and Atlantic Forest biomes, which cover 49.3 per cent and 13.4 per cent of the country respectively, largely comprise of tropical rainforests. The Amazon is responsible for producing around 20 per cent of the world's oxygen and holds nearly 15 per cent of all freshwater available on Earth. The Cerrado and the Pampas, which cover 23.9 per cent and 2.1 per cent of the country respectively, are kinds of savannas. The Caatinga biome, which covers 9.9 per cent of the territory, is also a kind of savanna, but much drier compared to Cerrado and the Pampas biomes. The Pantanal biome, which covers 1.76 per cent of the country, is a steppe-like savanna that is underwater for most of the year. It is

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considered the world's largest wetland area. Brazil is one of the most biological diverse countries in the world, arguably the most.

Environmental Issues in Brazil

The main industries responsible for the destruction Brazil's rich biodiversity and the emission of the greenhouse gases (GHG), are agricultural and animal husbandry activities undertaken in forests and protected areas.[1] Deforestation associated with the conversion of forests into agricultural areas is responsible for 74 per cent of the country's carbon dioxide emissions.[2] To date, 17 per cent of the Amazon, 93 per cent of Atlantic Forest, 17 per cent of Pantanal, 46.4 per cent of Cerrado, 59 per cent of Caatinga and 54 per cent of the Pampas biomes have been destroyed mainly by agriculture and urbanization.

In relation to Amazon, one of the most critical issues faced by this biome is the construction of giant hydroelectric power plants, especially Belo Monte, located in Xingu River drainage basin. The reservoir for this plant will cover a 440 km² area. It will be complemented by the Babaquara dam, covering an area of 6,140 km², which will be constructed to control the flow of the Xingu River in order to increase the energy production of Belo Monte plant.[3] Beside the environmental impacts associated with the construction of the plant and its dams, it will also have social impacts as the development will necessitate the relocation of several indigenous and traditional communities. In addition, the construction of Belo Monte plant and Babaquara dam will produce (on average) 11.2 million mg of carbon dioxide equivalent (CDE) per year for the first ten years, dropping to 6.1 million mg per year for the following 20 years, and 1.4 million mg per year for the next 50 years.[4]

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[1] See further: V. Magalhães, *A Reserva Legal e a Propriedade Rural.* Dissertação (2001) Mestrado em Direito, Faculdade de Direito, Universidade de São Paulo, São Paulo.
[2] Ministry of Science and Technology, *Brazil's Initial National Communication to the United Nations Framework Convention on Climate Change* (2004), available at http://www.mct.gov.br/index.php/ content/view/311359.html, at 88.
[3] P. Fearnside, 'As Hidrelétricas de Belo Monte e Altamira (Babaquara) como Fontes de Gases de Efeito Estufa' (2009) 12(2) *Novos cardernos NAEA*, *5-56,* at 5 (available at http://www.xinguvivo. org.br/wp-content/uploads/2010/10/As-hidroelétricas-de-Belo-Monte-e-Altamira-Babaquara-como-fontes-de-gases-de-efeito-estufa.pdf).
[4] Ibid, at 33.

Main Environmental Laws

Federal Constitution (1988)

The *Federal Constitution* enables the Federal District, the states and municipalities to create environmental laws (articles 24 and 30) and to take steps to preserve the environment (article 23). Environmental protection is also one of the economic order principles enshrined in the *Constitution* (article 170). The *Constitution* also provides that rural property owners may sustainably use natural resources but must preserve the environment to ensure that it can fulfill its social function (article 186). Lastly, the *Constitution* provides that an ecologically balanced environment is a right of all people and the government and the people must defend it and preserve it for future generations (article 225).

Framework Environmental Legislation

The *National Environmental Policy* (*NEP*), *National Environmental System* (*NES*) and the National Environmental Council (NEC) have been established under the *National Environmental Policy Act*.[5] The *NEP* aims to protect and restore the environment, and promote sustainable development in Brazil. Its main tool is environmental licenses required for the construction, implementation, expansion and performance of current or potentially polluting activities. Another key tool is provision for environmental impact studies and reports which must be prepared by the developer and submitted to the competent authority for consideration prior to granting or refusing any environmental license. The *NES* essentially comprises of the Ministry of the Environment and the environmental agencies of states and municipalities. The NEC is responsible for defining the technical standards and criteria for licensing; and prescribing and monitoring compliance with standards, criteria and rules regarding natural resource use.

[5] Federal Law No. 6.938/81.

Biodiversity, Genetic Resources and Traditional Knowledge

The *National Biodiversity Policy*[6] (*NBP*) provides for the protection and sustainable use of Brazil's biodiversity. It covers the following broad eight areas: the study and systematization of existing knowledge on Brazil's biodiversity; *in situ* conservation; *ex situ* conservation; the prevention and mitigation of impacts on biodiversity; access to genetic resources and related traditional knowledge; education; law; and institutional arrangements regulating biodiversity management.

Access to genetic resources and related traditional knowledge is further regulated under *Provisional Measure* (No. 2.186/01). It created the Genetic Resources Management Council, which is responsible for assessing requests for accessing and using genetic resources and related traditional knowledge, and granting authorisations to do so.

Forestry and Indigenous Vegetation

The *Forest Code* (1965) aims to protect forests and other indigenous vegetation situated in rural areas and some kinds of urban areas. It is the key legal instrument for preventing biodiversity loss and global warming associated with the destruction of forests and other vegetation. The main tools for doing so are the declaration of permanent preservation areas[7] and legal reserves[8]

Water Resources

Brazil has approximately 15 per cent of all the fresh water resources available on Earth with most of these resources being situated in the Amazon and Pantanal biomes.[9] The Brazilian southeast region has the highest water demand of the country, as it has the country's highest demographic density. To deal with this

[6] Decree No. 4.339/02,
[7] These are defined as urban and rural areas 'covered or not by native vegetation, where the water resources, landscape and geological stability, biodiversity, fauna and flora gene flow shall be protected, as well as the soil; assuring the well-being of the human population' (Articles 2-4).
[8] These are rural areas that cannot be deforested or used for agricultural and animal husbandry activities by landowners (Articles 16,17 and 44).
[9] Empresa Brasileira de Pesquisa Agropecuária, *Atlas do meio ambiente do Brasil* (1994) Brasília: EMBRAPA-SPI e Ed.Terra Viva, Brazilia, at 12.

situation, the country is divided into 13 hydrographic regions formed by the main drainage basins that have environmental, social, economic and cultural similarities. The use of these water resources is guided by the *National Policy on Water Resources* and the *National Water Resources Management System,* enacted under *Federal Law* (No. 9.433/1997).[10]

Coastal Management

Nearly 20 per cent of the Brazilian population resides on the coast which is similarly home to 2.5 million hectares of mangroves. These mangroves are a very important ecosystem for Brazil in that they prevent coast erosion along river mouths. The *National Coastline Management Program* (1988),[11] which is a part of the *National Policy on Water Resources and Environment*, governs the management of the coastal zone. It regulates the use of natural resources, occupation of and activities undertaken in the coastal zone.

Recent Developments in Policy and Legislation

Climate Change

In 2009, the Federal Government published the *National Policy on Climate Change* (*NPCC*).[12] The *NPCC* is an umbrella policy that focuses on reducing climate risk. It governs activities undertaken by both the government and private citizens. The *NPCC* prescribes that measures must be implemented to reduce anthropocentric GHG emissions from several sources (article 4). It sets a national commitment of reducing the country's current carbon emissions by 38.9 per cent compared to those levels estimated for 2020. The *NPCC* also aims to ensure that: economic and social development is compatible with the preservation of the climate system; necessary adaptation measures are implemented; the environment and its biomes are preserves and rehabilitated where necessary; protected areas are consolidated and expanded; and that the reforestation and recovery of affected areas is supported (Article 4).

[10] Article 21 provides that the government is responsible for providing national management system for water resources and defining criteria for their exploitation.
[11] Federal Law No. 7.661/88.
[12] Federal Law No. 12.187/2009.

While the introduction of the *NPCC* is to be welcomed, its content is not well articulated and several factors may undermine its utility. The *NPCC* leaves the nature of GHG emission reductions to be defined by another legal directive. Furthermore, the *NPCC* does not prescribe the institutional arrangements responsible for its implementation and to monitor GHG emissions. In addition, the provisions of the *NPCC* are unfortunately not integrated within or coordinated with other relevant federal environmental policies that are extremely important for achieving its objectives. These policies include the *National Plan for Agriculture*[13], the *Forest Code*, the *National Energy Policy*[14], the *National Policy on Biodiversity* and the *National Policy on Solid Waste*.

In October 2010, the Federal Government also published the *2nd National Communication* and the *2nd Inventory* (base year 2000). In 2000, Brazil's highest carbon dioxide emitters per sector were: land use change and forestry (78 per cent); and the energy sector (18 per cent). In the same year, Brazil's highest CH_4 emitters per sector were: agriculture (68 per cent); land use change (19 per cent); and the waste sector (18 per cent). As for N_2O emissions, the agricultural sector contributed 86 per cent.

Solid Waste

Brazil produces a considerable amount of solid waste and it is on the increase.[15] This was no doubt partly due to the absence of a suitable legal framework to regulate solid waste. In August 2010, the Federal Government enacted the *National Policy on Solid Waste*[16] (*NPSW*), the objectives of which are: the non-generation, reduction, reuse, recycling, treatment and environmentally-friendly disposal of solid waste; reducing the volume and hazardous nature of waste; supporting the recycling industry; and the integrated management of solid waste by the government and

[13] Ministry of Agriculture, Livestock and Supply. *Plano Nacional de Agroenergia 2006-2011*. Brasília: EMBRAPA Informação Tecnológica, 2005.
[14] Ministry of Agriculture, Livestock and Supply. *Plano Agrícola e Pecuário 2010-2011*. Brasília: Secretaria de Política Agrícola, 2010.
[15] In 2009, Brazil generated 57 million tons of municipal solid waste. This constituted an increase of 7 per cent when compared to 2008. Only 50 million tons of waste was collected in 2009, which means that 7 million tons were certainly improperly disposed of. See further: Brazilian Association of Public Cleansing and Special Waste, *Panorama of Solid Waste in Brazil* (2009), available at http://www.abrelpe.org.br/panorama_2009.php, at 177.
[16] Law No. 12.305/2010.

private companies (article 7). To achieve these objectives, the *NPSW* prescribes the following main measures: shared responsibility for the products' lifespan (article 3); tax, financial and credit incentives for the participation of cooperatives and associations formed by low-income individuals to collect, reuse and recycle solid waste (article 17, article 42 and article 44); prohibitions on the importation of hazardous solid waste (article 49); and the creation of the National Plan by the Ministry of the Environment, with the participation of the society (article 15).

The objectives of the NPSW appear to be clearly defined. In addition, its promotion of incentives and voluntary compliance measures in the context of solid waste management is essential given the current limited resources and infrastructure of the government. The Brazilian Government cannot even treat the solid waste produced by such companies.

Forestry

The main environmental legal reform currently being debated by the Federal Government is the amendment of the *Forest Code* (1965), specifically its provisions relating to the declaration and protection of permanent preservation areas and local reserves. The amendments are apparently being driven by agribusiness in an effort to decrease the size of these areas and lessen the strict regulation that applies to activities undertaken within them.[17] According to the former Minister of Environment, Mr. Carlos Minc, the amendments will lead to the destruction of approximately 80 million hectares of forest and indigenous vegetation in Brazil. Of further concern is that the amendments grant amnesty and suspend fines issued to rural landowners for offences committed under the *Forest Code* prior to July 2008. According to the current Minister of the Environment, Mrs. Izabella Teixeira, the anticipated loss associated with such amnesty and suspension for just the federal inspecting authority is in the region of R$ 10 billion (US$ 5.8 billion).

The proposed amendments to the *Forest Code* must be voted on by the end of 2010 or the beginning of 2011. If they are approved in their current form, it will lead to an exponential increase in the destruction of Brazil's biodiversity. It will further increase

[17] On 29 September 2009, a Special Committee was created to analyze several legislative bills to change the *Forest Code*. Deputy Aldo Rebelo was appointed as the reporter for the Special Committee. On 26 July 2010, his report, which contains the proposed amendments in the form of an Amendments Bill to the *Forest Code*, was submitted for debate.

Brazil's GHG emissions which may in turn result in floods and landslides in rural and urban areas with a material risk for soaring death tolls and severe economical damage, especially in those areas inhabited by poor communities. It appears likely that the amendments will be approved given the key role agribusiness plays in sustaining the Brazilian economy. Coupled with the approval of massive hydro-electric schemes in the Amazon biome, such as the Belo Monte hydroelectric power plant and associated Babaquara dam, it would appear unlikely that the Federal Government will attain the objectives and commitments set out in the *National Environmental Policy*, *National Biodiversity Policy*, *National Policy on Climate Change*, *Convention on Biological Diversity* and *UN Framework Convention on Climate Change*.

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Canadian Environmental Law – Some Recent Developments

Benjamin J. Richardson[*] and Georgia Tanner[§]

Introduction

Owing to Canada's federal system of government, Canadian environmental law comprises a complex array of often overlapping federal and provincial rules and policies. Both tiers of government, pursuant to the *Constitution Act* of 1867, share responsibility for environmental issues, although the 'environment' itself is not explicitly identified as a head of power.[1] This system can also lead to variable approaches, where some governments demonstrate considerable reform and commitment to robust environmental laws, while others lag.[2] Presently, the federal government controlled by the Conservative Party has tended to be indifferent or even hostile to environmental regulation, especially in relation to climate change. Conversely, some of the provinces such as Ontario have shown increasing zeal for environmental law reform.

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[1] See further: N. Hawke, 'Canadian Federalism and Environmental Protection' (2002) 14(2) *Journal of Environmental Law* 185.
[2] For an overview of the development of Canadian environmental law, see: S. Wood, G. Tanner and B. Richardson, 'What Ever Happened to Canadian Environmental Law' (2010) 37(4) *Ecology Law Quarterly*, 101.

Federal Sustainable Development Strategy

At a national level, Environment Canada (the principal federal environmental authority) recently released a federal sustainable development strategy titled *Planning for a Sustainable Future*,[3] pursuant to the *Federal Sustainable Development Act* (2008).[4] The strategy focuses on promoting an 'an integrated, whole-of-government picture of actions and results to achieve environmental sustainability'; linking 'sustainable development planning and reporting and the Government's core expenditure planning and reporting system'; and improving 'measurement, monitoring and reporting in order to track and report on progress' on sustainability.[5] Much of the strategy touches on climate change, and after reiterating the federal target to reduce Canada's greenhouse gas (GHG) emissions by 17 per cent below 2005 levels by 2020, the strategy lists various implementation strategies. In particular, it highlights: research and development initiatives, especially with regard to reducing emissions from land use and transportation; Canada's continued support for a clean energy dialogue and regulatory coordination with the United States; and ongoing involvement in the Asia-Pacific Partnership on Clean Development and Climate, which does not impose binding emission limits on its members.

The federal government, however, has resisted some efforts to accept legally accountable targets to reduce Canada's GHG emissions more stringently. In November 2010 the federal Senate, controlled by the Conservative Party, rejected the *Climate Change Accountability Act* proposed by the Opposition parties in the House of Commons.[6] The ambitious legislation had mandated a reduction of GHGs in Canada by 25 per cent from 1990 levels. Environment Canada's new sustainability strategy is not a satisfactory alternative, because it adopts a much less onerous target and does not include any specific measures that would put a nationwide price on GHG emissions.

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[3] Environment Canada*, Planning for a Sustainable Future: A Federal Sustainable Development Strategy for Canada* (2010) Environment Canada.

[4] Ibid, at vii.

[5] S.C. 2008, c. 33. This legislation was sponsored by the Opposition parties, not the Conservative Party Government.

[6] See further: 'Canada Senate Kills Climate Bill Ahead of UN Summit', BBC News online (18 November 2010), available at http://www.bbc.co.uk/news/world-us-canada-11781175.

Climate Change Regulation

One discrete area of climate policy where the federal government has been willing to regulate is with regard to coal-fired power plants. In June 2010, Environment Minister Jim Prentice announced forthcoming regulations that would require, by 2015, all new coal-fired generation units, and all coal-fired units that have reached the end of their economic life, to achieve more stringent environmental performance standards.[7] Notably, a large portion of these reductions would result from Ontario's existing regulations requiring the closure of the province's four coal-fired generators by the end of 2014. In 2010, Environment Canada also published the new *Renewable Fuels Regulations*, which will come into effect on December 15 2010. These regulations mandate that all producers and importers of gasoline in Canada ensure that they maintain a renewable fuel content of at least 5 per cent on the average annual volume. To improve the flexibility of the scheme, the regulations allow for the use of 'compliance units', which can be traded where surpluses or shortcomings occur annually.[8] Environment Canada also recently issued new emission regulations for light-duty vehicles, in an effort to reduce GHGs. The regulations establish average emission standards for any new such vehicles that companies would manufacture in or import to Canada in 2011.[9]

At a provincial level, a variety of measures have been adopted or proposed to address global warming. One recent example is that of the Quebec and Ontario governments agreeing to implement a GHG cap-and-trade system.[10] British Columbia's Ministry of the Environment also has plans to participate in such a

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[7] Environment Canada, 'Government of Canada to Regulate Emissions from Electricity Sector,' News Release (23 June 2010), available at http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=E5B59675-BE60-4759-8FC3-D3513EAA841C.

[8] Environment Canada, 'Government of Canada Releases Final Regulations for Renewable Fuel Content in Gasoline', News release (1 September 2010), available at http://www.ec.gc.ca /default.asp?lang=En&n=714D9AAE-1&news=2D84D5D6-F152-4F5F-A4B9-BE973BE6821B.

[9] *Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*, enacted pursuant to the *Canada Environmental Protection Act* (1999), available at http://www.gazette.gc.ca/rp-pr/p1/2010/2010-04-17/html/reg1-eng.html.

[10] Government of Ontario, 'Cooperation Between Ontario and Québec is Yielding Tangible Results', News Release (16 June 2010), available at http://news.ontario.ca/opo/en/2010/06/cooperation-between-ontario-and-quebec-is-yielding-tangible-results.html.

scheme, pursuant to the province's *Greenhouse Gas Reduction (Cap and Trade) Act* (2008).[11] Together, these provinces are working with United States members of the Western Climate Initiative[12] to implement a regional cap-and-trade system by 2012. Also, Ontario has proposed amendments to its *Greenhouse Gas Emissions Reporting Regulation*[13] to streamline its reporting requirements, bringing them into line with those used by the Western Climate Initiative. British Columbia's *Clean Energy Act*[14] came into effect in July 2010. This ambitious legislation enumerates numerous objectives, such as: developing renewable energy sources in the province; achieving self-sufficiency; increasing the export of energy; conservation; and improving the participation of Aboriginal peoples in energy developments.

Some provincial initiatives to address climate change have faced opposition. One instance is Ontario's new *Green Energy Act* (2009), which has triggered community concern about the projected increase in wind farms and other renewable energy projects in the vicinity of scenic landscapes or residential areas. In *Hanna v Ontario*, a case currently being heard, the applicant sought judicial review of sections of the *Green Energy Act* relating to the required set-back distances of wind turbines from residences. The litigation aims to obtain a moratorium on government approval of all wind energy projects in Ontario where turbines would be sited close to residences, until proper epidemiological studies of safe set-back distances are completed.[15]

Steps to Minimize Environmental 'Red-tape'

In the context of an economic recession which has intensified pressure to limit compliance costs with environmental regulation, most governments in Canada have continued to explore reforms to stream-line and minimize so-called environmental

[11] S. Anderson, 'Towards an Emissions Trading System: B.C. Releases Consultation Papers for Cap and Trade Regulations', *Blakes Bulletin* (27 October 2010).
[12] Western Climate Initiative: http://www.westernclimateinitiative.org/resources/cap-and-trade.
[13] Ontario Reg. 492/09; Government of Ontario, 'Amendments to Greenhouse Gas Emissions Reporting Regulation', (10 September 2010), available at http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTEwMDQ2&statusId=MTY1MTgy&language=en.
[14] S.B.C. 2010, c. 22.
[15] Wind Concerns Ontario, 'Ian Hanna v Ontario – Legal Action Update' (12 May 2010), available at http://windconcernsontario.wordpress.com/2010/05/12/ian-hanna-v-ontario-legal-action-update.

'red-tape'. One recent example is Ontario's new environmental approvals system. In 2010, the *Open for Business Act* was passed, which amended some 50 pieces of provincial legislation administered by different ministries, the most significant of which are the *Environmental Protection Act* and the *Ontario Water Resources Act*. The *Open for Business Act* replaces much of the existing certificate of approvals system with a more streamlined risk-based, approvals model. The previous system required air, land and water pollution permits to go through the same approvals process regardless of the complexity or environmental risk of the proposed activity. The new legislation streamlines the system into one of two avenues, depending on the type of activity for which approval is sought: (i) a 'Registry System' for low-risk activities and; (ii) a new 'Environmental Compliance Approval' system for higher-risk activities. Several environmental law and advocacy groups in the province voiced their opposition to the *Open for Business Act*, as it diminishes public rights under the *Environmental Bill of Rights*. Significantly, the legislation removes the requirement for public notice and opportunity for public comment for some industrial activities. Citizens also forego their right to seek leave to appeal the approval of these activities to the Environmental Review Tribunal.[16]

Environmental Impact Assessment

Environmental impact assessment is another key part of the regulatory system in Canada that has often proved controversial - to developers for the costs and delays it can add to projects; and to environmentalists for the occasional perceived leniency of the process. Both the federal and provincial governments have environmental assessment procedures for major developments. While the vast majority of projects are ultimately approved, albeit with conditions to mitigate foreseen environmental impacts, occasionally the likely impacts are so significant that projects are prohibited. One such example in 2010 was the federal government's rejection of the proposed Prosperity Mine, an open pit gold-copper operation. The mine, which would have been developed in the British Columbia interior, was vetoed because 'of concerns about the significant adverse environmental effects',[17] including the conversion of the

[16] Canadian Institute for Environmental Law and Policy, Canadian Environmental Law Association, and Ecojustice Canada, 'Environmental Groups Challenge Ontario Government's *Open for Business Act*', Media Release (18 May 2010), available at http://www.cielap.org/pdf/May18OntENGO_ChallengeAct.pdf.

[17] Environment Canada, 'Government of Canada Announces Decisions on Mount Milligan and Prosperity Gold-Copper Mines,' News Release (2 November 2010), available at

Fish Lake, home to thousands of rainbow trout, to a toxic tailings pond, as well as adverse impacts on Aboriginal rights, and boat navigation.[18] But more commonly the federal government has sought to limit the scope and impact of the environmental assessment process. The Auditor General of Canada, in its 2010 report to the House of Commons, found that 93 per cent of the project proposals reviewed under the Government's Infrastructure Stimulus Fund (a response to the recent economic recession) were exempted from the environmental assessment process.[19]

Albertan Oil Sands

The Albertan oil sands are the site of some of the most environmentally controversial developments in Canada presently, especially with regard to their implications for climate change. In September 2010 Environment Canada established an Oilsands Advisory Panel to provide recommendations with regard to the scientific research and monitoring of the environmental effects of oil sands projects.[20] Some specific developments have engendered litigation regarding their environmental effects. In the recent case of *R. v. Syncrude Canada Ltd*,[21] Syncrude Canada was successfully prosecuted for failing to maintain its hazardous tailing ponds to ensure it would not come into contract with any animals, in violation of section 155 of the Alberta *Environmental Protection and Enhancement Act*. The court also found the company guilty of depositing a substance harmful to migratory birds in an area frequented by them, contrary to section 5.1(1) of the Canada *Migratory Birds Convention Act*. About 1600 birds died as result of contact with the tailings pond, which could have been avoided had Syncrude taken reasonable steps to ensure the effective operation of a

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http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=59F03FA9-63AD-4EED-A14F-04BBF32906CF.

[18] Ecojustice Canada, 'Ecojustice Commends Federal Government for Rejecting Prosperity Mine' (2010), available at http://www.ecojustice.ca/media-centre/press-releases/ecojustice-commends-federal-government-for-rejecting-prosperity-mine.

[19] L. Whittington, 'Stimulus Projects Approved without Environment Study: Auditor,' *Toronto Star* (26 October 2010).

[20] Environment Canada, 'Environment Minister Appoints Oilsands Advisory Panel,' News Release (30 September 2010), available at http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=981D86D0-D3DB-4D71-8957-8EF52F85A05E.

[21] [2010] A.J. No. 730.

bird deterrent system. The company was fined C$3 million - a relatively high penalty.[22]

Toxic Chemicals

Exposure to toxic chemicals has generated considerable public concern in Canada in recent years,[23] and several governments and courts have enacted measures in response. In the case of *Smith v. Inco Ltd*,[24] a group of residents in Ontario was awarded C$36 million for the contamination of their lands with airborne metals (nickel). The case is significant as it is 'one of the first class actions in Canada to go through a full common-issues trial' and is a rare example of the certification of an environmental class action in any province other than Québec.[25] Among legislative responses, effective 1 January 2010, Ontario's new *Toxics Reduction Act* and accompanying regulations came into force. The legislation applies to facilities at which certain manufacturing activities or mineral processing activities take place involving toxic substances that are specified in a schedule to the Federal National Pollutant Release Inventory and which meet applicable thresholds. The legislation relies on three main methods of control: (i) to undertake toxic substance accounting; (ii) prepare a toxic substance reduction plan for each reportable substance; and (iii) report results to the government and the public. The federal government has also regulated the controversial bisphenol A, a chemical often used in plastics. On 16 October 2010 the chemical was officially declared a 'toxic substance' by Environment Canada, and was added to the Toxic Substances List pursuant to the *Canadian Environmental Protection Act.*[26] But there have also been some regressive steps, owing to public opposition to any increased costs associated with toxic chemicals controls. Notably, on 1 July 2010, the Ontario government discontinued a retail fee it imposed in 2008 on potentially hazardous items such as fire extinguishers, paint and

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[22] 'Syncrude to Pay $3M Penalty for Duck Deaths', *CBC News* (22 October 2010), available at http://www.cbc.ca/canada/edmonton/story/2010/10/22/edmonton-syncrude-dead-ducks-sentencing.html.

[23] See, for example, the Canadian bestseller, R. Smith and B. Laurie, *Slow Death by Rubber Duck: The Secret Danger of Everyday Things* (2009) Knopf Canada.

[24] [2010] O.J. No. 2864.

[25] J. Melnitzer, 'Court Awards $36 Million in Inco Class Action', *Financial Post* (6 July 2010).

[26] R. Fishlock, 'The Making of a Toxic Substance in Canada – The Sad Story of Bisphenol A,' *Blakes Bulletin* (25 October 2010), available at http://www.blakes.com/english/view_bulletin.asp?ID=4301.

household cleaners. The fee was regarded by many as too complex and cumbersome.[27]

[27] 'Ontario to Drop Eco Fee', *CBC News* (19 July 2010), available at http://www.cbc.ca/canada/ toronto/story/2010/07/19/eco-fee-ontario.html).

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What Should the Vehicle and Vessel Taxes in China be?

Li Jianxun*

Introduction

Background to the Vehicle and Vessel Tax Law of the People's Republic of China

China's economy has developed very fast in the past three decades. This has brought vast amounts of social wealth, but also caused serious environmental problems such as water pollution, soil pollution and atmospheric pollution. China has become the second biggest emitter of carbon dioxide from industrial sources in the world. Recently, the Ministry of Environmental Protection of the People's Republic of China published the *China Vehicle Emission Control Annual Report* (2010), which states that China was the highest producer and seller of motor vehicles in 2009. It produced 13.791 million motor vehicles of which 13.645 million were sold domestically in 2009.[1] Motor vehicles driven in China during 2009 emitted 51.433 million tons of pollutants.[2] Pollution from these vehicles in is becoming worse and worse, and exhaust emissions of motor vehicles have become the main source of air pollution in large and medium-sized cities. Therefore, the Chinese central government has decided to decrease the emission of carbon dioxide from between 40-45 per cent by the end of 2020, on the basis of 2009 levels. To this end, many solutions have being adopted. One such solution is the proposed amendment of the

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[1] Ministry of Environmental Protection of the PRC, *China Vehicle Emission Control Annual Report* (2010), available at http://wenku.baidu.com/view/9617dd40be1e650e52ea9913.html.
[2] Ibid.

Vehicle and Vessel Taxes Law of the People's Republic of China (*VVTLPRC*)[3] to better control emissions of carbon dioxide from motor vehicles and vessels.

Overview of the Amendments to the VVTLPRC

On 28 October 2010, the amendments to the *VVTLPRC* were deliberated for the first time in the seventeenth session of the tenth Standing Committee of the National People's Congress (SCNPC). The proposed revised *VVTLPRC* has several innovations, especially taxing vehicles and vessels according to their engine capacity. Those vehicles and vessels with different engine capacities will pay different taxes according to the following table.

Table: Tax Assessment and Tax Items of Vehicle and Vessel Taxes

Tax Items		Assessment Unit	Base Assessment by year(¥)	Remarks
Passenger vehicles (hierarchically by displacement of vehicles)	Vehicles Under 1.0 liter	Per unit	60-360	Carrying below nine passengers by approval.
	Vehicles 1.0-1.6 liters		360-660	
	Vehicles 1.6-2.0 liters		660-960	
	Vehicles 2.0-2.5 liters		960-1620	
	Vehicles2.5-3.0 liters		1620-2460	
	Vehicles3.0-4.0 liters		2460-3600	
	Vehicles above 4.0 liters		3600-5400	
Commercial vehicles	Passenger car	Per unit	480-1440	Over nine passengers by approval, including tram.
	Truck	Unladen weight/ton	16-120	1.Including trailer, tractor-truck, beachwagon, tricar, low-speed truck, etc. 2.Tractor-trucks taxed by 50% tax of trucks.
Other vehicles	Special motor vehicle	Unladen weight/ton	16-120	Not including tractors.
	Special and mechanical cars	Unladen weight per ton	16-120	
Motor bikes		Per unit	36-180	
Vessels	Motor vessels	Net tonnage per ton	3-6	Tug, barge without motor taxed by a half. Motor vessels, yacht shall be taxed separately.

[3] A copy of the draft amendments to the *VVTLPRC* is available at http://www.npc.gov.cn/huiyi/lfzt/ccsf/node_14419.htm.

Every vehicle owner in China must currently pay the same tax of 360-660 yuan. Under the proposed revisions to the *VVTLPRC*, motor vehicle owners will pay differing taxes according to the engine capacity of their cars, calculated in terms of the above table. This would mean that vehicle owners possessing cars with an engine capacity of less than 1.0 liter would pay much less tax than those possessing cars above 1.6 liter capacity.

The purported objective behind the proposed amendments to the *VVTLPRC* is energy efficiency and the reduction of greenhouse gas emissions. The method to achieve this objective is through imposing differential taxation on motor vehicles according to their engine capacity. But can the amendments achieve their purported objectives? Firstly, what is the real objective behind the amendments? Is it really only about energy efficiency and emission reduction, or is it also about adjusting the distribution of social wealth and raising additional revenue for the government? Secondly, what is the relationship between the revised *VVTLPRC* and other relevant taxes such as the: consumption tax; acquisition tax; and the fuel levy on vehicles and vessels? Thirdly, is engine capacity alone the correct base for determining the revised vehicle and vessel taxes? These issues are considered in turn below.

Critical Evaluation of the Proposed Amendments to the *VVTLPRC*

Since the SCNPC solicited opinion from interested and affected parties on the proposed amendments to the *VVTLPRC*, the public has expressed their controversial opinions online. Some members of the public have expressed concern that the background to and purpose of the proposed amendments lack clarity. Questions have therefore arisen, in the absence of reliable studies, about whether the increase in taxes for vehicles with higher engine capacities will actually achieve the stated environmental objectives of improving energy efficiency and reducing emissions. With the rapid development of technology, the inevitable correlation of environmental pollution caused by vehicles with higher engine capacities is unclear. This has raised doubts as to the real purpose of the revised vehicles and vessel taxes, with some people being of the opinion that it simply constitutes another form of taxation under

the guise of an environmental rationale.[4] Furthermore, with 58 per cent of China's vehicle market comprising of cars with an engine capacity of less than 1.6 liters, others have argued that the new tax only targets the wealthy sectors of the population, which predominantly drive vehicles with engine capacities in excess of this threshold.[5] This discontent is fueled by the numerous other forms of taxation currently levied on vehicles owners and users, such as: automobile consumption taxes; value-added taxes; car purchases taxes; and other environmental taxes.

Significant concerns have also arisen regarding the base on which the revised vehicle and vessel taxes are formulated, namely the engine capacity of the vehicle. While the imposition of differential levels of taxation on higher capacity engines would on the face of it appear to make sense, the actual emissions and efficiency of different models of engines of the same capacity is not factored into the equation. Furthermore, the age of the vehicle is not taken into account in the tax calculation. It is accordingly questionable whether the tax in its current form will achieve the environmental objectives it purports to achieve.

Conclusion

Given the above problems, the proposed revisions to the *VVTLPRC* have been met with public opposition. This opposition largely stems from a lack of clarity regarding the rationale for introducing the tax, the anticipated inequitable operation of the tax between different sectors of society and the apparently flawed base on which the tax will be calculated. Something clearly needs to be done to curb vehicle emissions in China given their increasing contribution to the country's carbon dioxide emissions. Significant effort will need to be made by the government to convince the public of the merits of implementing the revised vehicle tax and that its primary objective is energy efficiency and emissions reduction.

[4] See further: Auto 163 Talk Show, 'Does it Add Taxes in Disguised Form or Save Energy and Reduce Emissions?' (2010) available at http://auto.163.com/10/1029/14/6K60371800084JTN.html; and Auto 163 Talk Show, 'Does Add Taxes in Disguised Form Wearing a Vest of Saving Energy?' (2010) available at http://auto.163.com/special/chechuanshui_talkshow/.
[5] Ibid.

Every coin has two sides. Notwithstanding the above shortcomings associated with the proposed revisions to the *VVTLPRC*, its introduction has compelled Chinese citizens to rethink and debate the problems relating to social and economic equity, environmental protection and the relationship between these issues. This debate has in turn promoted independent thought and awareness of environmental issues.

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China's New Renewable Energy Law

Nengye Liu*

Introduction

Never before has the world's attention been intently focused on the rapidly increasing potential and need for renewable energy.[1] Renewable energy is believed to be a useful tool to meet growing energy demand and mitigate climate change. The European Union plans to increase the amount of renewable energy in total energy consumption to at least 20 per cent by 2020. Recent legislation and other efforts in the United States aim to boost renewable energy in order to reduce greenhouse gas emissions.[2] China has also paid much attention to renewable energy. In 2009, China produced 40 per cent of the world's solar Photo Voltaic (PV) supply, 30 per cent of the world's wind turbines (up from 10 per cent in 2007), and 77 per cent of the world's solar hot water collectors.[3]

China's *National Climate Change Program* has identified the use of renewable energy to be one of most important measures for the reduction of greenhouse gas (GHG) emissions.[4] A key factor in the development of China's renewable energy

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[1] Editorial, (2010) 1 *Renewable Energy Law and Policy Review*, at 1.
[2] Ibid.
[3] REN21, *Global Status Report* (2010) available at http://www.ren21.net/Portals/97/documents/ GSR/REN21_GSR_2010_full_revised%20Sept2010.pdf, at 9.
[4] National Development and Reform Commission of People's Republic of China, *National Climate Change Programme*, June 2007.

sector has been the enactment of a comprehensive legal framework to support the deployment of non-fossil energy technologies. In addition, China has harnessed international regimes capable of supporting renewable energy such as the *Kyoto Protocol*'s Clean Development Mechanism.[5]

The *Renewable Energy Law of China* (*RELC 2006*) was first adopted in 2005 and entered into force on 1 January 2006. However, only 4 years later, the *RELC* was amended on 26 December 2009. The amended legislation (*RELC 2010*) entered into force on 1 April 2010 The amendments occurred a few days after the United Nations Climate Change Conference in Copenhagen. It can be seen as the latest domestic effort of China to combat climate change. This report describes this new development and reveals reasons behind the amended *RELC*. Following this the implications of legal developments are discussed.

China's New Renewable Energy Law

The *RELC 2010* contains 8 chapters with 33 clauses. The Chapters come under the following headings: (1) General principles; (2) Resources survey and development planning; (3) Industry guidance and technology support; (4) Promotion and application; (5) Price management and compensation; (6) Economic incentives and supervisions; (7) Liabilities; and (8) Miscellaneous.

Major changes have occurred in these areas. These changes specifically relate to: an improved development and utilization plan of renewable energy; a more detailed full purchasing scheme for power generated by renewable energy; and the establishment of the National Renewable Energy Development Fund. Each of these issues are considered in turn below.

Improved Development and Utilization Plan of Renewable Energy

Article 8 states that:

> '(1) energy authorities and other relevant authorities of the State Council shall, on the

[5] P. Curnow, L. Tait and I. Millar, 'Financing Renewable Energy Projects in Asia: Barriers and Solutions', (2010) 1 *Renewable Energy Law and Policy Review*, at 107.

basis of the national energy development strategy, the middle and long-term total volume target of renewable energy throughout the country and available technology of renewable energy, prepare the national renewable energy development and utilization plan, which is to be implemented after being approved by the State Council;

(2) relevant authorities of the State Council shall adopt relevant plan in order to achieve the middle and long-term total volume target of renewable energy throughout the country;

(3) energy authorities and other relevant departments of the provincial governments shall, on the basis of the national renewable energy development and utilization plan and the middle and long-term target for the development and utilization of renewable energy in the region, prepare renewable energy development and utilization plan for their own administrative regions. This shall be implemented after being approved by the provincial governments and recorded by the energy authority of the State Council as well as the State power regulatory organ;

(4) The approved plan shall be released to the public, with the exception of confidential content as stipulated by the government.

(5) In the case that the approved plan needs to be modified, approval of the original approving authorities shall be obtained.'

The revision strengthens the coordination between the *National Energy Development Strategy* and the *National Renewable Energy Development and Utilization Plan*. It is also emphasized that the provincial plan must be in compliance with the national plan.

Moreover, article 9 provides that the development and utilization of different types of renewable energy (including wind power, solar power, hydropower, biomass, geothermal power and ocean power) must be planned in an integrated way. Several issues must be considered in the plan, including targets, main tasks, regional arrangement, key projects, implementation progress, supplementary construction of power grid facilities, service system and safeguards measures.

Chinese legislators have recognized that renewable energy development must be in accordance with power grid construction. For example, wind power is rich in the west and northeast of China. These areas are far from the more developed eastern part of

the country that has a more intensive grid. Therefore, the promotion of renewable energy in those areas (the west and northeast) without a careful plan may result in a great waste of resources.

More Detailed Full Purchasing Scheme for Power Generated by Renewable Energy

Article 14 is amended to prescribe more detailed obligations for the government, renewable power companies and grid enterprises in the scheme for purchasing power produced by renewable energy. The energy authority of the State Council, in combination with the State Power Regulatory Authority and Financing Department of the State Council, shall, based on the *National Renewable Energy Development and Utilization Plan*, determine the quota of power produced by renewable energy in the entire amount of power generated during the period under the plan. They shall also adopt specific rules for grid enterprises to prioritize and completely purchase power produced by renewable energy.

In the case of power companies, the *2010 RELC* provides that full purchasing must be set up in accordance with the *National Renewable Energy Development and Utilization Plan*. Moreover, power companies must obtain an administrative permit and assist grid enterprises in ensuring the safety of the grid.

Furthermore, the *RELC 2010* requires the grid enterprise to: (1) reach interconnection agreements with renewable power companies; (2) purchase all power generated by renewable energy within its grid in accordance with relevant interconnection technology standard (full purchasing scheme); and (3) enhance grid construction, expand the coverage of grid facilities for renewable energy, develop and utilize smart grid technology and energy storage technology, perfect grid operation and management, and improve capacity to receive power generated by renewable energy.

Although the *RELC 2006* also mentions the full purchasing scheme, it only provides that grid enterprises shall enter into a grid connection agreement with renewable power generation enterprises. This says nothing about detailed obligations and rights for the two parties. Furthermore, the *RELC 2006* did not address grid facilities construction or grid planning. This is an obstacle for the development of renewable

energy. For this reason, the amendments in *RELC 2010* aim to achieve better implementation of the scheme in practice.

Establishment of the National Renewable Energy Development Fund

The National Renewable Energy Development Fund (the Fund) is established under article 24. This provision states that the Fund will consist of the renewable energy tariff surplus imposed on the electricity sold throughout the country and special State annual funding. This marks a substantial change from the *RELC 2006*, which only provided a fixed amount of funding for the promotion of renewable energy. The establishment of the Fund in *RELC 2010* sets a new mechanism for the management and operation of the funding for promoting renewable energy in China.

The resources in the Fund may be used for different activities, including: (1) scientific research, standard setting and model project of development and utilization of renewable energy; (2) renewable energy projects in countryside and pasturing areas; (3) construction of independent renewable power systems in remote areas and islands; (4) surveys, assessments of renewable energy resources, and the construction of relevant information systems; and (5) Localized production of the equipment for the development and utilization of renewable energy.

Moreover, the Fund will compensate the difference in cost for the purchase of power generated by renewable energy and the cost of that generated by conventional energy. Furthermore, interconnections between grid and power generated by renewable energy or other costs of grid enterprises result from purchasing power produced by renewable energy may also be subsidized by the Fund.

Legal Implications

Chinese legislators anticipate that the *RELC 2010* will play a better role in the promotion of renewable energy. The amendments aim to address the difficulties and obstacles of implementing the *RELC 2006* during the past three years. Nevertheless, potential problems for implementation still exist.

First, though the full purchasing scheme is detailed in the *RELC 2010*, the scheme is still implemented by the Interconnection Agreement between grid enterprises and power companies. As a consequence, when the quota of power generated by renewable energy exceeds the capacity of the grid enterprise, the full purchasing scheme will no longer be feasible. Therefore, the quota must be carefully fixed by the energy authority of the State Council in collaboration with the State Power Regulatory Authority and Financing Department of the State Council. However, to date no legal binding quota has been determined. This issue shall be solved in the near future.

Moreover, the Fund has been established in order to better manage the funding for promoting renewable energy. It is foreseeable that the total amount of the money held by the Fund will increase rapidly as the renewable energy industry in China is now undergoing huge development. Based on the current renewable energy tariff surplus, every year 12 billion Chinese currency (Renminbi) will be added to the Fund. It is still unclear, however, which Authority will manage the Fund. The Ministry of Finance is currently working on the *Rules for the Management of the National Renewable Energy Development Fund*.[6] Nevertheless, it is still not clear which authorities will be involved with the Fund. If too many authorities are involved, the management cost and efficiency of the Fund may be affected.

Proposed Research Agenda for IUCN Academy of Environmental Law (IUCNAEL)

China's legal practice on renewable energy is an important example of state practice in the area of combating climate change. The conduct of comparative studies between China and other jurisdictions (e.g. between China and US, China and EU, China and Brazil) could therefore be of interest to scholars around the world.

Conclusions

The revision of China's *Renewable Energy Law* is an important legal contribution to the mitigation of climate change and the improvement of national energy security.

[6] See further: http://caihuanet.com/zhuanlan/meiti/21cbh/201004/t20100419_1678984.shtml.

The renewable energy sector in China is developing rapidly. It therefore needs to be supported and regulated by a comprehensive legal regime.

Major changes to renewable energy planning, the full purchasing scheme and the Renewable Energy Fund have significantly enhanced the domestic legal regime. However, problems of implementation still exist. The quota of power generated by renewable energy has yet to be determined and the management of the Fund needs to be clarified. For this reason the development of rules for the implementation and enforcement of the *Renewable Energy Law* is an urgent necessity.

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Legal Protection of Areas of Ecological Importance Such as Paramo in Colombia

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Introduction to the Paramo

As a megadiverse country, Colombia has a number of ecosystems of significant importance that have been identified as global biodiversity 'hot spots'. These areas should be particularly protected due to the ecosystem services that they supply and the great number of endemic species that live in them. The *Political Constitution of Colombia*[1] (1991) provides that the State has the duty to protect the diversity and integrity of the environment, conserve the areas of special ecological importance and promote education to achieve this objective (article 79).

Until now, there is not a precise definition or a descriptive list about what are the *areas of special ecological importance.* However, the High Courts, particularly the Constitutional Court, have played an important role in filling this gap. For instance, the Constitutional Court in some of its judgments has stated that from a legal point of view, wetlands are considered areas of special ecological importance. The Court explains that this character derives from Colombia's ratification of the *Ramsar*

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[1] *Constitución Política de la Republica de Colombia de* (1991), available at http://www.secretariasenado.gov.co/senado/basedoc/cp/constitucion_politica_1991.html.

Convention, which protects this type of ecosystem; and also due to the recognition of wetlands and other ecosystems as areas of special ecological importance through the jurisprudence of the High Courts.[2] Another example can be seen in the judgment C-443-09 where the Constitutional Court also recognized paramo ecosystems as areas of special ecological importance.[3]

Paramo is a unique mountain ecosystem. Paramo provide important reservoirs of water and play an important role in organic carbon storage. Paramo ecosystems are spread around the northern Andean mountain chain. They are located in high elevations, between the upper forest line and the permanent snow line (approximately 3000m and 5000 m respectively). They are mainly located in the humid Equatorial Andes in Venezuela, Colombia, Ecuador, northern of Peru and in some parts of Costa Rica and Panama.[4] Paramo ecosystems also consist of peat bogs, wet grasslands and lakes, which are considered wetlands under the *Ramsar Convention*.

Paramo offer essential ecosystem services. One of them is related to water, since this ecosystem possesses the ability to store and regulate this natural resource. In several cases, paramo constitute the source of potable water for some cities and provide for generation of energy. In fact, many of the headwaters of the major rivers in Colombia are located in paramo areas. Other ecosystem services are related to the vast biodiversity found in this form of ecosystem and their capacity to fix atmospheric carbon into the soil.[5]

Notwithstanding all the environmental services that this form of mountain ecosystem provides, paramo areas have been threatened for many years by a large number of

[2] T-666 of 2002 Corte Constitucional. Acción de tutela de la Señora Gladys Rubiela Sosa Beltrán contra Empresa de Acueducto y Alcantarillado de Bogotá E.S.P. (available at http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6230).

[3] C-443-09 Corte Constitucional. Acción de inconstitucionalidad contra el artículo 34 de la ley 685 de 2001 Código de Minas (available at http://www.corteconstitucional.gov.co/relatoria/2009/C-443-09.htm).

[4] Missouri Botanical Garden, '*Paramos - Flora'* (available at http://www.mobot.org/mobot/research/paramo_flora.shtml) .

[5] T. van de Hammen and J. Otero, 'Los páramos: Archipiélagos terrestres en el norte de los Andes' in *Atlas de páramos de Colombia* (2007) Instituto de Investigación de Recursos Biológicos, Alexander von Humboldt. Bogotá, D.C. Colombia.

human and natural factors.[6] Some of these factors are: agricultural encroachment; uncontrolled fires; overgrazing; ill-planned regional development projects; global warming; and mining.

Since we can now recognise the importance of protecting and preserving this form of ecosystem, it is then necessary to analyze whether the legislation adopted in Colombia is adequate to offer sufficient protection to the paramo. It is to such an analysis that I now turn, commencing with the highest norm that exists in the national legal system and then moving downwards.

Colombia's Legal Framework of Relevance to Conserving the Paramo

The *Political Constitution of Colombia* (1991) contains a number of environmental provisions, which did not exist before. For instance, for the first time in Colombia the right to have a healthy environment was incorporated (article 79). In addition, the *Constitution* states that property has a social and ecological function (article 58) and that the State has the duty to prevent and control the factors of environmental deterioration, impose sanctions and require the reparation of damage to the environment (article 80). Furthermore, the *Constitution* incorporates the possibility of limiting economic activities if required by social interest, the environment and the cultural heritage of the nation (article 333). It is due to these and other provisions that the *Constitution* has been named the 'Ecological Constitution' by the judiciary.[7]

Many of the above constitutional environmental provisions have been subsequently enunciated and developed through legislation. The most relevant one of these laws is *Law 99*[8] (1993). It establishes the general environmental principles for Colombia's

[6] Global Environment Facility, 'Project: Conservation of the Biodiversity of the Paramo in the Northern and Central Andes' (2003) *Project Appraisal Document* (available at http://gefonline.org/project DetailsSQL.cfm?projID=1918), at 11-12.

[7] C-375-94 Corte Constitucional, Review of Decree 1265 of June 21 1994, which adopted special provisions about credits in disaster zones in the departments of Cauca and Huila (available online at http://www.corteconstitucional.gov.co/relatoria/1994/C-375-94.htm).

[8] *Law 99* of 1993 (available at http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=297). This law creates the Ministry of Environment, reorganizes the public sector in charge of the management and

environmental policy. These principles include the following: the country's biodiversity shall be protected and exploited in a sustainable manner; water for human consumption will be considered a priority over any other water use; landscape, as common heritage, shall be protected; and environmental impact studies will be the basic tool for decision making regarding the construction of works and activities that significantly affect the natural or artificial environment. In addition, within this list of principles, it is mentioned that paramo areas, subparamos, water sources and aquifers shall be subject to special protection (article 1). This is the only form of ecosystem that is expressly mentioned in this list of environmental principles.

Another relevant environmental norm is the *Code of Renewable Natural Resources*.[9] This code is divided into different chapters per resource. It regulates the following resources: atmosphere and airspace; water; soil; terrestrial fauna and flora; and hydrobiologic resources. This code unfortunately regulates these resources in a fragmented manner and does not provide for the management and protection of ecosystems.

At a lower level, *Resolution 769*[10] was adopted by the Minister of Environment in 2002. It complements the implementation of the provisions contained *Law 99* (1993) and the *Code of Renewable Natural Resources*. *Resolution 769* was specifically adopted to contribute to the protection, conservation and sustainability of the paramo ecosystem. Its preamble states that paramo areas are a unique ecosystem with a singular cultural and biotic richness. It furthermore states that the paramo ecosystem contains a high level of endemic species of fauna and flora that are of enormous value and that constitute an essential factor for the systemic balance, biodiversity management and natural heritage of the country.

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conservation of the environment and natural renewable resources, and establishes the National Environmental System.

[9] *Law 2811* of 1974.

[10] *Resolution 769* of 2002 (available at http://www.icbf.gov.co/transparencia/derechobienestar/resolucion/minambiente/resolucion_minambiente_0769_2002.html).

Resolution 769 is the only provision in the whole national legal system dedicated solely to the regulation of the paramo ecosystem. It defines what the paramo is.[11] It requests regional autonomous corporations (regional governmental entities in charge of the administration of the environment and natural resources) and big urban centers to undertake studies regarding the actual state of paramo areas located within their jurisdiction and to declare them under one of the management categories provided by law (article 3). Moreover, *Resolution 769* also requests the regional autonomous corporations to design and implement environmental management plans for such areas in consultation with the communities that traditionally settle within them (article 4).

Unfortunately, *Resolution 769* is not a comprehensive norm that entirely regulates the protection, conservation and sustainable use of the paramo. In fact, there are other norms within the national legal system that also play an important role in regulating the paramo.[12] Legislation regarding soil, protected areas, water, mining and agriculture, for example, is also of relevance to the protection and regulation of the paramo.

Regrettably, the above legal instruments have not been sufficient to successfully protect and conserve paramo ecosystems situated in Colombia against harmful activities such as agriculture and mining. In particular, *Resolution 769* is ineffective if the regional autonomous corporations do not map the extent and analyse the state of the paramos situated within their jurisdiction. As a result, and recognizing that paramo ecosystems are areas of special ecological importance, an amendment to the existing legal framework has been made recently in an effort to protect them against one of the most damaging activities contributing to their destruction, namely mining.

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[11] Article 2 defines the 'paramo' as 'high mountain ecosystem, located between the upper limit of the Andean forest and, if it is the case, with the lower limit of glaciers and perpetual snow, which is dominated by a herbaceous vegetation and grasses, often frailejon. It may have formation of low forest and wetlands, such as rivers, streams, creeks, swamps, marshes, lakes and lagoons'.

[12] E.ugenia de Leon-Chaux, '*Marco jurídico Colombiano relacionado con Paramos*' (2002) 1 *Congreso Mundial de Paramos* (available at www.paramocolombia.info/Documentos/PrimerCongresoMundialdeParamos/TOMO 1.pdf).

Recent Legal Developments Seeking to Protect the Paramo Ecosystem.

Mining exploration and exploitation activities have contributed significantly to the demise of paramo ecosystems in Colombia. These same activities do, however, contribute to the economic development of the country and provide a source of income for a large number of families. Therefore, the regulation of these activities is essential as well as the identification of areas in which mining should not be allowed.

In order to offer a greater protection to certain nature areas, the *Mining Code*[13] was amended on 9 February 2010. The amendment[14] modifies the provisions in the *Mining Code* that prohibit mining activities in certain areas. According to the old provision, no mining activity could take place in those areas that formed part of the system of national natural parks, natural parks with regional character and forest reserves. Under the amended legislation, this prohibition is extended to the paramo ecosystem and wetlands designated under the *Ramsar Convention*. Article 3 of the amended legislation reads as follow:

> 'No exploration or exploitation mining work can be executed in areas that have been identified and declared as zones of protection and development of the natural renewable resources or of the environment according to the law.
>
> The excluded zones are those that have been constituted or will be constituted according to the current legislation, such as areas that are part of the System of national natural parks, natural parks of regional character, protected zones of forest reserve and the rest of zones of forest reserve, paramo ecosystem, and the wetlands that have been designated according to the Ramsar Convention. In order for these areas to produce effects, they have to be geographically delimited by environmental authority based on technical, social and environmental studies.
>
> Paramo ecosystem will be identified according to the cartographic information given by the research institute Alexander Von Humboldt'[15].

[13] *Law 685* of 2001.
[14] The amendments were affected under *Law 1382* of 2010.
[15] Original text translated by the author.

Under the previous legal regime, paramo areas were only protected against mining activities if they were located within a natural park or forest reserve. While the amended legislation extends protection to paramo areas situated outside these formal protected areas, such protection is once again dependant on the relevant environmental authority identifying and geographically delimiting these areas. A failure to do so will leave them exposed to mining activities. It is interesting to note that in formulating this new regime, the legislator took into consideration the jurisprudence of the Constitutional Court regarding areas of special ecological importance that need to be particularly protected, since the new legislation includes both paramo and wetlands as areas within which mining activities are precluded.

The amendments to the *Mining Code* also alter the range of areas that can be declassified as areas in which mining is prohibited. Under the amended regime, only forest reserves created under *Law 2* (1959) and regional forest reserves can be declassified by the environmental authority. As a result, areas that are part of the system of national natural parks, natural parks of regional character, paramos and wetlands cannot be declassified. When an area is declassified, the mining authority will establish the conditions on which mining activities can take place in the area. Such activities cannot, however, impact on any parts of the forest reserve area that have not been declassified. Therefore, some activities can be restricted or allowed provided that they comply with strict conditions prescribed by the mining authority.

The recent amendments to the *Mining Code* also provide that mining rights and environmental licenses in operation in areas within which mining activities were not previously prohibited, remain valid. They will not however be renewed when the amended regime comes into force.

An Evaluation of the Recent Developments

In summary, there is a clear trend in Colombia's environmental legal regime to offer special protection to paramo ecosystems. This trend permeates the entire regime from the *Political Constitution of Colombia* (1991) through to the laws adopted by Parliament and the resolutions issued by the Ministry of Environment. The main

problem in Colombia regarding protecting areas of ecological importance, such as the paramo, is not a deficient legal regime but the absence of compliance and enforcement measures to ensure that it is properly implemented.

It was only towards the end of 2010, that the Ministry of Environment Housing and Territorial Development (MAVDT), in a national operation against illegal mining, closed 48 illegal mines.[16] Of further concern is the large number of paramo areas that have not been formally identified, which opens up the possibility of mining activities being authorised within them. Finally, according to the new President Santos, mining is one of the mainstays of the country's national economic development.[17] This places extra pressure on the environment authorities to issue mining permits.

At present, there is discussion about the development of an open pit gold-silver mine in a mountain area in the northern-east part of Colombia. An extensive portion of the land comprises of paramo. Greystar, a Canadian company that is interested in developing a mine in the area, presented its environmental impact assessment (EIA) report to the MAVDT in December 2009. In February 2010, the amended *Mining Code* (*Law 1382*) came into force. The MAVDT therefore requested Greystar to prepare and present a new EIA report taking into account the impacts of the revised legal regime that specifically prohibits mining activities in paramo areas. Greystar challenged the decision of the MAVDT requesting them to submit a revised EIA report, on the grounds that their application preceded the commencement of *Law 1382* and it should accordingly not have been taken into account in relation to their initial application. Greystar succeeded in its appeal and accordingly the MAVDT will have to make its decision on the basis of the previous regime and EIA report submitted under it. Several communities and non-governmental organizations are concerned by the above decision, specifically the manner in which the developer has managed to circumvent the application of the revised regime specifically designed to protect paramo areas, such as that in which it seeks to undertake its mining activity.

[16] See further: Ministerio de Ambiente, Vivienda y Desarrollo Territorial, '*Minería ilegal*' *Noticias Institucionales*, dated 26 October 2010 (available at http://www.minambiente.gov.co//contenido/ contenido.aspx?conID=6397&catID=1137).
[17] See further: J. Santos, '*Buen gobierno para la prosperidad democrática, 110 iniciativas para lograrla*' (2010) Plan de gobierno (available at http://www.santospresidente.com/pdf/plan-de-gobierno-juan-manuel-santos.pdf).

This case provides clear evidence of the immense political and economic pressure placed on environmental authorities. The MAVDT should bear in mind, however, that article 3 of *Law 1382* only provides that licenses and permits issued before the new legislation enters into force will remain valid. *Law 1382* does not provide that if an authorization process was initiated prior to its commencement, its provisions cannot be taken into account. I am therefore of the opinion that should the environmental authorities fail to take into consideration that the mining will take place in a paramo area, in which under *Law 1382* mining is prohibited, their subsequent decision will be *ultra vires*.

The drawbacks of allowing mining and exploitation activities in these areas of significant ecological importance are not only related to biodiversity loss, but also to the reduction of water quantity produced by them. Mining is considered one of the main sources of water contamination.[18] These risks are heightened in the case of a gold-silver mines due to the risks associated with cyanide contamination. Such contamination would impact on not only the area itself, but also potentially affect fauna, flora and human beings situated downstream. In addition, an open pit mine would completely modify or destroy the landscape of the mountain area under discussion.

It can be concluded that Colombia's national environmental regime can provide for the protection of the paramo. This is however dependant on national, regional and local environmental authorities implementing it. Such implementation would include applying the norms contained in the regime when making their decisions, identifying paramo areas and designing management plans to conserve such areas. In addition, it is important that the country's economic imperatives do not trump its environmental imperatives. As a significant part of Colombia's economy is based on the exploitation of natural resources, it is necessary to realize that providing for the unsustainable utilization of such resources does not provide a long-term sustainable solution for the country.

[18] G. Pérez, 'Desarrollo y medio ambiente: una mirada a Colombia' (2002) 1(1) *Revista Economía y Desarrollo*, at 84 (available at http://www.fuac.edu.co/revista/M/seis.pdf).

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A New Regulation for Protected Areas in Colombia:

An Analysis of Decree No. 2372 of 2010

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"Protected areas remain the fundamental building blocks of virtually all national and international conservation strategies, supported by governments and international institutions such as the Convention Biological Diversity." (IUCN Report, 2008)

Introduction

Despite its relatively small size, Colombia is the second most biologically diverse country in the world. It is home to about 10 per cent of the world's species. In a nutshell, more than 1821 species of birds, 623 species of amphibians, 467 species of mammals, 518 species of reptiles, and 3,200 species of fish reside in Colombia. About 18 per cent of these are endemic to the country. Colombia has a mind-boggling 51220 species of plants, of which nearly 30 per cent are endemic. 53 per cent of its territory is covered by forests.

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This rich biodiversity stems largely from the country's location, geography, topography and varied ecosystems. Colombia is for instance the only country on earth to host five characterized and geographically-distributed ecosystems, namely: the Pacific Coast and its Coastal Cloud Forests; the Caribbean Coast; the Andes; the Orinoco Basin; and the Amazon basin and its tropical rainforest shared with Brazil, Venezuela, Equator and Peru.

Although 11 per cent of Colombia's territory is under some form of protection, its rich biodiversity and the ecological services stemming from it, is increasingly threatened by anthropogenic activities. These include: deforestation resulting from oil exploitation, mining, legal and illegal logging; the increasing demand of land for farming, cattle and drug trafficking; the expansion of urban areas; the increasing pressure on renewable resources like overfishing; and water consumption. Overall, the natural equilibrium is jeopardized by population growth, climate change, the rapid deterioration of natural ecosystems and the low environmental legal compliance. These pose major concerns for current and future citizens of Colombia.

International leaders have recognized the need and value of protecting and restoring critical ecosystems. At COP10 of the *Convention on Biological Diversity* held in Nagoya late last year, the parties adopted a historical agreement which establishes a target of 17 per cent of terrestrial and inland water protected areas, 10 per cent of marine and coastal protected areas and the restoration of at least 15 per cent of degraded areas by 2020.[1] This agreement reflects the growing interest in seeking to balance the competing imperatives of sustainable use and conservation. It is furthermore clear that the conservation of biodiversity is seen as the core of sustainability.

The current challenge facing many domestic policy-makers and communities is designing and implementing coherent conservation policy and legislation that gives effect to the above commitments. Protected areas are undoubtedly a fundamental

[1] Official Press Release, Nagoya Biodiversity Summit, COP 10 of the *Convention on Biological Diversity* (available at http://www.cbd.int/doc/press/2010/pr-2010-10-29-cop-10-en.pdf.)

tool in any such regime and are recognized as 'essential providers of ecosystem services and biological resources; and key components in climate change mitigation strategies'.[2] Colombia has ratified the *Convention on Biological Diversity* and continues to struggle to implement a coherent protected areas regime in order to enable it to adhere to its commitments under the *Convention*.

Several factors have undermined the development of a comprehensive conservation regime in Colombia. Firstly, the fact that conservation has not been accorded a priority in public policy with the State-Agency on National Parks having been established only in 1993. Secondly, the absence of a clear and consistent legal framework for protected areas. Thirdly, the lack of resources and capacity of conservation agencies that has undermine compliance and enforcement efforts.

In an attempt to overcome these challenges, the Colombian Government recently published the *National System of Protected Areas* (*SINAP*) in *Decree No. 2372 of 2010* (*Decree 2372*). The purpose of this report is to highlight Colombia's path towards a more efficient protected areas regime. It commences with a critical analysis of the old conservation regime and than analyses the impact of the new regime contained in *Decree 2372*.

Critical Evaluation of Colombia's Historic Approach to Conservation and Protected Areas

Despite being one of the most biologically diverse countries on earth, Colombia has not historically had an appropriate legal framework governing conservation and protected areas. The first regulation related to 'areas of relative ecological importance' was *Law No. 2a* (1959). It provided for the declaration of 'protective forest reserves' for the primary purpose of guaranteeing the protection of the water supply. The law was not therefore introduced to protect the biodiversity situated in these areas and its effectiveness in conserving the country's' forests must be

[2] N. Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (2008) IUCN, Gland, Switzerland.

questioned if one considers that during its tenure, forest cover in Colombia shrunk from 80 million hectares to 30 million hectares. This amounts to a deforestation rate of 170 000 hectares per annum.[3]

Types of Protected Areas

In 1974, the Government issued *Decree-Law No. 2811*, the '*Natural Resources Code'*. It refers to the need to preserve fragile ecosystems that are full of natural resources and may potentially offer environmental services such as water. Moreover, the *Natural Resources Code* regulates the management of forest reserves declared under *Law No. 2a* (1959). It furthermore imposes an obligation on the Government to: '*…establish or reserve special and determined areas to implement an integrated and comprehensive protection, propagation or breed hydro-biological species, in accordance with technical criterion'*. The *Natural Resources Code* allows the Government to declare 'areas of relative ecological importance' based upon their hydro-biological characteristics. It therefore constituted a step forward in the development of Colombia's conservation regime as, for the very first time, it imposed administrative obligations on authorities to declare protected areas and factor conservation issues into their decision-making.

Article 327 of the *Natural Resources Code* furthermore established a *System of National Parks*, which includes the following categories: a) national park; b) natural reserve; c) unique natural area; d) fauna sanctuary; e) flora sanctuary; and f) parkway. These categories do clearly not match the internationally recognized typologies promoted by the IUCN.[4] They rather reflect the conception domestic policy-makers had at the time of conservation and the purpose of protected areas. As far as we know, Colombia is the only country to include the 'parkway' category in its protected areas regime. The inclusion of this category was a response to some local and specific situation where local authorities sought to construct a road through a mangrove swamp that formed part of large wetlands located nearby Santa Marta. Several pre-existing categories of protected areas (such as 'municipal reserves', 'river star zones', 'eco-parks' and 'regional parks') were incorporated within this

[3] See further: National Committee on REDD, *Avoided Deforestation, A Guide for REDD + in Colombia* (2010) Bogota DC, Colombia.
[4] See specifically those contained in N. Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (2008) IUCN, Gland, Switzerland.

category which contributed to the misunderstanding and inefficient implementation of the conservation regime under the *Code* and increased the confusion around this specific type of protected area.

In other words, the Colombian system lacks clarity and tends not to meet the internationally recognized categories and standards established by the IUCN. This confusion has led to poor conservation management. The current regime is characterized by the inefficient assignment of financial resources. Furthermore, inconsistencies in its implementation have deepened competition for land-use and management between national and local authorities, and communities. This is evidenced by the Government allowing 'ancestral territories', administered by native or black communities, to be declared over land situated in certain protected areas. This has resulted in increased tension between conservation authorities and communities seeking to exploit the natural resources situated in protected areas.

Institutional Framework

The Special Administrative Unit of the System of National Parks (SAU), which is attached to the Ministry of the Environment, Housing and Territorial Development, is in charge of national parks. It has got both administrative and financial autonomy. In 1993, the SAU was strengthened by the creation of the Ministry of the Environment in terms of *Law No. 99* of 1993. Before that, natural resources were managed by the National Institute of Renewable Natural Resources (INDERENA), which was attached to the Ministry of Agriculture. INDERENA had its own administrative and organization chart and included a 'Department of National Parks', which has subsequently been transformed into the SAU. The SAU is currently in charge of the 56 national parks.

Legal Inconsistencies

The fragmentation of conservation management and administration arising from the many categories of protected areas at local, regional and national level, has undermined the establishment of a coherent and effective protected areas regime in

Colombia. The above problem is compounded by the prevalence of several contradictory regulations, including the following:

- *Law No. 99* (1993), which defines the powers and functions of the environmental authorities at the regional level and enables these authorities to manage 'cushion areas' in national parks.
- *Law No. 70* (1993), which provides for ethnic group rights within ancestral territories.
- *Law No. 685* (2001), the 'Mining Code', which provides for the possibility of mining within protected areas and fragile ecosystems.

Towards a Revised Conservation and Protected Areas Regime – *Decree 2372*

In response to the above challenges, the Government has sought to create a more efficient conservation and protected areas regime through the introduction of *Decree 2372.* It establishes the *National System of Protected Areas* (*SINAP*), which is defined as follows: 'a group of protected areas, social actors and institutions, as well as a set of strategies and tools which aim to meet the overall purposes of conservation' (article 3). *SINAP* lays the foundation for a new protected areas regime, one which seeks to substitute a more global and accurate protected areas system incorporating local and regional protected areas. It specifically highlights that 'the SINAP and the Protected Areas it includes, is the main element for the conservation of biodiversity in the country' (article 4(a)).

The following characteristics in *Decree 2372* are noteworthy. Firstly, it includes regional and local areas. Secondly, it provides for a far more participative approach to protected areas governance by civil society, state agencies and local agencies. Thirdly, it provides the framework for conservation in Colombia. Fourthly, it appoints the 'Unit of National Parks' to coordinate the implementation of the *SINAP*. This should ensure that there is one central authority tasked with overseeing and harmonizing its implementation across all levels of government. Fifthly, it clarifies and sets a hierarchy to prioritize revised-goals and methods to meet these goals. Sixthly, it establishes regional sub-systems of protected areas as well as thematic sub-systems. Seventhly, it redefines the categories of protected areas and creates both

public and private areas. Public areas include: a) national parks; b) protective forest reserves; c) regional national parks; d) integrated management districts; e) land conservation districts; f) recreational areas. Private areas are based on the now-called 'natural reserves of civil society', which allows private landowners to convert their property into natural protected areas. *Decree 2372* does not repeal the rules established in the *Natural Resources Code* or *Law 2a* (1959) and these therefore have to be read and applied in conjunction with it.

Conclusion

Decree 2372 seeks to reorganize and unify Colombia's system of protected areas by introducing a simpler framework that redefines the types of protected areas and alters the rules regulating their use and management. It tends to centralize authority at the national level and restructures the relations between national and local levels of government, and between the public and private sector. In addition, it provides evidence of the political will of the Government to afford greater priority to conservation and ensure the development of a more participative and efficient protected areas regime.

However, *Decree 2372* does not unfortunately provide for the domestic recognition of the full range of types or categories of protected areas promoted by the IUCN. Some critics are of the opinion that domestic policy-makers have pulled the wool over the general populace, as although certain semantic adjustments have been introduced by *Decree 2372*, the bulk of the old regime remains intact.

Nonetheless, the success of the revised *SINAP* will largely depend on the level of compliance and enforcement with the *Decree*, and the intrinsic capacity of government authorities and civil society to implement it. Traditionally, Colombia is characterized by low levels of environmental compliance and enforcement. Therefore, the success of *Decree 2372* will significantly depend on the capacity of political leaders, public servants, governmental institutions and state agencies to mobilize all the actors around the transcendental challenge of conservation. This may involve changing their current short-term rational approach in favour of a long-term perspective. The key therefore remains the education of communities and leaders in

order to raise awareness of the importance of respecting the legal framework and to discredit some tragic habits such as bypassing the current rules and regulations. In addition, authorities in charge of monitoring the implementation of the new regime must be empowered to ensure the strict implementation of its principles, methods and tools.

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'Green' Features of Recent Water Law Reform in Eritrea:

A Brief Appraisal

Senay Habtezion

Introduction

It is estimated that over 300 million people in Africa face water scarcity conditions.[1] A diversity of environmental and non-environmental stressors continues to plague the water sector and this has triggered regulatory reforms of the sector in many countries. '*As water becomes an increasingly scarce resource, threatened both qualitatively and quantitatively, many states are moving faster in the direction of adopting water resources legislation to address in detail the vast array of issues facing or emerging in the water sector*.'[2] A particularly notable feature in emerging water reform legislation is the move towards the inclusion of more environmentally-conscious provisions in water laws; a move referred to as the 'greening' of water

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[1] African Union, *AA/NEPAD African Action Plan 2010-2015: Advancing Regional and Continental Integration in Africa* (2009) available at http://www.oecd.org/dataoecd/27/32/44326734.pdf visited November 20 2010, at 21.

[2] Bradlow et al, *Regulatory Frameworks for Water Resources Management: A Comparative Study* (2006) World Bank, Law, Justice and Development Series, at iii.

laws.[3] This report looks into water reform efforts being introduced in Eritrea, namely the *Eritrean Water Proclamation* No. 162/2010, with accent on the 'green' aspects of the new legislation. The report provides a brief account of the new *Proclamation* and an appraisal of the environmentally conscious features of the law.

Water Resources and Stressors

No complete study exists regarding water resources in Eritrea. Yet, existing baseline research testifies to the fact that water is a scarce resource in Eritrea. There are three main drainage systems. There is only one perennial river – the *Setit* River – and all other rivers are seasonal and are dry all year along, except for the rainy season. There are no significant freshwater natural fresh water bodies, although there exist sporadic artificially dammed water bodies. The principal source of water in the country is groundwater tapped in different pockets of the country.[4]

The country's water sector has long been saddled with diverse stressors. A part of the Sahelian Africa, Eritrea is not blessed with rich surface and groundwater resources. In addition to physiographical mishaps, other water resources stressors in the country include increasing urbanization, population growth, land degradation, misuse, leakage, and inefficient agricultural and industrial practices and potential impacts of climate change. Pollution of the country's skimpy water resources is also a cause of concern.[5] Further, legislative voids have exasperated the problem.[6]

[3] S. Burch, 'The Interface Between Customary and Statutory Water Rights – A Statutory Perspective' (2005) Unpublished Paper presented at the International Workshop on African Water laws: Plural Legislative, 26-28 January 2005 at 5.
[4] GoE, *Macro-Policy*, November 1994, at 40-44.
[5] Ibid, at 44.
[6] See further: GoE-MoA, *National Action Plan Programme for Eritrea to Combat Desertification and Mitigate the Effects of Drought* (2002) available at http://www.unccd.int/actionprogrammes/africa/ national/2002/eritrea-eng.pdf.

Regulatory Voids

There is some groundwork in the national constitution, policy and sectoral planning tools for sound regulation of water resources in Eritrea.

The *Eritrean Constitution* provides that the state has the onus of 'managing all land, water, air and natural resources and for insuring their management in a balanced and sustainable manner; and for creating the right conditions to secure the participation of the people in safeguarding the environment'.[7] This constitutional construct plausibly mandates the state to put in place regulatory framework aimed at, *inter alia,* the sustainable use and conservation of water resources. Moreover, there have been scanty provisions in the *Transitional Civil Code of Eritrea* as well as sectoral legislation that govern some facets of the water sector. These laws have, however, tended to lay more emphasis on water utilization. Conservation, development and protection of water bodies were not accorded due treatment.

The nonexistence of comprehensive legislation on the water sector notwithstanding, there have been a few policy tools providing some form of guidance on water resources management in Eritrea. These include the *Eritrean Macro-Policy*, *National Environmental Management Plan for Eritrea* (*NEMP-E*), *The National Action Plan Programme for Eritrea to Combat Desertification and Mitigate the Effects of Draught*, *National Environmental Assessment Procedures Guidelines* (*NEAPG*); other sectoral environmental impact assessment (*EIA*) guidelines. All of these instruments have one thing in common - they all acknowledge the problem of scarcity of water in the country and they proclaim that judicious use of the resource is imperative. These instruments have, however, been very fragmented and, at times, conflicting. Besides, for whatever they are worth, they have largely been ignored. Another major problem emanating from these diverse sectoral policy enunciations is that they have promoted lack of integration and coordination on water resources management.[8]

[7] GoE, *The Eritrean Constitution* (2007).

[8] Consultancy on Technology, Marine, Resources and Environment, *Regulatory Framework for Water Resource Management in Eritrea* (2007) Consultancy Report prepared by SMAP Consultancy. The Report contains several annexures, including: *Draft Water Proclamation*;

The Legal Response: Proclamation No. 162/2010

Issued on 23 August 2010, the new *Eritrean Water Proclamation* contains 35 articles, distributed in 7 chapters and 16 pages. It is the first major attempt at serious regulation of the water sector and only the second major legislation geared towards conservation of the country's plummeting natural resources, next to the *Forestry and Wildlife Conservation and Development Proclamation*, No 115/2006.

The Preamble of the *Proclamation* acknowledges the fact that water is a scarce resource in the country; the need for comprehensive regulation of the water sector; and the importance of 'integrated planning and coordinated development strategy and practice, as well as conscious public participation' to ensure 'effective and sustainable management, conservation and utilization of water resources' in the country.

Among the stated objectives of the *Proclamation* is 'conservation and protection from pollution and related risk factors of the country's water resources'; 'promotion of integrated water resources management and development' and the 'establishment of pertinent legal framework and institutions with clear mandate in consonance with the principles of integrated water resource management' (article 3).

Among other things, the *Proclamation* declares all water resources 'public property' of the people of Eritrea (article 4), while simultaneously establishing a regime of permits for use of same (articles 5-7); creates a system of water resources planning by mandating inventory of water resources and national water resources master plan (articles 12-13); introduces novel provisions on pollution prevention (article 14) and water quality control (articles 16-17); lays out a framework for water pricing (article 19); and empowers the Ministry of Land, Water and Environment (MLWE) to implement the *Proclamation* (articles 10-11).

Water Commission Proclamation; *Draft Waste Water Permits Regulations*; and *Draft Water Use Permits Regulations*.

Permitting Regime

The *Proclamation* puts forth general requirements for water and waste water use and discharge through a permitting regime. A permit shall now be required for the use and development of water resources, including surface and groundwater exploitation and use for municipal, industrial and agricultural purposes (article 6(1)); and the construction and operation of any kind of water related works (article 6(1)(c)). While the *Proclamation* does not detail the requirements and process associated with permits, it does provide general guidelines for potential permit-holders. Accordingly, a permit-holder: '(1) may not engage in actions that alter flow rate, quality, quantity of water without authorization; (2) may not utilize the water for any other purposes, and/or in any volume exceeding, than is allowable by the permit; (3) may not cause or allow any water to be polluted; (4) shall take precautions not to cause damage to the source from which water is taken, or to which water is discharged after use; (5) shall take precautions to ensure that no activities on the land where water is used results in the accumulation of any substance which may render water less fit; (6) shall observe conditions prescribed by regulations issued under this *Proclamation*; and (7) shall observe any special condition that may attach to the permit' (article 9).

The provisions noted above are noteworthy not only by virtue of the fact that they target water pollution and safe discharge of used water, but also in that they address the other major water resource stressor (*i.e.* misuse). It is expected that the guidelines under article 9 will further be enunciated by future regulations promulgated under articles 6(7) and 33(8). The success of the permitting regime will arguably hinge on its application to other government agencies and the Eritrean defense forces in particular. The latter have thus far been responsible for the bulk of the development activities in the country, including building of water works (e.g. dams), infrastructure, major industries and commercial agriculture.

Environmental Impact Assessment

The *Proclamation* provides that issuance of permits for water use is contingent on prior submission of an EIA (article 8) This is a fairly elastic stipulation and its significance will only be understood within the larger context of existing normative regime on EIA and current practice in Eritrea.

In 1997, the government issued the *National Environmental Assessment Procedures and Guidelines*[9] (*NEAPG*) for the first time with the view to protecting the environment by integrating environmental considerations into national development processes. *NEAPG* puts water and water-related projects into Category 'A' and 'B' projects. Activities of storage dams with surface area of more than 0.5 km diversions of river base flows and geothermal activities are categorized as Category 'A' projects while construction of storage dams with surface area of less than 0.5 km sq., diversion of river flood flows, flood-control schemes and drilling for the purpose of utilizing groundwater resources fall within Category 'B' projects. Category 'A' projects ordinarily warrant full EIA while the EIA requirements for Category B projects are less stringent. It is to be noted also that a project ordinarily falling within Category B, can be environmentally screened as Category 'A' project if it lies in an area which is designated as an 'environmentally sensitive area' by the *NEMPG*. The following areas are considered as sensitive areas as concerns the water sector: any areas which already serve important water supply functions for domestic or agricultural use; any permanent or seasonal water bodies used for domestic or agricultural water supply; and, all major perennial and seasonal rivers.[10]

Besides the *NEMPG*, there are also sectoral EIA requiring guidelines that are tangentially relevant for the water sector. Two are noteworthy for purposes of this paper: the *Environmental and Social Impact Management Guidelines for Road*

[9] GoE, *The National Environmental Assessment Procedures and Guidelines* (1997).
[10] Ibid, at 66-67.

Operations[11] (*EESIAGRO*) and *Draft Environmental Assessment Procedures and Guidelines for Agricultural Projects*[12] (*DEAPGAP*).

EESIAGRO identifies the potential impact of road operations on water resource. Groundwater draw down, diversion of water courses and disruption of irrigation water supplies are some of the recognized ecological impacts of road operations. Similar to the *NEMPG*, *EESIAGRO* provides detailed EIA schemes in all phases of road operations. Detail notwithstanding, the guidelines in *EESIAGRO* lack the force of law and their application is entirely consensual.

Relatedly, *DEAPGAP* treats 'large scale agricultural development projects', 'large scale irrigated crop production', 'construction of big dams; diversion structures and digging wells for irrigation development', and 'irrigation schemes using untreated waste water' as 'Category A' projects; 'medium scale agricultural development projects', 'medium scale irrigation schemes', 'large and medium scale drip irrigation projects', 'digging of wells and boreholes as watering points for livestock' as 'Category B' projects; and 'small scale agricultural development projects', 'small scale irrigation schemes' and 'medium scale drip irrigation projects' as 'Category C' projects. *DEAPGAP* also recognize environmentally sensitive areas and, to this effect, cross reference is made to *NEAPG*, which means that if an agricultural project ordinarily falling in a given category is sited in an environmentally sensitive area, according to *NEAPG*, it would be treated as project falling into a superior category.

DEAPGAP is an important planning tool in addressing the pollution and/or misuse of water resources. Yet, there are points where *DEAPGAP* is divergent from the new water legislation. To illustrate, *DEAPGAP* treats 'irrigation schemes using untreated waste water' as 'Category A' projects while this is not the case under the *Proclamation*.

[11] GoE-MoPW, *Environmental and Social Impact Management Guidelines for Road Operations* (2003).
[12] GoE-MoA, *Draft Environmental Assessment Procedures and Guidelines for Agricultural Projects* (2005).

Coming back to the EIA requirement set out under article 8 of the *Proclamation* itself, it is unclear whether the EIA regime contemplated for the water sector would be subservient to *NEAPG* and/or override the sectoral EIAs dealt with above. The modalities for application of EIA for the water sector should arguably be fleshed out by future regulations promulgated by the MLWE and serious effort made in adopting a sound national EIA regime. In the same vein, any meaningful EIA regime needs to seriously regulate development projects initiated by different government agencies, including those by the military. As it stands, the national as well as sectoral EIA guidelines have no regulatory teeth and thus far only projects funded by international organizations such as the World Bank have been seriously subjected to the EIA requirement.[13]

Pollution Prevention and Abatement

The *Proclamation* devotes a full chapter to water pollution and abatement. Article 14(1) stipulates that '(t)he water resources and related ecosystem of the country shall be protected against pollution…'. Furthermore, article 15 provides a direct prohibition against pollution. Accordingly, '(n)o person may intentionally and/or negligently pollute or contaminate water resources by direct or indirect means' (article 15(1)). In the same vein, the *Proclamation* also empowers the MLWE to set standards and prescribe guidelines for water quality (article 16) and wastewater quality (article 17).

Whereas the above stipulations in favor of pollution prevention are creditworthy, more could have been done. For one, a specific provision on aquifers would have been appropriate, given the fact that this is the principal source of water resources in the country and there are looming concerns over safety of groundwater resources in the country, in light of proliferation of mining projects in the country. In the *Draft Water Proclamation* (2007), there was a provision stating that 'stringent regulations' may be put in place protecting 'groundwater resources in general and fossil aquifers in particular'.[14] Another apparent omission made in the *Proclamation* is the fact that

[13] K. Tesfagabir, 'Gaps in the Law and Practice of Environmental Impact Assessments: Case Study of the *Warsay-Yikallo* Campaign' Unpublished Paper (May 2005), University of Asmara, at 80-101.
[14] Consultancy on Technology, Marine, Resources and Environment, *Regulatory Framework for Water Resource Management in Eritrea* (2007) Consultancy Report prepared by SMAP

article 15 has taken a rather more restrained stance on the role of inspectors in policing discharge of waste or any pollutants into water, by direct or indirect means. Although the *Proclamation* empowers inspectors to enter private land, it adds 'provided no rights of privacy are violated'. The *Draft Water Proclamation* (2007) did state that inspectors may, in *exigent circumstances*, 'take such measures as may be necessary, including entry to land, without court warrant, to ensure compliance with the provisions of the proclamation'.[15] Furthermore, article 30 states that any person convicted of an offence under the *Proclamation* 'shall be punished in accordance with the penal code of Eritrea'. Article 506 of the *Transitional Penal Code of Eritrea*[16] (*TPCE*) states that '(1) A person who intentionally and without lawful excuse contaminates by means of substances harmful to health drinking water serving the needs of man or beast, is punishable, the extent of the damage, with fine or with simple imprisonment for not less than one month or in more serious cases, with rigorous imprisonment not exceeding five years'. In cases of intentional poisoning of wells or cisterns, springs, waterholes, rivers or lakes rigorous imprisonment shall not exceed fifteen years.[17] Obviously the scenarios contemplated in the *TPCE* fall short of covering most situations in which the *Proclamation* could be violated and the *Proclamation* should ideally have prescribed specific offences. This is arguably one of the most conspicuous failings of the *Proclamation*. The *TPCE* dates back to 1957. It will accordingly be difficult to use the Code in prosecuting the manifold violations that could arise in the context of implementing the *Proclamation*.

Returning to article 14(1), which states that '(t)he water resources and related ecosystem of the country shall be protected against pollution…', it is noteworthy that the *Proclamation* does seek to protect both water resources and *water related ecosystems*. Bringing water related ecosystems within the purview of the *Proclamation* signifies a progressive approach to water resource regulation. Relatedly, the *Proclamation* also empowers the MLWE to delimit the boundaries of banks of water bodies (article 14(2)(a)); prohibit clearing, cutting trees or vegetation and construction of buildings and structures, within the delimited water bodies (article

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Consultancy. The Report contains several annexes, including: *Draft Water Proclamation*; *Water Commission Proclamation*; *Draft Waste Water Permits Regulations*; and *Draft Water Use Permits Regulations*.

[15] Ibid.

[16] GoE, *Transitional Penal Code of Eritrea* (1957).

[17] Supra, article 506(2).

14(2)(b)); and if the environmental sustainability of a given water resource so requires, declare it as off-limits for agricultural and industrial use (article 14(2)(c))'. These provisions are noteworthy. It will, however, remain to be seen whether these ambitious enunciations geared toward the regulation of water-related ecosystems as well as prohibitions of construction, agricultural and industrial activities near delimited bodies will be enforced with discipline, given the competing sectoral powers of enforcement provided to the MLWE (articles 10-11) as well as other sectoral agencies, especially the Ministry of Agriculture. It is instructive to note that the *Draft Water Resources Proclamation* (2007)[18] had provided for the constitution of an independent water commission (with commissioner to be appointed by none less than the head of state) to be composed of inter-ministerial board, to ensure more integration and coordination, among different government bodies. With the MLWE's entrusted with jurisdiction that extends beyond water resources and bodies could potentially offer the fodder for inter-ministerial grudges, undermining the new water law. The *Proclamation* does empower the MLWE to monitor its implementation (articles 10-11) and pursuant to article 34, any laws or directives that are inconsistent with the *Proclamation* shall be null and void. The literal meaning of these two provisions read together would lead to the conclusion that all water-related provisions in other sectoral legislation would now be replaced with the new water law. The situation is, however, more complicated than meets the eye.

The Ministry of Mines and Energy is currently empowered to regulate some aspects water resources as pertains to their respective mandates.[19] Likewise, the Ministry of Agriculture is also mandated, among other things, to oversee forestry resources and activities, including riverside forests.[20]

[18] Supra note 14.
[19] See in this regard: GoE, Legal Notice No. 45/2000, *Revised Regulations on Petroleum Operations* (2000); GoE, Proclamation No.108/ 2000, *A Revised Proclamation to Govern Petroleum Operations* (2000); GoE, Proclamation No.68/1995, *Proclamation to Promote the Development of Mineral Resources*; and GoE, Legal Notice No. 19/1995, *Regulations on Mining Operations* (1995).
[20] GoE, *The Wildlife and Forestry Development and Conservation Proclamation* No. 155/2006.

Water Resources Planning

The *Proclamation* introduces some novel nuts and bolts for water planning and policy. Article 12 deals with inventories and the need for establishment of a database on water resources for the country while article 13 provides for the national water resources master plan. Accordingly, systematic studies are to be conducted, among other things, on 'assessing water pollution or contamination levels and tracing sources of pollution and contamination and possible treatment methods' (article 12(1)(e)) These studies along with 'surface and subsurface hydrologic investigations (article 12(1)(e)) will contribute to a national water resources database which shall be established and kept under constant review and be updated, as necessary. Similarly, the national water resources master plan, which shall be prepared under the *Proclamation* envisages long term process by which, among other things, the water resource potential of the country's river basins are evaluated and the economic and social benefits of same evaluated. Finally, the *Proclamation* mandates an integrated water resource management approach in the implementation of the master plan (article 13(3)).

Needless to say, these planning tools will help enhance the country's ability to methodically understand the water resource situation in the country and promote the sustainable utilization and conservation of the resource. It is to be noted, however, that article 12 and 13 of the *Proclamation* are a watered down version of the original draft. The earlier draft had two other tools as part of its chapter on planning – with additional provisions on water policy and river basin management plans. The latter was a particularly ambitious exercise in that management plans were to be specifically adopted for all existing river basins that, among other things: '(a) scientifically describe the resource; (b) state the objectives to be achieved in the management of the area, including environmental, social, economic and other objectives; (c) set out zones where development activities may be conducted; (d) set out the conditions that apply regarding any allowed development activity; (e) set out zones that are considered to be off-limits for any development activity; (f) articulate the responsibilities of River Basin committees vis-à-vis the River-Basin in question; and (g) detail the measures that need to be in place to facilitate the participation of

local communities and other stake holders in the management of the given river basin or aquifer'.[21]

Regulatory Powers

The *Proclamation* both mandates and empowers the MWLE to implement the new water law while at the same time empowering it to further regulate the water sector, in consonance with the *Proclamation*. The MWLE is now expressly mandated to ensure and monitor the implementation of the *Proclamation* and 'ensure that the desired water quality standard is maintained and all-water related bodies and structures receive due protection against pollution, contamination and physical damage' (article 10(2)(d)). By the same token, the Ministry is also empowered to issue regulations under article 33, which states that the Minister may, inter alia, issue regulations regarding 'water resources management and quality control works, or related activities such as water conservation and water saving measures'; water fees and charges; water permits; and 'such other matters as may be deemed necessary for the proper implementation of the Proclamation'. Further, the *Proclamation* empowers the MLWE to regulate specific water bodies. Accordingly, the MLWE may '…in relation to the use of any water source, where the situation so requires, … (a) regulate and/or restrict given water resource to be used for particular purposes; (b) revoke or suspend a given water use permit at times of shortage or anticipated shortage; (c) restrict or prohibit waste discharge permit or other permit issued under this Proclamation; and (d) provisionally or permanently, prohibit the use of water from a given source' (article 10(3)). These regulatory powers, it is submitted, could be utilized to promote sustainable uses and protection of the country's meager water resources.

Progressive Pricing

Article 19 of the *Proclamation* provides for the employment of progressive rates to be employed as part of water pricing scheme. Water scarcity is perhaps the most daunting environmental and survival challenge in Eritrea. This is a sound provision in that it will provide the incentive for putting a price and value on water as a scarce

[21] Supra note 14.

resource. This will also ostensibly incentivize judicious use and help users make investments, with a view to avoiding leakage. As it stands, in some regions in the country, estimated loss of water due to leakage is 50 per cent.[22] It is, therefore, fitting that the *Proclamation* has put forth a mandate on developing of guidelines on water pricing based on progressively graduating rates that encourage judicious use.

Conclusion

Water presents a complex set of issues that challenge leadership and require vision, deep commitment and action. The *Proclamation* presents both an opportunity and a challenge for the country's leadership. By and large, the new water law is in keeping with modern trends on water regulatory reform; it is particularly noteworthy that the new *Proclamation* has incorporated considerable 'green' stipulations.

It is hoped that the MLWE will methodically use its regulatory powers in detailing and clarifying some of the nuanced enunciations of the *Proclamation*, in favor of furthering the 'green' provisions of the new law. In the same vein, it is important that the MLWE swiftly move to establish the 'national water resources advisory board' envisaged under article 10(5) comprising different stakeholders and regional committees. This would help ensure integration and coordination, which are critical ingredients of IWRM.

Looking forward, the biggest challenges will be none other than implementation. Eritrea's environmental regime is far from developed. The country's *1997 Constitution* is yet to be enforced and a framework environmental proclamation is yet to be promulgated. It will remain to be seen how this law will interface with existing sectoral legislation on agriculture, mining and, perhaps most importantly, with development activities by the Eritrean defense forces. The government has taken an important step by promulgating the *Proclamation*; and it is time for the government to put its money where its mouth is.

[22] GoE, *National Environmental Management Plan - Eritrea* (1995), at 43.

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La consécration d'un droit à un environnement sain à l'échelon français et européen

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Abstract

The human right to a healthy environment is recognized in France as well as in Europe. While this achievement is important, it is somewhat disappointing that it has mainly reflected an anthropocentric view of the environment. However, with the adoption of a European Directive on environmental liability in 2004 and its recent transposition in domestic law, a regime for the protection of the environment is taking shape in France.

Country Report

Le droit à un environnement sain est reconnu comme un droit fondamental à l'échelon français, dans la Charte de l'environnement, et européen, dans la Charte des droits fondamentaux de l'Union européenne et dans la Convention d'Aarhus approuvée par la Communauté européenne. De même, bien que la Convention européenne des droits de l'homme ne le garantisse pas, son existence a été

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expressément affirmée par la Cour européenne des droits de l'homme dans l'arrêt Tatar c/ Roumanie[1], sur le fondement de l'article 8 de la Convention européenne.

Le droit à un environnement sain devrait contribuer à une protection efficace de l'environnement. Or, l'hésitation est permise. En effet, ce droit traduit essentiellement une vision anthropocentrique de l'environnement, c'est-à-dire une protection de l'environnement pour l'homme et non pour l'environnement en tant que tel. A chaque fois, le droit à un environnement sain est associé au bien-être de l'homme et au respect de la santé humaine.

Néanmoins, une évolution est en cours. En effet, l'Union européenne a fait preuve d'innovation avec la directive européenne 2004/35/CE du 21 avril 2004 sur la responsabilité environnementale, transposée en droit français par la loi n° 2008-757 du 1er août 2008 et par le décret d'application n° 2009-468 du 23 avril 2009. La responsabilité environnementale instaure un régime de prévention et de réparation de certains dommages purement environnementaux, c'est-à-dire de certaines atteintes à l'environnement indépendamment de toute répercussion sur les personnes ou sur les biens. Elle définit les conditions dans lesquelles sont prévenus ou réparés, en application du principe pollueur-payeur et à un coût raisonnable pour la société, les dommages causés à l'environnement par l'activité d'un exploitant. Il s'agit de certains dommages aux sols, à l'état de l'eau, aux oiseaux sauvages et à leurs habitats, aux habitats naturels, à la faune et à la flore sauvages, aux sites de reproduction et aux aires de repos de ces espèces et aux services écologiques. Elle reconnaît même la spécificité du dommage écologique pur en imposant une compensation en nature, c'est-à-dire principalement une remise en état des sites pollués, qui paraît plus adaptée que le versement d'indemnités. La responsabilité environnementale est un instrument juridique particulier car elle emprunte les mécanismes de la responsabilité civile mais elle est prononcée par les autorités administratives et non par un juge.

Elle rayonne dans le droit français même hors de son champ d'application, donnant ainsi une nouvelle dimension au droit à un environnement sain. En effet, certaines juridictions françaises du fond ont admis la reconnaissance d'un dommage écologique pur dans le cadre de la responsabilité civile. Si cette consécration était confirmée par la Cour de cassation, elle traduirait le passage d'un droit fondamental

[1] CEDH, 27 janvier 2009, req. n° 67021/01.

à un droit subjectif à un environnement sain. Cependant, l'existence d'un tel droit subjectif se heurte en droit français à des difficultés relatives à l'identification du titulaire du droit. Elle oblige à repenser des concepts, tels que le droit subjectif et le préjudice. Mais ces bouleversements juridiques permettraient au droit à un environnement sain d'intégrer la protection de l'environnement en tant que tel.

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Recent Developments in Environmental Policy, Statute and Case Law in Germany

Eckard Rehbinder*

A Summary of the Recent Developments

Policy Developments

For quite some time the focus of German environmental policy has been laid on climate protection and energy policy. The more recent development is marked by a certain policy shift brought about by the new conservative/liberal government that came into power after the September 2009 elections. On 28 September 2010 the government submitted a new 'Energy concept for an environmentally friendly, reliable and affordable energy supply'.[1] In accordance with the previous government, the programme continues to lay the emphasis on a gradual substitution of renewable energy for fossil and nuclear energy as the main pillar of future energy supply. However, it aims at achieving this goal in a more cost-efficient way, which entails certain reductions of the subsidies granted for the build-up of regenerative sources of energy (effectuated by feed-in obligations of public utilities and fixed feed-in prices)

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[1] *Federal Parliamentary Document* 17/3049.

and concentration on renewable sources offering a high energy yield. To this end, offshore wind energy, repowering of existing inland wind energy facilities, a sustainable use of biomass and a renewal of the grid infrastructure are being favoured. The second pillar of energy policy is the increase of energy efficiency. Apart from making full use of saving potentials that still exist in industry, including the automobile industry, the emphasis is being laid on the private sector (energetic renewal of existing buildings and energy-efficient construction requirements for new buildings). Finally, and most controversial, the Energy programme redefines the role of nuclear energy. While it does not depart, as a matter of principle, from the policy of gradual phase-out of nuclear energy that had been adopted in 2002, it stresses the role of nuclear energy as a cost-efficient transitional solution for global climate protection ('bridging technology'). Therefore the programme proposes to prolong the maximum operation times of the 17 existing nuclear power plants.

The re-evaluation of the role of nuclear energy also had an impact on the policy on final disposal of high level radioactive waste. In 2000 the socialist/green government had imposed a moratorium of up to 10 years on the further underground exploration of the controversial salt dome in Gorleben in Lower Saxony. This area had already been selected, in a rather technocratic procedure, at the end of the 1970s as the site of the repository for high-level radioactive waste. The new government, in concert with the government of the State of Lower Saxony, now has decided to resume underground investigations without considering possible siting alternatives.

Statutory Developments

Recent statutory developments have focused on energy law, in particular nuclear energy law, although there are also other developments that are worth noting.

On 28 October 2010,[2] the German Bundestag (House of Representatives) adopted a legislative package consisting of two amendments of the *Nuclear Energy Act* (*11th Amendment* and *12th Amendment*) and two financial laws. The *11th Amendment* prolongs the maximum operation times (that had been limited in 2002) by additional

[2] *Plenary Protocol* 17/68, 7166 C.

10 years on the average, more exactly by 8 years for older facilities and 12 years for newer ones.[3] The possibility of transferring operation times from older to newer facilities (not inversely) has been fully retained although the public utilities had pleaded for more flexibility. The *12th Amendment* of the *Nuclear Energy Act* on the one hand implements the *EU Directive on the Nuclear Safety of Nuclear Installations*[4] into German law, especially with respect to safety management and the obligation to continuously improve safety. On the other hand, it integrates the improvement obligation into the existing rules on periodic safety inspections and reintroduces powers of expropriation of landowners and holders of mining rights for the construction of repositories for radioactive waste.

As part of the new policy towards nuclear energy, the government has endeavoured to scoop off part of the gains the public utilities will derive from the prolongation of the operation times of nuclear powers plants. To this end, as part of the legislative package two further laws were adopted by the Bundestag on 28 October 2010.[5] The *Act on a Tax on Nuclear Fuel* imposes, in parallel to the eco-tax that is already imposed on major fossil fuel-powered electricity generating facilities, a consumption tax on nuclear fuels the proceeds of which will go into the general federal budget. The *Act on the Establishment of a Federal Fund "Energy and Climate Fund"* (based on an agreement with the public utilities) mandates public utilities that operate nuclear powers plants to make contributions to a special public fund that is designed to finance innovative technologies in the framework of the new energy programme.

On 26 November 2010 the Bundesrat, the representation of the States, decided by majority vote not to object to the nuclear package[6] so that it became law in December 2010[7]. However, the opposition parties assert that a positive agreement of the Bundesrat is required by the *Federal Constitution*. Ultimately the Federal Constitutional Court will have to decide on this issue.

[3] New Section 7(1a), 1st and 2nd sentences, Annex 3, *Nuclear Energy Act*.
[4] *Directive* 2009/71/Euratom.
[5] *Plenary Protocol* 17/68, 7166 D.
[6] *Document* 683/10 [Resolution].
[7] *Federal Gazette 2010 I, at 1814, 1817 (Atomic Energy Act), 1804 (Tax on Nuclear Fuel) and 1807 (Energy and Climate Fund)*.

The legislative development in the field of the environment is to an ever increasing extent influenced by European law. Thus, the legislative changes that have recently occurred in the field of air quality policy are essentially due to the new *EU Air Quality Directive*.[8] This directive consolidated the previous framework directive and several daughter directives into one piece of regulation and adjusted the regulatory regime to experience gained in implementation practice and to more recent knowledge about the harmful effects of particular air pollutants, especially the 2,5PM fraction of particulates. The *8th Amendment* to the *Federal Emission Control Act* that entered into force on 6 August 2010[9] adjusts the Act to the new *EU Air Quality Directive*. Among other things, it mandates the establishment of air quality plans, beyond non-attainment of mandatory limit values, already when the target values for the 2,5PM fraction of particulates are exceeded.[10] The *39th Federal Emission Control Regulation*[11] consolidates the existing two regulations that had implemented the various preceding EU air quality directives into one piece of regulation and adjusts them to the new requirements. Moreover, the Government announced a new regulation on the quality of gasoline that would require gasoline stations to offer gasoline with a 10 per cent content of ethanol made of biomass. The regulation implements the *EU Directive on the Specification of Petrol, Diesel and Gas-Oil*.[12]

Finally, it is to be noted that on 6 August 2010 the Ministry for the Environment submitted a first draft on implementing the new *EU Waste Directive*[13] into German law. The draft introduces new definitions, a five-tier hierarchy of waste management options (prevention, preparation for re-utilisation, material reprocessing, recycling for generation of energy and final disposal), waste prevention programmes, more demanding recycling quotas (beyond the minimum quotas prescribed by the Directive) and rules aiming at a more cost-efficient supervision.

[8] *Directive* 2008/50/EC.
[9] *Federal Gazette* 2010 I, at 1059.
[10] New section 47(1), 2nd sentence.
[11] *Federal Gazette* 2010 I, at 1065.
[12] *Directive* 2009/30/EC.
[13] *Directive* 2008/98/EC.

Recent Case Law

In Germany every year the administrative courts hand down numerous decisions on environmental and planning law, most of which are published in official reports and/or legal periodicals. Moreover, the Federal Constitutional Court is an active player in this area. The following four more recent decisions are representative of the kind of issues dealt with by German courts in the field of the environment.

On 24 November 2010 the Federal Constitutional Court[14] confirmed the constitutionality of the provisions of the *German Act on Biotechnology* concerning the public site register on GMO releases (section 16a), the precautionary obligations for handling GM products, especially cultivation of GM plants (section 16b) and the liability of GM farmers and other GMO users towards conventional and organic farmers for impairment of their use of land (section 36a). The plaintiff, the State of Saxony-Anhalt, had asserted a violation of various fundamental rights, especially the freedom of scientific research, the right to privacy (protection of personal data), the guarantee of property and the right to free exercise of a profession. The Court held that the requirements of proportionality (suitability, least burdensome alternative and adequacy) were met by the challenged statutory provisions, granting the legislature a broad margin of prognostic appreciation and political discretion. In the view of the Court, this was justified by the existing uncertainties as to the long-term effects of the release of GMOs into the environment. The legislature had not only to accommodate for the interests of those who are adversely affected by the use or the regulation of gene technology but also respect the duty, established in article 20a of the *Federal Constitution*, to protect the natural bases of life, also in responsibility for the future generations. As regards the issue of liability, the Court was of the opinion that the attachment of liability to adverse effects on the marketability of conventional or organic crops (need to label them as GM or prohibition to label them as GMO-free) only constituted a development of Civil Code liability for private nuisance and was an adequate means to safeguard coexistence of different forms of cultivation.

[14] 1 BvF 2/05.

A Chamber of the Federal Constitutional Court in its decision of 20 January 2010[15] refused to accept a constitutional complaint instituted by operators of nuclear power plants who asserted that the user fee the State of Lower Saxony charges for the commercial abstraction and diversion of surface and ground water violated federal constitutional principles. In keeping with existing precedents, the Federal Constitutional Court upheld the state regulation on the ground that it was legitimate to scoop off the special benefits derived from the use of a scarce, administratively managed natural resource. Moreover, it held that the user fee could also aim at providing incentives for an economical water use. In both respects, the Court recognised a broad margin of appreciation for the State legislature, acknowledging that the objective of protecting the resource was adequately reflected in differentiating the amount of the fee as to surface and ground water and refusing to assume lack of proportionality of the fee for the sole reason that particular operators, due to the short remaining operation time of their facilities, may be economically unable to switch to a circular cooling system.

For quite some time, the Federal Administrative Court, acting as a court of first instance with respect to infrastructure projects that are in the national interest, has had do deal with complex questions arising from the application of the *EU Habitats Directive*[16] and the *German Nature Conservation Act* that implements the directive to public infrastructure projects, mostly raised by association suits brought under the *Federal Nature Conservation Act*. The major features of applying the rather stringent area protection regime for European habitats (*Natura 2000*) as well as the special rules on species protection to new or significantly modified federal highways and airports have already been carved out in the previous case law of the Court. However, quite a number of open questions remain. In its lengthy judgement of 14 April 2010,[17] the Federal Administrative Court had to deal with a number of issues of area and species protection out of which only two can be presented here. Section 34 of the *Federal Nature Conservation Act* requires a habitat impact assessment whenever a project is likely to have a significant effect on a protected habitat. If the assessment cannot rule it out that the project will not adversely affect the integrity of the site in view of its conservation objectives or its protective purpose, the project is -

[15] 1 BvR 1801/07, 29 Neue Zeitschrift für Verwaltungsrecht 2010, at 831.
[16] *Directive* 92/43/EC.
[17] 9 A 51/08, 29 Neue Zeitschrift für Verwaltungsrecht 2010, at 1226.

subject to narrow exceptions – not permissible. In the case before the court the question was whether, in evaluating a possible impairment of protected beech habitats through nitrogen oxide car exhausts from the planned highway, a *de minimis* threshold could be recognised. In principle, the idea of such a threshold is inherent in the notion of 'significant' effect and habitat 'integrity'. The Court rejected accepting a general *de minimis* threshold of 10 per cent of the critical loads value (that aims at protecting natural resources against acidification and eutrophication). However, based on scientific consensus, it recognised a threshold of 3 per cent, at least in a case where the nitrogen oxide concentration in the ambient air was already double as high as the critical load value. As regards the potential impairment of protected species that already are in an unfavourable conservation condition, the Federal Administrative Court held that under the exception laid down in article 16 of the *Habitat Directive* a project is admissible when it neither deteriorates the existing unfavourable condition nor hampers the restitution towards a more favourable conditions, holding that the reference to 'exceptional circumstances' by a previous European Court of Justice Decision[18] did not constitute an additional requirement but rather described these two prerequisites.

Finally, a judgement of the Federal Administrative Court rendered on 16 March 2010[19] dealt with a municipal construction plan that aimed at enabling the construction of a large coal-fired power plant in the vicinity of residential areas. Among others, the question was whether, in the framework of the exercise of planning discretion under section 2(7) of the *Federal Building Code* and section 50 of the *Federal Emission Control Act* (the latter implementing the *EU Seveso Directive*), the construction plan had sufficiently considered the possibility of a major accident occurring at the facility premises. The Court held that where there are sensitive uses in the vicinity, the risk potential of the envisaged power plant must be specifically assessed and, applying the planning principle of conflict avoidance, the solution of potential conflicts with the neighbourhood can only be transferred to the subsequent permit procedure where it is to be expected that they can be solved there in an appropriate manner. Otherwise the plan itself must embody the necessary precautions, such as safety distances, or renounce to the siting of such a project.

[18] 2007 *European Court Reports* I, 4713 – Commission/Finland.
[19] 4 BN 1246/09, 29 Neue Zeitschrift für Verwaltungsrecht 2010, at 1246.

A Critical Consideration of Recent Domestic Developments

The emphasis on climate and energy policy and law reflected in the reported policy and statutory developments is representative for the priority the problem of global climate change has been accorded in the more recent German environmental policy. However, one should also note that this policy has a strong industrial policy facet: contributing to 'saving' the world climate but also fostering the competitiveness of the German economy by promoting environmental innovations that can be sold on the world market. Whilst there is national consensus that climate-friendly sources of energy must be pushed up so that by the year 2050 energy production based on fossil fuels will occupy an insignificant role only, there is no agreement on the future role nuclear energy is to play in this field. In contrast to almost all other EU member states, the opposition parties as well as a majority of the population in Germany, including a quite large hard core of militant opponents, are strictly opposed to nuclear energy and insist on a closure of the existing 17 nuclear power plants at least by 2022 by the latest as agreed upon in 2002. The efficiency-based arguments of the government in favour of prolonging the operation times of the existing nuclear power plants ('bridging technology') are countered by innovation-based arguments. It is asserted that the expected cost savings derived from nuclear power will be consumed by negative effects that the continued presence of the four big public utilities with their centralised systems of energy generation and distribution on the electricity market will have on the development of innovative, decentralised systems of energy generation and distribution. This latter view is also shared by part of, although not all, economic experts. On the other hand, the enormous costs that will be incurred for the necessary renewal and extension of the existing energy distribution grid (especially needed for the transmission of wind electricity generated off-shore) and its technological adjustment to varying volumes of regenerative energy fed in over time, militate for cost-efficient solutions. Already now the fixed prices, which the public utilities have to pay to regenerative electricity generators that feed their electricity into the grid, are causing continuous increases of electricity prices. Therefore, subsidisation of research and development of regenerative sources of energy may be superior to massive subsidisation of their market entry, at least of their market presence, as long as nuclear energy is available. Unfortunately, the negotiations between the government and the public utilities on scooping off part of the gains derived from the nuclear package have left the negative impression that what the nuclear package was all about was money for the state and for industry.

As far as the other noted policy developments as well as the case law are concerned, they reflect the deep impact EU environmental law is exerting on domestic developments. Nevertheless, there remains space for autonomous national policy and law, as represented in particular by the two constitutional cases. These decisions reflect a marked judicial stance in favour of the environment, at least where the constitutionality of existing regulation is at stake, less where citizens request more effective regulation. Moreover, it goes without saying that the existing national differences in judicial styles have not been eroded by Europeanization of environmental law. The lengthy decision of the Federal Administrative Court on the application of the *Habitats Directive* to a federal highway project shows that the German administrative courts, although they defer to a certain extent to the expertise of the administration, deeply scrutinize complex determinations of fact and application of scientific judgement, in a way behaving as if they were themselves scientific experts. A further judicial self-restraint might be advisable and bring Germany more in line with other European jurisdictions.

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Country Report – India

Kavitha Chalakkal*

Introduction

Independent India's history of comprehensive environmental regulation began with the Stockholm Conference in 1972. Pioneering laws such as the *Water Act* (1974) and the *Air Act* (1981) were a direct outcome of the conference. Later, the *Environmental (Protection) Act* (1986) (*EPA*) became the umbrella legislation under which most of the environmental policies are currently made in India. The *EPA* empowers the Government of India to take measures to protect and improve the environment. The diverse forest ecosystems of the country are governed by the Indian *Forest Act* (1927), *Wild Life (Protection) Act* (1972) and the *Forest Conservation Act* (1980). Flagship projects such as Project Tiger and Project Elephant were started during the 1970's. The system is guarded, protected and managed by the various state forest departments, headed by the Indian Forest Service officers under the Union Ministry of Environment and Forests (MoEF). India is also a signatory to most multilateral environmental agreements and has concluded many bilateral agreements with neighbouring countries such as Nepal and Bangladesh. The Indian environmental sector has been extremely dynamic in recent times, especially after the liberalization of India's economy in the 1990's, and the rapid industrialization and wealth-production that followed. The legislature, the judiciary and the executive have been involved in many landmark actions, legislation and decisions.

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Forest Management, Coastal Management and Species Protection

The MoEF, under Minister Jairam Ramesh, has become very proactive in recent years. The ministry had taken many actions, including the formation of a Compensatory Afforestation Management and Planning Authority to accelerate afforestation activities. In 2010, it drafted comprehensive amendments to the *Coastal Regulation Zone Notification (CRZ)* (1991) to improve the protection, regulation and use of the land within 500 meters of the sea-line and 100 meters of tide-influenced water bodies. In the draft *CRZ 2010*, special protection status has been given to Navi Mumbai, Greater Mumbai, Kerala, the Sunderbans and Goa, covering many critical coastal ecosystems in India. The MoEF has also issued a draft *Island Protection Zone Notification* (2010) for the islands of Andaman, Nicobar and Lakshadweep.

The Ministry has also constituted a task force for conserving of Dugongs, with a view to implementing the *Memorandum of Understanding on the Conservation and Management of Dugongs* under the *Convention on Migratory Species*. The MoEF have also implemented efforts to protect elephants through multi-level integrated governance. In 2010, it gave the elephant National Heritage Animal status aimed at boosting its conservation.

Creation of the National Green Tribunal

One of the major legislative steps taken in recent months has been the promulgation of the *National Green Tribunal Act* (2010). It provides for expeditious remedies in environmental cases. It also provides for the development of laws regarding liability and compensation for the victims of pollution and other environmental damage. A National Green Tribunal, consisting of a chairperson, 20 judicial officers and 20 environmental experts will be formed under the Act. The Tribunal will address about 5000 environmental cases currently filed in the country, and will deal with all laws on pollution and environment, including the *Biodiversity Act*. With this effort, India joined Australia and New Zealand, which have such specialized environment tribunals.

India is facing a growing backlog of environmental cases with rapid industrialization leading to disputes with traditional stakeholders. In this context, the ‘Green Benches’

established at the Supreme Court (SC) and state High Courts gain relevance. In the SC, an additional 'Forest Bench' was established in 2010 to hear forest and mining related cases. The states of West Bengal, Tamil Nadu, Madhya Pradesh, Punjab and Haryana, Karnataka and Kerala have formed such Benches. These structural and functional changes are critical, as the Green Bench is the final arbiter on a number of critical environmental issues from mining rights, forest and national parks and conservation, to hanging of billboards in public areas.

Recent Decisions of the Supreme Court of India

The Supreme Court of India has long been known as a proactive environmental judiciary and it has decided many cases that have served as precedents within India and internationally. It has interpreted the *Indian Constitution*'s guarantee of the right to life as including a right to a wholesome and pollution-free environment and held that a litigant may assert his or her right to a healthy environment against the State.

The Central Empowered Committee (CEC), constituted according to the SC's order, has a broad task to monitor and ensure the compliance of the Court's orders regarding forests, wildlife and related issues. It investigates various issues and directly reports to the Court. In 2010, the CEC recommended that the intensive collection of Kendu leaves by people from three wildlife sanctuaries in Orissa, should be disallowed in the Satkosia sanctuary unless appropriate safeguards are put in place to mitigate the environmental impacts caused by this activity. In *Siel Foods and Fertilizers Industries v Union of India*,[1] the SC expressed its concern about the pollution in Delhi, and affirmed the need to create 'green belts' in the land surrendered by industrialists.

Although the SC has been proactive for environmental protection in many cases, at times it also pays heed to the calls of developers. In *Nizamudeen M. v M/s. Chemplast Sanmar Limited and Others,*[2] which concerned the laying of pipelines for carrying hazardous chemical substances through a protected Coastal Regulation Zone, the SC, considering the $130-million investment and the fact that the developer had all the necessary government approvals, did not interrupt the project.

[1] Decided on 25 March 2010, available at http://judis.nic.in/supremecourt/imgs.aspx.
[2] Decided on 10 March 2010, available at http://judis.nic.in/supremecourt/helddis.aspx.

Another instance is the recent *Sterlite Copper Smelter Case*[3] in Tamil Nadu, where the SC extended the stay of the Madras High Court order to close down a smelter on the grounds of environmental damage associated with its operation.

A four-member panel set up by the MoEF investigated the bauxite mining proposal over Niyamgiri in Orissa, and reported in August 2010 that the Vedanta company involved in the project: colluded with government officials; 'consistently violated' all major laws; and undermined the rights of the tribal groups residing in the area. The panel recommended that the SC prohibit mining in such an ecologically-sensitive area.

Climate Change Policy and Action

India's take on climate change is being closely watched by the international community, as it has become one of the fastest-growing and rapidly industrialised economies. A signatory to the *Kyoto Protocol*, India has been at odds with the developed world regarding emission reduction requirements. It fears that these may curtail the country's industrialization. Just before the 2009 Copenhagen United Nations Climate Change Conference, Indian policy-makers stated that, '… action on Climate Change must enhance, not diminish the prospects for development. It must not sharpen the division of the world between an affluent North and an impoverished South, and justify this with a green label'. It is furthermore recorded as stating that 'India can, by no stretch of imagination, be described as a so-called "major emitter"'.

Although India hasn't introduced any legislation on climate change, plenty of proactive policy-level actions have been taken. In 2008, India released its first *National Action Plan on Climate Change*. Addressing climate mitigation and adaptation, the plan emphasizes eight National Missions: (1) solar; (2) enhanced energy efficiency; (3) sustainable habitat; (4) water; (5) sustaining the Himalayan ecosystem; (6) 'greening India'; (7) sustainable agriculture; and (8) strategic knowledge for climate change. India also launched the *Indian Network on Climate Change Assessment* (*INCCA*) in October 2009. It comprised of a grid of about 220

[3] Decision on 28 September, 2010, available on http://www.elaw.org/system/files/Sterlite+Closure+Order+September+28%2C+2010+OCR+Version.pdf. ;

scientists from 127 research bodies and its purpose is to promote climate change research. India has also introduced a *National Policy on Biofuels*.

In Copenhagen, India agreed for a voluntary reduction of carbon dioxide emissions of 20-25 per cent by 2020 (2005-base). It however rejected any international monitoring and legally binding commitments. The failure of the Copenhagen summit, the 'Climate-gate' issue and the revealing of unsupported projections on glacier-melts in the Inter-Governmental Panel for Climate Change's (IPCC) reports has had an effect on the Indian stance. In February 2010, while announcing India's plan to set up a National Institute of Himalayan Glaciology, the Minister Ramesh publicly expressed his dissatisfaction on the IPCC's handling of facts. He has stated that, 'A country like India cannot depend on only IPCC'. In the introduction to the first major *INCCA* report in November 2010, he stated that: 'We should not be dependent on external studies to tell us for example about the impact of climate change on our glaciers, on our monsoons, and indeed even on sea level rise'. This shows India's strong stance to have its policies based on its own findings. Many states have started working along these in lines, and Delhi became the first to release a *Climate Change Action Plan*.

Several tangible actions have also been taken on the climate change front in the last year. These are briefly listed below. Firstly, an Expert Group on A Low Carbon Strategy for Inclusive Growth has been formed to develop a road-map for low-carbon development in the electricity, transport, industry, oil and gas, buildings and forestry sectors. This strategy will be incorporated into the country's *Twelfth Five-Year Plan*. Secondly, the Government has announced the introduction of a carbon tax of $1 per ton on coal, which will be paid into the National Clean Energy Fund to support research and clean-energy projects. Thirdly, the Government has approved the formation of a *National Mission on Enhanced Energy Efficiency, including a Perform, Achieve and Trade Mechanism* for annual carbon dioxide emission reductions of 25 million tons by 2014-15. Fourthly, in May 2010, the Government of India released its *GHG Emissions Inventory* for 2007. Fifthly, in April 2010, the Government, along with fellow members of the South Asian Association for Regional Cooperation, adopted the *Thimphu Statement on Climate Change*, which recommends an Intergovernmental Expert Group on Climate Change for better policies in the region. Sixthly, India and Bangladesh agreed to create a joint forum to conserve the Sunderbans Delta, one of the most globally vulnerable regions to climate change.

The UN Climate Change Conference held in Cancun in November-December 2010, is also crucial with respect to India's position on Climate Change. In April 2010, Minister Ramesh in a statement on Cancun, stated, 'I would stress that the voluntary actions of developing countries which are the subject of such international consultations and analysis should, under no circumstances, be seen as taking on internationally legally binding commitments by these countries'. In a meeting of BASIC countries held in April 2010, members noted that internationally-binding legal agreements existing under the *UN Framework Convention on Climate Change* and *Kyoto Protocol* 'must follow two tracks and include an agreement on quantified emission reduction targets under a second commitment period for Annex I Parties under the Kyoto Protocol, as well as a legally binding agreement on long-term cooperative action under the Convention'.

Recently-Formed Environmental Institutions

Ganga Authority - The Government of India constituted the National Ganga River Basin Authority (NGRBA) under section 3(3) of the *EPA* in 2009. The River Ganga was afforded the status of a 'National River'. The Ganga Authority was formed to sustainably tackle pollution, and was given regulatory and developmental functions, including formulating a river-basin management plan and conducting research. The Authority was allocated $111 million for 2009-10. It launched a 'Mission Clean Ganga' Initiative in October 2009 to prevent the flow of sewage and industrial effluents into the river by 2020. Memoranda of Understanding were signed with all riparian states.

CITES Cell 2010 **–** Although India has been a signatory to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* since 1976, it was only in August 2010 that it managed to form an institution to fulfill its commitments under the *Convention*. The Cell, which falls under the central Ministry of Environment and Forests, will 'assist in the technical, administrative and legal functioning of CITES implementation in India'. India has also recently banned the hunting of pangolins under CITES.

GM Appraisal Panel **-** Following a major controversy regarding genetically modified (GM) organisms, the Government of India has renamed the Genetic Engineering

Approvals Committee, an apex body set up in 1990 under the *Rules for Manufacture, Use, Import, Export and Storage of Hazardous Microorganisms/Genetically Engineered Organisms or Cells* (1989) published under the EPA. It has powers to regulate and permit the production and use of GM organisms and products. In 2010, the Committee's approval of GM brinjal (*Solanum melongena*) for agricultural purposes created much controversy. The Supreme Court of India raised questions on the accountability and transparency of the Committee. As a result, the Government amended the *1989 Rules*, changing the name of the Committee to the 'Genetic Engineering Appraisal Committee'. No change has however been made to the mandate of the Committee. Nevertheless, a moratorium has been placed on the release of GM brinjal for agricultural purposes.

Forthcoming Laws, Regulations and Actions

National Biotechnology Regulatory Bill - This Bill, conceived to regulate the research, production, import and use of biotechnology products in the country, has become controversial in recent times. It has come under fire from environmentalists and many scientist groups. They allege that the clauses of the Bill are environmentally disastrous, non-democratic, oppressive, non-scientific, and aid the business interests of biotechnology corporations.

Western Ghats Ecology Expert Panel - In March 2010, the Government of India constituted the panel as a precursor to a Western Ghats Ecology Authority. It will act as a regulatory body for the sustainable management of this biodiversity hotspot.

National Environment Assessment and Monitoring Authority - In November 2010, the Government of India proposed forming a National Environment Assessment and Monitoring Authority, as an appraisal and monitoring agency for environment impact assessments and coastal regulatory zone management.

National Elephant Conservation Authority - The MoEF envisages the creation of such an authority, along the lines of the National Tiger Conservation Authority. It is furthermore anticipating declaring ten areas as 'Elephant Landscapes'.

Reintroduction of Cheetah in India - The MoEF is planning the reintroduction of Cheetah, the only large mammal declared extinct in India in recent history.

National Wetlands Conservation Programme – This Programme, which currently provides financial support to 115 wetlands, will cover six more sites shortly.

Challenges and Opportunities

India's booming economy demands intensive exploitation of natural resources, and thus more innovative and scientific legislation. Although climate change has emerged as the biggest international environmental concern, loss of ecosystems and biodiversity should be seen as the most important issue on the Indian sub-continent. The new power projects, especially hydroelectric projects developed for supplying energy to satisfy growing industrial demand, could constitute a major destructive force for the mountain ecosystems in the Himalayas and the Western Ghats, two regions of significant biological importance. The same holds true for the mining projects arising in various regions of the country. India's liberalized government policies have attracted national and international mining corporations, posing a grave threat to many forested regions. Illegal actions from such companies have already attracted legal attention, such as in the Nyamgiri case mentioned above. Huge construction projects such as an ambitious project to link major rivers through irrigation canals and the Sethusamudram shipping-canal project through the Gulf of Mannar Biosphere Reserve, demand better legislative, executive and judicial intervention to protect and conserve these crucial ecosystems. Even renewable energy projects such as wind energy projects have attracted recent controversy owing their potential to disturb they hold mountain ecosystems and usurp tribal lands. Strong legislation based on sound biological and ecological scientific knowledge can be crucial in such cases. Another issue demanding innovative legislative attention is the case of GM and potential genetic contamination of wild relatives of crop plants. Considering the fact that India is the 'centre of origin' of many crop plants, including rice and brinjal, two crops in the centre of the recent controversy, any chance of genetic contamination through cross-breeding can affect the critical wild genetic pool forever. Laws based on sound and comprehensive scientific studies are required, and organizations such as the IUCN can contribute tremendously in providing

authentic scientific data, especially taxonomic and ecological data. The IUCNAEL could play a significant role in assisting India to develop legal protections for ensuring a sustainable coexistence of the new world order with the natural environment.

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Country Report: Italy

Nicola Lugaresi*

Recent Developments in Italian Environmental Law

Italian legislators are still struggling to consolidate the country's environmental legal framework.[1] The need for a systematic approach, taking into account the obligation to implement European Union law, continues to collide with emergency issues, requiring emergency legislation, and recurring political uncertainties that slow down the legislative process.

After the enactment of the *Decree No. 152* dated 3 April 2006 (commonly referred to as the *Environmental Code*) one would expect recent legislative developments to relate to amendments to the *Code*. This is not however always the case, as domestic legislators continue to enact sectoral laws that are not integrated within the *Environmental Code*. That said, the Decree No. 128 dated 29 June 2010, does amend several aspects of the *Environmental Code*, in particular Part I (Principles), Part II (EIA, SEA and IPPC) and Part V (Air Pollution). The amendments to Part I modify certain of the principles underlying the *Environmental Code*. Unlike previous drafts, the amendments do not amend the entire set of principles. The amendments

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[1] See further: N. Lugaresi, 'Country Report: Italy' (2010) 1 *IUCNAEL e-Journal*, at 1.

to Part II introduce a new integrated environmental permitting scheme. They seek to bring Italy's domestic regime in line with *EU Directive 2008/1/EC*, concerning integrated pollution prevention and control. The Amendments to Part V aim at making the domestic air pollution regime more effective and simplify several procedures associated with it.

Part IV (Waste Pollution) of the *Environmental Code* has also been amended, but on this occasion by Decree No. 205 dated 3 December 2010. It provides for the domestic implementation of the *EU Waste Framework Directive* (*Directive 2008/98/EC*), specifically incorporating a new Waste Control Traceability System. Part III (Water Management) and Part VI (Environmental Liability and Environmental Damage) of the *Environmental Code* have not been revised.

Certain other statutory developments have not related to the Environmental Code. *Decree No. 155* dated 13 August 2010, provides for the domestic implementation of *EU Directive 2008/50/EC* governing ambient air quality in Europe. It provides for the integrated regulation of several pollutants (sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter, lead, benzene and carbon monoxide) and ozone. These provisions are unfortunately not integrated into the *Environmental Code,* which perpetuates legislative fragmentation.

One of the most newsworthy developments in Italy in 2010, concerns the waste emergency that exploded again in some parts of Italy. Violent protests by local communities brought a standstill to the country's waste management system. These protests arose from local community opposition to the establishment of garbage dumps and waste treatment plants and the failure of central and local governments to find a participatory and integrated solution to the problem.

A Critical Consideration of the Recent Domestic Developments

The development of Italy's environmental regime is significantly influenced by the country's political crisis. The environmental reforms are not supported by a shared long-term vision and are accordingly often very piecemeal in nature. With the

exception of the various decrees providing for the domestic implementation of relevant EU Directives, the remainder of the legal reforms tend to be enacted by the ruling party, simply to be amended when a subsequent political party comes into power. This trend is evidenced by the amendments to Part 1 of the *Environmental Code*. One exception to this rule is the amendment to Part V of the *Environmental Code,* which secured comprehensive support across all political parties. A further trend is the failure to integrate all sectoral environmental laws within the *Environmental Code*. This is evidenced by *Decree No.155/2010*, which, while providing for integrated pollution control, is not integrated within the *Environmental Code*.

The primary problem undermining Italy's environmental regime remains the absence of a comprehensive and coherent framework for guiding legislative reform. While broad reform should be pursued, trying to do so in the absence of such a framework becomes problematic and has resulted in on-going and perpetual 'back-and-forth reforms'.

Regarding the waste protests, the main problem is the failure of the government to promote public participation and the attempts by regional and central government to resolve local issues. As a result, local communities fail to understand the broader public interests at stake, and regional and central governments fail to grasp the local political, economic, social and environmental climate. The resultant confrontation precludes any bi-partisan initiatives in the environmental arena, exacerbates the issues at stake, and undermines the attainment of mutually acceptable and beneficial solution. The problems associated with Italy's environmental regime reflect the deadlock of the political debate. The resolution of the impasse requires the adoption of a very different approach to that currently being utilized.

At this time, what is missing in Italy is a rational, comprehensive and thoughtful consideration of all environmental interests and issues to guide decision-making. The current trend of justifying existing decisions on the nebulous rhetoric of sustainable development does not provide clarity. What is furthermore required is increased public participation and a more open, transparent and accountable decision-making

process. Recent cuts to the budget allocated to the environmental sector do not bode well in this regard.

Possible New Research Agenda for IUCNAEL

Two possible research agenda's for the IUCNAEL emerge from the current Italian situation. The first relates to analysing recurrent environmental decision-making deadlocks with a view to formulating possible solutions applicable across jurisdictions. The second perhaps more ambitious pursuit is to give tangible content to the principle of sustainable development, so frequently used to unravel knotty environmental (and social, and economic) problems involving public participation and subsidiarity.

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New Constitutional Environmental Law in Kenya: Changes in 2010

Robert Kibugi*

Introduction

This section introduces the main legal development in Kenya within the last six months, highlighted by new constitutional environmental law. On 4 August 2010, the people of Kenya voted at a referendum, and duly approved a new constitution with a 67 per cent majority. The new *Constitution*[1] came into force on 27 August 2010. Unlike the now repealed *Constitution*,[2] this new basic law introduces the right to a healthy environment, and classifies it as a fundamental or basic right. It also integrates a chapter on land, environment and natural resources management.

A Critical Consideration of the 2010 Constitutional Environmental Law

Right to a Clean and Healthy Environment

Article 42 in the Bill of Rights, creates an environmental right for all persons. This right includes having the environment protected for the benefit of present and future generations. Further, environmental protection for people of Kenya is enshrined as a

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1 Revised Edition (2010).
2 Revised Edition (2008).

constitutional concept that is actionable and enforceable as a basic right through a petition for enforcement of fundamental rights to the High Court (article 70). The *Environment Management and Coordination Act* (1999) (*EMCA*) was hitherto the only legal source for this right and still provides alternative access to the High Court by ordinary suit (section 3). It is therefore noteworthy that both *EMCA* (section 3) and the *Constitution* (article 70) now embody a liberalized *locus standi* to enforce the environmental right in court without need to show personal loss or injury.

The constitutional environmental right includes having 'the environment protected for the benefit of present and future generations through legislative and other means, particularly those contemplated in article 69'. The aspect of having a right fulfilled through 'legislative and other means,' coupled with the liberalized *locus standi* for access to justice, provides an opportunity for Kenya to realize some positive enhancement in environmental management. It will be necessary to have ordinary legislation enacted in order to set out, definitively, the meaning, criteria and parameters of these 'legislative and other means'. This will make it possible to guard procedural superficial enactment of law and policy by the Kenyan Government in order to claim compliance.

The decision of the South African Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*[3] at length analysed the actual interpretation where a constitution requires the government to fulfil fundamental rights through 'legislative and other means.' The actual phrase used in various sections of the *Constitution of the Republic of South Africa* (1996) is 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of...' the rights (article 26(2)). In this judgment, the court determined that enacting legislation and establishing a programme to fulfil the rights in question, are just a first step. In its interpretation of the provisions in the *Constitution of the Republic of South Africa*, the court ruled that 'what remains is the implementation of the programme by taking all reasonable steps that are necessary to initiate and sustain it. And it must be implemented with due regard to the urgency of the situations it is intended to address'.

The *Grootboom* judgment, while merely persuasive as judicial precedent in Kenya, offers useful conceptual insights. It is important to note there is a divergence because

[3] 2001 (1) SA 46 (CC).

article 42 of the Kenyan *Constitution* does not refer to 'reasonable legislative' means, 'within its available resources' or achieving 'progressive realization' of the pertinent rights. However, the reasonableness of any measures taken by the Kenyan Government to implement this environmental right may have to be determined by a court of law. It is also arguable that the drafters of the *Constitution* considered environmental degradation to be a major challenge, and a threat to human survival, and therefore did not intend to restrict implementation of sustainable environmental management within the 'progressive realization' philosophy. This 'progressive realization' treatment, similar to the South African experience, is actually expressly restricted to provisions relative to socio-economic rights in the Kenyan *Constitution* (article 20(5)). On the other hand, article 72 states that 'parliament shall enact legislation to give effect to the provisions of this part,' supporting an argument that the *Constitution* intends the obligations and measures in article 69, for environmental management, to be implemented without delay.

Obligations and Measures for Environmental Management

Chapter five of the *Constitution* contains provisions regarding environment and natural resources. The second part on the environment addresses the obligations of the Kenyan Government in respect of the environment and agreements relating to mineral resources.

Article 69(1) of the *Constitution* sets out certain obligations contingent on the Kenyan Government relating to environmental management. It is useful to highlight that these obligations represent some of the 'legislative and other measures' set out as part of realization of the right to a clean and healthy environment in article 42.

These obligations compel the Kenyan Government to firstly ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of accruing benefits. This obligation combines the human need to utilize resources, with the contingent duty to sustainably manage and conserve these resources. Therefore for the first time, within the Kenyan legal system, the *Constitution* creates a sound basis for subsequent review of sectoral statutes with competence over natural resources to ascribe by these obligations. It is also noteworthy that the *Constitution* calls for equitable sharing

of benefits. The achievement of such an outcome will, however, require significant statute and governance reform, civic education, and possibly judicial enforcement.

The second obligation imposes a duty on the Government to work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya. Loss of forest cover from deforestation and degradation is a major setback for environmental management law and policy in Kenya, with tree cover currently estimated at two percent.[4] The *Forest Act* (2005) is silent on any definitive reforestation targets and therefore a constitutional objective of attaining ten per cent tree cover affords unrivalled legal basis and merit. However, the provision should have directed the Government to set up clear legislative and policy mechanisms on how to achieve this goal, including how such mechanisms will respect other provisions of this article like public participation, or protecting biological diversity.

The third obligation compels the Government to encourage public participation in environmental protection and management. This forms a basis for the introduction of public participation components in statutes and policies relative to environmental management. However, it is notable that the *Constitution* applies the term 'encourage' raising the concern over how this obligation can be legally enforced. Since the population of Kenya is dominantly rural, and engaged in mostly land-use based economic activities like agriculture, it is important to develop an innovative approach to give legal effect, without overly inhibiting decision-making.

The fourth obligation is to establish systems of environmental impact assessment, audit and monitoring of the environment. Already, *EMCA* (section 58-60) provides for environmental impact assessment and audit for the category of projects set out in the second schedule of the Act. Enshrining these requirements in the *Constitution* is meritorious, as it underscores the importance integrating environmental and development concerns and interests in decision-making.

[4] *Forest Policy* (2007).

Duty to Protect and Conserve the Environment

While article 42 captures the basic right to a healthy environment, article 69(2) states that 'every person has a duty to cooperate with state organs, and other persons to protect and conserve the environment and ensure ecologically sustainable development' (author's emphasis added). This provision can be analysed in two parts.

The first part relates to the duty on every person to cooperate with state organs, and other people to protect and conserve the environment. With regard to cooperation between every person and state organs, this duty could form another basis to reinforce public participation as a primary element of environment conservation and management. This duty could also form the basis to establish a statutory stewardship role defining responsibilities for people to the environment, land or natural resources. Further, the *Constitution* defines person to 'include a company, association or other body of persons whether incorporated or unincorporated' (article 260). This duty could be broadly construed to extend the duty to companies thereby providing a constitutional basis to require stricter compliance with environmental standards by artificial persons such as companies and industry.

The duty to protect and conserve the environment, discussed above, is intended to ensure 'ecologically sustainable development.' The right to a healthy environment in article 42 is linked to the entire article 69 by the requirement of the Government to take the 'legislative and other means' specified in article 69, to enhance realization of the fundamental right. Using this rationale and linkage allows the conclusion that overall, the aim of all the measures set out in the *Constitution* is to ensure the realization of ecologically sustainable development. This conclusion further implies that the *Constitution* has made a credible legal effort at integrating sustainable utilization and sustainable management of natural resources as key legal concepts in environmental decision-making.

Some normative support for this conclusion can be derived from the principles of ecologically sustainable development set out in Australia's *Environment Protection and Biodiversity Conservation Act* (1999), specifically section 3A. Indicatively, the first principle states that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable

considerations. Another principle indicates that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making. These principles offer useful conceptual insights from a comparative aspect. However, the constitutional law basis for ecologically sustainable development and sustainable environmental management in Kenya may only remain aspiration unless laws such as *EMCA* are either amended or totally reviewed to comply with the new *Constitution*.

Parliamentary Ratification for Natural Resources Agreements

The new *Constitution* introduces an innovative provision on agreements relating to natural resources. Article 71 specifies that a transaction is subject to ratification by parliament if 'involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resources of Kenya.'

This provision could be construed as intending to achieve several goals. The first goal is to ensure transparency and accountability regarding any revenues, or royalties, payable to any public agencies. The second goal concerns questions of involuntary displacement and resettlement of people whenever major mining operations are implemented. Presumably, parliamentary scrutiny would audit compliance with any law or regulations on involuntary resettlement. The third goal regards specific environmental requirements for natural resource exploitation undertakings such as mining. These include requirements like mandatory environmental management plans, environmental restoration plans, or questions over apportionment of disaster liability. This list is merely indicative, and implies that giving effect to this constitutional provision will require a complete review of the outdated *Mining Act* (1940).

Identification of Possible New Research Agenda for the IUCNAEL

The implementation of the provisions in Kenya's new *Constitution* will be challenging. Article 71, referring to the environment provisions, states that Parliament 'shall enact legislation required to give full effect to the provisions of this part'. The fifth schedule

to the *Constitution* requires legislation regarding the environment to be enacted within four years from the effective date, which was 27 August 2010. Legislation regarding natural resources agreements, and land use and property should be enacted within a period of five years. This is a complex task requiring significant technical and intellectual capacity.

The Minister for Environment has recently appointed a technical task force 'for drafting Legislation Implementing Land Use, Environment, and Natural Resources Provisions of the Kenya Constitution'.[5] The duties of the task force include reviewing existing legislation and proposing provisions to be repealed or replaced through new legislation. The task force is also responsible for developing new legislation, in collaboration with other statutory bodies, for debate and adoption by parliament.

There is an opportunity for the IUCN Academy of Environmental Law to collaborate with the Kenyan legal, policy or other experts already engaged in the task force. This collaboration could include research on comparative experiences on implementing constitutional environmental law, especially in developing countries. Further, even though the term environmental law is used here, laws relative to the environment include land use, water, forests and physical planning among other specialized areas. The process underway in Kenya could be designed as a case study on constitutional implementation, highlighting challenges, opportunities or ideas on how to exploit the constitutional moment to address key challenges that confront developing countries, such as poverty or hunger.

[5] *Gazette Notice* No. 13880, 1 November 2010.

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Environmental Implications of the 2010 Constitution of the Kyrgyz Republic

Michelle Lim*

Introduction

On 7 April 2010, the Bakiyev Government of the Kyrgyz Republic[1] was overthrown in a civil uprising. Following this, the subsequent interim government introduced the draft of a new Constitution. This draft Constitution significantly reduced the powers of the President. On 27 June 2010, this draft was approved by 90 per cent of voters in a referendum.

The *Report of the Venice Commission* (2010)[2] has analysed the merits of the political restructure. Hence, this Country Report will focus primarily on the particular provisions of the 2010 *Kyrgyz Constitution* (the *2010 Constitution*) that concern the natural environment ('the environment'). Other constitutional changes that may potentially have an impact on the environment will also be considered.

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[1] The official name of this Central Asian nation is the 'Kyrgyz Republic'. The country is however widely known as 'Kyrgyzstan'. Both names are used interchangeably in this report.

[2] Venice Commission (European Commission for Democracy Through Law) (2010) 'Opinion on the Draft Constitution of the Kyrgyz Republic' (version published on 21 May 2010), Adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010) CDL-AD (2010) 015.

Since declaring independence from the former Soviet Union in 1991, the Kyrgyz Republic has experienced numerous instances of constitutional change. Therefore, the scope of this report is limited to a comparison of the *2010 Constitution* with its immediate predecessor: the *2007 Constitution*. The report consists of 3 parts. Part 1 sets out the constitutional developments and political context within the Kyrgyz Republic leading up to the adoption of the *2010 Constitution*. Part 2 presents critical analysis of the constitutional changes brought about by the introduction of the *2010 Constitution* and their implications for environmental law in Kyrgyzstan. The political situation is also analysed in a reflection on what will be required to achieve positive environmental outcomes in the country. Finally, Part 3 puts forward three potential research agendas for consideration by IUCN Academy on Environmental Law (the IUCN Academy).

Recent Constitutional Developments in the Kyrgyz Republic and the Political Context Leading up to the Introduction and Adoption of the *2010 Constitution*

General Background

In 1991, the Kyrgyz Republic gained independence following the collapse of the Soviet Union. In the two decades that followed, Kyrgyzstan underwent a significant period of transition from a planned to market economy. During this time, the Kyrgyz Republic took concrete steps for economic reform. At the same time, a relatively stable political situation developed within the country. These factors, in combination with the country's geographic location and position as an anti-terrorism ally in the region, resulted in the Kyrgyz Republic emerging as a preferred destination for donors and investors. This year has however been a tumultuous one for the country. Recent events have undermined both the political and economic stability of the nation. The political situation that led to the adoption of the 2010 Constitution is charted below.

Political Background to the Adoption of the 2010 Constitution

President Kurmanbek Bakiyev was ousted from power on 7 April 2010 following violent protests in which 78 people were killed and 1600 injured.[3] These events mirror the lead up to Bakiyev's rise to power in March 2005. In 2005, Bakiyev's predecessor Askar Akayev was similarly overthrown in a civil uprising. This overthrow followed numerous protests, which stemmed from independent and opposition candidates being barred from standing in Presidential elections. Kurmanbek Bakiyev took over as the acting president after President Akayev fled to Russia. In July 2005, Bakiyev achieved a landslide victory in presidential polls and was inaugurated in August of that year.[4]

In elections held on 23 July 2009, President Bakiyev was returned for a second term. The Organization for Security and Co-operation in Europe (OSCE) was an observer at these elections. The elections were assessed by the OSCE as having 'failed to meet key OSCE commitments for democratic elections'.[5]

The events in the Kyrgyz Capital on 7 April 2010 created for many, not least Bakiyev himself, a real sense of déjà-vu. On this day, rioters stormed government offices protesting against the rising prices for basic necessities and accusing Bakiyev of failing to curb corruption.[6] Fleeing from Bishkek to the south of the country the President initially refused to resign. Bakiyev has since been granted refuge abroad, in Belarus.[7]

The newly formed interim government led by Roza Otunbayeva introduced the 'Return to Democracy' program. The objective of this program was to create a

[3] R. Demytrie, 'Kyrgyzstan Holds Funeral Ceremonies for Protest Victims' *BBC News* (Kyrgyzstan, 10 April 2010) available at http://news.bbc.co.uk/2/hi/asia-pacific/8612812.stm.
[4] R. Demytrie, 'Kyrgyzstan Timeline' *BBC News* (Kyrgyzstan 14 October 2010) available at http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1296570.stm.
[5] Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, *Kyrgyz Republic Presidential Election* (2009), at 3.
[6] R. Demytrie, 'Clashes Escalate in Kyrgyz Crisis' *BBC News* (Bishkek, 7 April 2010) available at http://news.bbc.co.uk/2/hi/8607324.stm.
[7] R. Demytrie, 'Kyrgyzstan Holds Funeral Ceremonies for Protest Victims' *BBC News* (Kyrgyzstan, 10 April 2010) available at http://news.bbc.co.uk/2/hi/asia-pacific/8612812.stm.

peaceful transition of the Kyrgyz Republic into a democratic state.[8] A review of the *2007 Constitution* was identified to be crucial to achieve this transition.[9] As a result, the draft *2010 Constitution* was produced and a constitutional referendum was scheduled for 27 June 2010.

From 10 June 2010, violent clashes between ethnic Kyrgyz and Uzbeks broke out in the south of the country. At least 200 people were killed, however the interim government has said that the figure is closer to 2000. Further, the United Nations has reported the displacement of 400,000 people as a result of the violence.[10]

The referendum on 27 June 2010, took place as scheduled despite widespread concerns of the impact the security situation would have on voter turn-out and consequently the legitimacy of the vote. The OSCE noted shortcomings in the referendum process but concluded that the Kyrgyz authorities had succeeded in creating the necessary conditions for the peaceful conduct of a constitutional referendum.[11] With the approval more than 90 per cent of voters (from a 72 per cent voter turn-out) the *2010 Constitution* was adopted.[12] Having considered the events leading up to the adoption of the *2010 Constitution*, the significant developments contained within its text are considered below.

Constitutional Developments

The *2010 Constitution* is based on its 2007 predecessor. Whilst the articles have been rearranged and renumbered the substantive components of many provisions remain largely unchanged. The parts that have been significantly overhauled concern the powers of the President. The constitutional developments in three areas: the political restructure; provisions relating to the environment; and the greater emphasis on international human rights treaties, are highlighted below. The merits of these developments are evaluated later in this report.

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[8] Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights), *Kyrgyz Republic Constitutional Referendum - OSCE/ODIHR Limited Referendum Observation Mission Report* (2010), at 3.
[9] Ibid.
[10] R. Demytrie, 'Q&A: Kyrgyzstan's Ethnic Violence' *BBC News* (Kyrgyzstan, 24 June 2010) available at http://www.bbc.co.uk/news/10313948.
[11] Supra note 8.
[12] Supra note 8.

Political restructuring

The *2010 Constitution* significantly reduces the powers of the President and redistributes these powers to the *Jogorku Kenesh* (Parliament). The President remains the head of state (article 60(1), *2010 Constitution*; article 42(1), *2007 Constitution*) but is no longer the 'highest' official of the Kyrgyz Republic (cf. article 42(1), *2007 Constitution*).

The *2007 Constitution* enabled the President to define domestic and foreign policy (article 42(3)) and submit draft laws to the Parliament (article 46(5)(1)). These Presidential powers are now vested with the Parliament. Articles 74 and 76(3) of the *2010 Constitution* state the various functions of the Parliament and vest with it the power to draft and adopt laws. The President does however retain the role of representing the Kyrgyz Republic within the country and in international relations (article 64(6)(1), *2010 Constitution*; article 42(3), *2007 Constitution*).

Additions to environmental provisions

Neither the *2007 Constitution* nor the *2010 Constitution* has defined the term 'environment'. Nevertheless the changes within the *2010 Constitution* that have the greatest impact on the natural environment are identified by the author as the provisions concerning: land and resource ownership (article 4, *2007 Constitution*; article 12, *2010 Constitution*); and rights and duties regarding the environment (article 35, *2007 Constitution*; article 48, *2010 Constitution*).

Article 4(5) of the *2007 Constitution* vests ownership of land and its underlying resources, forests, flora, fauna and natural resources with the Kyrgyz Republic. This article also attributes special State protection to these resources. Article 4(5) also states that land and other natural resources may be in 'private, municipal or other forms of property'. This provision is largely reproduced in article 12(5) of the *2010 Constitution*. The *2010 Constitution* contains an additional statement that pastures may not be in private ownership.

Article 35 of the *2007 Constitution* states that 'citizens of the Kyrgyz Republic' have the right to a healthy and safe environment. It also states that 'citizens' are entitled to compensation for damage caused to the health or property that results from the use

of nature. Article 48 is the corresponding provision in the *2010 Constitution*. The new provision now grants 'everyone' the right to a healthy environment and compensation for its damage. Furthermore, an additional sub-paragraph (article 48 (3)) imposes a duty on 'everyone' to care for the environment, flora and fauna.

Greater emphasis on international human rights treaties

The *2007 Constitution* contains a range of provisions reinforcing the rule of law and providing human rights guarantees. Many of these provisions are retained in the *2010 Constitution*. The *2010 Constitution* now also provides, in article 6, that international human rights treaties have direct effect. Article 17 of the *2010 Constitution* states further that rights and freedoms shall not be interpreted as a derogation of other 'universally recognized human and civic rights and freedoms'. As with environmental rights, other rights under the former Section II are no longer granted solely to citizens of the Kyrgyz Republic but to 'everyone'. 'Everyone' is not however defined in the *2010 Constitution*.

Critical Consideration of the 2010 Kyrgyz Constitution

A critical analysis of the constitutional changes and their implications for the environment and environmental law in the Kyrgyz Republic is presented below.

Political Restructuring

The most important changes in the *2010 Constitution* concern the distribution of further powers to Parliament and the corresponding reduction of presidential powers. These developments potentially provide enhanced conditions for democratic governance and stability within the Kyrgyz Republic. It is foreseeable that the improved socio-political environment created by these developments would also have positive flow-on effects for the effective management of the natural environment. The amendments concerning the redistribution of power should therefore be welcomed.

Analysis of the Environmental Provisions

The additions to the *2010 Constitution* are acknowledged. While these are positive developments, the environmental provisions of the *2010 Constitution* still suffer from the same shortcomings of their predecessor. Like the *2007 Constitution*, the 2010 environmental provisions contain only broad aspirational statements. Further, neither the term 'environment' nor the means of enforcing environmental rights have been defined. Specific issues concerning the environmental provisions of the *2010 Constitution* are discussed in further detail below.

Article 48(3) of the *2010 Constitution* now includes, in addition to the right to a healthy environment, a duty to care for the environment. While this addition is an improvement on the *2007 Constitution*, the attribution of the duty to 'everyone' is far too vague. It is therefore unclear how article 48 will be enforced if 'everyone' has such broad rights *and* duties.

Article 12(5) of the *2010 Constitution* now explicitly states that pastures may not be in private ownership. This reflects developments that have occurred in Kyrgyz legislation since 2007. In January 2009, the Kyrgyz Republic's *Law on Pastures* came into force. Article 3(1) of the *Law on Pastures* also states that pastures are publicly owned. Agriculture and pasture use are important economic activities in the Kyrgyz Republic. They also have great cultural significance. The move to acknowledge pasture ownership within the *2010 Constitution* is to be commended. This is because doing so provides a greater degree of certainty for the management of this type of land use, which is of significant importance to many within the Kyrgyz Republic.

While the clarification on pasture ownership is welcomed, neither the *2007 Consti*tution nor *2010 Constitution* expressly state whether wildlife is owned by the Kyrgyz Republic. These constitutional texts refer to flora and fauna but make no distinction between wild and domesticated plants and animals. The Kyrgyz Republic's *Law on Animals* (1999) provides that wildlife is legally owned by the Government of Kyrgyzstan. This instrument subjects the protection and use of native wild species to governmental regulation. It would have been desirable that this statement was also included within the *2010 Constitution*.

To further assess the merits of the environmental provisions of the Kyrgyz's *2010 Constitution* a comparison is drawn with the 2010 *Constitution of Kenya*. The *Kenyan Constitution* not only highlights how the framers of the Kyrgyz *2010 Constitution* may have provided more substantive content within its text, but also how enforcement provisions could have been drafted.

As with the Kyrgyz Republic, a new *Kenyan Constitution* also came into force in 2010. The environmental provisions of the *Kenyan Constitution* are one of the most comprehensive of any in the world. From its preamble to its provision of environmental rights (article 42); its incorporation of specific associated obligations of the State (article 69); and provisions stating how environmental rights are to be enforced (article 70), the text consists of an impressive incorporation of contemporary international environmental law principles and concepts.

Questions remain regarding the capacity of both Kenya and Kyrgyzstan to enforce the provisions of their Constitutions. However, if assessed solely on the wording of the respective instruments, the *Kenyan Constitution* provides an excellent example of how the Kyrgyz Republic could have addressed, within its *2010 Constitution*, the shortcomings of its *2007 Constitution*.

Potential Implications of the Greater Emphasis on International Human Rights Treaties

As noted above, the *2010 Constitution* gives direct effect to international human rights treaties (article 6, *2010 Constitution*). Further, article 17 states that rights and freedoms under the *2010 Constitution* are not to be read in such a manner that would derogate from universally recognized human rights. By acknowledging both human rights treaties and universal human rights, the *2010 Constitution* would appear to incorporate into domestic law human rights from the international law sources of both treaty and custom.[13]

Furthermore, the recognition within the *2010 Constitution* of the universal rights of all persons (non-citizens included) is commendable. This is also congruent with

[13] See further: *Statute of the International Court of Justice*, article 38(1).

international law principles concerning the treatment of foreign citizens[14] and those contained within multilateral human rights treaties.[15] There is however no clarification as to whether rights contained within the *2010 Constitution* have a hierarchical status. There is also no indication whether international human rights treaties take precedence over other treaties to which the Kyrgyz Republic is a signatory.[16]

The emphasis within the *2010 Constitution* on universal human rights and international human rights treaties could be important in the future management of the natural environment of Kyrgyzstan. This is because these provisions may enable developments that occur in the international sphere concerning environmental rights as fundamental human rights to impact or inform the development of environmental law in the Kyrgyz Republic.

Implementation and Enforcement

Commenting in the context of the *2010 Constitution,* the *Venice Commission (2010)* stressed that even a 'good Constitutional text' cannot ensure, in itself, 'the stability and democratic development of society'.[17] The Commission further emphasised the need for associated political will, supporting legislation and the existence of a 'system of checks and balances'. In addition, in 2007 the Commission expressed the view that even though the *2007 Constitution* provided a 'broad catalogue of social rights', implementation and enforcement of these rights could prove 'purely programmatic' in an economically disadvantaged country such as Kyrgyzstan.[18] Despite amendments to the text, the same concerns remain for the *2010 Constitution*.

[14] See further: *Mavromattis Palestine Concessions Case (Greece v UK)* (Jurisdiction) [1924] PCIJ Rep Series A No 2, at 12.
[15] See, for example: I*nternational Covenant on Economic, Social and Cultural Rights* (December 16, 1966, entered into force 3 January 1976) 993 UNTS 3; and *International Covenant on Civil and Political Rights* (December 16, 1966, entered into force 23 March 1976) 999 UNTS 171.
[16] See further: *Venice Commission* (2010) (supra note 2), at 3.
[17] Ibid, at 12.
[18] Venice Commission (European Commission for Democracy Through Law) (2007), 'Opinion-on the Constitutional Situation in the Kyrgyz Republic', Adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007) CDL-AD (2007) 045, at 7.

These statements of the Commission also ring true for the effective management of the natural environment. It is added here however that good governance and institutional capacity are also essential. The challenge is that garnering sufficient political will for environmental regulation and management is far more difficult when livelihood and security issues are so pressing. The concern is that for the Kyrgyz Republic, long-term sustainability and environmental issues will be, somewhat understandably, deemed to be of lesser importance.

While it is recognized that no Constitution can adequately address environmental issues in the absence of appropriate leadership and financial and institutional backing, a comprehensive constitutional instrument can provide the foundation upon which institutional, governance and enforcement capacity are subsequently built. Further, by the incorporation of environmental provisions within the *2010 Constitution*, drafters send a clear signal to legislators and policy makers that the environment is an issue of importance. This creates a positive framework within which other components of environmental management can be addressed.

New Research Agendas for the IUCN Academy

The discussion above identifies for the author three areas of further research for consideration by the IUCN Academy. These three areas are discussed below.

Constitutions and Environmental Outcomes

Through the analysis of the Kyrgyz *2010 Constitution* the author is reminded of the wide variability between the Constitutions of various jurisdictions. The comparison between the Kyrgyz and Kenyan Constitutions is just one example of the vast differences that exist in how Constitutions worldwide deal with the issue of the natural environment.

The first area for further research therefore calls for comparative constitutional studies across jurisdictions. This research would evaluate how environmental concerns are facilitated within respective constitutions. The research would reflect on the content and relative effectiveness of particular constitutions in achieving

environmental outcomes. The capacity of countries to implement constitutional ideals would be a further point for consideration.

Critical Evaluation of Environmental Rights and the Rights-Based Approach

The emphasis on international human rights treaties and norms within the Kyrgyz Constitution illustrates the potential importance of the human-environmental rights discourse. A second area of research therefore concerns the theme of this issue: 'New Directions in Earth Rights, Environmental Rights and Human Rights'. While potential synergies exist between the rights to life and livelihoods; environmental rights; and rights to a healthy environment, conflicts can and do occur. Further research is therefore recommended to address how best to incorporate human and environmental rights into existing and future constitutions.

Capacity Building

Building capacity for environmental law scholarship within countries such as the Kyrgyz Republic is essential for the facilitation of robust environmental law discourse within the country. It is expected that such a discourse would enable enhanced decision-making with regards to the environment and ultimately result in improved environmental outcomes.

The third research issue therefore concerns how the IUCN Academy promotes an inclusive global environmental law discourse. Particular issues include questions of how the Academy engages with countries that are not part of the IUCN membership and how the Academy supports the involvement of institutions within countries that do not have environmental law programmes.

These issues are of particular relevance for Kyrgyzstan and other former Soviet countries. Many of these countries are still developing the instruments and institutions to address contemporary challenges and changed circumstances. It is thus important that countries conducting legal reform have access to the wide range of environmental law materials and legal instruments that exist globally. The availability of (additional) resources in Russian would be a positive first step.

Conclusion

The Kyrgyz *2010 Constitution* is an improvement on its 2007 predecessor. The amendments that redistribute presidential powers are commended and have the potential to create a stable political environment within the country. If this potential is realised it could have positive flow-on effects for enhanced environmental and sustainability outcomes.

The environmental provisions of the Kyrgyz *2007 Constitution* and *2010 Constitution* are, however, too vague. Furthermore, the extent to which the additional emphasis on international human rights will have on the interpretation of environmental rights remains to be seen.

Recognizing that constitutional reform does not provide in itself, the solutions to environmental issues, it is recommended that addressing the inherent institutional and governance issues within the country should also be a priority. Capacity building and the development of environmental scholarship within the Kyrgyz Republic are also essential.

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Country Report: The Netherlands

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Introduction

Globalization may have severe negative side impacts on the environment, especially as a consequence of the growing opportunities for businesses to avoid strict national environmental laws by moving operations (or waste) to places in the world where environmental legislation tends to be less well developed and/or enforced. As international law is primarily directed at states and not at transnational corporations, it has serious weaknesses to counteract such severe environmental impacts. Moreover, the few national legislative attempts to specifically regulate the environmental performance of companies that operate abroad, did not pass through parliament.[1] The limitations of law have led to the rise of non-state environmental law in which national authorities play no or only a very limited role.[2]

Still, the role of national law has not been played yet: as from the mid-nineties of the past century there is a steadily growing body of court cases from the home state of the parent company. One of the first cases in this respect was the *OK Tedi* case, in

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[1] Take for instance the *Australian Corporate Code of Conduct Bill* (2000) and the *Canadian Bill C 300* 'An act respecting corporate accountability for the activities of mining, oil or gas in developing countries'.

[2] M. van der Heijden and K. Jesse, 'Corporate environmental accountability as a means for intragenerational equity: "Hidden" environmental impacts in the North-South conflict' in H. Bugge and C. Voigt (eds.) *Sustainable Development in International and National Law* (2008) at 349-374.

which 30,000 Papua New Guinean landowners successfully sued the Australian company BHP before an Australian court for the pollution of river systems and adjoining land by the company's copper mine in Papua New Guinea. The case was settled out of court in 1996. One of the latest cases is a 2010 Norwegian Supreme Court decision in which the Danish parent company Hempel was held liable for costs involved with pollution caused by a Norwegian subsidiary and even that of the subsidiary's predecessor in Norway. In between these are some other cases, such as two well-known successful UK court decisions (the 1997 Connelly case and the 2000 *Lubbe v. Cape PLC* case) and two unsuccessful US court decisions (the 1999 *Beanal v. Freeport-McMoran* case and the 2003 *Flores v. Southern Peru Copper Corporation* case).

Although, mainly for tax reasons, a relatively large numbers of transnational corporations have chosen the Netherlands as their elected domicile, only recently we saw the first two court cases – one of them still pending – regarding the alleged liability of (partly) Dutch-based corporations for serious environmental impacts caused while operating in Africa. The first one, the *Trafigura* case, concerned the dumping of hazardous waste in the African state of Ivory Coast. The second one, the *Shell-Nigeria* case, relates to environmental damages from oil leakage in Nigeria. This contribution will discuss both cases in turn, followed by some concluding remarks.

The *Trafigura* Case

In 2006, the multinational trading company Trafigura, which is legally based in the Netherlands (as a Dutch legal entity) but is headquartered in London, chartered the tanker vessel Probo Koala to transport oil products. In June 2006, the waste facility Amsterdam Port Services (APS) in the Netherlands charged Trafigura €12,000 to take from the Probo Koala a chemical waste product called ´slops´, which is a regular waste from oil tankers. During the transfer of this waste in Amsterdam, APS noted an abnormal smell and found that the waste was 250 times as polluted as normal slops. The company then refused to take the rest of the waste and informed Trafigura to contact another Dutch company that was suited to receive this kind of toxic waste. Trafigura refused to do so because of the costs involved (€500,000). Instead, the company wanted to take back all the waste.

After having noticed the abnormal smell, APS immediately notified the municipal environmental authorities. APS also requested the port authorities to allow them to return the waste into the ship to be transferred to a facility that is suited to take the polluted waste. After consultations with the supervising authorities concerned, the port authorities allowed APS to return the slops into the tanker as there was no (international maritime) legal basis (i.e. the *MARPOL Convention*) for prohibition. Meanwhile, the municipal environmental authorities, after consulting the national environmental inspectorate, decided to prohibit APS to return the waste because they suspected offences against national environmental law. Consequently, they reported this to the criminal authorities. The Public Prosecutor's Office started an investigation against the Probo Koala and took a sample of the slops. It did not chain up the vessel, although it had the power to do so. All of this happened in the span of only three days. While the municipal and national environmental authorities were still discussing the situation and the Public Prosecutor's Office was still investigating the case, the slops were pumped back by APS following permission granted by the port authorities. Immediately thereafter, the vessel departed to open sea.

Later, it turned out Probo Koalo´s charge concerned waste of an onboard cleaning process of polluted naphtha. Trafigura bought the naphtha in the United States with the intention to clean ('wash') the naphtha so that it could be used as a blend stock for gasoline. Caustic washes like this have been banned by most countries because of the hazardous waste that remains after the washing process and because of the absence of facilities prepared to take that waste. Therefore, Trafigura decided to do the washing at sea, onboard the Probo Koala.

After leaving the Amsterdam port, the Probo Koala sailed to Abidjan in Ivory Coast. The slops were discharged at a local waste disposal company, called Compagnie Tommy. This company had only been in the possession of a permit to take waste from ships for one month. It charged Trafigura only about €1,200. Both the company and the authorities were notified by the Dutch authorities on the toxicity of the slops, apparently before the dumping took place. Local authorities started an investigation, but they permitted the ship to leave for Europe. During the following night, a total amount of 500 tons of chemical waste was dumped near the Ivory Coast capital of Abidjan, with 5 million inhabitants. Apart from the alleged death of eight to ten people, the various (investigating) reports – though somewhat contradictory –

mention resultant health impacts for several thousands of inhabitants: nose bleeding, diarrhea, nausea, irritated skin and eyes, dizziness, breathing problems and vomiting (including throwing up blood). Displaced people, closed schools in affected areas, closed industries, and laid-off workers were reported as well, as were halted fishing activities and vegetable and small livestock farming. In addition, water sources and food chains were reportedly contaminated, alleging resulting in contaminated food products. The city's household waste treatment centre had to be closed down for two months.

The court cases following the dumping of this waste took place in Ivory Coast, the UK, and the Netherlands. In Ivory Coast, the owner of Tommy was sentenced to 20 years imprisonment and his shipping agent to five years. Criminal and civil law cases were not pursued after Trafigura and the Ivorian authorities reached a settlement of the case for €152,000,000. In the UK, supported by a report of the Netherlands Forensic Institute which showed that the Probo Koala at that time shipped 2,600 liters of a substance containing high levels of the extremely toxic sulphur hydrogen, Trafigura agreed to pay £ 1,000 to each of the 30,000 victims who lodged the claim against Trafigura's headquarters in the UK.

In the Netherlands, two directors of the Dutch waste disposal service APS were arrested. Furthermore, the Dutch criminal authorities decided to prosecute the Ukrainian captain of the Probo Koala together with the CEO of Trafigura. Regarding the CEO, a Dutch court ruled that he should be acquitted, as there was no link between his personal actions and the dumping of the waste. Although a higher court reaffirmed this ruling, the Dutch Supreme Court later declared that decision invalid and referred the case back to the higher court for final sentencing.[3]

In the case against the other defendants, the Dutch company Trafigura was sentenced to a fine of one million Euros for the illegal export of waste to Ivory Coast. This activity infringed the *EU Regulation on the Shipment of Waste*, which explicitly prohibits the export of waste from the EU to Africa. The Trafigura employee who was leading the onboard treatment of naphtha as well as the discharge of the waste in Amsterdam received a suspended sentence of six months imprisonment and a fine of €25,000 for concealing the hazards while delivering hazardous substances to others. The Ukrainian captain of the Probo Koala was sentenced to five months suspended

[3] Supreme Court, 6 July 2010, Case Number LJN: BK9263.

imprisonment for the same crime, as well as for fraud. The director of APS was found guilty of infringing Dutch environmental legislation. However, he was acquitted because he rightfully trusted the port authorities, which allowed him to have the waste pumped back into the ship. The case against the municipal authorities was declared inadmissible because, under Dutch law, governmental authorities cannot be prosecuted for their actions.[4]

Besides these criminal proceedings, on behalf of more than 1,000 Ivorian victims, a Dutch law firm initiated tort proceedings against Trafigura, the city of Amsterdam, and the Dutch State. Independent from that, Dutch national and municipal (Amsterdam) authorities offered one million Euros to the UNEP trust fund to relieve the needs of the victims. In 2008, however, the law firm ceased all activities because of financial constraints: the Ivorian claimants could not apply for legal aid because most of them did not have a passport. Since, under Dutch law, it is not allowed for a law firm to negotiate with the client to transfer a part of the award of the case, there were no funds to cover the huge costs involved in a complicated case like this. As stated above, the UK tort case was more successful as unlike the Netherlands, it is possible to claim all the costs that a law firm makes in a case like this.

The above illustrates that the Netherlands followed a national approach: neither the actual dumping of waste in Ivory Coast nor its consequences was dealt with. Instead, Trafigura was only prosecuted for infringing Dutch law on Dutch territory.

The *Shell-Nigeria* Case

The relevance of the pending civil law *Shell-Nigeria* case is not merely a national one. The proceedings were initiated by four Nigerian plaintiffs together with NGOs Friends of the Earth Netherlands (*Milieudefensie*) and Friends of the Earth Nigeria. These NGOs filed a lawsuit against both the Dutch international headquarters of Shell and its Nigerian subsidiary for alleged negligence relating to environmental damages caused by oil leakages in Nigeria. The four plaintiffs, all farmers and fishermen, claim that agricultural lands have been devastated, drinking water polluted, fish ponds made unusable and the environment and health of local people

[4] District Court of Amsterdam, 23 July 2010, Case Numbers LJN: BN2052 (municipality of Amsterdam); BN2068 (employee of Trafigura); BN2149 (Trafigura); BN2185 (director of APS); and BN2193 (captain of Probo Koala).

has been harmed. Because the oil leakages spilled over their fields and fishing ponds, they consequently allege a loss of their livelihoods.

First, a jurisdictional matter had to be dealt with. In December 2009 and February 2010, the Dutch court ruled the claims admissible against both the parent company Royal Dutch Shell (RDS) and its subsidiary Shell Petroleum Development Company Nigeria (SPDC) for damage as a consequence of oil spills near the three Nigerian villages of the plaintiffs.[5] Even though the damage is suffered by Nigerian villagers and is caused by a Nigerian company, the court ruled itself competent to hear the claim against SPDC because of its connectedness to the claim against the RDS. This last mentioned claim holds that RDS should have used its influence on, and control over, the (environmental) policy of SPDC to prevent as much as possible that this Nigerian subsidiary would cause harm to people and the environment. In this respect, the plaintiffs state that RDS has breached its duty of care (due diligence). They request the court to rule that: RDS and SPDC acted improperly against them and are both liable for the damages they have suffered and will continue to suffer; to order the replacement of obsolete and/or defective (parts of) the pipelines near the three villages and maintain them in good condition and to develop or maintain an adequate system of pipeline inspection; to order the cleaning up of the soil around the oil spills; to order purification of water resources concerned; and to order an adequate plan for responding to oil spills to be implemented in Nigeria.

On 28 March 2010, an exhibition request had been placed at the Dutch court to force Shell to make public some thirty internal Shell documents regarding both the leakages at Oruma and the way responsibilities are assigned within Shell. Shell refused to make these documents available. Connected with this request, the plaintiffs´ lawyer asked for referral as well to be able to process the possibly results of the exhibition request. In addition, on 28 March 2010, the lawyer of the claimants subpoenaed the former parent company of the Shell concern. The reason for doing so is that RDS states it is not liable because it did not formally exist at the time of the leakages. Thus, also the former Royal Dutch Shell Group and former Shell Transport and Trading will be formally involved in the process.

[5] District Court of The Hague, 30 December 2009, Case Number LJN: BK861624 (Oruma); 24 February 2010, Case Number LJN: BM1469 (Ikat Ada Uda); and 24 February 2010, Case Number LJN: BM1470 (Goi).

Apart from the aforementioned matters, the court also has to consider whether or not all of the plaintiffs will have standing (in particular with respect to the NGOs). Furthermore, the court will have to decide whether or not RDS can be held liable for its subsidiary. RDS states it is only a shareholder of Shell Nigeria and, therefore, rejects liability. However, considering RDS owns 100 per cent of SPDC´s shares, the court may decide otherwise.

The choice of law will have to be dealt with as well. Most probably, the defendants will reason that the court should apply Nigerian law, whereas the plaintiffs will reason that the court should apply Dutch law. *The EU Regulation on the Law Applicable to Non-Contractual Obligations*[6] (*Rome II*), which entered into force in January 2009, is relevant to the choice of law. Article 7 of *Rome II* adds a distinctive environmental principle that leaves the person seeking compensation for extraterritorial environmental damage the option to choose to base the claim on the law of the EU Member State in which the corporation to be sued is incorporated – provided this member state can be considered as the country in which the event giving rise to the damage occurred. To fulfill this latter condition, the place where this event occurred needs to be interpreted as the place where the parent company is incorporated. This interpretation might well be viable should acts or omissions by a parent company (such as the failure to have a subsidiary implement an adequate emergency scheme) have led to the environmental harm abroad. Article 7 may help people from countries with weak environmental legislation, such as Nigeria, in case they want to sue the parent company for damages caused by local subsidiaries´ activities. Still, it is not yet clear whether or not this community-oriented regulation leaves room to apply it to transnational tort cases if the harmful effect is neither felt in an EU member state nor at one of its neighbour countries.

If, on the basis of article 7 of *Rome II*, Dutch tort law (for example article 6:162 of the *Dutch Civil Code*) is applicable to transnational tort cases, the question remains whether the elaborated legal framework of (partly European based) Dutch environmental standards can be invoked in transnational litigation. Nevertheless, based on the legal doctrine of indirect effect, (hard or soft) international law could be relevant to support constructing one of the three grounds for tortuous liability: violation of a rule of unwritten duty of care. In the non-tort decision of 21 June 1979 against the corporation Batco, the Court of Chamber accepted the legally non-

[6] Regulation 864/2007/EC, OJ L 199/40.

binding *Guidelines for Multinational Enterprises of the OECD*, adopted by the company, to sustain the claim of mismanagement. It has been argued that this finding seems also possible for a tort, all the more so because codes of conduct, unlike treaties, are expressively addressed at companies. If, on the other hand, Nigerian law constitutes the applicable law in the *Shell-Nigeria* case, the Dutch court could still give effect to international environmental law as courts can ignore particular rules of this foreign state if these violate international law.

Concluding Remarks

Although both the *Trafigura* case and the *Shell-Nigeria* case concern overseas environmental impacts, the cases differ considerably. For one, the *Trafigura* case followed a criminal law track, whereas the *Shell-Nigeria* case follows a tort proceeding. This difference is, however, not substantial. It could have been the other way round as well. Still, for merely economic reasons, the Dutch public prosecutor might be reluctant to start criminal proceedings against Shell. Secondly, unlike the national law approach used in the *Trafigura* case, in the *Shell-Nigeria* case the actual consequences of the oil leakages in Nigeria, and the way RDS and SPDC responded to these are central. Also, in the *Shell-Nigeria* case, soft law such as codes of conduct might be relevant to support constructing the violation of the duty of care.

Given contemporary calls for corporate sustainability, many companies have either volunteered to adhere to codes of conduct and/or have their own ones in place. Independent monitoring mechanisms are, however, seldom incorporated. Through interpretation of a rule of unwritten duty of care with reference to such codes of conduct, they might be uplifted from a merely public relations effort to a useful purpose in transnational tort law.

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Country Report: Norway

Hans Christian Bugge*

Recent Policy Developments

Norway to Fulfill its Commitments under the Kyoto Protocol

Norway is in a good position to fulfill its Kyoto commitment of 101 per cent of its 1990 emission level, corresponding to 50,1 million tons CO2 eqv. on average 2008-2012. In 2009 the emissions were 50,8 million tons - the lowest emission figure since 1995. This was at least partly due to the finance crisis. Norway is party to the EU-ETS emission trading system, and the Norwegian state is active in the CDM market. It is envisaged that Norwegian companies will buy allowances in the European market, which will cover the possible gap between its actual emissions and the Kyoto obligation. In addition, the Norwegian state will buy CDM CERs in order to more than fulfill its Kyoto obligation.

The measures to be taken in order to reduce domestic emission towards 2020 are still a controversial issue under discussion. A white paper is foreseen in 2011. In 2010 the State Pollution Control Authority under the Ministry of the Environment got an extended mandate and became Norway's Climate and Pollution Agency - the

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central government agency for climate change issues. However, many important climate policy instrument rest with the various sector ministries.

Waste Reduction for the First Time in Norway's History

At last, for the first time in history, there was a reduction in total waste production in Norway. In 2009, the amount was 5 per cent less than in 2008, while the BNP fell by only 1 per cent. Household waste was reduced by only 2 per cent and now corresponds to 21 per cent of the total waste. 78 per cent of the waste – hazardous waste excluded – was recycled. In spite of the fact that Norway already in the 1990s developed several new instruments with the purpose of reducing waste production, waste production has increased by 41 per cent since 1995 – roughly corresponding to the 40 per cent increase in GNP.

Two Important Environmental Battles on the Political Front

During 2010, two of the most important, hottest and most controversial political issues in Norway have been in the environmental field.

The first is the question of whether the continental shelf outside the Lofoten islands in northern Norway shall be opened to petroleum exploration and exploitation. The sea surrounding the Lofoten islands are known as a major spawning area for the very important stock of North Atlantic cod. Every winter since time immemorial huge stocks of North Atlantic come to this area to spawn and the Lofoten fishery has always been of economic importance for the people and communities along the northern coast of Norway. This makes the area particularly vulnerable to possible pollution from petroleum activity. In addition, the nature in the Lofoten area – and along the entire coast of this part of Norway – is spectacular and attracts huge numbers of tourists every year. Therefore, this area has been protected from petroleum activities until now.

The petroleum industry, with the state owned oil company Statoil in a leading role, argues strongly in favour of opening the area for petroleum exploration. The main argument is that Norway's petroleum production most likely faces a marked decline

in a few years, and it is essential to find new sources. The industry maintains that the risk of serious pollution is minimal. Apparently, the geological conditions around Lofoten seem quite promising. In addition, petroleum industry will create economic development and new jobs, which are needed in this part of Norway. On the other hand, environmental NGOs and a good part of the public are clearly against. As the continental shelf in the area is very narrow, petroleum activity will be carried out quite close to the coast. A major accident and oil spill may thus have disastrous consequences. Needless to say, the 'Deepwater Horizon' accident in the Gulf of Mexico has made the industry's 'no risk' assertions somewhat less convincing.

At the base of the discussion is a thorough political document called *Management Plan for the Barents Sea and Lofoten*. Adopted by the Norwegian parliament in 2006, this model plan for sustainable management of marine resources protects the Lofoten area until 2011. But now the issue is reopened. At present, the coalition government seems to be split on the issue, which is to be decided in the course of the coming winter.

Another hot political issue is the planned construction of a major new power line through the beautiful fjord area of Hardanger on the western coast of Norway. The line will consist of very major masts placed in otherwise pristine areas. Its purpose is to transport hydroelectric power to the Bergen area, as well as to petroleum installations on the continental shelf. The fjords of Norway have a very special scenic beauty and some parts are on the World Natural and Cultural Heritage List. The local population, partly dependent on the tourist industry, protests strongly against the power line, and is supported by a good part of Norwegians. In august, the government made the decision to go ahead with the line, but the massive protests forced it to postpone parts of the project. The alternative - to transport the power partly by sea cable - is now subject to a detailed assessment, and a final decision is envisaged in spring 2011.

Recent Statutory Developments

Nature Diversity Act (2009) Comes into Practice

In 2009, Norway got a new comprehensive *Nature Diversity Act* and 2010 saw the first major decisions pursuant to this act. The purpose of this Act is 'to protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sami culture' (section 1).

The Act is administered by the Ministry of the Environment and its Directorate of Nature Management. It lays down objectives, principles and framework rules for: protected areas; the sustainable management of flora, fauna and other organisms; the import of alien species; and access to genetic resources (bioprospecting) in Norway. With regard to its geographical scope, the Act applies to Norwegian land territory, including river systems, and to Norwegian territorial waters. In the EEZ outside territorial waters, the management and protection of living marine resources is regulated pursuant to the *Marine Resources Act* (2008) under the Ministry of Fisheries and Coastal Affairs. This illustrates one of several political conflicts in connection with this new Act.

The Act lays down several important principles for the management of nature diversity, including the principle of knowledge-based management (section 8), the precautionary principle (section 9), and the ecosystem approach: pressure on an ecosystem shall be assessed on the basis of the cumulative environmental effects on the ecosystem now or in the future (section 10). These principles shall serve as guidelines not only in the application of the *Nature Diversity Act* itself, but also when other Acts are applied. Hence, the Act is meant to play a cross-sector role. However, the extent to which these principles are actually applied in individual cases is decided by the sector administration in question within the substantive framework of its legislation. It remains to be seen to what extent these principles actually will be taken into account in these other fields of law.

Radioactive Substances under the Pollution and Waste Control Act

From 1 January 2011, radioactive pollution and waste will be regulated and controlled pursuant to the general *Pollution and Waste Control Act* (1981) instead of the special *Act on Radiation Protection and Use of Radiation* (2000). In spite of the fact that Norway has no nuclear power plants, emissions of radioactive substances and radioactive waste have increased during the later years, in particular in the petroleum industry and other industries, and hospitals. The *Pollution and Waste Control Act* provides an integrated system of pollution control, covering air, water and soil pollution and noise, as well as treatment of all types of waste. With some exceptions, it lays down a general prohibition to pollute and dispose of waste without a permit.

As a consequence of the reform, radioactive substances will be treated similarly to other types of substances that may be hazardous to the environment. This will broaden and strengthen the legal basis for regulation of radioactive substances and connected activities on the basis of environmental considerations in addition to the health aspects. General environmental principles will apply to the treatment of radioactive substances, such as the principles of prevention, polluter pays and the use of best available technology. It is particularly important that all release of radioactive substances will require a permit.

Recent Cases

In 2010, Norway's Supreme Court made several decisions of principle that are seen as positive from an environmental perspective.

The Hempel Case: Mother Company's Responsibility for Soil Pollution

In this case, a Danish mother company, Hempel, was found responsible for carrying out investigations about the level of soil pollution on two sites that had been owned by a daughter company, the stock company Hempel Coatings AS, which produced paint. Hempel owned 100 per cent of the shares in Hempel Coatings. The pollution had not been caused by Hempel Coatings, but earlier, by a company that produced

paint on the site before, and which was taken over by Hempel Coatings. After some years, Hempel Coatings AS was closed down and liquidated by Hempel, and the properties were sold to a third party without financial means.

Pursuant to section 51 in Norway's *Pollution and Waste Control Act,* the pollution control authority may order 'any person that possesses, does, or initiates anything that results in or that there is reason to believe may result in pollution to arrange or pay for any investigations or similar measures that may reasonably be required'. Such investigation may be required in order to determine whether and to what extent the activity results in or may result in pollution, or ascertain the cause of or impact of pollution that has occurred. The question in the case was whether the mother company was a 'person that possesses, does, or initiates anything that results in or that there is reason to believe may result in pollution'. On the basis of the preparatory works of the Act and other sources, the Supreme Court unanimously answered yes.[1]

It was not disputed that the daughter company Hempel Coatings AS would have been responsible for carrying out investigations if it had still existed. Since Hempel had full control over its daughter company and had chosen to close it down, it was found to be responsible. The issue was not treated as a question of 'piercing the corporate veil' in company law, but solely as an issue of interpretation of section 51 regarding possible responsible subjects. Nevertheless, the case raises the question of whether the traditional limitation of shareholders liability has come under pressure in Norwegian law, in particular where mother companies have full control of daughter companies. In such cases, the reasons for a limited shareholder liability are clearly not always evident.

The Loevenskiold Case: The Right to Environmental Information from a Private Company

This is a case about the right to environmental information from private companies. According to section 17 in Norway's *Right to Environmental Information Act* (2003) any person has the right to get environmental information from private companies and other undertakings 'concerning factors related to the undertaking, including factor inputs and products, which may have an appreciable effect on the

[1] Norsk retstidende (2010), at 306.

environment'. There are some exemptions to this. One exemption is information that concerns 'technical devices and procedures or operational or business matters which for competition reasons it is important to keep secret in the interests of the person whom the information concerns' (section 18).

In this case, the Oslo branch of Norway's Nature Conservation Association had requested information about the status of the forest around Oslo. It was particularly interested in areas with old and pristine forest that - presumably - would be rich in biodiversity and therefore important to protect from logging. It asked a major private forest owner, Løvenskiold-Vækerø, about such information. Initially, the company was not willing to give it out. After several legal rounds the issue before the Supreme court was whether the association had the right to get detailed maps of the forest areas in question, altogether 2,500 small and bigger areas. In a unanimous decision the court agreed with the nature protection association and ordered the forest company to disclose the maps.[2]

This was the first case concerning the interpretation and application of the *Right to Environmental Information Act* and thus of considerable interest. The court found that the concept 'environmental information' covered information about the age and status of the various parts of the forest. Furthermore, it found that this information concerned 'factor inputs ... which may have an appreciable effect on the environment'. The reason was that there was a risk of logging in these areas, and such logging would have a negative environmental effect. The information was thus essential in order to be able to protect the biodiversity. The court did not agree with the forest company that this information could and should be kept secret for competition reasons.

[2] Norsk retstidende (2010), at 385.

A Critical Consideration of Recent Domestic Developments

In the course of 2010, there were no major developments in Norway's environmental law, but some elements such as the two mentioned Supreme Court cases, marked a positive trend.

The new *Nature Diversity Act* is in itself a major step forward. It provides the authorities with important new instruments to protect biodiversity. It is undisputed that loss of biodiversity is still going on in Norway in spite of the political objective to halt this development within 2010. Infrastructure and urban development are important reasons for this. Also, aquaculture along the coast - in particular salmon farming - is increasingly under scrutiny for its environmental effects due to diseases and escape. It remains to be seen whether the present government in fact will use the new Act to significantly strengthen biodiversity protection. This depends to a large extent on how various sector authorities and local planning authorities - with objectives and mandates, which are different from and even in conflict with biodiversity protection - chose to take biodiversity protection into consideration when they apply their legislation.

Identification of Possible New Research Agenda's for the IUCNAEL

It seems desirable to broaden the "traditional" research agenda in environmental law. The policy and law in such sectors as transport, energy production, agriculture, forestry, fisheries, public procurement, and defence, as well as in regional planning, urbanization and land use planning in general, is at the end of the day at least as important as the environmental policy and law in the strict sense The legal framework for these various sector authorities to take environmental considerations in their decisions, and in particular take biodiversity protection into account, and how this legislation is applied, should be made subject to more research. Such studies could also be extended to such areas as tax law, important parts of private law such as company law, and parts of property and contract law. Here, both common methodological discussions and comparative studies might be fruitful as part of the research agenda of IUCNAEL.

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Country Report: Papua New Guinea

Justin Rose*

Introduction

2010 was not an auspicious year for environmental law and governance in Papua New Guinea (PNG). While the balancing of environmental and economic development priorities has always been a complex and contentious process in PNG, in recent decades the country's environmental governance systems have incrementally improved, on paper if not always in practice. Yet 2010 witnessed an abrupt end to that trend. Amendments were passed in May last year to the *Environment Act* (2000), which remove many safeguards against environmental damage caused by pre-2004 mining and other development projects.

This report commences by briefly introducing the context of environmental management and regulation in PNG. It proceeds by describing recent developments in environmental litigation and legislative amendment, and concludes by providing a critical assessment of these developments.

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Background to Papua New Guinea

Papua New Guinea has 'one of the most diverse repositories of geographic, biological, linguistic and cultural wealth on earth'.[1] PNG's current estimated population of 6.8 million people inhabit 463,000 square kilometres of land spread over 600 separate islands. PNG is the most linguistically diverse country in the world, with more than 840 languages spoken.[2] The positive nexus between biological and cultural diversity is widely acknowledged and it is thus not surprising that PNG also harbours five per cent of the world's biodiversity.[3]

Industrial logging, mining and land conversion for agriculture are the primary threats to PNG's environmental sustainability. Corruption and unsustainable practices in PNG's logging industry are well documented. Justice Barnett stated in the conclusions of an inquiry he chaired in the late 1980's that the logging 'companies are now roaming the countryside with the self-assurance of robber barons; bribing politicians and leaders, creating social disharmony and ignoring laws in order to gain access to, rip out and export the last remnants of the province's valuable timber'.[4] The response to the Barnett Inquiry was the passage of the *Forestry Act* (1991). Despite the revised law, the PNG logging industry remains dogged by allegations of illegality, corruption, unsustainable practices and human rights abuses.[5]

PNG's economy is increasingly reliant upon mining revenues, but the history of the mining industry in PNG is one of conflict and controversy. Contamination from tailings at the Panguna copper mine in Bougainville was a significant catalyst contributing to the secessionist movement and bloody civil war that occurred in

[1] *AusAID Papua New Guinea Summary* (available at http://www.ausaid.gov.au/country/png/png_intro.cfm).
[2] *Ethnologue: Languages of Papua New Guinea* (available at http://www.ethnologue.com/show_country.asp?name=PG).
[3] N. Sekhran and S. Miller, *Papua New Guinea Country Study on Biodiversity* (1996) PNG Department of Environment and Conservation, at 67 (available at http://sipddr.si.edu/dspace/bitstream/10088/3533/1/Sekhran_and_Miller_1996_PNG_partial.pdf).
[4] T. Barnett, *Commission of Inquiry into Aspects of the Forestry Industry Final Report* (PNG Government Commission of Inquiry Report Vol. 1) at 85.
[5] A. Schloenhardt, *Illegal Trade in Timber and Timber Products in the Asia Pacific Region* (2008) Australian Institute of Criminology Research and Public Policy Series Report No. 89, at 70-71 (available at < http://www.aic.gov.au/documents/B/D/4/%7BBD4B2E50-33B4-47F1-815E-901C0ACC7A43%7Drpp89.pdf).

Bougainville Province during the late 1980s and 1990s.[6] The Ok Tedi gold and copper mine in Western Province has caused massive environmental degradation to the surrounding area. The Ok Tedi mine, which in 2005 contributed 25 per cent of PNG's export earnings, has since the mid-1980s been discharging around 80 million tonnes of tailings and overburden into the Ok Tedi River each year, thereby severely degrading between 1600 and 2500 km2 belonging to the 50,000 people living in 120 villages downstream of the mine.[7] The Porgera gold mine in Enga Province has caused severe pollution problems along the Strickland River, which has been observed turning to crimson as a result of pollution by mine tailings containing significant quantities of cyanide, mercury and other heavy elements.[8] Canadian company Nautilus Minerals is soon to commence the world's first deep-sea bed mining operation off the coast of New Ireland and East New Britain Provinces, the environmental consequences of which are largely unknown.[9]

Recent Litigation: Ramu NiCo

Kurumbukari, located in the foothills of the Bismark Ranges approximately 75km south west of the provincial capital of Madang, is the location of a massive nickel and cobalt mine currently in the final stages of construction. The mine, known as Ramu NiCo, is owned by a joint venture including a syndicate of four Chinese companies (85 per cent) a subsidiary of Australian company Highlands Pacific (8.5 per cent), the Mineral Resources Development Corporation of PNG (4 per cent) and the local landowner corporation (2.5 per cent). Ramu NiCo's mining operation (including the Kurumbukari mine, a 135km slurry pipeline and a processing facility at Basamuk Bay on the coast) is the largest Chinese greenfield mining investment outside of China.[10]

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[6] J. Linnett 'Grievances in Bougainville: Analysing the Impact of Natural Resources in Conflict' (2009) *POLIS Journal* (available at http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ma-winter-09/jack-linnett-winter-09.pdf).

[7] J. Marychurch and N. Stoianoff, '*Blurring the Lines Of Environmental Responsibility: How Corporate And Public Governance Was Circumvented In The Ok Tedi Mining Limited Disaster'* Unpublished paper presented at the Australasian Law Teachers Association Conference, Melbourne, 2006, at 10-11 (available at http://www.alta.edu.au/pdf/conference/published_papers/marychurch_j_stoianoff_n_2006_alta_conference_paper_blurring_lines_of_environmental_responsibility.pdf.

[8] A. Biersack, 'Red River, Green War: The Politics of Place Along the Porgera River' in A. Biersack and J. Greenberg, *Reimagining Political Ecology* (2006) Duke University Press, at 233-234.

[9] For further information about the plans of the company, see: http://www.nautilusminerals.com/s/ Home.asp.

[10] See further: http://www.ramunico.com/plus/view.php?aid=699.

It is predicted to yield 31,150 tonnes of nickel and 3,300 tonnes of cobalt annually during the next 40 years.[11]

Appropriate tailings management is difficult in much of PNG due to high precipitation and steep and inaccessible landscapes. Ramu NiCo is no exception in this regard. The intended method of tailings management for Ramu NiCo is a deep-sea tailings placement system (DSTP) via a pipeline that carries wastes from the processing facility to discharge them 150m below the ocean surface. Concerns and uncertainties relating to the DSTP plan are at the centre of recent litigation initiated by local landowners aiming to prevent Ramu NiCo mine wastes being disposed in this manner.

Ramu NiCo obtained approval in 1999 under the *Environmental Planning Act* (repealed)[12] to deposit approximately 100,000,000 tonnes of tailings plus other waste material into Basamuk and Astrolabe Bays over the life of the mine. The repealed legislation was replaced by the *Environment Act* (2000) that contains a saving provision (section 136) for approvals granted prior to that Act coming into force. As detailed below, the interpretation of the savings provision is central to litigation now before PNG's courts.

On 4 March 2010, a group of four individuals representing local governments and landowning groups initiated proceedings in the PNG National Court.[13] The plaintiff's statement of claim suggests that if the DSTP goes ahead, enormous damage will be done to the marine environment in and around Astrolabe Bay causing severe negative effects to their livelihood. The plaintiff's statement of claim lists the following environmental impacts that may result from the DSTP:

- Ore slurry deposits and turbidity in shallow habitats
- Condition suitable to Tsunamis
- Shallow water habitat change and burial of fauna
- Toxic effects from tailings
- Tailings brought onshore from upwelling and currents

[11] Ibid.
[12] Available at http://www.paclii.org/pg/legis/consol_act/epa1978249/.
[13] *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 75 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/75.html?query=Ramu).

- Turbidity Plumes of sediment, both toxic and otherwise, spreading out horizontally over hundreds of kilometres
- Adverse biological impacts on the Goldband Snapper and the Ruby Snapper.
- Mortality of Benthic Fauna over a large area
- Increased bio concentration of trace metals and eco-toxicological risks to the food web.
- Elevated levels of chromium, iron, manganese, nickel and mercury in the marine environment as well as extremely high levels of ammonia which will:
    - be ingested by benthic fauna,
    - be acutely and chronically toxic to fish,
    - create sub-lethal affects as well, reduced growth and gill damage.

The causes of action pleaded are private nuisance, public nuisance, and breach of the *Environment Act* (*2000)*. The defendants were the mining company and the PNG Government regulatory agencies (Ramu NiCo Management Ltd, the Mineral Resources Authority, the Department of Environment and Conservation and its Director, and the PNG Government).

The plaintiff's sought orders for: (i) an interim injunction preventing construction and operation of the tailings disposal system pending full consideration of the matter at trial; (ii) an independent environmental impact assessment (EIA) to be funded by the company; and (iii) the company and other defendants to provide the plaintiffs with all environmental plans and approvals related to the mine's tailings disposal.

This claim provided the catalyst for a series of court proceedings, as well as the amendment of the PNG *Environment Act* (2000). Present constraints allow only an outline of the various stages of litigation, provided below:

PNG National Court (*19 March 2010)* – The court dismissed a request for the EIA and release of documents, but granted an interim injunction preventing further work on construction of the DSTP that would involve directly or indirectly damaging or disturbing the offshore environment, pending determination of the substantive proceedings.[14]

[14] Ibid.

PNG National Court (*14 April 2010*) – The court refused to set aside the interim injunction granted on 19 March.[15]

PNG National Court (*22 April 2010)* – The court refused an application for leave to seek judicial review of the decision of the Minister for Mining of 11 October 2000 to grant a lease for mining purposes to Ramu NiCo under the PNG *Mining Act*.[16]

PNG National Court (27 May 2010) – The court refused an application for leave to seek judicial review of the decision of the Director of Environment in November 2007 to grant an amendment to Ramu NiCo's environment permit. The grounds for refusal were the undue delay in bringing the application.[17]

PNG Supreme Court (16 July 2010) – The court, by 2-1 majority decision, upheld the interim injunction granted on 19 March.[18] Davani J in the majority stated, '… there are very serious issues raised in relation to the law of nuisance and whether serious environmental damage will be caused, more particularly where the trial judge had extensive affidavit material from environmental scientists who are saying quite clearly that the proposed deep sea tailings placement system will have substantial negative effects on the marine environment'.

PNG National Court (2 September 2010) – The court made an order requiring the defendants to produce the mine development contract, the memorandum of agreement (between the PNG Government, the Madang Provincial Government and Ramu NiCo), and the compensation agreement between Ramu NiCo and local landowners, for inspection by the plaintiffs.[19]

PNG National Court (24 September 2010) – The court, on the date set for the trial, granted leave allowing the plaintiffs to discontinue the proceedings commenced on

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[15] *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 77 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/77.html?query=Ramu).
[16] *Medaing v Mulung* [2010] PGNC 164 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/164.html?query=Ramu)
[17] *Tarsie v Dr Iamo* [2010] PGNC 39 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/39.html?query=Ramu).
[18] *Ramu Nico Management (MCC) Ltd v Tarsie* [2010] PGSC 22 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGSC/2010/22.html?query=Ramu).
[19] *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 134 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/134.html?query=Ramu).

19 March.[20] In granting leave, Cannings J observed, 'The present circumstances are unusual, special, exceptional and, to a degree, suspicious (what really has led to the plaintiffs sacking their lawyers on the eve of the trial and seeking leave to discontinue on the day of the trial – have they been intimidated? threatened? paid off? – these being the sorts of questions reasonable people will legitimately ask) but they are not sufficiently extreme to warrant the court forcing the plaintiffs to continue their case'.

PNG National Court (22 October 2010) – 38 new plaintiffs sought to reinitiate the proceedings commenced by the original plaintiffs on 19 March 2008, who had discontinued their application on 24 September 2010.[21] They commenced proceedings seeking a permanent injunction to restrain Ramu NiCo from committing an alleged nuisance arising from its mining activities, in particular constructing and operating a DSTP. The plaintiffs also applied for an interim order preventing Ramu NiCo from any preparatory or construction work on the proposed DSTP that involves damage or disturbance to the offshore environment. The National Court granted an interim injunction, but not on the terms sought by the plaintiff. The 22 October 2010 injunction allows construction of the DSTP to proceed but prevents its operation, thus prohibiting the placement of any tailings in the marine environment until after the matter is decided at trial.

PNG National Court (*17 December 2010*) – David Tigavu was convicted of three counts of contempt of court for threatening and abusing parties, lawyers and witnesses involved in the proceedings summarized above on 24 September 2010.[22] He was subsequently sentenced to 12 months imprisonment.

The various proceedings noted above are preliminary to the full hearing of the matter currently scheduled to commence on 8 February 2011. At the trial, the central issue to be determined is, in essence, whether the DSTP is sanctioned under the permit issued in 1999 under the *Environmental Planning Act* (repealed). This will require interpretation by the Court of Section 136(3) of the *Environment Act* (2000), which provides:

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[20] *Tarsie v Ramu Nico Management (MCC) Ltd* [2010] PGNC 144 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/144.html?query=Ramu).
[21] *Medaing v Ramu Nico Management (MCC) Ltd* [2010] PGNC 149 (available at http://www.paclii.org//cgi-bin/disp.pl/pg/cases/PGNC/2010/149.html?query=Ramu).
[22] *Registrar of the National Court v Tigavu* [2010] PGNC OS 582 (available at http://ramumine.files.wordpress.com/2010/12/full-verdict.pdf).

Where, immediately before the coming into operation of this Act—

(a) a person was lawfully carrying on an activity pursuant to a permit, licence or approval under the repealed Acts which is deemed to be a permit by virtue of Subsection (1); and

(b) the activity would constitute an offence under this Act,the person is entitled, subject to this section and to the permit, to carry on the activities and the carrying on of the activity does not constitute an offence.

The plaintiff's statement of claim suggests that the DSTP is not saved because the company was not lawfully carrying on that activity when the *Environment Act* came into operation.

2010 Amendments to the *Environment Act* (2000)

The *Environment Act* (2000) is similar in format and construction to comparable laws in force in the Australian States of Queensland, South Australia and Tasmania. It creates a 'general environmental duty' (section 7) and the offences of causing 'serious environmental harm' (section 11) and 'material environmental harm' (section 12). The primary regulatory mechanism in the Act is the environmental impact assessment and permitting procedure established under Part 5 (sections 41-73). The Act regulates activities that result, or are likely to result, in a change to the environment. These are divided into three categories – level 1, level 2 and level 3 activities (section 2 read with section 42). The *Environment (Prescribed Activities) Regulation* (2002) defines these categories by specifying activities in levels 2 and 3, with level 1 being a residual category. Section 44 of the Act requires persons undertaking level 2 or 3 activities to obtain a permit under the Act prior to doing so. Level 3 is the category of activities most likely to cause serious environmental harm and includes most mining activities.

As a direct response to the litigation summarized in the previous section, the PNG Parliament passed an Act amending the *Environment Act* (2000) on 27 May 2010.[23]

[23] Available at http://www.fiapng.com/PDF_files/Environment%20Act%20&%20Regs%202010.pdf.

The Explanatory Notes of the *Environment (Amendment) Act* (2010) (the *Amending Act*) make the connection between the litigation and the amendments clear: 'A recent court decision against the State has exposed resource projects to the risk that environment permits granted by the State in satisfaction of legal and scientific requirements may not be valid and enforceable'.[24]

The *Amending Act* provides wide powers to the Director of the Department of Environment and Conservation to grant an 'exemption certificate' (new section 87A), 'best practice certificate' (new section 87B), 'certificate of necessary consequence' (new section 87C) or 'certificate of compliance' (new section 87D) to holders of environmental permits. Each of these certificates is a form of special permission certifying that an act, work or activity undertaken by the holder of the certificate is in compliance with the law. Furthermore, in each case, the Director's decision is 'final and may not be challenged in any court or tribunal, except at the instigation of an aggrieved holder of an authorisation instrument'.

The term 'authorisation instrument' is central to the operation the *Amending Act*, being defined as 'any approval, consent, lease, licence, permission, permit or authorisation issued or granted under the [repealed] *Environmental Planning Act*' (section 3). All of the new provisions inserted into the *Environment Act* (2000) as a result of the 2010 amendments are limited to holders of authorisation instruments and do not apply to environment permits issued under the Act subsequent to its coming into operation in 2004. Thus, while the provisions of the *Amending Act* provide an absolute and unchallengeable discretion to the Director to authorize activities that may otherwise be unlawful, this discretion only applies with respect to activities that were approved prior to 2004.

Critique of Recent Environmental Law Developments in PNG

The 2010 amendments to the *Environment Act* (2000) are a backward step for environmental law in PNG. They create a series of mechanisms whereby a single decision-maker may determine that activities causing severe environmental harm are legal, and these decisions may not be challenged, are not subject to review or appeal

[24] Ibid.

of any kind, and any harm resulting from those activities is shielded from being the subject of civil action of any kind. This gives rise to the potential for substantial abuses of power. The *Amending Act* seems to have been drafted specifically to ensure that the challenge against Ramu NiCo fails. The essence of the arguments in the Ramu NiCo case relate to the specific terms saving the operation of activities permitted under the repealed *Environmental Planning Act.* That the PNG Government is willing to re-write the country's central environmental statute for the benefit of a single mining company is regrettable and concerning for those who wish for environmentally sustainable development in PNG.

The amendments are not as far-reaching or detrimental in their effect as has been widely reported.[25] The amendments have been widely misunderstood to apply to all environmental permits, including those issued recently and those yet to be issued. This confusion is shared not only by the public and the media but also by those responsible for its passage. The following is a quote from the amendments' Explanatory Notes, referring to the impact of the Ramu NiCo litigation: 'All major mining and petroleum projects are particularly at risk whether they are already operating, in construction or proposed.'[26] This indicates that the officer drafting the Explanatory Notes believed the amendments would apply to all existing and future permits granted under the *Environment Act* (2000). If that were in fact the situation, then the amendments would indeed severely undermine the Act rendering PNG's environmental impact assessment procedures farcical.

Concern and confusion over the impact of the amendments resulted in public and media outrage in PNG, including street demonstrations and severe criticism of the government from many quarters. This criticism and disquiet was fuelled by the circumstances surrounding the passage of the amendments - a rushed process on a single Friday afternoon wherein normal parliamentary timetables for debate and review were suspended. In response to the public concern, the PNG Government not only failed to properly explain the amendments, but in fact actively sought to

[25] See for example: R. Callick, 'PNG Law to Shield Resource Giants from Litigation' *The Australian*, 2 June 2010 (available at http://www.theaustralian.com.au/business/png-law-to-shield-resource-giants-from-litigation/story-e6frg8zx-1225874201579); and Ramu Nickel Mine Watch, *Environment Act Changes have Destabilised* (available at http://ramumine.wordpress.com/2010/10/31/environment-act-changes-have-destabilised-png/).

[26] Supra note 23.

suppress public discussion of it by claiming that it was *sub judice* and thus could not be discussed in public. This attempt to suppress public debate over a recently enacted law was an absurd and acutely counterproductive response. It is not surprising that the amendments are the subject of a constitutional challenge that will be heard by the Supreme Court in 2011.[27]

PNG needs to balance the often conflicting priorities of economic development of natural resources and the need to protect its natural environment from pollution from mining. Importantly, where mines are allowed to proceed there is also a need to maximize the economic returns of these developments for the benefit of Papua New Guineans. Given this, there are also serious questions being asked regarding why the PNG Government has entered into an agreement that both exempts Ramu NiCo from taxation on its revenue for the first 10 years of operation and allows transfer pricing to occur in relation to its exported product.[28] These issues are equally concerning as those relating to the potential impacts of the DSTP on the marine environment.

The case against the Ramu NiCo DSTP will be heard in full in the PNG National Court in February 2011 but the decision is likely to be appealed, particularly if it is adverse to the interests of Ramu NiCo. This is merely the first installment of another chapter in PNG's long and complex story of its struggles towards sustainable development.

[27] Attorney-General's Order, available at http://ramumine.files.wordpress.com/2010/06/ministers-edict.pdf.

[28] See Advertisement in *PNG Post Courier* by Belden Namah MP, 11 October 2010, at 41 (available at http://ramumine.files.wordpress.com/2010/10/belden-statm-pc1.jpg). Also E. Narokobi, *The Pato that Laid the Golden Eggs* (available at http://masalai.wordpress.com/2010/10/28/the-pato-that-laid-the-golden-eggs/.)

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Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering In a Golden Era for Environmental Rights Protection

Gloria Estenzo Ramos*

Introduction

A study conducted by Kent Carpenter and 100 foremost marine experts points to Central Philippines as having the richest concentration of marine life on the entire plane[1]. In his 2010 Cebu presentation, 'Scientific Discovery and the Urgent Need for Conservation at the Philippine Epicenter of Marine Biodiversity', Carpenter described the Philippines as 'the global epicenter of marine biodiversity'.[2] He furthermore reiterated the urgent calls for conservation as the country is likewise a 'center of marine conservation adversity' with rapid biodiversity loss taking place due to sedimentation from deforestation and poor land use, coastal development, pollution and overfishing.[3]

International recognition of its megadiversity but severely threatened status, a pro-environment and pro-people Constitution, numerous environmental laws, the signatory of several international agreements, a dynamic civil society and the

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[1] Carpenter and Springer (2004).
[2] Shingila Mactan's Go Green Cebu Fair, October 9, 2010, Cebu, Philippines.
[3] Ibid.

globally-heralded *Oposa v. Factoran* case[4] (*Oposa* case) on the trust doctrine of intergenerational responsibility and another trail-blazing ruling in the form of *MMDA v. Concerned Residents of Manila Bay* case[5] (*MMDA* case), are no magic wands for stopping the wanton destruction and loss of the country's dwindling natural resources. Unsustainable programs and the absence of much-needed political will to implement the laws and protect human rights and the environment compound the enormous challenges facing the Philippines.

While acknowledging the sad state of the environment in the country's *Medium Term Development Plan* (2004-2010)[6], the former administration focused not on conservation and integrated ecosystem management. It instead prioritized extractive activities that further ravaged the already degraded life support system. Mining, offshore drilling and coal power plant operations were promoted even though less than six per cent of the country's original forest cover remains, 418 of the country's species appear in the *IUCN Red List of Threatened Species* (2000)[7] and its coral reefs are regarded as the most threatened in the world.[8] In the face of overwhelming scientific data evidencing the current environmental disaster in this climate hot spot, the extent of biodiversity loss was so alarming that some international experts proposed writing the Philippines off as a global biodiversity disaster area.[9]

Financial and cultural constraints in filing cases, the slow grind of the justice system, widespread poverty and the people's lack of knowledge of the laws and their rights are among the reasons why only a handful of constituents have claimed and asserted their rights to a healthy environment through environmental adjudication.

Amid the lethargy of institutions and inhabitants, the Philippine Supreme Court emerged as the staunchest ally and defender of the people's rights to life and a healthy environment. Its unwavering determination to perform its constitutionally mandated judicial[10] and rule-making powers[11] to protect human rights and the fragile

[4] G.R. No. 101083, 30 July 1993, 224 SCRA 792.
[5] GR No.171-947-48, 18 December 2008, 574 SCRA 661.
[6] Available at: http://www.neda.gov.ph/.
[7] *Philippine Biodiversity Conservation Priorities*, Final Report (2002).
[8] Roberts et al (2002); and Carpenter (supra note 1).
[9] Terborgh (1999) and Linden (1998) in *Philippine Biodiversity Conservation Priorities* (supra note 7).
[10] *Constitution*, Article VIII, section 1.
[11] *Constitution*, Art VIII, section 5 (5).

ecosystems were brought to light by the landmark *Oposa and MMDA cases,* among others. These efforts were further buttressed by ground-breaking initiatives undertaken by the Supreme Court under the leadership of then Chief Justice Reynato S. Puno (the 'Puno Court').

Innovative Sustainability Initiatives under the Puno Court

Chief Justice Puno, who retired in May 2010, left behind a sterling legacy in the advancement of human rights, participatory governance and environmental sustainability. These lie in stark contrast to the disheartening low prioritization afforded to the environment by the Executive Department, including the local government units and the Department of Environment and Natural Resources.

In a stunning departure of the long-held tradition for courts to await suits before jurisdiction is acquired and judicial pronouncements made, the Puno Court actively championed the right of the constituents to participate in the decision-making process[12] in fulfilling its mandate as the ultimate bulwark of democracy. The Puno Court became an active policy-maker in protecting human and environmental rights. It reached out to stakeholders, spear-heading the beginning of three unprecedented nationwide consultations dealing with the imperilled constitutionally protected rights, with unparalleled achievements.

In 2007, it organized a *Summit on Extra Legal Killings and Enforced Disappearances*. In the following year, it convened a *Forum on Increasing Access to Justice*. These meetings paved the way for the Puno Court to craft the rules for the issuance of the writs *of amparo* and *habeas data*, and to roll out the *Enhanced Justice on Wheels Programme*, among others.

In 2008, the Supreme Court designated 117 special courts to handle environmental cases (the "green courts"). This marked the beginning of the pioneering initiatives of the Puno Court in the journey towards attainment of environmental justice. Prior to the end of 2008, the Supreme Court, in the *MMDA* case compelled government agencies under a co-equal branch (the Executive Department), to clean up the historic but severely polluted Manila Bay. For the first time, the Supreme Court

[12] *Constitution*, Article XIII, section 16.

unleashed the tool called the *writ of continuing mandamus*, where respondent executive agencies were required to submit quarterly progress reports of compliance with the Court's order until judgment is fully satisfied. In its decision, the Court referred to rulings rendered by the Supreme Court of India and noted that 'In India, the doctrine of continuing mandamus was used to enforce directives of the court to clean up the length of the Ganges River from industrial and municipal pollution'.

In 2009, the Supreme Court led the way for another nationwide summit to consider specifically the barriers to and solutions for attaining environmental justice and hopefully reversing the worsening tide of ecological destruction. Simultaneously convened in Baguio City (Luzon), Iloilo City (Visayas) and Davao City (Mindanao), the *Forum on Environmental Justice* brought together key stakeholders with the objective of 'giving more meaning to our right to a healthful and balanced ecology'.[13] At this forum, a draft of the proposed *Procedural Rules for Environmental Cases* (the *Rules*) were circulated for comment by participants and stakeholders, which included the country's environmental law practitioners. These *Rules*[14], which integrate a rights-based approach to environmental justice, were adopted by the Supreme Court on 13 April 2010 and became effective 29 April 2010.

An Overview of the Procedural Rules for Environmental Cases (2010)

Objectives of the Rules

The objectives of the *Rules*, set out in Rule 1 (section 3), are:

> To protect and advance the constitutional right of the people to a balanced and healthful ecology;
>
> To provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements;
>
> To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and

[13] Speech of Chief Justice Puno, 'Environmental Justice: Establishing a Judicious Judicial Framework', 16 April 2009.

[14] Available at: http://sc.judiciary.gov.ph/Rules%20of%20Procedure%20for%20Environmental%20Cases.pdf.

To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.

Liberalized Locus Standi and Citizen's Suit

The *Oposa* case set the stage for liberalized standing to sue in environmental cases in Philippine jurisprudence, based on the principle of intergenerational responsibility. The ruling in this case is amplified by Rule 2 (section 5), which provides that 'any Filipino citizen, in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws'. The provision limits filing of suits to Filipino citizens and corporations, with out need to present proof of injury. Filing fees and other legal fees are deferred, which shall serve as first lien on the judgment award.[15]

Citizen suit provisions are found in two statutes, namely: the *Philippine Clean Air Act*[16] and the *Ecological Solid Waste Management Law*.[17] These are similar to the US environmental laws. The requirements relating to filing fees and/or the payment of a security bonds are dispensed with.

Under Rule 2 (section 4) and Rule 9 (section 1), citizens, foreigners, government officials mandated enforce environmental laws and juridical entities can file environmental cases, provided there is direct damage or prejudice from an act or omission of the defendant. 'A person suffering damage or injury arising from an environmental prejudice, which is also the same subject of a citizen suit', may choose to file a separate action under Rule 2 (section 4) for personal indemnification. Thus, 'a citizen suit can take place simultaneously with the filing of an individual complaint.[18]

[15] Rule 2 (section 12).
[16] Republic Act No. 8749.
[17] Republic Act No. 9003.
[18] Annotation on the Rules of Procedure for Environmental Cases, Supreme Court, April 2010.

Speedy Disposition of Cases

In civil cases, Rule 2 (section 3) requires the submission of all evidence supporting the case upon filing. In lieu of direct examination, the affidavit in question and answer form is provided for. Certain pleadings are prohibited to assure early resolution of the cases. Pre-trial is extensively used to simplify issues. Trials are shortened to one year, subject to extension upon prior approval of the Supreme Court (Rule 4 (section 5)).

In criminal cases, the same features are present. In addition, to avail bail, the innovative requirement is the defendant's undertaking authorizing the judge to enter a plea of not guilty. (Rule 14 (section 2). This guarantees that the criminal proceedings continue even if the defendant jumps bail.

Special Civil Actions

The writ of kalikasan (nature) and the writ of continuing mandamus are among the remedies granted to petitioners of environmental cases.

Writ of Kalikasan (nature) – If environmental damage is of such magnitude that 'prejudices the life, health or property of inhabitants in two or more cities or provinces', and if the petition is sufficient in form and substance, the writ is issued by either the Supreme Court or the Court of Appeals within three days of filing the application. Hearing of the matter is set within sixty days. There is no docket fee. The proceedings terminate within sixty days from submission of the original application (Rule 7).

Writ of Continuing Mandamus – Rule 8 integrates the ruling in the *MMDA* case into existing court rules on the issuance of the writ of mandamus. This writ may be used to compel the performance of a ministerial duty especially enjoined by law. The court retains jurisdiction after the judgment to ensure its implementation through submission of reports and other methods to monitor compliance with its ruling.

Consent Decrees

Rule 3 (section 5) of the *Rules* encourages parties to go through alternative dispute resolution and reach an amicable settlement through the issuance of a consent decree by the court. The content of a consent decree must comply with 'law, morals, public order and policy to protect the right of the people to a balanced and healthful ecology'.

Ancillary Remedies

An Environmental Protection Order is an order issued by the court directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve or rehabilitate the environment. The issuance of such an order is provided for in Rule 1 (section 4(d)).

Application of the Precautionary Principle

Rule 20 (section 1) provides that '(w)hen there is lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it'. The rule furthermore adds that '(t)he constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt'.

Anti-Strategic Lawsuit Against Public Participation (SLAPP) Proviso

Rule 6 provides that '(l)egal action to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights shall be treated as a SLAPP' suit. Hearing is summary in nature and if the court dismisses the action, it may award damages, attorney's fees and costs of suit under a counterclaim if one is filed (Rule 6 (section 4)).

A Critical Consideration of the Procedural Rules for Environmental Cases Rules

The *Rules* usher in a new era of human rights and environmental rights protection. Dormant substantive rights are actualized through providing citizens (including government agencies, corporations and non-government organizations) distinct procedural rights.

It is important to stress that the significant features contained in the *Rules*, as highlighted above, were inspired by the statutes and case law of foreign jurisdictions and the provisions of international instruments such as the *Rio Declaration*.

While it is still premature to make conclusions on the impact of the *Rules* on human and environmental rights protection and sustainability, citizens and environmental groups are bolstered by the swift response of the green courts in addressing recent critical environmental challenges. The leak of the gas pipeline that caused the evacuation of residents in a condominium in Makati City resulted in the first writ of kalikasan being issued by the Supreme Court.[19] A Mandaue City green court recently issued a temporary environmental protection order (TEPO) to stop the indiscriminate throwing of hazardous coal ash.[20] The TEPO was the first one to be issued in the Visayas and the second in the country. Amid wide media coverage, the green court judge and the parties actually visited the relevant dumpsites and the coal power plants.[21] The provisions relating to SLAPP suits contained in the *Rules* should ensure that the filing of such suits against environmental crusaders is no longer met with anxiety, sleepless nights and dread.[22]

The *Rules* have triggered a renewed sense of hope, especially on the part of the most vulnerable sectors, that the law can work in their favour after all. In the short time since the *Rules* came into force, there is a growing realization that the right to a healthy environment can now be effectively asserted and claimed even against

[19] See further: http://www.philstar.com/Article.aspx?articleId=631751&publicationSubCategoryId=63.
[20] See further: http://www.sunstar.com.ph/cebu/issuance-tepo-partial-victory-environmental-groups.
[21] See further: http://globalnation.inquirer.net/cebudailynews/news/view/20101118-303898/Coal-ash-dumping-sites-found-covered-with-soil; and http://www.sunstar.com.ph/cebu/local-news/green-groups-welcome-court-s-inspection.
[22] See further: http://www.sunstar.com.ph/cebu/local-news/power-firm-seeks-p2m-damages.

influential stakeholders, through environmental suits. The *Rules* have become the State's response to Principle 10 of the *Rio Declaration*, to the effect that 'effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. It is not wishful thinking to state at this stage that perhaps, in the future, the trust in the efficacy of the law, institutions and legal processes will be restored. These are essential prerequisites for the rights to life and a healthy environment to be protected.

During the formal launch of the *Rules* on 29 April 2010, Chief Justice Puno shared his observation that the *Rules* will open the floodgates for litigation cases. But, he added, that it is one instance when the suits are welcome since the issue involves the preservation of life.

The consistency with which the judges implement the *Rules*, the widespread dissemination of knowledge of the *Rules* and the citizens' trust in the legal processes prescribed by the *Rules*, will no doubt impact on their implementation. Their implementation will hopefully integrate a mindset of sustainability throughout all sectors of Philippine society. Future development will probably include a growing public demand to attain good governance and for public officers and employees to fulfil their environmental protection mandates efficiently and effectively. The *Rules* might also pave the way for the business sector to realize that it is smart business practice to comply with environmental laws.

With more engaged stakeholders participating in governance, the day will hopefully come when the integration of human rights in all phases of the policy-making process becomes a reality. Such a step will help steer the country towards the path of sustainable development.

The adoption of the *Rules* is a significant feat not just of the Supreme Court, but also for the general crusade towards restoring an authentic rule of law throughout country. The words of the former UNEP Director, Klaus Toepfer, come to mind in this regard:

> 'We all have a duty to do whatever we can to restore respect for the rule of law, which is the foundation for a fair and sustainable society… Sustainable development cannot

be achieved unless laws governing society, the economy, and our relationship with the Earth connect with our deepest values and are put into practice internationally and domestically. Law must be enforced and complied with by all of society, and all of society must share this obligation.'

Identification of Possible New Research Agenda for the IUCNAEL

The objectives of the *Rules* can only be achieved with the indispensable partnership of and collaboration among local, national and global stakeholders, including the members of the IUCNAEL. Aside from the exchange of information, the expertise of the IUCNAEL's member institutions and environmental law scholars can be of tremendous help in building the capacity of Philippine administrators, lawyers and communities to make the *Rules* an effective means to promote human rights, good governance and in restoring the ecological integrity of the unique but global biodiversity hotspot called the Philippines.

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Country Report: Russia

Irina Krasnova*

Introduction

Three significant developments took place in Russia in 2010. First, the summer forest fires of 2010 triggered reform to Russia's forestry legislation and institutional arrangements. Secondly, the State Duma reviewed the draft *Federal Law on Handling of Radioactive Waste*. Thirdly, in May 2010, the State Council had a meeting on ecology and discussed the development of further environmental legislation and implementation measures.

Reform to Russia's Forestry Legislation

The year 2010 will be remembered in Russia for its unprecedented summer heat and forest fires. Forest fires that occurred mainly in the European part of Russia have caused severe economic and ecological damage. Thousands of families lost their homes. Following the fires, the government has allocated significant financial relief to rehabilitate and reconstruct human settlements. Consolidated data on the damage is not available, but in the Urals District (one of 7 federal districts in Russia) the cost of the destruction is estimated to be in the region of 6 billion Rubles (US$200 million).

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This cost includes the loss of homes, forest resources and fire fighting expenses.[1] The forest fires in this district covered an area of 360 thousand hectares.[2] In Briansk Oblast, an area that was damaged by radioactive pollution in 1986 by the Chernobyl accident, the forest fires threatened to cause secondary radioactive pollution. The forest fires also threatened the nuclear center in Sarov. The fires also destroyed 2,5 hectares of forests in the famous Oksky State Nature Biosphere Reserves, famous for its breeding of the Red Data Book European Bison.[3] Several reasons have been put forward for the extensive damage caused by the forest fires, including: insufficient budgets allocated to regional and local governments for forest management; the wrong use of earmarked funds; outdated technical forest fighting appliances; poor structural arrangements and poor compliance discipline; the lack of preparedness of responsible administrative institutions; and deficient of forest legislation.[4] In addition, severe forest fires in central Russia are also caused by abandoned peat bogs that appeared in the Soviet era as a result of the drainage of wetlands.

The 2010 forest fires triggered wide discussion about the need to amend the relevant legislation and institutional structures. According to the Federal Agency for Forestry, the *Civil Code* will be amended to impose liability on landowners who cause forest fires. Furthermore, it has proposed amending the *Criminal and Administrative Codes* to provide stronger liability measures for the destruction of forests and non-compliance with forest fire protection requirements. The head of the Agency also suggested that the Ministry for Emergencies (responsible for forest fire fighting since 2002) improves their coordination and strengthens control over due compliance with injunction orders.[5]

According to the views of experts from the Institute of Forest Management, situated within the Russian Academy of Sciences, the fundamental reasons for the 2010 forest fire disaster lies in the administrative reforms undertaken in 2000, when the Federal Agency for Forest Management (FAFM) was stripped of almost all powers and responsibilities relating to forest management, and more than 80 thousand

[1] See further: http://www.rg.ru/2010/10/28/reg-ural/pogary/html.
[2] Ibid.
[3] See further: http://www.fire.nad.ru/fire_2.htm.
[4] See further: http:/www.rg.ru/2010/09/13/stepashin.html.
[5] See further: http://www.fire.nad.ru/2008/12_05_08_pzhr.htm.

foresters were dismissed.[6] Under the *Forest Code* (2006), the functions of fire prevention and forest management were delegated to the Federal Regions. The Federal Regions were in turn required to allocate funds to employ commercial organizations to fulfill these fire and forest management functions when required. As a result, the Federal Regions implemented the *Forest Code* in an ad hoc manner, and the previous unified system of fire prevention and control was destroyed. Within recent years, the forests have been degraded. The lack of monitoring has caused a rise in violations of forest use and protection requirements. Officials, experts and the public currently speak about the need to reinstate the former centralised system of forest management and to amend the *Forest Code* accordingly.

As an urgent institutional measure, the FAFM has been moved from falling under the Ministry of Agriculture, to under the direct control of the Government of Russia, by means of a Presidential Decree issued on 27 August 2010. The FAFM has been further charged with the task of developing state policy and legislation relevant to forestry (except for forests falling within specially protected areas) and enforcing such legislation. The new powers and functions of the FAFM are detailed in *Governmental Decree* No. 736, dated 23 September 2010. The decision seems to be a reasonable one as now one agency will be able to coordinate the preparation of strategic decisions, adoption of new legislation and the enforcement of such legislation. Prior to the above Decrees, these powers were distributed between the Ministry of Agriculture (rule-making), Federal Service for Phytosanitary Control (enforcement), and the FAFM (control over implementation by federal regions of the federal forest management powers). Notwithstanding these amendments, some functions like forest fire fighting and the allocation of forested lands for use still fall under the Ministry of Emergencies and Federal Agency for Administration of Public Lands respectively. The Federal Regions also still play the principle practical role in forest management. It would therefore appear that satisfactory coordination in the context of forest management and forest fire management is yet to be achieved.

[6] See further: http://www.fire.nad.ru/11_8_10_2_eksp.htm.

Handling of Radioactive Waste

In January 2010, the State Duma adopted in the second reading the draft *Federal Law on Handling of Radioactive Wastes*, originally prepared by the State Corporation Rosatom in 2008. The draft law aims to: strengthen the safety of radioactive wastes; address the issue of control over past stocks of radioactive wastes; and to establish rules for controlling every stage of movement of such waste, from their production through to their storage and burial. Provision is made for nominating the state corporation Rosatom as the principal management authority and owner of all storage facilities. It is also provided that the Government, upon submission of Rosatom, shall designate one operator that swill be empowered to accept and bury radioactive wastes.[7]

The draft law has provoked much public discussion. According to the experts, allowing the final burial of radioactive waste in subsoil may cause a dangerous long-term environmental degradation and pollution, associated with the potential penetration of especially liquid wastes into underground water systems. It should be also noted that article 48 of the *Federal Law 'On Environmental Protection'* prohibits the discharge and submersion of radioactive waste into water. Article 51 furthermore prohibits their burial in subsoil situated within water drainage areas. The adoption of the draft law will therefore require the amendment of these provisions, thereby introducing a more lax environmental regime for the disposal of radioactive waste. In addition, the draft law does not address the publicly sensitive and yet to be properly regulated issue of the importation of radioactive wastes, including spent radioactive fuel. Article 49 of the *Federal Law 'On Environmental Protection'* actually allows the importation of certain types of wastes for their temporary technological storage and treatment under the international agreements. This provision appears to contradict the above aspects of the same law that seek to prohibit such importation. As at the end of 2010, the draft law has passed two readings and the State Duma is currently reviewing the comments received during these readings.

[7] See further: www.pravo.ru/news/view/23220/.

Meeting on Ecology

On 27 May 2010, the State Council (an advisory body of the Russian President) had a meeting on ecology. The President, Minister of Natural Resources and Ecology and other state officials spoke at this meeting.[8] In his speech, the President outlined the principle challenges in this area and his views on how to improve both the legislative and institutional system. He proposed codifying environmental legislation, strengthening environmental limitations and standards, developing a mechanism of best available techniques, and reinstating ecological funds within the budget. The Ministry of Natural Resources is currently preparing several federal laws including legislation on environmental monitoring and enforcement, and the protection of the marine environment against oil pollution. It is furthermore considering introducing measures to encourage the proper handling of waste, and to improve of the administration of specially protected areas. The idea of codification that was officially initiated and supported by the Ministry is not unfortunately provided for in the recent plans. In 2006, under the aegis of the Ministry, a group of experts prepared and submitted to the Ministry a draft *Environmental Code*. Its further development has however been abandoned and removed from the political agenda. The draft *Environmental Code* provided for consolidated legal regulation of all environmental relationships, including natural resources use – an idea that is strongly opposed by the commercial lobbyists.

[8] See further: www.kremlin.ru/news/7980.

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Recent Developments in Environmental Law and Policy in Singapore

Lye Lin-Heng*

Introduction and Overview

Sited one degree north of the Equator, the tiny tropical Republic of Singapore is a city-state, with a land area of 710 square kilometres and a large population of five million people (a density of 7,000 persons per sq km). As land is scarce, land use planning is very comprehensive, with each plot of land zoned for a particular use.[1] The majority of its people live in high-rise apartments. Most apartments are built by the Government's public housing authority, the Housing Development Board (HDB), which houses 84 per cent of the population. These apartments are sold to citizens and permanent residents on 99 year leases[2] in one of the most successful public housing schemes worldwide. Singapore is also sited within the Malesian Region, which accounts for a rich diversity of flora and fauna. Although much of its natural environment was destroyed by the 1930s, the government which came to power in 1959 has taken firm steps to develop Singapore as a "City in a Garden". Strong

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[1] L.H Lye, 'Land Use Planning, Environmental Management and the Garden City as an Urban Development Approach in Singapore', in N. Chalifour, P. Kameri-Mbote, L.H Lye and J. Nolon (eds), *Land Use Law for Sustainable Development* (2007) Cambridge University Press, 374-396.

[2] See further: http://www.hdb.gov.sg/.

measures have been taken to enhance its greenery and enrich its biodiversity, including the passing of legislation. Singapore's air and water quality are well within World Health Organisation (WHO) standards.[3] All inland waters support aquatic life, the coastal waters meet recreational water standards, and the physical environment is one that is 'clean and green'.

A former Crown colony, Singapore inherited the common law as the base of its legal system. Thus, common law actions in tort such as claims in nuisance, negligence, trespass and the rule in *Rylands v Fletcher*[4] continue to apply; as well as the doctrine of *stare decisis.* An integrated system of environmental management is implemented by various agencies. The Ministry of Environment and Water Resources and its two statutory boards, the National Environment Agency (NEA) and the Public Utilities Board (PUB), take charge of pollution control and water resources respectively. In particular, the NEA enforces the *Environmental Protection and Management Act* (*EPMA*), the *Environmental Public Health Act* (*EPHA*) and the *Hazardous Waste (Control of Import, Export and Transit) Act* (which implements the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*) and their subsidiary laws.[5] PUB ensures an efficient, adequate and sustainable supply of water, and enforces the *Public Utilities Act* and its subsidiary laws including the *Public Utilities (Reservoirs and Catchment Areas) Regulations*. The Ministry of National Development plays a key role in Singapore's physical transformation and the conservation of its natural and man-made heritage. Its National Parks Board (NParks) manages four nature reserves, two national parks, 22 nature sites and over 320 public parks.[6] It is also responsible for implementing the *Convention on Biological Diversity*. NParks administers the *Parks and Trees Act* which protects animals and plants within the parks and areas under its purview. The Agri-Veterinary Authority (AVA) is responsible for ensuring food safety and supply,

[3] See further: National Environment Agency (NEA) *Annual Report 2008-09* (available at http://web1.env.gov.sg/cms/ar2009/content/nea-annual_report.pdf).
[4] (1868), L.R. 3 H.L. 330.
[5] A list of laws enforced by NEA is available at http://app2.nea.gov.sg/legislation.aspx. Electronic copies of the primary laws are available at http://statutes.agc.gov.sg/. Electronic copies of the subsidiary laws (rules, regulations, notifications etc) and soft laws (guidelines, codes of practice) can be found on the websites of the government authorities tasked with enforcing these laws (eg. www.nea.gov.sg (National Environment Agency); www.nparks.gov.sg (National Parks Board)). Electronic copies of all laws, cases and legal writings are also available at www.lawnet.com.sg.
[6] For further information on this authority, see: http://www.nparks.gov.sg/cms/.

safeguarding animal and plant health and protecting endangered wildlife.[7] It enforces the *Wild Animals and Birds Act*, *Animals and Birds Act*, *Fisheries Act*, *Control of Plants Act* and the *Endangered Species (Import and Export) Act* (which implements the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*). The Maritime and Port Authority[8] enforces the *Prevention of Pollution of the Sea Act*, *Merchant Shipping Oil Pollution (Civil Liability) Act* and the *Merchant Shipping (Civil Liability for Bunker Oil Pollution) Act*. The Energy Market Authority[9] manages the energy market in Singapore and advises the Government on national needs, policies and strategies relating to energy utilities.

This short report highlights recent developments in policies and laws that relate to the environment and incidents relating to the environment in 2010. There are no major decisions relating to the environment and only a few new laws have been passed.

Oil Pollution

Singapore is one of the world's busiest ports. On 25 May 2010, two vessels[10] collided, causing a 2,500 oil spill that polluted the waters of the east coast. While containment and cleanup operations were conducted by the NEA, NParks teamed up with biodiversity experts from the Tropical Marine Science Institute and the Raffles Museum of Biodiversity Research to monitor and manage the situation at ecologically sensitive locations such as Chek Jawa and Pulau Ubin, which are rich in marine life. The Animal Concerns Research & Education Society (ACRES) mounted daily operations along East Coast Park to rescue animals victimised by the oil spill.[11] By 4 June 2010, the NEA assured the public that the cleanup was a success and the beaches were re-opened. It is unclear what action has been taken against the two ships or their owners but Singapore is party to the *International Convention on Civil Liability for Bunker Oil Pollution Damage* (2001), *International Convention on Civil*

[7] For further information on this authority, see: http://www.ava.gov.sg.
[8] For further information on this authority, see: http://www,mpa.gov.sg.
[9] For further information on this authority, see: http://www.ema.gov.sg/. See further the *Energy Market Authority of Singapore Act*, 2001.
[10] The Malaysian-registered tanker MT Bunga Kelana suffered a gash on its port side after colliding before dawn with the MV Waily, a bulk carrier registered in St Vincent and the Grenadines.
[11] See further: http://theonlinecitizen.com/2010/05/singapore-coping-oil-spill/ and http://app2.nea.gov.sg/news_detail_2010.aspx?news_sid=20100604924460905755

Liability for Oil Pollution Damage (1992) and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (1992). In 1998, Singapore passed the *Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Act*[12] and in 2008 the *Merchant Shipping (Civil Liability and Compensation for Bunker Oil Pollution) Act*[13], which took effect from 21 November 2008.[14] Compulsory insurance against liability for bunker oil pollution is required for any ship having a gross tonnage of more than 1,000.

In 1991, Singapore passed the *Prevention of Pollution of the Sea Act* '… to give effect to the International *Convention for the Prevention of Pollution from Ships* 1973 as modified and added to by the Protocol of 1978, and to other international agreements relating to the prevention, reduction and control of pollution of the sea and pollution from ships...'. Many subsidiary laws have subsequently been passed under this Act. The latest of these is the *Prevention of Pollution of the Sea (Harmful Anti-Fouling Systems) Regulations*, passed in 2010, to implement the *Convention on the Control of Harmful Anti-fouling Systems on Ships* (*AFS Convention*).[15] Parties to the Convention are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships flying their flag, as well as ships not entitled to fly their flag but which operate under their authority and all ships that enter a port, shipyard or offshore terminal of a party. Thus, with effect from 31 March 2010, all ships (excluding fixed or floating platforms, floating storage units and floating production storage and off-shore loading units) in the Port of Singapore, including all harbour craft and pleasure craft, are prohibited from applying or using harmful anti-fouling systems (AFS) on their ships or craft. A ship to which the *AFS Convention* applies may be inspected by Port State Control officers for the purpose of determining whether the vessel is in compliance with the Convention.[16]

[12] Act 33 of 1998, Chapter 180 Rev. ed.
[13] Act 24 of 2008, Chapter 197A Rev. ed.
[14] For further information on this new law, see: http://www.mpa.gov.sg/sites/circulars_and_notices/pdfs/port_marine_circulars/pc08-21.pdf.
[15] S. 198/2010.
[16] Further information is available at http://www.mpa.gov.sg/sites/circulars_and_notices/pdfs/port_marine_circulars/pc10-04.pdf.

Water Quality at Beaches

The NEA had in August 2008 revised its guidelines for water quality for recreational use. The revised guidelines were developed based on the World Health Organisation's water quality guidelines for recreational use. These revised guidelines are based on the microbial indicator, Enterococcus*, which corresponds better with the health risks associated with the use of recreational beach water compared to the previous indicator, faecal coliform. Only beaches with not more than 5 per cent of the collected water samples having enterococcus counts of greater than 200 per 100 ml, and graded 'good' or 'very good', are suitable for whole–body water contact activities such as swimming, water-skiing, and wakeboarding (also known as primary contact activities). Beaches that have more than 5 per cent of the collected samples having enterococcus counts greater than 200 per 100 ml and graded 'Fair', 'Poor' or 'Very Poor' are not suitable for primary contact recreation. In 2008 and 2009, five out of six popular recreational beaches monitored by NEA met the 'good' or 'very good' standard. The NEA completed its survey of recreational beaches in September 2010. As in 2009, the Pasir Ris beach was found to be unfit for swimming. It was found that this beach's water quality is affected by various possible sources, including: minor leakage from older sewers; moored vessels; animals; and discharges from small-scale Sewage Treatment Plants that presently serve the more remote areas in Pasir Ris. The low water currents in the concave part of Pasir Ris beach are not effective in diluting and dispersing the discharges. To help improve the water quality at Pasir Ris beach, the PUB has an ongoing plan to extend the sewer network and phase out the 39 old sewage treatment plants by 2012. PUB also has an ongoing sewer rehabilitation programme for aging sewers in this area, under which 23km of sewers will be rehabilitated by 2011.[17]

Air Quality

The *ASEAN Agreement on Transboundary Haze Pollution* was signed by all 10 countries of ASEAN in 2002. However, Indonesia is yet to ratify this Agreement. Notwithstanding this omission, considerable progress has been made in

[17] See further: *NEA News Release* (dated 7 September 2010) 'Annual Assessment of Water Quality at Beaches' available at http://app2.nea.gov.sg/news_detail_2010.aspx?news_sid=20100907770799672002.

implementing the Agreement, including: establishing the ASEAN Transboundary Haze Pollution Control Fund; undertaking various activities under the ASEAN Peatland Management Strategy; conducting simulation exercises for monitoring, assessment and joint emergency response; implementing zero burning and controlled-burning practices; developing an online inventory of available fire fighting resources that could be made available in case of emergency; establishing the Panel of ASEAN Experts on Fire and Haze Assessment and Coordination for deployment during impending critical periods; and publishing the ASEAN Haze Action Online website (http://haze.asean.org) to facilitate information sharing and dissemination on fire and haze issues.

Sub-regional frameworks such as the Sub-Regional Ministerial Steering Committee on Transboundary Haze Pollution (comprising Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand) and the Mekong Technical Working Group (comprising Cambodia, Lao PDR, Myanmar, Thailand and Viet Nam) have added further impetus to tackling forest fires and smoke haze in their respective regions. Collaborative capacity building programmes among Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand have been implemented in fire-prone areas under the framework of *Indonesia's Comprehensive Plan of Action in Dealing with Transboundary Haze Pollution*. These specifically include Indonesia-Malaysia collaboration in Riau Province and Indonesia-Singapore collaboration in Muaro Jambi Regency, Jambi Province. A US$ 15 million regional peatland project, comprising a grant of US$ 4.3 million from the Global Environment Facility, is being implemented to undertake measures to prevent peatland fires, the major source of smoke haze in the region.

The 6th Meeting of the Conference of the Parties to the *ASEAN Agreement on Transboundary Haze Pollution*, and the12th Informal ASEAN Ministerial Meeting on the Environment took place in Bandar Seri Begawan, Brunei Darussalam on 13 October 2010. The Ministers reviewed on-going programmes on the environment to promote future regional cooperation on the environment. Soon thereafter, from 15 to 22 October 2010, air quality in Singapore was adversely impacted by smoke from burning of forests in Indonesia. On 21 October 2010, the Minister for Environment and Water Resources contacted his Indonesian counterpart, to register Singapore's concerns that the haze situation would further deteriorate if Indonesia does not put in place immediate and enhanced measures to curb the hotspot situation in Sumatra.

He urged Indonesia to allocate the necessary resources, and implement timely and effective measures, to solve the haze situation. Singapore again reiterated its offer to augment Indonesia's efforts to combat the haze problem, including helping to put out the fires in Sumatra.[18] Singapore has formed an Inter-Agency Haze Task Force (HTF) comprising representatives from various government agencies and chaired by the NEA. The HTF has drawn up a set of action plans to mitigate the impact of the haze in the event of a severe smoke haze episode. The HTF met to prepare for activation of the Haze Action Plan, which spells out the measures that each agency would take to minimize the impact of the haze on the public at different levels of the Pollution Standard Index (PSI). Fortunately, the haze situation improved.

Littering

Singapore is well known for its enforcement of strict anti-litter laws. Persons who litter may be fined up to SGD$5,000[19], although the usual composition fine for a first offender with a small piece of litter who pleads guilty is $200. Offenders may also be sentenced, under a Corrective Work Order (CWO), to clean up a public site under supervision.[20] Illegal dumping of waste from a vehicle entails a maximum fine of $100,000 and the vehicle used may be forfeited. Despite on-going campaigns to stamp out littering, it continues to be a concern. According to a recent survey, it was found that four in ten people are unlikely to bin their trash. Thus, it was announced that from 7 June 2010, NEA will increase patrols at littering hotspots from one day per week to two days per week; and stricter sentencing guidelines were introduced. The fine for first offenders who plead guilty will be raised to $300, but for third and subsequent offenders, the maximum fine will be $5000. CWOs will be made more visible to the public by being conducted at busy public places, such as barbeque pits at East Coast Park, shopping areas, bus interchanges and HDB neighbourhood

[18] See further: *NEA News Release* (dated 21 October 2010) 'Urging Indonesia to act' available at http://app2.nea.gov.sg/news_detail_2010.aspx?news_sid=20101022475142591106.
[19] Sections 17 and 21, *Environmental Public Health Act*. The exchange rate as at 26 November 2010 was SGD$1.32 to USD$1.00.
[20] Section 21A, *Environmental Public Health Act*. See further: L. Lye 'A Fine City in a Garden - Environmental Law and Governance in Singapore' (2008) SJLS, 68-117.

centres. The maximum number of hours remains at 12 hours, and only a maximum of 3 hours can be imposed per day.[21]

Noise

Noise is a major concern in Singapore. In 2008 and 2009, NEA received about 14,000 and 12,000 complaints on construction noise respectively, up from about 9,000 in 2007 and 6,000 in 2006. On 8 March 2010, the Minister for the Environment stated that the Government's long-term goal is to prohibit construction work at sites within 150m of residential areas and noise sensitive developments on Sundays and Public Holidays. The changes will be implemented progressively to give the construction industry sufficient time to adjust. Sites starting work from 1 September 2010 will not be allowed to carry out construction activities from 10pm on the night before a Sunday or Public Holiday to 10am on the day itself. NEA will extend this prohibition to the rest of the day on Sundays and Public Holidays for sites starting work from 1 September 2011.[22] The NEA has also tightened the noise standards for new and in-use vehicles. The revised standards for new vehicles, which are based on those currently implemented in Japan and the EU, will take effect from 1 October this year.[23] Traffic noise comes under the purview of the Land Transport Authority (LTA), which conducts noise-impact assessments for road and MRT development projects as part of its evaluation of traffic projects. It has been announced that the NEA has put out a tender for a study on traffic noise which comprises the LTA, Urban Redevelopment Authority, Housing Board, National Parks Board and Singapore Mass Rapid Transit (SMRT).[24]

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[21] See further: *NEA News Release* (dated 6 June 2010) 'National Environment Agency Adopts A More Integrated Strategy To Curb Littering In Singapore' available at http://app2.nea.gov.sg/ news_detail_2010.aspx?news_sid=20100607732194423387.

[22] See further: http://www.938live.sg/News/Singapore/EDC100309-0000157/Govt_to_tighten_noise_limits_for_construction_sites/.

[23] *Environmental Protection and Management (Vehicular Emissions) Regulations*, amended S. 564/2010.

[24] See further: http://www.reach.gov.sg/YourSay/DiscussionForum/tabid/101/mode/1/Default.aspx?ssFormAction=%5B%5BssBlogThread_VIEW%5D%5D&tid=%5B%5B813%5D%5D.

Climate Change

Singapore' contribution to global emissions is miniscule, at less than 0.2 per cent. It is a party to the *UN Framework Convention on Climate Change*, and ratified the *Kyoto Protocol* in 2006. It is a member of the Group of 77 (G77) as well as the Alliance of Small States and is particularly concerned about global warming as it is a low-lying island and subject to several vulnerabilities associated with sea level rise.

Singapore is not an Annex I country and is therefore not required to make specific cuts in greenhouse gas emission levels. It has however declared that it will reduce its emissions by 16 per cent below Business as Usual (BAU) in 2020, contingent on a legally binding global agreement and all countries implementing their commitments in good faith. Its *National Climate Change Strategy*[25] was presented in 2008. A National Climate Change Secretariat (NCCS) was set up on 1 July 2010 under the Prime Minister's Office.[26] Senior Minister Prof S Jayakumar chairs the Inter-Ministerial Committee on Climate Change which comprise the Ministers for Finance, Trade and Industry, Foreign Affairs, Transport, National Development and Environment and Water Resources. The NCCS will support international negotiations and coordinate domestic mitigation and adaptation responses to climate change, coordinate climate policies across government agencies and ensure that plans are prepared and progress tracked and monitored.

Adaptation - The Government has commissioned studies to assess Singapore's vulnerability in regard to long-term physical impacts such as sea level rise, temperature profiles and wind. Studies are also being conducted on secondary impacts such as biodiversity, energy demand and public health. A study will also be done to map out those parts of Singapore's coastline that will be threatened by sea level rise – this will start in 2011 and end in December 2013.[27]

Mitigation - As Singapore has limited access to alternative energies, its approach to reduce emissions is primarily to improve energy efficiency in all sectors, as well as put in resources to test-bed alternative energy sources to facilitate easy and early

[25] See further: http://app.mewr.gov.sg/data/ImgUpd/NCCS_Full_Version.pdf.
[26] See further speech by Mr Tan Yong Soon (26 July 2010) available at http://www.thegovmonitor.com/ world_news/united_states/singapore-gets-serious-about-climate-change-36127.html/print/.
[27] 'Singapore to study threat of rising sea levels', *The Straits Times*, 30 November 2010.

implementation. The Economic Development Board (EDB)'s Clean Energy Programme Office has launched a Clean Energy Research and Test bedding Programme to support the test bedding of clean energy applications in government buildings. With the support of the Government, the Agency for Science, Technology and Research (A*STAR), National University of Singapore (NUS) and Nanyang Technological University (NTU) are currently engaged in several research projects working on developing alternative energies and other green technologies. Nuclear energy is also being considered.

The *Sustainable Singapore Blueprint* (SSB) was released in April 2009 by the Inter-Ministerial Committee on Sustainable Development.[28] It contains measures to reduce the island's energy intensity (per dollar GDP) by 20 per cent from 2005 levels by 2020 and by 35 per cent from 2005 levels by 2030. It sets targets for reducing energy intensity and emissions in four key sectors of the economy, namely: industry; transport; households; and buildings. It calls for long-term carbon emissions cuts in households, businesses and industries. $1 billion was committed over five years to improve the energy efficiency of the economy in these 4 sectors. These measures will help reduce carbon emissions by 7to 11 per cent from the business-as-usual (BAU) scenario by 2020.[29]

NEA chairs an Energy Efficiency Singapore Programme Office (E2PO) comprising members from the Energy Market Authority (EMA), Economic Development Board (EDB), Land Transport Authority (LTA), Building Control Authority (BCA) and the Agency for Science, Technology and Research (A*STAR). The E2PO has developed a national plan to promote energy efficiency, also known as *Energy Efficient Singapore* (*E2 Singapore*). NEA also set up the Energy Efficiency National Partnership (EENP) in April 2010, to engage industry. To support implementation of the *E2 Singapore*, a Sustainable Energy Fund (SEF) of S$50 million over 5 years has been established, administered by the E2PO. A portion of the SEF will be used to incentivise energy efficiency improvements in the different sectors such as industry and buildings. The SEF will also be used to fund energy efficiency studies to improve data availability across all sectors. Energy audits are encouraged and co-funded under the $10 million *Energy Efficiency Improvement Assistance Scheme* (*EASe*)

[28] See further: http://app.mewr.gov.sg/web/contents/ContentsSSS.aspx?ContId=1299.
[29] See further: 'The Economics of Climate Change' available at http://www.mof.gov.sg/budget_2010/ download/FY2010_Budget_Highlights_part4.pdf.

launched in 2005. Under *EASe*, funding of up to 50 per cent of the cost for energy audits, subject to a cap of $200,000, will be provided to any Singapore registered company with a building or manufacturing facility in Singapore. The recommended energy efficiency measures from the energy audits are projected to result in annual energy savings of $23.4 million, energy savings of 296,402 MWh and 150 kt of CO2 savings per year for the companies, if implemented.

New Laws - The *Environmental Protection and Management (Energy Conservation) Regulations*[30] came into effect on 1 January 2008, mandating energy labels for motor vehicles and certain electrical appliances (refrigerators, washing machines, clothes dryers). All energy inefficient appliances will be removed from the market by 2011. The Government has announced plans for an *Energy Conservation Act* to come into effect in 2013, to facilitate a coordinated approach to standards for energy efficiency and energy management for companies that consume large amounts of energy. The *Building Control (Environmental Sustainability) Regulations* (2008), which came into effect on 15 April 2008, require a minimum environmental sustainability standard that is equivalent to the Green Mark Certified Level for new buildings and existing buildings that undergo major retrofitting. The minimum environmental sustainability standard will be revised with effect from 1 Dec 2010.[31] The requirements on environmental sustainability of buildings will be integrated with the building plan process. The qualified person who submits the building plan and other appropriate practitioners will be responsible for assessing and scoring the building works under their charge using the criteria and scoring methodology spelled out in the *Code for Environmental Sustainability of Buildings* (2nd ed. August 2010). Higher emission standards will be imposed for taxis by 2014, and for buses, by 2020. Singapore is also doing separate studies on carbon pricing to ascertain whether to impose a carbon tax. From 2013, corporations that use more than 15GWh of energy a year will be required to appoint an energy manager report energy use and submit plans to NEA to improve energy efficiency.

[30] See further: http://app2.nea.gov.sg/data/cmsresource/20090316653072840750.pdf.
[31] See further: http://www.bca.gov.sg/EnvSusLegislation/Environmental_Sustainability_Legislation.html.

Biodiversity

Singapore ratified the *Convention on Biological Diversity* on 21 December 1995. As it is clear that more and more people will live in cities in the future, Singapore believes that cities have an important role in biodiversity conservation. In May 2008, at the 9th Meeting of the Conference of the Parties, Singapore proposed the establishment of an index to measure biodiversity in cities. In February 2009, the First Expert Workshop was convened in Singapore.[32] Seventeen technical experts, comprising representatives from the Global Partnership on Cities and Biodiversity worked on designing the *Cities Biodiversity Index* (*CBI*).[33] This *CBI* functions as a self-assessment tool for cities to benchmark their biodiversity conservation efforts. It comprises three components: (i) native biodiversity in the city; (ii) eco-system services provided by biodiversity in the city; and (iii) governance and management of biodiversity in the city. From March to September 2009, the Task Force on Cities and Biodiversity worked with Singapore to test the *CBI* in several cities,[34] resulting in the publication of the first version of the *User's Manual for the City Biodiversity Index.* A Second Expert Workshop was held in July, 2010, resulting in the publication of a revised version of the *User's Manual for the City Biodiversity Index.*[35]

On 31 October 2010, the *CBI* was formally endorsed by the Parties to the CBD at CBD COP-10 City Summit held in Nagoya, Japan.[36] Singapore has offered to host a Cities and Biodiversity Forum for Mayors during the next World Cities Summit to be held in mid-2012, as a preparatory meeting to CBD COP-11 in India in October 2012. At this Mayors Forum, cities can report on their progress in biodiversity conservation and the application of the *CBI*. The deliberations of the forum can then be reported to CBD COP-11. To enhance understanding of the *CBI*, the Centre for Urban Greenery and Ecology (CUGE), will be organising a new training and capacity building

[32] A full report of the First Expert Workshop is available on the CBD Website (http://www.cbd.int/doc/?meeting=EWDCBI-01) as UNEP/CBD/EW.DCBI/1/3.
[33] See further: *Singapore's 4th National Report to the CBD*, September 2010 (available at http://www.cbd.int/doc/world/sg/sg-nr-04-en.pdf).
[34] Some eight cities (Curitiba, Montreal, Nagoya, Singapore, Brussels, Paris, Edmonton and Joondalup) have agreed to test-bed the Singapore Index. The following ten other cities have indicated their interests to test-bed the index: Adelaide; Amsterdam; Cape Town; Gold Coast; Jerusalem; Melbourne; Oslo; Seattle; Taiwan City; and Vancouver.
[35] See further: http://www.cbd.int/authorities/gettinginvolved/cbi.shtml. On 27-29 April 2010, an ASEAN Workshop on the CBI was held in Singapore, organised by NParks' Centre for Urban Greenery and Ecology (CUGE) and the ASEAN Centre for Biodiversity (ACB).
[36] See further: http://www.thegovmonitor.com/world_news/asia/singapore-index-on-cities-biodiversity-formally-endorsed-in-nagoya-41761.html.

programme on urban biodiversity conservation in May 2011. Targeted at officials from cities and local authorities, participants will also learn about Singapore's experience and efforts in urban biodiversity conservation.

Conclusion

In conclusion, while most aspects of the environment are well regulated and enforced in Singapore, it is hoped that laws on recycling will soon be passed. Additional laws which are required include those mandating environmental impact assessments and those protecting marine biodiversity. Although there have been many domestic calls for their introduction, it does not appear that they will appear in the near horizon.

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Developments in South African Environmental Law during 2010: Focus on Two Decisions Relating to Mining

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Introduction

There are several noteworthy developments during 2010 in South African environmental law. Although there have been no new environmental Acts, there has been considerable legislative activity at the administrative rule-making (delegated legislation) level. This is important since many of the Acts are of a framework nature, leaving the detail to regulations. The most noteworthy regulations promulgated during the year are: the air quality emission standards in terms of the *National Environmental Management: Air Quality Act* (39 of 2004); draft norms and standards for hunting in terms of the *National Environmental Management: Biodiversity Act* (10 of 2004); the commencement of the licensing provisions in the *Air Quality Act* and the identification of polluting activities, together with publication of minimum emission standards for those activities; new EIA regulations and listing notices (listing those activities for which some form of assessment is required) and the environmental management framework regulations made in terms of the *National Environmental Management Act* (107 of 1998); and a set of regulations under the *National Water*

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Act (36 of 1998) for the establishment of a water resource classification system. At the policy level, South Africa has seen the publication of a draft *National Strategy for Sustainable Development*, and, just before the deadline for this piece, a *Green Paper on Climate Change*.

Notable new cases either reported or handed down during the year include: the case of *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government*[1] which concerned the validity of an environmental authorisation (based on an EIA process) for a development in Cape Town; and two cases dealing with the relationship between provincial land-use planning legislation and national minerals legislation: *Swartland Municipality v Louw NO and Others*[2] and *City of Cape Town v Maccsand (Pty) Ltd*.[3] The discussion in this report will focus on the latter two cases.

The Relationship Between Land-use Planning and Mining

Mining is probably the biggest area of environmental concern in South Africa right now. Many parts of the country, including productive agricultural land, protected areas and wetlands, are under threat of mining. In the province of Mpumalanga, for example, vast swathes of the province are under either prospecting or mining operations. Moreover, there are concerns that the amount of money set aside for rehabilitation post closure (as required by law) is, in most cases, inadequate. The importance of the funding of rehabilitation and the addressing of post-closure impacts is highlighted by the enormous problem of acid mine drainage, particularly on the reef (Gauteng province, including Johannesburg and its immediate surrounds), where there have already been decants. Research suggests that the centre of Johannesburg is under threat of decanting within a few years. The proliferation of mining seems to be happening hand in hand with significant 'black economic empowerment' deals and widespread suggestions of corruption. The latter seems to have been the reason for the decision of the Minister of Minerals in August of this year to declare a moratorium on the issue of any new mining rights (including

[1] Unreported Case No. 15974/07 (WC).
[2] Unreported Case No. 13703/9 (WC).
[3] Unreported Case No. 4217/2009 (WC).

prospecting rights). It is in this broad context that the two cases discussed below must be seen.

Before dealing with the judgments, it will be instructive to discuss, very briefly, the legislation governing the situation. In terms of the *Constitution of the Republic of South Africa* of 1996, mining and minerals is a 'functional area' of exclusive national legislative competence. Mineral rights are granted in terms of the *Minerals and Petroleum Resources Development Act* (28 of 2002) (*MPRDA*). This is national legislation governing the entire country. On the land-use planning side, the provinces have exclusive legislative competence in terms of the Constitution in the field of provincial planning. All provinces have town planning legislation pertaining to each province's area of jurisdiction. This legislation contains provision for town planning, which includes subdivision control and zoning regulation. Town planning schemes, which zone land into different land-use zones, are promulgated in terms of the provincial town planning laws and themselves have the force of law. 'Municipal planning', on the other hand, is a functional area of concurrent national and provincial legislative competence, regarded as a local government matter.

Judgment in the *Swartland Municipality* case was delivered on 21 December 2009 in the Western Cape High Court, per La Grange J. The central issue in this case was whether the issue of mining rights in terms of the *MPRDA* resulted in the owners of the land being exempt from applying for a change in land use in terms of the *Western Cape Land Use and Planning Ordinance* (15 of 1985) (*LUPO*). The applicant sought an interdict preventing the fifth respondent (Elsana Quarry (Pty) Ltd) from continuing mining activities on a farm within the applicant's jurisdiction that had not been properly rezoned from Agricultural I to Industrial III (which permits mining) in terms of the relevant town planning scheme under the *LUPO*. From the facts it appeared that Elsana had submitted a rezoning application, but had withdrawn this when advised (in effect) by the Department of Minerals that this was unnecessary, since (in the view of the Department of Minerals) the province's ability through *LUPO* to regulate mining as a land use is constitutionally impermissible.

Applicant's view was that *LUPO* was 'relevant law' applying to mining operations, which was thus required by the *MPRDA* to be observed (sections 23(6) and 25(2)(d) of the *MPRDA* subject the holder of a mining right to observe any 'relevant law'). The argument of the respondents was that the functional area of mining and minerals being an area of exclusive national competence, the *MPRDA*'s reference to 'relevant law' did not include *LUPO*, since *LUPO* is inconsistent with the *MPRDA* and *Constitution*. The Court decided that, in the light of the municipality's responsibilities in respect of municipal planning, and the fact that the *LUPO* was in existence at the time that the *MPRDA* was promulgated, that *LUPO* was a 'relevant law' as contemplated by the *MPRDA*.

The Court then turned to the question as to whether there was a conflict between the *MPRDA* and *LUPO*, requiring resolution in terms of section 146 of the *Constitution*. The Court considered that the planning role of the Municipality (as regulated by *LUPO*) is required by the *Constitution*, and hence there was no question of *LUPO* being unconstitutional. The Court also held that *LUPO* does not unlawfully intrude into the area of national competence – such as mining. Rezoning, according to the Court –

> 'can … not be regarded as a matter connected to the issuing of mineral rights to such an extent that it is also regulated thereby and in fact renders provincial and municipal planning legislation as provided for constitutionally, superfluous. The MPRDA is silent on the issue of rezoning. The MPRDA can therefore not be read as impliedly having repealed legislation with LUPO's character and aim'.[4]

The Court also indicated that –

> 'given the fact that the object and focus of the MPRDA and LUPO are not the same, as well as the fact that provincial and local spheres of government are given considerable constitutional latitude to regulate areas of interests, the impact of which

[4] At paragraph 38.

can only be locally determined, the MPRDA cannot be regarded as water-tight to the exclusion of relevant zoning legislation'.[5]

Consequently, the Court granted the interdict.

In the *Maccsand* case, the issue was similar to that in the *Swartland Municipality* case: whether the issue of mining rights in terms of the *MPRDA* resulted in the owners of the land being exempt from having to obtain authorization for the use of that land, primarily in terms of the *LUPO* and the *National Environmental Management Act* (*NEMA*). The applicant and fourth respondent (Minister of Local Government, Environmental Affairs and Development Planning, Western Cape) brought an interdict restraining the first respondent from commencing or carrying on mining activities on three erven (plots) in the Mitchell's Plain area (part of Cape Town's municipal jurisdiction) until such time as the respondent had obtained the necessary authorization under *LUPO* and *NEMA*. The first respondent had been granted mining rights in terms of the *MPRDA* by the second respondent (Minister of Minerals and Energy). Neither of the areas in which these mining operations were to take place was zoned for mining in terms of LUPO.

The essential thrust of the respondent's arguments was that the *MPRDA* 'trumps' other legislation and that a change in the zoning under *LUPO* was therefore not necessary. Were it to be otherwise, it was argued, then *LUPO* could essentially 'veto' mining where the mining rights had been granted. It was pointed out by counsel for the applicant that there were provisions for departure from the zoning scheme that could be exercised in relevant circumstances, which would remove (in effect) the alleged 'veto'.

Following consideration of the definition of 'municipal planning' given to the term by the Constitutional Court in *The City of Johannesburg Metropolitan Municipality v The Gauteng Development Tribunal*[6], the Court concluded that municipal planning

[5] At paragraph 41.

[6] [2010] ZACC 11.

includes the control and regulation of the use of land falling within a municipality's jurisdiction and national and provincial spheres of government cannot legislatively furnish themselves with the power to exercise executive municipal powers nor the right to administer municipal affairs.[7]

The Court also observed that section 25(2) of the *MPRDA* provides that the holder of a mining right must comply with the provisions of 'any other relevant law under terms and the conditions of the mining right'. Had parliament wanted the *MPRDA* to override any other law, the Court observed, it would have provided so explicitly. The Court consequently concluded that *LUPO* does apply in the circumstances of the case, observing that the finding does not preclude the possibility of an overlap between the powers of local and national government. Having so concluded, it fell to the Court to decide on whether mining qualifies as a 'land use' and thus fall within the applicant's planning powers. Respondent contended that mining was not provided for as a land use in *LUPO*. The court did not agree and held that mining was a land use for present purposes.

It was also contended (by the provincial environment department – fourth respondent) that the mining activities in question constituted activities requiring environmental authorizations in terms of section 24 (and the relevant regulations) of *NEMA*. The Court considered the provisions of *NEMA* in some detail but, perhaps most critically, highlighted section 24(8)(a) as providing that 'authorisations or permits obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act and any such other authorisations or permits may only be considered by the competent authority unless an authorisation has been granted in the manner contemplated in section 24L [which deals with alignment of authorization procedures]'. The Court concluded, importantly, that the requirement for environmental authorization under *NEMA* in respect of listed activities was not removed because the activity may now be regulated in terms of another law.

In the face of arguments that the *MPRDA* had now 'incorporated' *NEMA* (and that the necessary environmental considerations were taken into account in the *MPRDA* application process), the court reverted to sections 24(8) and 24L of *NEMA* to

[7] At page 17 of the judgment (no paragraph numbers appear in the judgment).

conclude that the *MPRDA* did not incorporate *NEMA* and that a *NEMA* authorisation was required irrespective of whether the activity was approved in terms of other legislation.

The Court concluded that the mining activities did fall within the list of identified activities under *NEMA* (and there seemed to be no argument on this score). Moreover, the Court observed that the terms of the respondent's permits under *MPRDA* provided explicitly that the holder of the rights was not exempted from compliance with other relevant legislation. Consequently, the Court found in favour of the applicant. The effect of the order of the Court (Davis J, Baartman J concurring) is that the respondent is interdicted from commencing or continuing with mining activities until such time as the necessary approval is obtained in terms of *LUPO* and *NEMA*.

In my view, both the *Swartland Municipality* and *Maccsand* cases are correct. The court in *Maccsand*, unfortunately, did not address head-on the contention that *LUPO* was in conflict with *MPRDA*. This contention is misguided, in my opinion, because, if the appropriate zoning is in place, then there is no conflict. As pointed out in the judgment, there are various mechanisms available, both in *LUPO* and *MPRDA*, to override zoning obstacles in cases where mining is of national importance. It would be a sad day, however, if a relatively minor sand winning operation (as in this case) were seen to be so important as to trump legitimate local planning powers.

The facts of both of these cases are indicative of an apparent trend in the Department of Mineral Resources to regard the *MPRDA* as trumping all other legislation – there is anecdotal evidence to suggest that applicants for mineral rights are being told by the Department that they do not require water use licences (all mining operations inevitably involving at least one of the water uses defined in the National Water Act as requiring such licences). These cases go some way to disabusing the department of that view, but there is much still to be done in this regard. It may well be that either or both of these cases will end up in the Supreme Court of Appeal before long.

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España: Country Report

Lucía Casado*

Introducción

La actividad normativa desarrollada por España en materia de protección del medio ambiente durante el período objeto de análisis se ha realizado fundamentalmente a través de normas reglamentarias. Únicamente ha visto la luz una norma de rango legal, si bien no se trata propiamente de la elaboración de una nueva ley, sino de la modificación de una ya existente. Nos referimos a la Ley 13/2010, de 5 de julio, por la que se modifica 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. Además de esta Ley, debe destacarse en este ámbito la jurisprudencia recaída recientemente en torno a las asignaciones individuales de derechos de emisión y los propios Planes nacionales de asignación. También se han aprobado en este período algunas normas reglamentarias de interés, de las que se da cuenta en esta crónica.

Novedades en el régimen de comercio de derechos de emisión de gases de efecto invernadero

La modificación 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

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El régimen de comercio de derechos de emisión de gases de efecto invernadero en España ha sido objeto de importantes modificaciones, a través de la Ley 13/2010, de 5 de julio, por la que se modifica la Ley 1/2005, de 9 de marzo, para perfeccionar y ampliar el régimen general de comercio de derechos de emisión e incluir la aviación en el mismo. La aprobación de esta Ley era del todo necesaria para adaptar la legislación española al nuevo marco jurídico comunitario en este ámbito. Efectivamente, la aprobación de dos Directivas que revisan la Directiva 2003/87/CE del Parlamento Europeo y del Consejo, de 13 de octubre de 2003 (las Directivas 2008/101/CE, de 19 de noviembre de 2008; y 2009/29/CE, de 23 de abril) exigía la modificación de la Ley 1/2005.

La Ley 13/2010 cuenta con un único artículo que, a través de diversos apartados, va modificando diversos preceptos de la Ley 1/2005, y se completa con una disposición transitoria, una disposición derogatoria y dos disposiciones finales. Sus disposiciones son de carácter marcadamente ambiental, tanto por su objetivo -contribuir a la reducción de las emisiones de efecto invernadero- como por su origen -los compromisos asumidos con arreglo al Protocolo de Kioto y las directivas comunitarias-. Por ello, buena parte de sus disposiciones se adoptan en el marco del artículo 149.1.23 de la Constitución (así, las relativas a las autorizaciones de emisión, las obligaciones de seguimiento de las emisiones, de remisión de información y verificación), sin perjuicio de que se invoque también el artículo 149.1.13, en materia de bases y coordinación de la planificación general de la actividad económica (para las modificaciones del mercado de derechos de derechos de emisión).

Son muchas las novedades que introduce esta Ley, aunque algunas de ellas no entrarán en vigor hasta el 1 de enero de 2012 o el 1 de enero de 2013, de acuerdo con la disposición final segunda. Dado el volumen de modificaciones incorporadas, sólo se destacan algunas de las más importantes. Entre ellas, en primer lugar, la inclusión del sector de la aviación en el régimen de comercio de derechos de emisión, lo que hace necesario introducir las correspondientes actualizaciones, modificaciones y adaptaciones en diferentes preceptos de la Ley 1/2005. Existen, además, otros cambios en cuanto al ámbito de aplicación, habida cuenta que se

incluyen sectores industriales nuevos en el anexo 1 y aparecen gases distintos del CO2.

En segundo lugar, la Ley introduce algunas novedades en el régimen de autorizaciones de emisión de gases de efectos invernadero, como son la necesidad de revisar las autorizaciones al menos cada cinco años y la integración del plan de seguimiento en la autorización y el establecimiento de obligaciones sobre el uso de sistemas automatizados y formatos de intercambio de datos.

En tercer lugar, a partir del 1 de enero de 2013, desaparece el Plan Nacional de asignación, que ha sido el elemento central en la asignación de derechos de emisión durante los dos primeros períodos de aplicación del régimen de comercio de derechos de emisión. A partir de esta fecha, se adopta un enfoque comunitario, tanto en lo que respecta a la determinación del volumen total de derechos de emisión, como en lo relativo a la metodología para asignar los derechos de emisión. De este modo, la cantidad de derechos de emisión se determina a escala comunitaria, correspondiendo el cálculo y publicación de dicha cantidad a la Comisión Europea, con arreglo a lo establecido en la Directiva 2009/29/CE. En este nuevo régimen, se prevén dos fórmulas básicas a través de las cuales se asignarán los derechos de emisión: la subasta de derechos de emisión, que adquiere un papel central como método de asignación, y la asignación gratuita transitoria.

En cuarto lugar, se introduce como novedad el concepto de período de comercio, que sustituye lo que en el régimen actual es el período de vigencia de un Plan nacional de asignación. Los derechos de emisión sólo son válidos para un período de comercio dado pero, una vez finalizado el período, los haberes de los titulares de cuenta deben intercambiarse por derechos correspondientes al siguiente período.

En quinto lugar, también hay cambios importantes en el funcionamiento del registro de derechos de emisión (a partir del 1 de enero de 2012 los derechos de emisión deben estar consignados en el registro comunitario único) y en el régimen sancionador (provienen fundamentalmente de la inclusión del sector de la aviación).

Por último, también se regulan todos los aspectos específicos del funcionamiento del régimen de comercio de derechos de emisión para la aviación que difieren del funcionamiento del régimen general.

Jurisprudencia recaída sobre asignación de derechos de emisión de gases de efecto invernadero

A nivel jurisprudencial, el régimen del comercio de derechos de emisión de gases de efecto invernadero ha dado lugar a numerosas sentencias durante el año 2010. En ellas, se ha analizado tanto la conformidad a derecho de determinadas asignaciones individuales de derechos de emisión realizadas en el marco de los diferentes Planes nacionales de asignación (entre otras, las Sentencias del Tribunal Supremo -Jurisdicción Contencioso-Administrativa- de 4 de mayo, de 11 de junio, de 9 de julio, de 14 de julio, de 28 de septiembre o de 8 de octubre) como de los propios Planes nacionales de asignación. De especial interés son las Sentencias del Tribunal Supremo de 4 de marzo y de 9 de marzo de 2010, que han declarado nulas de pleno derecho algunas determinaciones del Plan Nacional de Asignación de derechos de emisión de gases de efecto invernadero, 2008-2012. También es interesante la Sentencia del Tribunal Supremo de 25 de febrero de 2010, que precisa la naturaleza jurídica del Plan nacional de asignación de derechos de emisión (en este caso, para el período 2008-2012), determinando que "se trata de una disposición de carácter general", que "constituye un instrumento regulador y ordenador en esta materia, que no agota su eficacia en sí mismo, sino que se consolida mediante su aplicación sucesiva a una pluralidad indeterminada de situaciones. Constituye, por tanto, un complemento de la regulación que se inicia en el derecho comunitario y que desciende hasta la impugnada norma reglamentaria (...) completando el régimen jurídico general sobre el comercio de derechos de emisión de gases de efecto invernadero, en el que se determina el número total de derechos de emisión que se asignarán en cada período, así como el procedimiento aplicable para su asignación, erigiéndose en guía general de las aplicaciones posteriores, concretamente, de las concretas adjudicaciones de derechos de emisión que se realizan mediante resoluciones del Consejo de Ministros" (FJ 4).

Modificaciones normativas para la adaptación de diferentes reglamentos ambientales al nuevo régimen de libre acceso a las actividades de servicios

En este período, se ha aprobado el Real Decreto 367/2010, de 26 de marzo, que modifica diversos reglamentos del área de medio ambiente para su adaptación a la Ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio, y a la Ley 25/2009, de 22 de diciembre, de modificación de diversas leyes para su adaptación a la Ley anterior. Se continúa, de esta forma, el proceso de adaptación de la normativa ambiental española vigente a los principios de la Directiva de servicios, iniciado por la Ley 25/2009. A través de esta Ley, se modificaron, entre otras, 9 leyes del área ambiental, con el fin de adaptarlas a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio. Este proceso de adaptación, que no termina en las normas con rango de ley, continúa ahora con el Real Decreto 367/2010, que modifica 19 reglamentos ambientales (en materia de caza, pesca, montes, incendios forestales, aguas, costas, residuos...) para su adaptación al nuevo régimen de libre prestación de servicios.

Algunas novedades de tipo organizativo: la modificación de la estructura orgánica básica del Ministerio de Medio Ambiente, y Medio Rural y Marino

Desde el punto de vista organizativo, debe destacarse la modificación de la estructura orgánica básica del Ministerio de Medio Ambiente y Medio Rural y Marino, así como el cambio de la titular del Ministerio (Elena Espinosa ha sido sustituida por Rosa Aguilar).

Tras la reestructuración de departamentos ministeriales efectuada por el Real Decreto 1313/2010, de 20 de octubre, y tras la aprobación del Real Decreto 1366/2010, de 29 de octubre, por el que se aprueba la estructura orgánica básica de los departamentos ministeriales, se ha adoptado el Real Decreto 1443/2010, de 5 de noviembre, por el que se desarrolla la estructura orgánica básica del Ministerio de Medio Ambiente, y Medio Rural y Marino. Tras estas modificaciones normativas, a este Ministerio continúa correspondiendo la propuesta y ejecución de la política del Gobierno en materia de lucha contra el cambio climático; protección del patrimonio natural, de la biodiversidad y del mar; agua; desarrollo rural; recursos agrícolas,

ganaderos y pesqueros; y alimentación. No se ha visto, por tanto, alterada la configuración de las políticas propias del referido departamento ministerial tras esta reestructuración, que se mantiene en torno a dos Secretarías de Estado (la Secretaría de Estado de Cambio Climático y la Secretaría de Estado de Medio Rural y Agua) y, la Subsecretaría y la Secretaría General del Mar. Ello no obstante, como consecuencia del Real 1366/2010, de 29 de octubre, por el que se aprueba la estructura orgánica básica de los departamentos ministeriales, en aras de una mayor racionalización y equilibro interno se aborda una reordenación de las funciones y competencias entre órganos superiores y directivos.

El nuevo régimen de evaluación y gestión de los riesgos de inundación

A través del Real Decreto 903/2010, de 9 de julio, se ha incorporado al ordenamiento jurídico español la Directiva 2007/60/CE del Parlamento Europeo y del Consejo, de 23 de octubre de 2007, relativa a la evaluación y gestión de los riesgos de inundación, que introduce criterios para la gestión de este tipo de riesgos que deben ser aplicados por los países miembros de la Unión Europea. Se completa así el marco jurídico regulador español en esta materia.

El objeto de este Real Decreto es regular los procedimientos para realizar la evaluación preliminar del riesgo de inundación, los mapas de peligrosidad y riesgo y los planes de gestión de los riesgos de inundación en todo el territorio español. Esta regulación tiene, además, en su mayor parte, el carácter de legislación básica al dictarse al amparo de las competencias que corresponden al Estado en el artículo 149.1.13 y 23 de la Constitución para dictar las bases de la actividad económica y de protección del medio ambiente. Los principales objetivos son obtener un adecuado conocimiento y evaluación de los riesgos asociados a las inundaciones y lograr una actuación coordinada de todas las administraciones públicas y la sociedad para reducir las consecuencias negativas de las inundaciones. Se da cumplimiento, de este modo, al mandato de la Directiva de reducir las consecuencias negativas, asociadas a las inundaciones, para la salud humana, el medio ambiente, el patrimonio cultural, la actividad económica y las infraestructuras.

Con estos objetivos, se introducen una serie instrumentos para hacer efectiva la prevención y protección contra los riesgos de inundación que se concretan en la

evaluación preliminar del riesgo de inundación, los mapas de peligrosidad y de riesgo y los planes de gestión del riesgo de inundación. También se recogen algunas disposiciones complementarias de coordinación sectorial, participación pública y coordinación entre las distintas administraciones públicas, necesarias para alcanzar los objetivos propuestos.

Como se recoge en el Preámbulo, los beneficios de la aplicación de este Real Decreto derivarán de un doble efecto: “Por una parte la introducción de las nuevas herramientas de gestión agilizará la implantación de los mecanismos de protección de los cauces y de las zonas inundables, lo que redundará en evitar o disminuir los daños ambientales y sobre los bienes y personas que se protegen. Por otra parte, el conjunto de disposiciones introducidas en el Real Decreto permiten responder de modo más eficaz ante las fuertes presiones de ocupación que sufren las zonas limítrofes con los cauces, lo que redundará en una disminución de los daños derivados de las inundaciones por avenidas”.

Otras normas de interés

Además de la normativa destacada, se han aprobado en este período varias normas reglamentarias -Reales Decretos y Órdenes ministeriales-, tanto en materias ambientales como en sectores directa o indirectamente relacionados con el medio ambiente. Dado el objetivo de esta crónica no pueden enumerarse todas ellas, aunque sí destacamos algunas aprobadas en materia de aguas (el Real Decreto 1161/2010, de 17 de septiembre, que modifica de forma puntual el Real Decreto 907/2007, de 6 de julio, por el que se aprueba el Reglamento de la planificación hidrológica, con el fin de dar una solución transitoria a una problemática concreta planteada en el proceso de elaboración de los nuevos planes hidrológicos, como es la falta de la efectiva constitución de los Consejos del Agua de la demarcación, órganos colegiados, configurados como órganos de participación y planificación), protección sanitaria contra radiaciones ionizantes (Real Decreto 1439/2010, de 5 de noviembre, de modificación del Reglamento sobre protección sanitaria contra radiaciones ionizantes, aprobado por el Real Decreto 783/2001, de 6 de julio), residuos (Real Decreto 943/2010, de 23 de julio, por el que se modifica el Real Decreto 106/2008, de 1 de febrero, sobre pilas y acumuladores y la gestión

ambiental de sus residuos), sustancias y mezclas (Reales Decretos 717/2010, de 28 de mayo, por el que se modifican el Real Decreto 363/1995, de 10 de marzo, por el que se aprueba el Reglamento sobre clasificación, envasado y etiquetado de sustancias peligrosas y el Real Decreto 255/2003, por el que se aprueba el Reglamento sobre clasificación, envasado y etiquetado de preparados peligrosos; y 1436/2010, de 5 de noviembre, que incorpora al derecho español la Directiva 2008/112/CE del Parlamento Europeo y del Consejo, de 16 de diciembre), desarrollo sostenible en el medio rural (Real Decreto 752/2010, de 4 de junio, por el que se aprueba el primer Programa de desarrollo rural sostenible para el período 2010-2014, en aplicación de la Ley 45/2007, de 13 de diciembre, para el desarrollo sostenible en el medio rural) y protección civil (Real Decreto 1564/2010, de 19 de noviembre, por el que se aprueba la Directriz básica de planificación de protección civil ante el riesgo radiológico).

Por otra parte, desde una perspectiva internacional, debe destacarse la ratificación por España del Protocolo sobre evaluación ambiental estratégica al Convenio sobre la evaluación del impacto en el medio ambiente en un contexto transfronterizo, hecho en Kiev el 21 de mayo de 2003, mediante Instrumento de Ratificación de 24 de junio de 2009 (publicado en el BOE núm. 162, de 5 de julio). Este Protocolo ha entrado en vigor de forma general y para España el 11 de julio de 2010.

Consideraciones sobre la evolución reciente de la normativa ambiental

A la luz de la evolución de la normativa ambiental en el período objeto de análisis, queremos destacar dos aspectos significativos. Por una parte, los cambios normativos de mayor trascendencia, como son la modificación del régimen de comercio de derechos de emisión de gases de efecto invernadero, la aprobación de un nuevo régimen de evaluación y gestión de los riesgos de inundación o la modificación de multitud de normas ambientales para su adaptación al nuevo régimen de libre prestación de servicios, tienen su origen en el Derecho comunitario. Se pone de manifiesto, una vez más, cómo el Derecho ambiental español va, en buena medida, a remolque del derecho comunitario, uno de los principales motores de innovación para la legislación ambiental española.

Por otra, el amplio proceso de modificación normativa que se está dando en España, entre otros sectores, en el ambiental, para la adaptación del ordenamiento jurídico vigente a la Directiva 2006/123/CE del Parlamento Europeo y del Consejo, de 12 de diciembre de 2006, relativa a los servicios en el mercado interior, transpuesta al ordenamiento jurídico español, mediante las Leyes 17/2009, de 23 de noviembre, y 25/2009, de 22 de diciembre. En este contexto, debe destacarse la incidencia sobre el Derecho ambiental español del nuevo marco jurídico regulador de la libre prestación de servicios en el mercado interior. En primer lugar, debe tenerse presente la importancia de la protección del medio ambiente en este nuevo régimen, ya que -junto a otros ámbitos- se recoge como "razón imperiosa de interés general" que va a permitir aplicar, excepcionalmente, el régimen de autorización, o introducir limitaciones temporales y territoriales de los títulos de intervención (autorización, comunicación o declaración de responsable). En segundo lugar, no puede ocultarse el impacto de la nueva normativa reguladora de la prestación de servicios sobre la legislación sectorial ambiental. Buena prueba de ello son las modificaciones de varias Leyes sectoriales y reglamentos acometidas en los últimos meses y de las que se da cuenta tanto en esta crónica como en la del semestre anterior, aunque van a ser muchas más las legislaciones que van a requerir ser modificadas. En tercer lugar, además de los cambios radicales de carácter normativo, también van a darse en el ámbito del Derecho ambiental importantes cambios de carácter administrativo, en especial sobre los regímenes de intervención administrativa existentes hasta este momento sobre las actividades con incidencia ambiental. Por último, también deben tenerse en cuenta los grandes cambios organizativos que van a ser necesarios en la administración ambiental para hacer frente al nuevo papel de control que deberá acometer. El profundo cambio a que se somete el control preventivo de actividades hace necesario proceder, no sólo a la redefinición del régimen jurídico de intervención sobre las actividades, sino al refuerzo de los aparatos de control *a posteriori*. En definitiva, estamos ante un importante reto para el Derecho ambiental y la administración ambiental española en los próximos años.

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Country Report: Spain

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Introduction

During the period covered in this report, the norm-setting activity of Spain in the field of environmental protection has been primarily based on administrative regulations. Only one law has been adopted. Rather than enacting a new law, it amends an existing one. Namely, we are speaking about *Law 13/2010*, which modifies *Law 1/2005*. It establishes the legal scheme for greenhouse gas emission allowance trading. Moreover, new case law has been established with respect to individual allocations of allowances under the *National Allocation Plans*. Some interesting administrative regulations have also been adopted in this period and will be reviewed in this report.

Developments in the scheme for greenhouse gas emission allowance trading

Amendment to Law 1/2005 (Regulation of trade of greenhouse gas emission allowances)

The scheme for greenhouse gas emission allowance trading in Spain has undergone significant changes through *Law 13/2010*, which amends *Law 1/2005*, as it improves and extends the general trading scheme to include the aviation sector. The adoption

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of this law was necessary to adapt the Spanish legal order to EU legislation in this field. Indeed, the adoption of two directives revising *EU Directive 2003/87/EC*[1] called for the amendment of *Law 1/2005*.

Law 13/2010 has a single article that modifies several provisions of *Law 1/2005*. Furthermore, it contains a transitional provision, a repealing clause and two final provisions. Its provisions are of a markedly environmental character, both in their purpose (to contribute to the reduction of greenhouse gas emissions) and in their origin (the commitments undertaken under the *Kyoto Protocol* and the *EU Directives*). Therefore, many of its provisions have been adopted on the basis of article 149.1.23 of the *Constitution* (in particular, those relating to emission allowances, to emission monitoring, reporting and verification). However, article 149.1.13, relating to bases and coordination of the overall planning of economic activity (i.e. for the modifications of the allowances market) may also be invoked.

This law introduces many changes into law. However, according to the second final provision, some of them will not take effect until 1 January 2012 or 1 January 2013. Given the volume of the changes introduced, only some of the most important ones will be highlighted.

First of all, the inclusion of the aviation sector in the emissions trading scheme has made it necessary to introduce appropriate updates, modifications and adaptations to different provisions of the *Law 1/2005*. Nevertheless, there are also other changes regarding the scope of application, given the fact that new industrial sectors have been included in Annex 1 and greenhouse gases other than carbon dioxide have also been introduced.

Secondly, the law introduces changes to the licensing system of greenhouse gas emissions. These include the need to review the license at least every five years, the

[1] These were: *EU Directives 2008/101/EC* (dated 19 November 2008); and *EU Directive 2009/29/CE* (dated 23 April 2009).

integration of the monitoring plan in the permit and the establishment of obligations on the use of automated systems and data exchange formats.

Thirdly, as of 1 January 2013, the *National Allocation Plan*, which has been the central element in the allocation of allowances in the first two periods of implementation of the emissions trading scheme, will disappear. From this date onwards, a community approach is adopted, both as regards the determination of total allowances, and in relation to the methodology for allocating allowances. Thus, the amount of allowances will be determined at EU level. Under *Directive 2009/29/EC*, the European Commission holds the power to calculate and publish the amount. In this new scheme, two basic formulas are established through which the allowances are to be allocated: the auction of allowances, which takes a central role as a method of allocation; and the transitional free allocation.

Fourthly, it newly introduces the concept of trading period, which replaces the period of validity of the *National Allocation Plan* under the current scheme. Allowances are only valid for a given trading period, but once the period has expired, the assets of the account holders must be exchanged for rights corresponding to the next period.

Fifthly, there are also significant changes in the operation of the emission rights registry (as of 1 January 2012 the allowances must be recorded in the single EU registry) and the sanctions regime (derived mainly from the inclusion aviation sector).

Finally, it also regulates all the specific features of the operation of the emissions trading scheme for aviation that differ from the operation of the general scheme.

Case-law on the Allocation of Rights of Greenhouse Gas Emissions

The scheme for greenhouse gas emission allowance trading has led to numerous judicial decisions during 2010. These decisions dealt with the lawfulness of certain individual allocations of allowances made under the different national allocation plans (see for example the judgments of the administrative branch of the Supreme Court of

4 May, 11 June, 9 and 14 July, 28 September and 8 October), and that of the National Allocation Plans themselves. The Supreme Court's judgments of 4 and 9 March 2010 are particularly interesting, as they found some determinations under the *National Allocation Plan* (2008-2012) to be null and void. Its judgment of 25 February 2010 is also interesting, as it specified the legal status of the *National Allocation Plan* (2008-2012), stating that 'it is a general provision', which 'constitutes a regulatory instrument in this field, which does not exhaust its effectiveness in itself, but is consolidated by its successive application to an indeterminate plurality of situations. It is therefore a complement to the regulation that has its origin in EU law and descends to the contested regulatory standard (...) completing the general legal regime of trade in allowances of greenhouse gases emissions, in which the total number of allowances to be allocated in each period is established, together with the procedure applicable to their allocation, becoming forthwith a general guide for subsequent implementations, in particular, with respect to specific allocations of allowances to be made by decisions Council of Ministers' (at paragraph 4).

Regulatory Changes for the Adaptation of Different Environmental Regulations to the New Regime of Free Access to Service Activities

In this period, the *Royal Decree 367/2010* was adopted. It amends various environmental regulations in order to bring them in conformity with: *Law 17/2009*, on the free access to and exercise of service activities; and Law 25/2009, to adapt various pieces of legislation to the aforementioned law. In this way, the process of adaptation of the Spanish environmental regulations to the principles underlying the services directive, initiated by *Law 25/2009*, is carried on. This law introduced modifications, among others, into nine pieces of legislation concerning the field of environmental protection, in order to bring them in conformity with the *Law 17/2009* on free access to and exercise of service activities. This adjustment process, which does not only involve legal rules, continues now with the *Royal Decree 367/2010* that amends 19 environmental regulations (on hunting, fishing, forestry, forest fires, internal waters, costs, disposal of wastes, etc) to adapt them to the new regime of free provision of services.

Some Organizational Innovations: The Modification of the Basic Organic Structure of the Ministerio de Medio Ambiente, y Medio Rural y Marino

From the organizational standpoint, we should emphasize the modification of the basic organic structure of the Ministerio de Medio Ambiente, y Medio Rural y Marino, and the change of the head of the Ministry (Elena Espinosa has been replaced by Rosa Aguilar).

Following the restructuring of ministerial departments conducted by the *Royal Decree 1313/2010* and the adoption of *Royal Decree 1366/2010* that approves the basic organic structure of ministerial departments, the *Royal Decree 1443/2010* was eventually adopted on 5 November 2010. It establishes the new basic organic structure of the Ministry of Environment and Rural and Marine Affairs. Following these changes, the Ministry continues to be responsible for the proposal and implementation of government policy in areas such as the fight against climate change; protection of the natural heritage; biodiversity and the sea; water; rural development; agricultural, livestock and fishing resources; and nutrition. Hence, the configuration of the policies and areas of responsibility of the aforementioned ministerial department has not suffered any significant alteration. It remains structured around two State Secretariats (the Secretary of State for Climate Change and the Secretary of State for Rural Affairs and Water) and the Sub-secretariat and the General Secretariat of the Sea. Nevertheless, as a result of the *Royal Decree 1366/2010*, establishing the basic organic structure of ministerial departments, a reorganization of roles and responsibilities between senior and policy bodies has been set in place, in order to further streamline their operation and improve the internal balance.

The New Flood Risks Assessment and Management Regime

The *Royal Decree 903/2010* integrates *EU Directive 2007/60/EC*, on the assessment and management flood risks, into the Spanish legal order. It introduces criteria for the management of such risks, which are to be implemented by the Member States of

the European Union. In this way, the Spanish regulatory framework in this area is completed.

The purpose of this *Royal Decree* is to regulate the procedures for preliminary risk assessment of floods, to draw up flood risk and hazard maps, and to implement flood risk management plans throughout the Spanish territory. Most parts of this normative framework have the nature of basic legislation issued under the powers conferred upon the State, in articles 149.1.13 and 23 of the *Constitutio*n, to lay down the foundations of economic activity and environmental protection. The main objectives are to obtain adequate knowledge and assessment of flood risks and to achieve coordinated action from all public authorities and society, in order to reduce the negative consequences of floods. In this way, the mandate of the *Directive* to reduce the negative consequences associated with floods, to human health, environment, cultural heritage, economic activity and infrastructure is complied with.

With these objectives, a set of tools is introduced in order to make prevention and protection against flood hazards effective. These are the preliminary risk assessment of flood hazard, the flood hazard maps, and the flood risk management plans. It also includes some additional provisions regarding sectoral coordination, public participation and coordination between various public authorities, which are deemed to be necessary to achieve the envisaged objectives.

As stated in its preamble, the benefits of the implementation of this *Royal Decree* are twofold: ‘On one hand, the introduction of new management tools will contribute to streamline the implementation of mechanisms for the protection of riverbeds and floodplains, which will result in avoiding or reducing environmental damage and the damage on the protected people and properties. On the other hand, the set of provisions introduced by the Royal Decree allows to react more effectively to the strong pressure of occupation of the areas bordering the riverbeds, which will result in reduced damage from flooding’.

Other Rules of Interest

Besides the aforementioned normative developments, several administrative regulations (royal decrees and ministerial orders) have been adopted in this period, both in environmental matters and in areas directly or indirectly related to the environment. Due to the limited scope of this report, not all of them will be reviewed. They include the following:

- Water management - *Royal Decree 1161/2010* amends *Royal Decree 907/2007*, which approves the regulation of hydrological planning, in order to provide a temporary solution to a specific problem posed in the process of developing new management plans, such as the lack of effective constitution of the Water Councils.
- Health protection against ionizing radiation - *Royal Decree 1439/2010* amends the Regulation on health protection against ionizing radiation, approved by *Royal Decree* 783/2001.
- Waste - *Royal Decree* 943/2010 amends the *Royal Decree 106/2008*, which regulates batteries and accumulators and environmental management of wastes.
- Substances and mixtures - *Royal Decree 717/2010* amends the *Royal Decree 363/1995* (approving the Regulation on classification, packaging and labelling of dangerous substances); *Royal Decree 255/2003* (which approves the Regulation on classification, packaging and labelling of dangerous preparations; and *Royal Decree, 1436/2010* (which incorporates *Directive 2008/112/EC* into Spanish law).
- Sustainable development in rural areas - *Royal Decree 752/2010* approves the first *Sustainable Rural Development Programme* (2010-2014) pursuant to *Law 45/2007* (which provides sustainable development in rural areas).
- Civil protection - *Royal Decree 1564/2010* approves the basic guideline of civil protection planning at radiological risk.

Moreover, from an international perspective, Spain has ratified the *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact*

Assessment in a Transboundary Context (2003). This *Protocol* entered into force generally and for Spain on 11 July 2010.

Considerations of the Recent Developments

In the light of the developments in environmental regulation in the period under review, we would like to highlight two significant aspects. On one hand, the most significant regulatory changes, such as the reform of the greenhouse gas emissions trading scheme, the adoption of a new flood risk assessment and management regime and the adaptation of many environmental standards to the new regime on free provision of services, have their origin in EU law. It shows once again that EU law is one of the main drivers of innovation for Spanish environmental legislation.

In addition, the extensive process of regulatory change that is occurring in Spain, among other sectors, is the environmental adaptation of existing legislation with *EU Directive 2006/123/EC* on services in the domestic market. It was transposed into Spanish law by *Law 17/2009* and *Law 25/2009*. In this context, the impact that the new Spanish legal framework governing the freedom to provide services in the internal market has on environmental law has to be stressed. First, the importance of environmental protection in this new regime will be remarkable, as it is enshrined as an 'overriding reasons relating to the public interest' that will allow for derogations from the authorization system, or the adoption of temporary and territorial limitations of the securities of action (approval, communication or statement of responsibility). Secondly, the impact the new regulations governing the provision of services have on the various sets of sectoral environmental legislation cannot be overseen. This is illustrated by the amendments affected to various sectoral laws and regulations during recent months. Even further legislative amendments are needed to complete this process. Thirdly, in addition to these radical normative developments, major administrative changes will also occur in the field of environmental law, in particular with respect to the current administrative intervention schemes regulating activities with environmental impacts. Finally, it should also be noted that the newly assumed supervisory functions will also demand major organizational changes in the environmental administration. The profound changes to which preventive control of activities is subjected makes it necessary not only to redefine the legal regime

regulating the supervision of these activities, but also to significantly reinforce the apparatus for verification. Ultimately, the Spanish environmental law and administration is facing major challenges in the coming years.

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Country Report: United Kingdom

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Introduction

This Country Report on the United Kingdom focuses on three main issues. First, a report of the Aarhus Compliance Committee regarding the United Kingdom's alleged non-compliance with article 9 of the Convention. Secondly, the publication of the *White Paper on the Reform of the English Water and Sanitation Market*. Thirdly, the case of *Badger Trust v The Welsh Ministers* regarding halting badger culling in Wales. Each of these developments is considered in turn below.

Access to Environmental Justice: United Kingdom's Breach of Article 9 of the Aarhus Convention

Overview

On 18 September 2010, the Aarhus Convention Compliance Committee released its *Final Report*[1] regarding the United Kingdom's (UK) alleged non-compliance with the Convention. The findings focused on the judicial review procedures in England and

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[1] Aarhus Convention Compliance Committee, *Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication* ACCC/C/2008/3 *Concerning Compliance by the United Kingdom* (2010) (*Final Report*).

Wales and the ability of individuals and organisations to challenge environmental decision-making. The publication of the *Final Report* comes a little over a year after the release of the *Sullivan Report*,[2] which found that substantial reforms were required in England and Wales to ensure broad based access to environmental justice.[3]

Background of the Complaint

In December 2008, the complainants ClientEarth, the Marine Conservation Society and an individual Robert Lattimer submitted a communication to the Aarhus Convention Compliance Committee alleging that the UK was in non-compliance with the article 9 of the *Aarhus Convention*.[4] Specifically, the complainants argued that the judicial review procedures in England and Wales precluded their challenge of a licence allowing the disposal and protective capping of dredge materials from Port Tyne to an existing off shore disposal site. The complainants argued that in light of this failure, the UK was in breach of their obligations under article 9, paragraphs 2, 3, 4 and 5.[5] Article 9 creates a broad based right of access to environmental justice and enables individuals and Non-Government Organisations (NGOs) to challenge environmental decision making and alleged breaches of environmental legislation in circumstances where their rights have been impaired or they possess a 'sufficient interest' in the subject matter. The English Courts have held that an interest will be deemed sufficient in light of the seriousness of the alleged illegality and the strength of the case.[6]

Specifically, the complainants alleged that current legislation and procedures in England and Wales established barriers to accessing environmental justice as required by article 9 of the *Aarhus Convention*. It was asserted that in light of the

[2] Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (May 2008) (*Sullivan Report*).
[3] Ibid.
[4] *Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters* (1998) 38 *ILM* 517 (*Aarhus Convention*).
[5] Final Report (supra note 1) at 1-3.
[6] *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte World Development Movement* [1995] 1 All ER 611. See further: P. Birnie, I. Boyle and C. Redgwell, *International Environmental Law and the Environment* (2009) 3rd edn, OUP, at 293-294.

prohibitive cost and restrictive time limits of judicial review, the absence of individual rights of actions for breaches of environmental offence and the lack of substantive review procedures, the UK failed to comply with the obligations imposed by article 9.[7]

The submissions of the communicants raised a number of important issues regarding access to environmental justice, specifically with respect to England and Wales. Comparatively, the UK Courts are an expensive forum to challenge breaches of environmental legislation. It is estimated that a single hearing day can cost in excess of £100,000. It has been argued that this level of cost combined with the operation of the 'looser pays principle' presents a substantial challenge and deterrent for individuals and organisations wishing to challenge environmental decision making.[8] Moreover, public funds are rarely allocated to support environmental applicants. The Coalition for Access to Environmental Justice (CAJE) highlighted this point in their amicus brief arguing that under the current rules, organisations were precluded from receiving legal aid and that whilst it was technically available for individuals in public interest cases, it was rarely awarded. Consequently, individuals and organisations wishing to challenge environmental decision-making are generally required to fund their actions through private means. The CAJE also noted in their submissions that mechanisms such as conditional fee agreements and protective cost orders were of limited practical value in the area, given the lack of damages and the generally high level of caps that have been imposed.[9]

The Final Report

The Compliance Committee, in its *Final Report*, determined that the UK had failed to ensure that 'the costs for court procedures subject to article 9 [were] not prohibitively expensive' especially in light of the failure of either the legislature or the judiciary to take measures to address this concern.[10] The Committee held that this failure was specifically a breach of article 9(4) of the *Aarhus Convention*, which requires parties

[7] Final Report (supra note 1) at 3.
[8] A. Vaughn, 'High UK Legal Costs Deter Challenges to Environmental Damage, UN Warns' *The Guardian* (London, 27 August 2010) (available at http://www.guardian.co.uk/environment/2010/aug/27/legal-costs-environment-un).
[9] *Final Report* (supra note 1) at 6-14.
[10] *Final Report* (supra note 1) at 30.

to: 'provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.'[11]

The Committee also found that the failure of the UK Courts to provide defined timeframes for the filing of judicial review applications was another failure under article 9(4). Moreover, it held that this failure meant that the UK was also in breach of article 9(3), which requires member countries to ensure that its citizens have access to administrative and judicial procedures to challenge environmental decision-making. The Committee also determined that the Court system in England and Wales was as a whole in contravention of article 9(5) as it had failed to 'remove or reduce financial barriers to access to justice'.[12]

In light of these failures, the Committee recommended that the UK review its present cost structure for environmental litigation and undertake 'practical and legislative measures' to overcome the present barriers. In particular, these measures are to be designed to ensure the fair, equitable and affordable access to environmental justice and enable the creation of a 'clear and transparent' framework.[13]

The UK Government's Response

In response to the Committee's initial draft Report, the Department of Environment, Food and Rural Affairs (DEFRA) asserted that the Civil Procedure Rule Committee was already drafting rules regarding Protective Cost Orders (PCO), following the release of the Sullivan Report, and that it aims to implement these reforms by April 2011. It also asserted that these reforms would address some of the Committee's areas of concern. It specifically noted that:

> 'This codification will give added clarity and transparency to the law and the procedure for making an application for a PCO, thereby providing certainty for applicants at the outset of the proceedings that the costs they will face if their claim

[11] *Final Report* (supra note 1) at 30-31.
[12] *Final Report* (supra note 1) at 31-32.
[13] *Final Report* (supra note 1) at 31.

fails will not be prohibitively expensive and certainty as to the modest costs of applying for a PCO'.[14]

With respect to the Committees findings regarding the time allowed for filing judicial review applications, the Government asserted that the requirement to file applications 'promptly' was not in breach of articles 9(4) and 3(1). It also argued that this was not 'inherently' unfair and that in certain circumstances delay may have broader implications of unfairness. However, in spite of this statement, the Government has committed itself to giving further consideration to the starting point of application time limits.[15]

Importantly, three days prior to the release of the *Final Report*, DEFRA released its own report containing an outline of the measures the British Government had taken to implement the *Aarhus Convention*. The report was open for public comment until 17 November 2010.[16] Its findings will provide an interesting and hopefully formative point for future discussion.

Way Forward

Access to environmental justice is a central issue for the attainment of precautionary and sustainable decision-making. The report of the Aarhus Compliance Committee demonstrates that established and formalised legal structures may fail to enable the realisation of the rights the systems they seek to protect. It is clear, in light of the findings of the Committee that all jurisdictions must consider whether there are structural barriers to individuals or organisations seeking the judicial review of government decision-making. As will be demonstrated below in the example of the *Badger Trust v Welsh Ministers* case, these types of applications provide an important accountability mechanism for government and have the capacity to ensure compliance with environmental legislation. Compliance with article 9 therefore, must be viewed as a priority amongst Member States.

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[14] *UK Response to Draft Compliance Committee Findings in Cases 2008/27 and 2008/27*, dated 22 September 2010.
[15] Ibid.
[16] DEFRA, 'Views Sought on Public Access to Information on Environmental Decision Making' (available at http://ww2.defra.gov.uk/news/2010/10/15/aarhus-news/).

DEFRA White Paper on the English Water Market

Overview

In September 2010, DEFRA announced it would be releasing a *White Paper* in 2011 on the future regulation of the water industry in England.[17] The *White Paper* will focus on the future of the industry in terms of 'resource needs, charging and affordability'. It will specifically consider: water resource security; improving 'choice and competitive opportunities, driving innovation, improving consumer service, and value'; developing a modern 'regulatory' system designed to protect consumers and reduce regulatory burdens; ensuring 'fair and affordable water charges'; and 'incentivising water conservation'.[18]

England (and Wales) privatised their water supply in 1989. Since then, the private water suppliers have been regulated by the Water Services Regulation Authority (Ofwat) and a number of versions of the *Water Act*, the latest being the *Water Act* (2003). In conjunction with this *White Paper*, DEFRA is also conducting a review of the regulator, Ofwat, to assess its function and success in protecting water consumers within the market. DEFRA has indicated that these conclusion will be incorporated in the final *White Paper*.[19]

Background to the White Paper

In 2009, two reports were released on 'competition and innovation' in the water and sanitation services sectors of England and Wales. The *Independent Review of Competition and Innovation in Water Markets* (*Cave Report*), undertaken by Professor Michael Cave, surveyed the current levels of competition and innovation in the English and Welsh water markets. It proposed mechanisms through which to

[17] DEFRA, 'Water White Paper' (available at http://ww2.defra.gov.uk/environment/quality/water/whitepaper/).
[18] DEFRA, 'Future Water Policy "an issue that affects all of us", says Environment Minister' (available at http://ww2.defra.gov.uk/news/2010/09/09/future-water-policy/).
[19] (DEFRA, 'Ofwat Review will Consider Future Challenges Facing Industry' (available at http://ww2.defra.gov.uk/news/2010/08/26/ofwat-review/; and DEFRA, 'Water White Paper' (available at http://ww2.defra.gov.uk/environment/quality/ water/whitepaper/).

improve these levels, in light of the challenges posed by climate change and population growth. The *Cave Report* found that there was a need to adjust the current regulatory structures in order to increase innovation and market integration. It recommended the increased adoption of market mechanisms and the reform of current abstraction licensing and discharge consent regimes.[20] In Wales, an additional report was undertaken by Anna Walker entitled, *The Independent Review of Charging for Household Water and Sewerage Services* (*Walker Report*). The *Walker Report* examined the charging structure for water and sanitation services in Wales. It concluded that there was a need to reform the current pricing structure in order to ensure that the market had the adequate capacity to adapt to future needs, including climate change. The Report also noted the importance of adopting efficiency measures throughout the network and again the need to reform the current abstracting licensing and discharge consent regimes.[21] The DEFRA *White Paper* will form part of the coalition's commitment to implementing the *Cave Report* and the *Walker Report*, in as much as the Cave Report applies to the English water market.

Community Consultation and Future Outcomes

In terms of gauging the direction of the *White Paper*, DEFRA has released a community survey, which asks consumers four questions regarding their perspectives on 'possible reforms of the water industry'. The questions are broadly focused on the issues faced by individuals and the community by water supply, water conservation proposals, water payments and proposals for future government priorities.[22] Whilst these are clearly aimed at promoting diverse responses, it is also questionable whether these questions will prompt individual consumers and households to specify their concerns regarding their individual interaction with private water suppliers.

[20] M. Cave, *Independent Review of Competition and Innovation in Water Markets: Final Report* (April 2009), at 1-14.
[21] A. Walker, *The Independent Review of Charging for Household Water and Sewerage Services* (April 2009), at 1-18.
[22] DEFRA, 'Water White Paper Survey' (available at http://www.surveymonkey.com/s/Water-WP).

In terms of the future direction of the English water market, it is clear that this review forms part of the continuing reform of the privatised water market. The regulation the of private sector has heavily evolved over the past twenty years to increasingly include a greater consumer and environmental focus. The *Cave Report* contained a number of important challenges to the Government and clearly the success of the *White Paper* must be judged by its ability to address these recommendations. The water market of England and Wales provides an important lesson and source of comparative study for states embarking on, or who have already embarked on, the path of water privatisation. It is hoped that the *White Paper* provides both direction for reform within the English water market and direction to other nations within the privatised water community.

Badger Trust v The Welsh Ministers[23]

Overview

In June 2010, the Court of Appeal of England and Wales considered an application by the Badger Trust to halt a badger cull in Wales. The purpose of the cull was to decrease current badger populations in order to mange the threat posed by badgers infecting cattle herds with bovine turberculosis (TB). The cull was initiated by the Welsh parliament under the *Tuberculosis Eradication (Wales) Order* (2009) pursuant to the *Animal Health Act* (1981) and formed part of a broader strategy aimed at managing TB in Welsh cattle. Bovine tuberculosis arises from cattle being infected by M bovis, a virus carried by a number of species, including badgers. The proposed cull was supported by the findings of the *Intensive Action Pilot Area* (IAPA), a study based upon the North Pembrokeshire badger and cattle populations.[24]

TB infections in Welsh cattle are a serious problem, having been described by the Government's Chief Veterinary Officer as being 'out of control and unsustainable'.[25] Infected animals are able to pass the disease to other species, including humans, and therefore infected herds are required to be destroyed. It is estimated that over

[23] [2010] EWCA Civ 807 (*Badger Trust case*).
[24] *Badger Trust case* (supra note 19) at 11.
[25] *Badger Trust case* (supra note 19) at 12.

the past ten years, the Welsh Government has paid over £100 million in compensation to cattle farmers for the losses associated with Bovine TB.[26]

Protection of Badgers Act (1992)

The *Badger Trust case* concerned a 'non-selective' cull of badgers across Wales. The cull was however complicated by the status of badgers as a protected species. Section 1(1) of the *Protection of Badgers Act* (1992) provides that '[a] person is guilty of an offence if, except permitted by or under the Act, he willfully kills, injures or takes, or attempts to kill, injure or take, a badger'. Consequently, it was argued that the authorities were required to justify any action that may fall under the exception category of the Act.[27] The Badger Trust in their submissions acknowledged the need to cull badgers in certain circumstances. However, it argued that in this instance that the Order was not underpinned 'by robust and up to date scientific evidence' demonstrating that the cull would achieve the 'legitimate aim' of preventing bovine TB.[28]

The Cull and Application for Judicial Review

On 13 January 2009, the badger cull commenced over an area of 288 square kilometers focused but not contained to North Pembrokshire. The Badger Trust applied to the Queen's Bench Division of the Administrative Court, arguing that the *Tuberculosis Eradication (Wales) Order* (2009) was invalid under the *Animal Health Act.* The application was rejected at first instance and the Badger Trust appealed the matter to the Court of Appeal. The issue on appeal was whether the trial judge had erred in finding that a 'substantial reduction' under the *Animal Health Act* meant that it was 'more than merely minor or trivial' and whether discretion under the Act could be exercised without considering whether the incidence of disease reduction and the extent of the badger cull would achieve this outcome.[29] Also at issue was the validity

[26] See further: Welsh Assembly Government, 'Bovine TB' (available at http://wales.gov.uk/topics/environmentcountryside/ahw/disease/bovinetuberculosis/?lang=en; and *Tuberculosis Eradication (Wales) Order* (2009).
[27] *Badger Trust case* (supra note 19) at 26-28.
[28] *Badger Trust case* (supra note 19) at 21.
[29] *Badger Trust case* (supra note 19) at 23-24.

of the application of the order to the whole of Wales based on the findings of the *IAPA*.[30]

Court of Appeal

The Court of Appeal unanimously upheld the appeal. Lord Justice Pill held that the Assembly Government had erred making an order for the entirety of Wales based upon the findings of *IAPA*, noting that, 'It cannot be said that the incidence of bovine TB is evenly spread throughout Wales…Evidence which, in my view, would justify an order for the IAPA in North Pembrokeshire does not justify the Order made [covering] all of Wales'.[31] Consequently, Lord Justice Pill held that the *IAPA* only supported action in the area of the *IAPA*.[32] His Lordship allowed the appeal and quashed the order on this basis. Importantly, his Lordship also noted that despite the statements made by the Minister to the public during the proceedings, that it was not an option for the Welsh Assembly, in light of the Court's judgment, to 'immediately make a fresh order' solely for the *IAPA* area.[33]

The decision of Lady Justice Smith also held the order to be invalid. In her judgment, Lady Justice Smith questioned whether the proposed 9 per cent reduction in bovine TB, which was to be achieved by the cull, could be considered a 'substantial reduction' under section 21 of the *Animal Welfare Act*.[34] In consideration of this issue, Lady Justice Smith asserted that 'if Parliament had intended that a reduction of that order should suffice, it would have required only that the minister be satisfied that there would be a 'reduction' in the incidence of disease'; and that a 'reduction' would have implied that there must be something more than a trivial or insignificant effect'.[35] She further held that it was important to consider 'the nature and extent of killing a large number of badgers' and whether the benefits from the cull would override the

[30] *Badger Trust case* (supra note 19) at 69.
[31] Ibid.
[32] Ibid.
[33] *Badger Trust case* (supra note 19) at 72.
[34] *Badger Trust case* (supra note 19) at 80-84.
[35] *Badger Trust case* (supra note 19) at 84.

adverse effects. Consequently, Lady Justice Smith found that the Minister had failed to consider these concerns in its submissions.[36]

Judicial Review and Conservation

The *Badger Trust case* is an important decision for biodiversity conservation. The decision of the Court of Appeal demonstrates both the weight of species conservation legislation and the willingness of the courts to consider non-economic factors when determining the validity of Government action. It also highlights the need for government agencies to provide equal weight to both economic and environmental concerns in their decision-making processes. The case also demonstrates the importance of individuals and organisation being able to challenge environmental decision-making. Furthermore, in light of the above mentioned *Final Report* of the Aarhus Compliance Committee, it also highlights that the ability for all individuals and organisations to be able to seek environmental justice is a matter of continuing importance and concern.

[36] *Badger Trust case* (supra note 19) at 91-92.

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Country Report: United States

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Introduction

On 20 April 2010, BP's Deepwater Horizon drilling platform, located in the Gulf of Mexico, exploded, resulting in the loss of eleven lives and the largest oil spill in American history. This Country Report outlines the legal responses taken by the United States Government in response to the spill. This Report also summarizes the recent Supreme Court case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, decided in June 2010. The *Stop the Beach Renourishment* case addresses the Fifth Amendment Takings Clause of the *United States Constitution* with respect to the government's beach conservation efforts. The opinion addressed the prospect of a 'judicial taking' and represented a potentially significant shift in federal takings jurisprudence.

The Gulf Oil Spill Response

Deepwater drilling activities are regulated under the *National Environmental Policy Act*[1] (*NEPA*), the *Outer Continental Shelf Land Act*[2] (*OCSLA*) and the *Oil Pollution*

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1 42 U.S.C. § 4321 (1970).
2 43 U.S.C. § 1301 (1953).

Act[3] (*OPA*).[4] Despite these three acts, the Deepwater Horizon blowout and severity of the gulf oil spill were unanticipated by United States law.[5] Since the blowout, the executive and legislative branches have sought changes in drilling laws and regulations to improve governmental oversight, prevention and response.

Changes in Regulations

In response to the spill, President Obama asked Interior Secretary Salazar to prepare a review of the Deepwater Horizon blowout and to report on precautions and technologies that can be required to improve deepwater drilling. The Secretary's Report recommended a series of steps, including several that could and should be implemented immediately.[6] Measures suggested for immediate implementation included a moratorium on drilling on tracts falling under the jurisdiction of the *OCSLA*, as well as additional safety requirements regarding drilling technology, design, and emergency response procedures. These safety requirements focus on the ability of drills to stop leaks in the event of an emergency and mandate certification that the appropriate parts and systems are in functioning working order. These regulations were issued in the *Notice to Lessees to Impose a Moratorium on All Drilling*[7] and the *Notice to Lessees on Increased Safety Measures.*[8]

The Interior Department's response to the Gulf oil spill has been punctuated with litigation over administrative procedure. On 28 May 2010, the Mineral Management Services (MMS), an agency within the Interior Department, issued a six-month moratorium on offshore drilling operations on new and permitted deepwater wells.[9] Hornbeck Offshore Services sued the Department of Interior under 5 U.S.C. § 706, claiming the ban on drilling was arbitrary and capricious and therefore invalid under the *Administrative Procedure Act* (*APA*).[10] The court agreed, finding no logical reason for the moratorium's definition of 'deepwater well' or basis for banning all deepwater

[3] 33 U.S.C. § 1001 (1961).
[4] See generally: O. Houck, 'Worst Case and the Deepwater Horizon Blowout: There Ought to Be a Law' (2010) 40 *ELR* 11039.
[5] Ibid.
[6] *Drilling Safety Rule*, 75 Fed. Reg. 63346, 63346 (14 October 2010) (to be codified at 30 C.F.R. pt. 250.
[7] NTL No. 2010-N04 (30 May 2010).
[8] NTL No. 2010-N05 (8 June 2010).
[9] NTL No. 2010-N04 (30 May 2010).
[10] *Hornbeck Offshore Svc v. Salazar*, 696 F. Supp. 2d 627 (2010).

drilling. The court issued a preliminary injunction stopping the implementation of the moratorium.[11] Before the case could be fully resolved, the Department of Interior withdrew the moratorium.[12] Consequently, the Fifth Circuit, in an unpublished opinion, declared the issue moot.[13]

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), the federal agency that replaced the MMS within the Interior Department, issued a second moratorium via temporary suspension letters sent to each affected operator.[14] Additionally, the government issued a *Notice to Lessees* implementing ten new regulations.[15] These too were challenged under the *APA*.[16] On 12 October 2010, based on the BOEMRE report and the strengthened safety measures that had been implemented, Secretary Salazar determined that deepwater oil and gas drilling could resume.[17] Subsequently, the court held the legal challenge to the ban to be moot.[18] The regulations under the *Notice to Lessees* were also stricken down as contravening the *APA* because the Department of Interior failed to follow proper notice and comment procedures prior to adopting them.[19]

Five days before the *Ensco Offshore* case was decided, however, the Interior Department released its interim final regulation, which included virtually all of regulations from the *Safety NTL*, with the exception of the rules requiring one-time compliance.[20] The resultant *Drilling Safety Rule* also incorporated recommendations under the *Safety Measures Reports*.[21] Interior issued the regulations under the emergency rule-making process of the *APA*.[22] The *Drilling Safety Rule* took effect on

[11] Ibid.
[12] *Hornbeck Offshore Svc v. Salazar*, 2010 WL 3825385 (C.A.5 (La.)).
[13] Ibid.
[14] *Ensco Offshore Co.*, 2010 WL 4116892.
[15] NTL No. 2010-NO5 (8 June 2010).
[16] *Ensco Offshore Co*., 2010 WL 4116892.
[17] Press Release: 'Deepwater Drilling may Resume for Operators who Clear Higher Bar for Safety, Environmental Protection', 2010 WL 3973627 (D.O.I. 12 October 2010).
[18] *Ensco Offshore Co*., 2010 WL 4116892.
[19] Ibid.
[20] *Drilling Safety Rule*, 75 Fed. Reg. 63346 (14 October 2010) (to be codified at 30 C.F.R. pt. 250).
[21] NTL No. 2010-N05 (8 June 2010).
[22] Press Release: 'Salazar Announces Regulations to Strength Drilling Safety, Reduce Risk of Human Error on Offshore Oil and Gas Operations', 2010 WL 3799165 (D.O.I. 30 September 2010).

14 October 2010, but allows for comments until 13 December 2010.[23] It requires various certifications by registered professional engineers, third party certification firms, and operators. The certifications cover engineering and safety requirements, as well as the operator's knowledge of the requirements under 30 C.F.R. § 250 – *Oil and Gas and Sulphur Operations in the Outer Continental Shelf*.[24] The *Drilling Safety Rule* also specifies proper cementing, casing practices, and engineering systems to prevent blowouts. In addition, it strengthens oversight of the mechanisms designed to shut down the flow of oil and gas.[25] The *Rule* also mandates that personnel be trained in deepwater well control and associated duties, equipment, and techniques.[26]

Once an operator obtains BOEMRE approval, it may resume drilling. To gain approval, the operator must satisfy specified requirements of the *Drilling Safety Rule*.[27] BOEMRE also requires the CEOs of each drilling entity to certify compliance with the *Environmental NTL*, *Drilling Safety Rule*, and *Safety NTL* (incorporated in the *Drilling Safety Rule*). Companies must also achieve compliance with the *Safety and Environmental Management System Rule* (*SEMS Rule*). BOEMRE intends to inspect each operation for compliance before approving resumption of drilling.[28]

The *Environmental NTL* requires companies to submit blowout scenario plans and estimates on discharges in worst case discharge scenarios, descriptions of measures taken to prevent and reduce the likelihood of blowouts, and intervention plans for if a blowout occurs.[29] The companies must also describe the assumptions and calculations used to make the plans as well as their reasons for adopting them.[30]

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[23] *Drilling Safety Rule*, 75 Fed. Reg. at 63346.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] *Fact Sheet: Enhanced Requirements to Resume Deepwater Drilling Activities* (12 October 2010) available at http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile& PageID=64755.
[28] *Press Release*: 'Deepwater Drilling may Resume for Operators who Clear Higher Bar for Safety', 2010 WL 3973627 (D.O.I. 12 October 2010).
[29] NTL No. 2010-N06 (18 June 2010).
[30] Ibid.

The *SEMS Rule* is a final rule issued by BOEMRE on 15 October 2010.[31] The Rule mandates that companies implement a Safety and Environmental Management System (SEMS). Prior to the Deepwater Horizon Spill, SEMS was a voluntary program under the auspices of the *American Petroleum Institute's Recommended Practice 75*. From 1996-2009, approximately one half of drilling companies elected not to participate in SEMS.[32] Although never explicitly stated as such, the cost of a SEMS system ($1,670,000 per year for high activity operations) undoubtedly played a role in the low rate of participation.[33] The *SEMS Rule* calls for companies to identify and manage safety hazards and environmental impacts associated with deepwater well drilling.[34] Unlike the *Drilling Safety Rule*, however, the *SEMS Rule* was not issued under emergency rulemaking procedures, and did not become effective until 15 November 2010.

Restoration Task Force

On 5 October 2010, President Obama created a Gulf Coast Ecosystem Restoration Task Force whose mission is the restoration of the Gulf Coast ecosystem.[35] The President's plan is for the task force to consist of five state representatives appointed by the President, one senior official from each of the federal departments and agencies, and possibly representatives from affected Indian tribes to integrate public and private restoration efforts. To date, not all members of the Task Force have been named.[36] The President appointed Environmental Protection Agency Administrator Lisa Jackson to chair the Restoration Task Force.[37]

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[31] *SEMS Rule*, 75 Fed. Reg. 63610 (15 October 2010) (to be codified at 30 C.F.R. pt. 250).
[32] Ibid at 63640.
[33] Ibid.
[34] *Press Release*: 'Salazar Announces Regulations to Strength Drilling Safety', 2010 WL 3799165.
[35] Exec. Order No. 13554, 15 C.F.R. 190.30 (407-411) (2010).
[36] Administrator L. Jackson, Remarks at the Gulf Coast Ecosystem Restoration Task Force Meeting in Pensacola, Florida, As Prepared (8 November 2010), available at http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/9cb4d15823c2606b852577d500780898!OpenDocument. *Press Release*: 'President Obama Signs Executive Order Officially Forming Gulf Coast Ecosystem Restoration Task Force', 2010 WL 3885831 (E.P.A. 5 October 2010).
[37] Ibid.

Mabus Report

On 28 September 2010, Navy Secretary Ray Mabus submitted a long-term restoration proposal to President Obama.[38] The *Mabus Report* is 'an aggressive plan that includes a call for dedicated funds to support the gulf coast's environmental and economic recovery'.[39] It recommends that the civil penalties from responsible parties be used to foster long-term recovery and restoration efforts. The President has indicated that he will follow this recommendation.[40] Other recommendations include a media campaign (funded by responsible parties) to restore public confidence in the region's tourism and seafood industries, and continued aid to communities, including assisting affected people with the claims process.[41] Acknowledging a critical need for health and human services, the *Mabus Report* also recommends that Congress authorize a Gulf Coast Recovery Council to manage funds for restoration efforts and ensure representation from critical stakeholders.[42]

Congressional Policy Shift

Despite public outrage over the spill and the clear tie between fossil fuels and climate change, Congress remains unwilling to enact a comprehensive measure to cap greenhouse gas emissions. Instead, it has narrowed its focus from sweeping climate policy towards measures that tighten energy efficiency standards.[43]

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[38] *Press Release*: 'Obama Administration Moves Long-Term Gulf Plan Forward', 2010 WL 3885831 (E.P.A. 28 September 2010).
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid. See further: America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill, Restore The Gulf (2010) available at http://www.restorethegulf.gov/release/2010/09/28/ america%E2%80%99s-gulf-coast-long-term-recovery-plan-after-deepwater-horizon-oil-spill.
[43] C. Hulse and D. Herszenhorn, 'Democrats Call Off Climate Bill Effort', *N.Y. Times*, (22 July 2010) available at http://www.nytimes.com/2010/07/23/us/politics /23cong.html?_r=1&sq=climate% 20legislation%20&st=cse&scp=4&pagewanted=print.

Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection

In the *Stop the Beach Renourishment* case[44], the Supreme Court of the United States determined that a beach restoration project in Florida did not violate the Takings Clause of the *United States Constitution*. Under the *U.S. Constitution*, a government cannot take private property without just compensation.[45] Under Florida law, a littoral landowner gains title to lands added to his or her property if those lands are the result of accretion, the gradual loss of water or gradual addition of land. By contrast, new lands that result from avulsion, or sudden changes to landscape, belong to the state. By adding sand to eroded beaches in order to restore the beaches, the government prevented the future addition of land to the littoral landowners' property. Stop the Beach Renourishment, Inc. claimed the state's actions had unconstitutionally taken the landowner's rights to those future lands. The Court ruled that the restoration projects were avulsions, and the lands consequently belonged to the state of Florida. Since the water and the added beaches do not belong to the landowner, the landowners' property rights were not violated. Consequently, state and local governments can implement restoration and conservation measures without having to compensate landowners who may benefit from future environmental degradation.

In *Stop the Beach Renourishment* case*,* the Supreme Court also addressed the prospect of judicial takings. Justice Scalia (joined by three Justices) decided that a judicial taking exists when a court declares a once established property right no longer exists. Justice Breyer, joined by Justice Ginsburg, agreed with the plurality's conclusion that judicial takings could exist, but opined the Court should not have reached the issue in this case.[46] Justice Kennedy, joined by Justice Sotomayor, questioned whether a judicial taking could exist, noting that the Due Process Clause would prevent such a taking.[47] Justice Kennedy also maintained that a decision, which amounted to a judicial taking would be constitutional so long as the state

[44] *Stop the Beach Renourishment v. Fla. Dept. of Envtl. Prot.*, 130 S. Ct. 2592 (2010).
[45] U.S. Const. amen. V.
[46] *Stop the Beach Renourishment,* at 2618-19.
[47] Ibid*,* at 2614-15.

government pays the party.[48] All of the justices agreed that no judicial taking existed in this case.

Critical Considerations

Gulf Oil Spill Response

The resulting litigation from the Department of Interior's Notice to Lessees exemplifies the hurdles faced by the government when responding to national disasters. On the one hand, the *APA*'s arbitrary and capricious standard prevents irrational responses based on shock and fear. On the other hand, it can block necessary changes in regulation. Because both Interior Department's moratoriums were withdrawn during litigation, the issue of whether the bans were arbitrary and capricious was never fully decided. Consequently, the nature and extent of the limits on the government's response in the event of another oil spill or other environmental disaster remain unknown. More specifically, the decisions do not answer whether the newly revealed dangers associated with deepwater drilling provided the requisite support for a deepwater drilling ban.

The requirement that companies create a worst case scenario represents a significant change in drilling policy. In 1978, the Council on Environmental Quality (CEQ), which is part of the executive branch, replaced the requirement to provide 'worst case' scenarios with one requiring those that are 'reasonably foreseeable'.[49] This change resulted in a drastic under-estimation of the risks associated with deepwater drilling. Instead of focusing on what could happen, reports focused on the average prior spills.[50] This encouraged a climate of denial regarding the potential for a deepwater.[51] For example, emergency response systems for blow out prevention were only encouraged; they were not enforced or required.[52] By reinstating worst case scenarios requirements, the government can change the drilling culture's views on the risks of deepwater drilling.

[48] Ibid, at 2614.
[49] See Houck (supra note 4).
[50] Ibid.
[51] Ibid.
[52] Ibid.

Nevertheless, the government's response leaves several questions unresolved. It remains unclear what impact (if any) the gulf oil spill will have on federal climate and energy policies. Immediately after the spill, President Obama stated he was still in favor of expanding drilling – a stance originally taken to satisfy conservatives skeptical of climate change.[53] However, the two moratoriums indicate a possible federal policy change from supporting expansion to limiting the growth of the offshore oil industry.

Congressional response to the spill remains uncertain. During the November 2010 elections, Republicans took control of the House of Representatives and gained a number of seats in the Senate. With the House of Representatives and Senate under control of different parties, any legislation will be harder to pass. It is unknown whether Congress will authorize the Gulf Coast Recovery Council suggested by the *Mabus Report*, and if it does, what Congress will then authorize the Council to do.

Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection

The Supreme Court determined that Florida's actions do not constitute a taking. Subsequently, the state of New Jersey has relied on the *Stop the Beach Renourishment* case analysis to determine property rights after the occurrence of an avulsion.[54] The New Jersey's Supreme Court held that adjacent landowners did not acquire property rights to newly created beaches that are the result of federally-funded beach restoration projects. The *Stop the Beach Renourishment* case may provide encouragement for states to pursue ecosystem restoration projects by eliminating the need to compensate for future land claims. The case simultaneously limited and expanded Takings jurisprudence. The Supreme Court rejected applying Takings compensation for future land claims. But, although a majority did not adopt applying judicial takings analysis to the case, six Justices agreed that judicial takings may occur and require compensation, thus opening the door to a new and potentially powerful line of takings litigation.

[53] B. Walsh, '*Gulf Oil Spill: Could it Change Obama's Energy Policy?*', *Time* (4 May 2010) available at http://www.time.com/time/health/article/0,8599,1986843,00.html.
[54] *City of Long Branch v. Liu*, 203 N.J. 474 (2010).

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Book Review

Michael Faure, Han Lixin & Shan Hongjun (eds.) - *Maritime Pollution Liability and Policy: China, Europe and the US*

(Alphen aan den Rijn: Kluwer Law International, 2010)
(ISBN: 978-90-411-2869-0)

Review by Dr Richard Caddell*

Since the *Torrey Canyon* disaster in 1967 heralded the phenomenon of catastrophic oil spills from tankers, few maritime regions and trading routes have remained unaffected by such pollution. As the impact of tanker accidents has varied considerably from region to region, so too has the legislative response from major jurisdictions. The *Torrey Canyon* ushered in a new era of international regulation in the form of the International Convention on Civil Liability for Oil Pollution 1969/92 (CLC) and International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971/92 (Fund Convention), latterly bolstered by the 2003 Supplementary Protocol, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunker Convention) and, if it enters into force, the Hazardous and Noxious Substances Convention 1996 (HNS). However, the responses of key regions to the threat posed by marine pollution have raised interesting questions concerning the overall cohesion and effectiveness of the international liability regimes. In the USA, the infamous *Exxon Valdez* spill prompted the authorities to eschew international cooperation in favour of draconian Federal legislation in the form of the Oil Pollution Act 1990. In Europe, the damage wreaked by the *Erika* and *Prestige* spills and the subsequent political fall-out almost generated a break-away EU regime. Latterly, in China – a major maritime jurisdiction within

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which the spectre of marine pollution looms large – considerable questions remain concerning the implementation of key liability conventions. These controversial questions are the primary focus of this interesting and informative collection of papers, published to mark the centenary of Dalian Maritime University.

Maritime Pollution Liability and Policy comprises twenty-six substantive chapters, addressing a series of broad themes including general principles, the Bunker Convention, the role of criminal law, US and Chinese approaches and individual case studies. The book opens with the customary outline of the project by the editors, who observe that they will address elements of compensation, implementation, prevention and enforcement of pollution liability regimes. Chapter 2, by Wang Hui, provides a helpful outline of the major liability conventions and MARPOL, noting the truism that the high political visibility of oil spills has developed an expansive tapestry of legislation in a way that has not been replicated with less obvious pollutants. Chapter 3, by Eddy Sommers, moves to examine a key aspect of pollution prevention, namely the vexed issue of port access to vessels in distress – a key element in the *Prestige* spill. In a concise but insightful chapter, Sommers highlights the customary international law rules and argues that while a right of access is often assumed to exist, such a privilege is not legally enforceable and will require specific international and regional legislation to implement.

Chapters 4 and 5 then examine the question of compensation for damage to natural resources, demonstrating that such claims provide few easy answers. James Boyd examines damages for lost ecosystem benefits, noting that this remains an emerging head of compensation fraught with considerable practical difficulties even where the jurisdiction in question is sympathetic to such claims. Likewise, Proshanto Mukherjee evaluates the role of the public trust doctrine, calling for clearer international rules on claims of this nature. On an allied note, Bariş Soyer examines the reception of pure economic loss claims in the English courts and under the Fund Convention. In a concise evaluation of the case law, Soyer demonstrates that the Fund adopts a more generous approach to such claims, which is of considerable practical interest to many claimants reliant upon – but exercising no proprietary claim over – marine resources. Chapter 7, by Jason Scott Johnson, provides an outline of the polluter pays principle as applied to oil spills. In a very brief, but highly interesting, chapter Johnson provocatively argues that the *ex post facto* application of the principle might ultimately prove counter-productive to environmental protection objectives.

Chapters 8 and 9 address the Bunker Convention, opening with an account by Shan Hongjun of Chinese implementation of this regime. Shan observes that the Bunker Convention has filled some practical lacunae within the national system and argues that this provides a clear indication that China should also implement the Fund Convention and Supplementary Protocol. Subsequently Han Lixin and Wang Dapeng examine issues of insurance and limitation of liability within the Convention. Like Shan, they observe that national implementation in China has left a series of complexities in the operation of the law, the two chapters suggesting that a degree of practical modification will be required by the Chinese authorities to ensure the effective operation of the convention.

Chapters 10 to 14 consider the controversial matter of criminal liability for oil pollution incidents, an issue brought into sharp focus by the *Erika* and *Prestige* spills. In an interesting, well-written and comprehensive chapter, Michael Faure develops an economic analysis of criminal liability. Unlike the US position, the CLC has never operated on a punitive basis. Faure suggests that administrative fines and criminal sentences may have a deterrent role to play, but have had a limited effect to date – not least given that the penalties are often too low to realistically prevent environmental crimes. Liu Nengye and Frank Maes then consider criminal liability under EU and US law, noting that the *Erika* spill and subsequent legislation has made the EU a more proactive operator, while the US has long taken a strident line on emissions. An interesting overview ends with a call for China to adopt more rigorous administrative and criminal sanctions for such events. Chapter 12 sees Marc Huybrechts examine the compatibility of relevant EU rules with the UN Convention on the Law of the Sea 1982, with particular reference to the *Intertanko* litigation. In a nuanced and insightful chapter, Huybrechts notes with caution the implications of the controversial Directive 2005/35/EC and raises concerns over the potential treatment of seafarers. This broad concern is echoed by Jiang Yuechuan in an interesting chapter 13 on the Chinese position. The section closes with an informative overview of the Hong Kong position by Li Lianjun and Qin Mu.

Chapters 15 to 17 examine aspects of the US regime, opening with a helpful summary of the divergence of approaches between the OPA and CLC by Robert Force. In Chapter 16 Li Tiansheng and Han Lixin note a number of deficiencies in the Chinese system and argue that a US-style approach provides a useful source of

reference for future reforms. An interesting comparison of further aspects of pollution law between the US and China is contributed by Guo Ping, arguing strongly for a greater degree of integration between the myriad of Chinese pollution laws. Chapters 18 to 22 then expand these issues further by examining specific aspects of Chinese law. Song Ying provides an informative account of key environmental statutes in China, alongside a sobering analysis of their deficiencies. Chen Qi then outlines the application of the CLC, noting that definitional problems have strongly undermined the implementation of the Convention in Chinese waters and territories. Continuing this theme Zhang Liying examines the application of oil pollution laws, observing that inconsistencies in the approach of the courts have often served to weaken the overall compensation regime in China. In chapter 21 Chu Beiping and Zhang Jinlei outline the requirement for compulsory insurance on HNS cargoes, noting that for all its positive features, implementation has been bedevilled by drafting difficulties and administrative shortcomings. This useful and insightful section on Chinese practices closes with an excellent review by Sun Guang of evidential problems and judicial difficulties in compensation cases.

The book is brought to a close with a selection of useful case studies of compensation issues in major spills within the region. Hu James Zhengliang outlines the *Hebei Spirit* catastrophe in South Korea, a cautionary tale for jurisdictions considering the waiver of the Supplementary Fund, and calls on China to adopt a domestic compensation fund and improve emergency response procedures. This theme is continued by Li Zhinghua and Zhou Zhujun, who examine the *MSC Ilona* spill off the coast of Hing Kong, and also note these practical deficiencies in the system. Meanwhile, Wang Yuh-Ling examines the Taiwanese experience in the *Amorgos* incident, noting that Taiwan's precarious sovereignty status precludes access to international conventions and effective enforcement of judgments against foreign owners. A final chapter, ostensibly concerned with comparative conclusions, ends on a slightly disappointing note and largely reiterates the central arguments of each paper, calling for "further research".

Overall, *Maritime Pollution Liability and Policy* is an interesting and informative book, providing a number of practical insights into the difficulties experienced by China in implementing key international pollution treaties. The overarching picture is one of very cautious optimism, with promising developments often undermined by ineffective legislation and inadequate implementation by the national authorities.

Although the authors had intended to provide an overarching account of difficulties within the international regime, the final work is ultimately rather more focussed on China. Readers who are attracted to the book by its stated focus on US and EU approaches may be somewhat disappointed – EU concerns are relatively peripheral, while the US is used essentially as a basis for comparison to the Chinese initiatives. Nevertheless, given the voluminous literature already available on the Conventions and US/EU approaches, the Chinese focus is a welcome development. There are a number of excellent contributions and the book will serve as a valuable introductory text to key elements of Chinese practice, which is otherwise much neglected in the current scholarship. The nature of the subject matter means that those reading from cover to cover will encounter multiple explanations of the CLC and other Conventions in the chapters; otherwise, this is a helpful account of a series of controversies within the system. This is a lively and enjoyable collection of papers and an illuminating review of the considerable difficulties that China will face in implementing key liability conventions in future years.