IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

A WORD FROM THE EDITORS: INNOVATIONS IN SOCIAL JUSTICE AND ENVIRONMENTAL GOVERNANCE

In this issue of the IUCNAEL eJournal we invite readers to explore Innovations in Social Justice and Environmental Governance. During the past few decades, much attention has been paid to 'efficient' environmental protection. Less has however been said about the social cost of this focus. Following the global economic crisis of 2008, the debate as to the best course for government, governance and regulation has been reignited. In many jurisdictions, where government coffers have been reduced, there is a renewed emphasis on market-based instruments. Yet these same instruments frequently empower the rich at the expense of poorer sectors of society. Regulated access is often easier for those who are confident, informed and mobile. Innovations in environmental law may, however, show the way toward improved environmental governance that simultaneously significantly improves the lot of the least advantaged in society. The three articles published in this issue of the eJournal address the above themes.

Some of the problems inherent in market-based approaches to environmental regulation are neatly illustrated in Jessica Owley's article titled 'Neoliberal Land Conservation and Social Justice'. Professor Owley examines the relationship between conservation easements and environmental justice and identifies significant drawbacks in the use of this type of regulatory mechanism from an environmental justice perspective. While the theory behind their use is that they provide a cost effective way of conserving land without removing it from private ownership or necessarily removing it from some form of productive use, the reality is that the environmental and social benefits they may bring appear questionable in certain circumstances. According to Owley, conservation easements are, for example, often applied to land that is not earmarked for development. Furthermore, the group of persons able to enjoy the conserved land is frequently limited to the owner and/or those invited onto the land by the landowner. Even where access is nominally more

open, the author highlights the reality that conservation easements are often applied to land located some distance from urban centers that makes access to the land impractical for many sectors of society. Conservation easements are generally paid for by the government through direct subsidies or tax incentives granted to the landowner. Owley draws out the link that this creates between members of the public and the landowners receiving the subsidy or tax incentive. She implicitly argues that the link points to the need for both the usual government controls and active engagement by the public in both the creation and enforcement of easements. This link is, however, shown to be rather weak. Owley therefore suggests several ways in which the use of conservation easements could be improved to address some of these social and environmental concerns.

Where Owley's article considers ways of improving an existing market-based mechanism to ensure both better environmental governance and improved social justice, Jordi Jaria i Manzano takes a more radical approach, suggesting that it is time to reconsider the idea of environmental justice in order to address existing inequalities in the use and distribution of natural resources. In his article titled 'Environmental Justice, Social Change and Pluralism', Professor Jaria i Manzano argues that until we address the assumption underlying the western constitutional model, namely that welfare creation is dependent on increasing the use of resources, we will never be able to improve social justice and environmental governance at the local or global levels. He contends that the way to address this problem does not lie in an attempt to redefine the concepts of social welfare or environmental justice on an abstract level, but rather to adopt a procedure which allows the global and local communities to engage together in refining these concepts. His paper explores the nature of this procedure.

In the third article titled 'Environmental Governance and Marine Governance in the Caribbean', Dr Michelle Scobie considers the relationship between social justice and regional marine governance. She focuses on the institutions tasked with providing marine governance in the Caribbean Region, highlighting existing gaps within these institutions and the resultant regional social and economic inequalities they cause. She proposes a range of ways through which these institutions could be strengthened to provide both stronger governance at the regional level and capacity building to, in particular, the small island developing states in the region. Historically, debates on marine governance have predominantly focused on inter-state relations,

and this article takes the debate on marine governance in a new direction, linking it clearly to questions of social justice at the local scale.

Following the above articles you will find a diverse array of country reports from scholars situated in 25 different jurisdictions across the globe. These provide an overview of recent legal, policy and judicial developments in these countries. We hope that these provide you with interesting insights into several jurisdictions you would ordinarily not have an occasion to follow. You will furthermore find reviews of three recently published books by members of the IUCNAEL. We would like to again thank all authors for their contributions and support and look forward to receiving any comments from the readership.

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NEOLIBERAL LAND CONSERVATION AND SOCIAL JUSTICE

Jessica Owley*

Introduction

The protection of private land is an important component of land-protection efforts. In the United States, most land is privately owned, with some of the most important lands - from an ecological standpoint - in private hands.[1] In seeking ways to protect ecologically important lands, three main routes have developed. At national and sub-national levels, governments seek to protect land through regulation. However, a lack of coordination combined with political challenges in both passing and enforcing land-protection regulation has stymied this technique. Where regulation has proven inadequate - or where lands are identified as particularly significant from a cultural, historical, or ecological standpoint - governments purchase land outright and hold the properties in fee simple. Land purchase is, however, a limited technique. Not only is it an expensive and logistically onerous process, but it may involve removing people from the land.

In this context of dissatisfaction with regulation and fee-simple purchase of land, a third route has emerged: using private agreements, including conservation easements. Conservation easements are non-possessory interests in land held by either a government entity or a non-profit conservation organization (called a land trust). Conservation easements follow rubrics outlined by each state's law, leading to some variations in the tool. Generally, however, conservation easements are

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[1] D. Clark and D.Downes, 'What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States' (1996) 11 *Journal of Environmental Law and Litigation* 9 at 10.

perpetual restrictions on the land that seek to fulfill an environmental purpose. They have an advantage over regulation because they can be tailored to an individual parcel and are not associated with complicated legislative procedures. As conservation easements commodify nature and put monetary values on ecological services, they fit into the growing context of neoliberal environmental governance.[2]

Part 2 of this article situates conservation easements in the neoliberal framework and summarizes the growth of conservation easements, demonstrating how the agreements result primarily in benefits for wealthy Americans. Part 3 describes the social concerns associated with conservation easements, and Part 4suggests ways to address some of the environmental justice and equity concerns raised by conservation easements and cautions against a too enthusiastic embrace of the tool.

Conservation Easements in the United States

Neoliberal Conservation

The wilderness conservation approach has dominated the conservation movement in the United States and elsewhere.[3] This approach focuses on isolating and protecting designated environmental areas or amenities from human impact. Implicit is the assumption that human activity will negatively affect environmental resources and, therefore, human interaction with those resources should be eliminated, reduced, or controlled. National park programs (like the National Park Service in the United States) epitomize this approach. However, alongside this approach, conservationists seek methods that enable people to remain on the land, avoid the burdens and costs of fee-simple land ownership, and draw upon alternative environmental governance structures. Property-rights-based tools embodied by conservation easements fit that niche.

Conservation easements are part of a trend of compensating landowners for environmental services and amenities. They are part of a soft environmental policy

[2] N. Heynen and P. Robbins, 'The Neoliberalization of Nature: Governance, Privatization, Enclosure, and Valuation' (2005) 16 *Capitalism Nature Socialism* 5; N. Castree, 'Neoliberalizing Nature: Processes, Effects and Evaluations' (2008) 40 *Environment and Planning A* 153; N. Castree, 'Neoliberalizing Nature: The Logics of Deregulation and Reregulation' (2008) 40 *Environment and Planning A* 131.

[3] P. West, J. Igoe and D. Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251 at 255.

that reinforces the neoliberalization of conservation.[4] Soft policies involve instruments that are flexible, subject to negotiation, and consistent with market approaches.[5] In these approaches, market forces are harnessed in an effort to improve ecosystem management and enhance human well-being. In this respect, neoliberalism restructures conservation mechanisms to facilitate the spread of market-based mechanisms.[6] One of neoliberalism's chief techniques for achieving that goal is reregulating nature through forms of commodification. Commodification is a process whereby states transform previously untradeable things into tradable commodities.[7] By recognizing the right to develop land as a property right that can be broken off the property-rights bundle, conservation easements do just that. The win-win aspect of conservation easements wherein landowners receive compensation, developers receive permits, and the public receives increased environmental protection appears to fit into the neoliberal 'promise of a world where one can eat one's conservation cake and have development dessert too'.[8]

Conservation Easement Basics

Conservation easements are non-possessory interests in land restricting landowners' ability to use their land in an otherwise permissible way with the goal of yielding a conservation benefit.[9] All fifty states have conservation easements statutes affecting nearly nine million acres of land.[10] Conservation easements vary in duration, but most are perpetual. Indeed, the desire to make long-term and perpetual land-

[4] S. Logan and G. Wekerle, 'Neoliberalizing Environmental Governance? Land Trusts, Private Conservation and Nature on the Oak Ridges Moraine' (2008) 39 *Geoforum* 2097.
[5] B. Swallow, M. Kallesoe, U. Iftikhar, M. van Noordwijk, C. Bracer, S. Scherr, K. Raju, S. Poats, A. Duraiappah, B. Ochieng, H. Mallee and R. Rumley, 'Compensation and Rewards for Environmental Services in the Developing World: Framing Pan-Tropical Analysis and Comparison' (2009) 14 *Ecology and Society* 26 (available at www.ecologyandsociety.org/vol14/iss2/art26/).
[6] J. Igoe and D. Brockington, 'Neoliberal Conservation: A Brief Introduction' (2007) 5 *Conservation & Society* 432 at 433-34.
[7] N. Castree, 'Neoliberalizing Nature: Processes, Effects and Evaluations' (supra note 2).
[8] L. Grandia, 'Between Bolivar and Bureaucracy: The Mesoamerican Biological Corridor' (2007) 5 *Conservation & Society* 478 at 480.
[9] See, for example, National Conference of Commissioners on Uniform State Laws, 'Uniform Conservation Easement Act 1981, s.1(1)' (available at http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm).
[10] K. Chang, *2010 National Land Trust Census Report* (2011) Land Trust Alliance, Washington D.C. 5 (available at http://www. landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report). The Land Trust Alliance's census calculates the amount of land protected by conservation easements held by land trusts but does not include national land trusts like The Nature Conservancy. Furthermore, because the acreage protected by government entities is unknown, the total number of protected acres is likely much higher.

conservation restrictions is one of the chief reasons states passed conservation-easement statutes.[11]

There are a number of ways in which conservation easements can be created, the most common of which is for landowners to place conservation easements on their land voluntarily. When doing so, the landowner is agreeing to refrain from exercising certain rights.[12] These rights can include the right to develop, the right to farm in a certain manner, and the right to fill in wetlands. The holder of the conservation easement has the right to bring an action against the landowner if the landowner violates the terms of the conservation easement. Under most state laws, the conservation-easement holder can be either a government entity or a non-profit conservation organization.

Landowners create conservation easements in a few ways. First, many landowners donate conservation easements burdening their land. They may do so for several reasons, the chief of which are usually a desire to preserve the character of land and to receive a tax break.[13] Conservation easements, like other property rights, can also be sold.[14] Increasingly, however, conservation easements are coming into being not based on donations or sales. Instead, they emerge from large development projects with complex permitting programs.[15] Developers encumber land with conservation easements in exchange for the local, state, and federal permits needed for their projects to proceed.

[11] J. Hocker, 'Foreword' in J. Gustanski and R. Squires (eds), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) Island Press Washington D.C. at xvii, xvii–xviii (explaining that states adopted such statutes because the long-term enforceability of negative easements in gross was questionable); see also J.Owley, 'The Emergence of Exacted Conservation Easements' (2006) 84 *Nebraska Law Review* 1043 at 1075–77

[12] Conservation easements may also have affirmative obligations, such as requiring restoration projects.

[13] J. Gustanski and R. Squires, 'Preface' in J. Gustanski and R. Squires (eds), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) Island Press Washington D.C. at xxi.

[14] A. Merenlender, L. Huntsinger, G. Guthey and S. Fairfax, 'Land Trusts: Who is Conserving What for Whom?' (2004) 18 *Conservation Biology* 65 at 67.

[15] Owley (supra note 11).

Conservation Easement Concerns

Concerns regarding the ecological value and enforceability of conservation easements have led some to question their use.[16] Essentially, from the perspective of the public, conservation easements may not be the best way to protect land. Conservation easements usually work to protect a static landscape in perpetuity despite increasing acknowledgement that the natural world is ever-changing.[17] Additionally (and paradoxically), there are some concerns that conservation easements may not last as long as they purport to. Statutory language often indicates conservation easements should follow the same rules as traditional easements. This may enable amendment or dissolution of conservation easements - which may negate the positive ecological benefits associated with them.

Additional social concerns inherent in the use of conservation easements may make them an undesirable tool. First, for reasons of democracy and accountability, it may be better to make land-use decisions via political processes. Second, conservation easements generally reduce tax revenues, reducing funds available for social and environmental programs. Third, because of the nature of conservation easements and their attendant landowner benefits, conservation easements are most likely to be used in rural and suburban areas and most likely to benefit the wealthy - raising concerns regarding equity and environmental justice.

Democracy and Accountability

Conservation easements are undemocratic: their use enables a landowner and land trust working together to trump local zoning laws. Zoning draws upon the local police power to protect and promote the health, safety, and welfare of a community. This means zoning decision makers are accountable to the democratic process through election or appointment. Additionally, officials enact zoning laws and make land-use decisions publicly. When private organizations and individuals gain the ability to

[16] See, for example, J. Owley, 'Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements' (2011) 30 *Stanford Environmental Law Journal* 121; see also J. Owley, 'Conservation Easements at the Climate Change Crossroads' (2011) 74 *Law and Contemporary Problems* 199.

[17] A.Rissman, 'Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes' (2011) 74 *Law and Contemporary Problems* 145; H. Doremus, W. Andreen, A. Camacho, D. Farber, R. Glicksman, D. Goble, B. Karkkainen, D. Rohlf, A. Tarlock, S.Zellmer, S. Jones and Y. Huang, 'Making Good Use of Adaptive Management' (2011) Center for Progressive Reform Washington D.C. (available at http://www.progressivereform.org/articles/Adaptive_Management_1104.pdf).

circumvent this public process and engage in private land-use planning, the democratic process suffers.

This problem can continue throughout the life of conservation easements as monitoring and enforcement are often left to private organizations too. If conservation easements are created under state and federal laws or enabled through public funding, the public has an interest in the agreements being enforceable. But where the conservation easement is held by a non-profit conservation organization rather than a government entity, it is unclear that the public can hold the non-profit conservation organization accountable if it mismanages the public interests. There is no ballot box solution, usually no requirement for public participation, and few states allow public enforcement. Some scholars assert that the organizations are accountable to the public because as non-profit charitable organizations, they are subject to review by state attorneys general and the Internal Revenue Service (IRS).[18] However, such review has been inconsistent in practice and is, in any event, discretionary.

Tax Issues

Concerns surround the tax breaks associated with conservation easements at the state, local, and federal levels. The IRS has expressed its concern over deductions for donated and bargain sale conservation easements-calling into question the validity and accuracy of valuation of many conservation easements. It asserts that some taxpayers claim deductions far exceeding the value of their land restrictions.[19] When conservation easements are valued too highly, the public pays too much for

[18] S. Fairfax and D. Guenzler, *Conservation Trusts* (2001) University Press of Kansas Lawrence, KS at 153.
[19] J. Stephens and D. Ottoway, 'IRS Toughens Scrutiny of Land Gifts' *Washington Post* (2004) Washington, DC (available at http://www.washingtonpost.com/ac2/wp-dyn/A19102-2004Jun30?language=printer).

them.[20] A congressional committee evaluating conservation easements concluded that the benefit of conservation easements is 'tenuous and speculative'.[21]

Beyond the questions of proper valuation and justifiable conservation values attained, allowing a tax deduction for conservation easements may not be the best use of public funds. Depending on the loss of tax revenues, it may be more economically efficient to collect the taxes and use the money to purchase land in fee. Alternatively, if the same conservation goals can be met via regulations instead of conservation easements, it may be more fiscally sensible to prohibit the tax deduction and encourage land protection through regulatory channels.

Along with the federal tax deductions for donations, most owners of encumbered land also receive local and state tax benefits because of reduced property values. Land trusts and other conservation-easement proponents often tout reduced property taxes as one of the chief benefits of conservation easements, but reduced property tax revenue means less money for schools and other public projects.

Environmental Justice and Equity

In much of this discussion, in other scholarly works, and even in the IRS code, conservation easements are spoken of as providing a public benefit. Left unanswered, however, is the question of who is meant by the public. Although conservation easements may yield wide-ranging environmental benefits from which everyone gains, many of the specific benefits associated with conservation easements go to wealthier sectors of society.[22] Wealthy landowners receive tax breaks so they can maintain their lifestyle while agreeing to conservation easements restricting development that they may never have intended to allow. Take the example of historic façade easements. The government gives landowners a tax

[20] See, for example, *Hollis* v *Stonington Development*, LLC, 394 SC 383 (2011). A developer placed a fifty-foot wide conservation easement on some its land in an effort to appease unhappy neighbors. The developer advised neighbouring proprietors that the conservation easement prevented the developer from cutting down trees, but then proceeded to cut down the trees. Thus, the developer either misrepresented the nature of the conservation easement to the neighbors and/or violated its terms. Nevertheless, the developer received a $1 million charitable tax deduction for agreeing to the restriction.

[21] J. Stephens, 'Panel Advises Ending Tax Breaks for Easements' *Washington Post* (2005) Washington, D.C. (available at http://www.washingtonpost.com/wp-dyn/articles/A42697-2005Jan27.html).

[22] D. Halperin, 'Incentives for Conservation Easements: The Charitable Deduction or a Better Way' (2011) 74 *Law and Contemporary Problems* 29 at 31.

deduction to maintain their historic façades-something few homeowners had intended to change.

Conservation easements are a tool used by people who own land. Additionally, for donated conservation easements, landowners must have enough income for the tax breaks to be worthwhile. Increasingly, conservation easements stem from exactions associated with development permits. Exacted conservation easements are even more likely to concentrate wealth as they facilitate development by wealthy investors. By acceding to conservation easement exactions, developers can obtain governmental permission to convert ecologically sensitive lands. Prior to the use of conservation easements, permission would either not be forthcoming in these circumstances or other types of restrictions, which may have been less palatable to developers, would be required.[23]

The tool is usually used over large tracts of land. These open spaces are often at some distance from urban areas where the majority of people live. This makes it harder for most Americans to enjoy directly the amenities provided by conservation easements. Conservation easements preserve land, including open space, through private means. If conserved land is public, there are often opportunities for recreation and access. With conservation easements, conservation organizations and government agencies use public money to preserve land, but, because the land remains in private hands, it is unusual to have public access. Instead only the landowners and their licensees get to enjoy access and recreation opportunities.

Re-envisioning Conservation Easements

Conservation easements have generally been used in a way that benefits wealthier communities. Increasingly, governments and conservation organizations are also purchasing conservation easements as part of efforts to protect working landscapes. This movement has the benefit of recognizing the connection of people to land (and rejecting the hegemony of park-based land-protection schemes). There are also additional changes that could be made to conservation easement use that would address some of the environmental justice concerns discussed above.

[23] Owley (supra note 11) at 1095-1100.

Increase Public Participation in Formation and Enforcement

Conservation easements are often privately negotiated agreements between landowners and prospective conservation easement holders. Members of the public have little to no involvement in the creation of these private agreements. They do not get to voice concerns over either placement of the restrictions or their terms. Some states have public procedures for at least certain categories of conservation easements that include a public review process.[24] Although members of those communities may not have the opportunity to vote on conservation easements, they play a role in the process by voicing opinions and influencing outcomes. Increasing opportunities for public involvement may help increase the justice and equity of conservation easements. Such provisions should be extended to cover all conservation easements.

The democracy concerns of conservation easements are mirrored by accountability concerns. Community members are not involved on the front end of these agreements and are often left out of the back end as well. Once a conservation easement is placed on a parcel of land, it is challenging for community members to learn of the restriction or police its terms. Although conservation easements are recorded public documents, like property deeds and other land restrictions, they can be hard to find and understand.[25] Searching through county recorders' offices for conservation easements can be hampered by inconsistent labeling and inaccurate filing. Increasing transparency through improved recording systems perhaps including an online portal would enable members of the public to review and evaluate conservation easements. They could use this information to lobby for increased or decreased use of the tool as well as perform citizen-monitoring functions by tracking conservation easements violations.[26]

When conservation easements are violated, citizens may once again find themselves without a voice. Most state statutes and conservation-easement agreements do not

[24] See, for example, Maryland Code Annotated Ch. 184 s. 32. See also J. Owley, 'Use of Conservation Easements by Local Governments' (in press) in P. Salkin and K. Hirokawa (eds) *Greening Local Government*(A.B.A. Publishing Chicago, IL).
[25] A. Morris and A. Rissman, 'Public Access to Information on Private Land Conservation: Tracking Conservation Easements' (2009) *Wisconsin Law Review* 1237.
[26] Of course, without access to the properties, members of the public are hampered in enforcement actions even in jurisdictions recognizing public enforcement routes.

allow for citizen enforcement.[27] The only clear enforcers are the holders of the conservation easements, but it is not certain what can be done when holders choose not to enforce. As indicated earlier, some statutes enable enforcement by other public officials, and arguably conservation easements can always be enforced by state attorneys general. Such public enforcement (where it is even available) is discretionary however. Facilitating public enforcement (by amending state laws to include a citizen suit provision for example) would increase the security that conservation easements will yield a public benefit.

Change the Tax Incentives

Reimagining conservation easements as a tool of social justice will involve changing the level and structure of both property tax benefits and charitable tax deductions. Dan Halperin recommends that the IRS either place a cap on the tax deduction or use a grant program for conservation easements instead of tax deduction.[28] A grant program could enable an improved assessment of the public benefit of a conservation easement. Additionally, grant administrators could work to improve the equitable distribution of conservation easements by directing more strategic placement of protected lands.

Removing the federal income tax deduction does not address concerns associated with reduced property taxes. Where communities use democratic and public processes to establish conservation easements, they can make an informed decision about whether the reduced property tax revenue is worth the conservation benefit gained. Alternatively, conservation easement holders could require greater endowments per conservation easement held and use the income from the endowment to monitor and enforce the restrictions or to make payments in lieu of taxes to support schools and social programs.

[27] See, for example, *McEvoy* v. *Palumbo*, 2011 WL 6117924 (Super. Ct. Conn. Nov. 15, 2011) (explaining that no citizens, not even adjoining landowners, have standing to enforce conservation easements in Connecticut); *Long Green Valley Assoc*. v. *Bellevale Farms, Inc.,* No. 0228 (Maryland Ct. of Special Appeals Nov. 30, 2011) (enabling a neighbor to enforce, but holding that citizens cannot enforce under either third-party beneficiary or charitable trust theories).

[28] Halperin (supra note 22) at 45.

Reconsider Conservation Easement Placement

When William Whyte first coined the term conservation easement in 1959, he presented the tool as a method for protecting urban land.[29] Whyte suggested that government agencies identify key open space areas and then purchase development rights in those areas from landowners. He saw the tool as curbing sprawl. Indeed, the first conservation-easement-like agreements protected the Fens in Boston (a public parkway that forms part of Boston's Emerald Necklace). Despite this early connection of conservation easements with urban landscapes, few conservation easements today are in urban settings even though nearly eighty percent of the United States' population lives within metropolitan regions.

In addition, urban areas in the most need of high quality recreational space and amenities from protected areas may be the ones least likely to be protected by conservation easements. In part this is because, where the landowners have low incomes, tax deductions provide little incentive for entering into conservation easements. Even where the landowner might be tempted by a tax deduction, the lands themselves may have such a low value (due to the depressed land prices in blighted urban areas) that conservation easement valuation is too low to seem worth encumbering the land in perpetuity. The use of grants, as discussed earlier, may go some way to addressing these criticisms, but other tools may also be useful and some of these are already being used.

Many of the examples of conservation easements in urban settings involve publicly owned property, big development projects, or both. For example, the City of Richmond, Virginia, encumbered city-owned urban parkland with a conservation easement to ensure that the property would remain publicly accessible open space. Large commercial entities in Detroit donated conservation easements over land along the Detroit River. In Chicago, coalitions of land trusts are working with the Land Trust Alliance and other organizations on an initiative called Chicago Plan II to protect natural areas within the city limits.[30]

[29] W. Whyte,'Securing Open Space for Urban America: Conservation Easements' (1959) 36 *Urban Land Institute Technical Bulletin* 2.
[30] *Chicago Plan II* (2011) Land Trust Alliance, Washington D.C.(available at http://www.landtrustalliance.org/about/regional-programs/mw/Chicago).

While these efforts are innovative in seeking to protect urban lands, they leave something to be desired in terms of public benefit and equitable distribution of environmental amenities. The property in Richmond was already owned by the public and provided environmental amenities to the community. In Detroit, General Motors and other companies donated conservation easements on land they were unlikely to build on (and which would have been hard to sell in the current market) and received large tax deductions for their generosity. Most of the organizations involved in Chicago Plan II work in neighboring rural and suburban counties, with only one organization, NeighborSpace, working to protect land within the city.[31] Projects like these recognize the need to provide environmental amenities to all citizens but must be expanded. Where land trusts work with local governments to identify important ecological amenities and opportunities, the use of the tool can become more equitable.

Conclusion

The section above presents suggestions for making conservation easement use more equitable. However, some of the most vital concerns associated with conservation easements arise from the essence of the tool as a commodification of nature and a facilitator of development. As we use protected areas to provide mitigation to offset the spread of environmentally destructive commercial activities, the number of protected areas increases but so too does the level of environmentally destructive activities. Such considerations call into question the use of conservation easements for environmental protection.

Conservation easements are part of a worldwide trend of neoliberalizing nature. The problem with commodification of the landscape to make it fit more easily into a free-market system is that it neglects equity and justice. Conservation easement use is not marked by efforts to distribute environmental amenities, often because the driving forces of these land protection efforts stem from different mandates and perspectives. As shown here, it is not only the use of the tool, but the structure of the tool itself that presents concerns for democracy and public access.

[31] Ibid. See also NeighborSpace (available at http://neighbor-space.org/main.htm), describing the organization's efforts to protect community gardens but not indicating that NeighborSpace uses conservation easements.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

ENVIRONMENTAL JUSTICE, SOCIAL CHANGE AND PLURALISM

Jordi Jaria i Manzano*

Introduction

The aim of this paper is to re-build the idea of environmental justice to deal with the inequalities derived from the present model of the use and distribution of natural resources.[1] My argument is that the dominant idea of environmental justice does not provide space for a global redefinition of the rules for the distribution of benefits and harms associated with the use of natural resources. This is because the legal culture in which the concept of environmental justice was generated is dominated by the idea of limited government. In this context, social transformation is theoretically the result of individual decisions, not of a conscious political program. Therefore, the law in general (and, particularly, the constitution) works as a set of rules to solve particular conflicts, not to change society.[2]

The result is injustices in the distribution of goods. The most blatant injustices derived from our model of the use of natural resources are not, however, particular pathologies. They are instead the natural consequences of a model based on

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[1] On the origins and evolution of environmental justice see, for example: K. Bosselmann, 'Justice and the Environment: Building Blocks for a Theory on Ecological Justice' in K. Bosselmann and B. Richardson (eds), *Environmental Justice and Market Mechanisms. Key Challenges for Environmental Law and Policy* (1999) Kluwer, Den Haag-London-Boston, at 30-57.

[2] See L. Prieto Sanchís, 'Neoconstitucionalismo y Ponderación Judicial' in M. Carbonell (ed), *Neoconstitucionalismo(s)* (2003) Trotta, Madrid, at 124ff.

individualism, market assignation of resources and an idea of welfare based on consumerism. This social model leads to structural injustices in the global flow of resources and goods, and in the distribution of environmental harm. And, at present, inequalities between human beings and communities seem to be growing.[3] This suggests that partial remedies (such as have been adopted before and are discussed below) are not useful and instead, a program of social change is required in order to guarantee real environmental justice. For this to be achieved we have to overcome the dominant idea of environmental justice as a response to individual cases of environmental harm unfairly distributed. Instead environmental justice has to be conceived as the regulative idea for:

> (i) building a fairer model of social exchange of benefits derived from the use of natural resources,
> (ii) reducing harm to human beings to that which is unavoidable to maintain an appropriate level of welfare and autonomy for human individuals,
> (iii) ensuring a fairer distribution of unavoidable harms,
> (iv) reducing our impact on nature and our consumption of natural resources to achieve sustainability,
> (v) giving individuals and communities enough room to pursue their projects of life and coexistence, and to define their own ideas of welfare.

Environmental justice in its traditional sense seems to cope only with (iii).[4]

To advance in the way we treat these five points, we need to take law as a tool of social transformation. The Western European constitutional tradition (WECT) may provide inspiration for such a transformation, although it presents some flaws regarding points (iv) and (v). The usefulness of this tradition is its commitment to a whole program of social change, with an active role played by the government.[5] Underlying this commitment is the belief that no actual freedom is conceivable

[3] See R. Margalef, 'Lo Que Se Llama Ecología y Posibles Condicionantes de Nuestro Futuro' in J. Alcina Franch and M. Calés Bourdet (eds), *Hacia una Ideología Para el Siglo XX. Ante la Crisis Civilizatoria de Nuestro Tiempo* (2000) Tres Cantos, Akal, at 330.
[4] See, for example: L. Cole and S. Foster, *From the Ground Up. Environmental Racism and the Rise of Environmental Justice Movement* (2001) New York University Press, New York & London, at 66; or S. Cutter 'Race, Class and Environmental Justice' (1995) 19(1) *Progress in Human Geography*, at 112.
[5] See Prieto Sanchís (supra note 2) at 124ff.

without a certain standard of living and achieving that standard of living requires a public program of social transformation[6] which only the government can deliver.

The flaws referred to are related to the fact that the legitimacy of the social state in the WECT has depended on widening the number of people enjoying goods and services. Because of that, this tradition has relied on the continuity of the process of capitalist accumulation, exploiting natural resources, to be turned into goods. This, the social metabolism, is what has to be changed[7] in order to design a matrix of social transformation to secure a comprehensive notion of environmental justice to operate as the fundamental principle upon which governance and the exploitation of natural resources will be based.

(Distributive) Justice and Environmental Justice: Re-building the Idea of Justice within the WECT

The idea of justice is pervasive in the WECT. It (and particularly social justice) has been the main inspiration of this tradition since the Weimar Constitution (1919) as a result of the historic compromise between the traditional values of freedom in the original conception of liberalism and a social commitment to provide adequate living conditions to all citizens in order to ensure 'real freedom'. Justice is here understood as basic equality in the conditions of existence of all citizens[8] - in other words it is conceived of as distributive justice. The goal of distributive justice is to compensate the non-desired effects of commutative justice in traditional constitutionalism, diminishing inequalities and giving people the opportunity to achieve a minimal quality of life.[9]

This conception then underpins the idea of social transformation as justified. The problem with this approach, however, is that this transformation is achieved through

[6] The WECT can be seen as a compromise between civil rights, rooted in the tradition of early constitutionalism, democratic rights and social rights, all linked with the idea of human dignity. See: R. Ávila, Santamaría *El Neoconstitucionalismo Transformador. El Estado y el Derecho en la Constitución de 2008* (2011) Abya-Yala & Universidad Andina Simón Bolívar, Quito, at 168-169; S. Crook, J. Patulski and M. Waters, *Postmodernization. Change in Advanced Society* (1992) Thousand Oaks (London) and Sage (New Delhi), at 84; and M. García Herrera and G. Maestro Buelga, *Marginación, Estado Social y Prestaciones Autonómicas* (1999) Cedecs, Barcelona, at 35.
[7] See J. Jordano Fraga, *La Protección Del Derecho a un Medio Ambiente Adecuado* (1995) J. M. Bosch, Barcelona, at 110.
[8] See M. García Herrera and G. Maestro Buelga, 'Regulación Constitucional y Posibilidad del Estado Social' (1998) 22 *Revista Vasca de Administración Pública*, 87.
[9] See A. Llano, *La Nueva Sensibilidad* (1998) Espasa, Madrid, at 188.

the growing exploitation of natural resources. The idea of distributive justice hegemonic within the WECT is based on the belief that natural resources are both virtually inexhaustible and resistant to human exploitation.[10] In the revised concept of justice proposed here environmental justice serves as a restraint on this conception of distributive justice by acting as the higher principle upon which the idea of social change propelled by public powers is based. This approach should ensure that some of the less desirable features of the WECT are avoided.

The first flaw to be addressed is the fact that the welfare achieved by irrational exploitation of natural resources is predicated on the degradation of the environment. This gives way to an internal contradiction posed by the actual limitation and vulnerability of natural resources: the more we exploit them to get more goods to achieve more welfare, the more they degenerate threatening the same welfare.[11] With that, environmental degradation leads to a new scenario regarding the promotion of a minimal standard of living, which cannot be conceived in the same terms as it has been in the past.[12] We must therefore revise the idea of distributive justice in this tradition, along with its notion of welfare.

Updating that idea of justice, to take into account scarcity and vulnerability of natural resources, and relying on a program of social transformation, provides a mechanism to address (i), (ii), (iii) and (iv), as formulated in the first section. That program would have to fix new rules for the global exchange of goods, protecting more vulnerable people. Moreover, it would be required to adapt the conception of welfare hegemonic in the West, (which is based more or less on consumerism and self-gratification) to the factual limitations given by nature. The result should be shared minimal living conditions, based on a realistic use of natural resources (*ökologisches Existenzminimum*).[13]

[10] For that reason, when environmental questions are raised within the classic model of the European social state we must face up to sharp conflicts between constitutional goods: economic growth as a source of welfare vs. environmental protection as a (pre-)condition to welfare. See R. Alexy, 'Los Derechos Fundamentales en el Estado Constitucional Democrático' in Carbonell (supra note 2) at 37.
[11] See, among others and using only Spanish sources: R. Canosa Usera, 'Aspectos constitucionales del Derecho Ambiental' (1996) 94 *Revista de Estudios Políticos*, 73 at 81; and J. Serrano Moreno, *Ecología y Derecho: principios de Derecho Ambiental y Ecología Jurídica* (1992) Comares, Granada, at 52.
[12] See U. Karpen, 'Zu Einem Grundrecht auf Umweltschutz' in W. Thieme (ed), *Umweltschutz im Recht* (1998) Duncker & Humblot, Berlin, at 21.
[13] See D. Murswiek, *Umweltschutz als Staatszweck* (1995) Economica, Bonn, at 47.

This result would be achieved through the redistribution of the available resources, in order to provide minimal conditions of welfare in the broader terms proposed here to all human beings, including future generations.[14] This would imply limitations for some, the well-off individuals, who would lose a certain amount of autonomy - in terms of access to resources to pursue a certain project of life - to enhance the autonomy of those who have more limited access to resources and are more vulnerable to (environmental) harm.[15]

A (Renewed) Idea of Distributive Justice as a Model for Global Environmental Justice

Despite the WECT's aspirations to universality, the distribution of environmental benefits and harms is, as indicated above, inequitable. The majority of the global population bears the environmental cost derived from the use of natural resources that feeds the welfare of the minority.[16] Reform of the concept of environmental justice requires us to acknowledge also that the concept must be conceived as having universal application and that this requires us to address the human community at the global level, designing a fairer distribution of the available resources and the (social and environmental) costs derived from their use.[17] We have to extend the ideas of justice, solidarity, equity and fairness to all human beings, regardless of place and time.[18]

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[14] See the Third Principle of the *Rio Declaration on Environment and Development* (1992) (available at http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163). The idea of solidarity including all human community, present and future, seems clear.

[15] There are different studies on the global distribution of goods, wealth and welfare. See, for example: J. Davies, S. Sandstrom, A. Shorrocks and E. Wolff, *The World Distribution of Household Wealth* (available at http://www.iariw.org/papers/2006/davies.pdf).

[16] See E. Altvater, *El precio del Bienestar* (1994) Alfons el Magnànim, Valencia, at 188 (original edition in German: E. Alvater, *Der Preis Des Wohlstands: Oder Umweltplunderung Und Neue Welt(Un)ordnung* (1992) Westfalisches Dampfboot, Münster).

[17] The international law principle of Common but Differentiated Responsibilities provides a good example of how a global community of solidarity for environmental protection and social (in-)justice reasons may be constituted. See, for example, Article 3(1) of the *United Nations Framework Convention on Climate Change* (UNFCCC, signed in Rio de Janeiro in 1992, within the framework the Earth Summit and available at http://unfccc.int/resource/docs/convkp/conveng.pdf). See further on this aspect: S. Clarkson and S. Wood, *A Perilous Imbalance. The Globalization of Canadian Law and Governance* (2009) UBC Press, Vancouver and Toronto, at 122ff; and M. Elizalde Carranza, 'Desarrollo y Cambio Climático' (2010) I-1 *Revista Catalana de Dret Ambiental*, at 11-12.

[18] See D. Jositsch, 'Das Konzept Nachhaltigen Entwicklung (Sustainable Development) im Völkerrecht und Seine Innerstaatliche Umweltsetzung' (1997) *Umweltrecht in der Praxis / Le Droit de L'Environnement Dans la Pratique*, 93 at 99.

Without such reform current problems in the South and North, such as massive migration movements and innumerable episodes of violence, in the form of war or terrorism, will continue. The temptation to move towards isolation evidenced in the richer countries by security policies, border control, the war against terror, humanitarian military interventions, etc., with some elements of international charity, such as NGO activities and international aid, therefore, must be replaced by a commitment to justice.[19] The social state clause in the WECT was originally an attempt to address an inner situation analogous to the present global one - distributing better welfare as a means to dignify the working class and prevent economic/political violence. This same conception could provide the inspiration now for reform at the global level. Guaranteeing a certain minimal welfare for all human beings would strengthen the legitimacy of international society. For this to work, however, the distribution of goods and harms under the conception of universal welfare has to be undertaken in awareness of the scarcity and vulnerability of natural resources. In this sense social justice and environmental protection are closely linked.[20]

Combining environmental and social concerns demands a re-thinking of the ideas of development and welfare dominant in Western culture and, particularly, within the WECT. While there are quite marked differences between the American constitutional tradition and the WECT in terms of the contents of the constitution, the role of public powers and the procedures of distribution of goods and services, the idea of welfare is the same as is the idea of the essential elements of the human being. The former is based on consumption of goods and self-gratification; the latter, on individualism and submission of nature to human caprice.[21] In fact, early liberalism, Marxism and social democracy are based on the same idea of domination of nature and its exploitation as a source of goods (merchandises) to be socially distributed (through the market or public assignment) in order to satisfy human

[19] See S. Palidda, 'La Revolución Policial' in L. Puente Aba, M. Zapico Barbeito and L. Rodríguez Moro (eds), *Criminalidad Organizada, Terrorismo e Inmigración. Retos Contemporáneos de la Política Criminal* (2008) Comares, Granada.
[20] This has been underlined from the very moment when international public opinion began to be concerned about environmental protection, for example, in Stockholm, in 1972. See Jositsch (supra note 18) at 99.
[21] See J. Baudrillard, *La Sociedad de Consumo. Sus Mitos, Sus Estructuras* (2009) Siglo XXI, Madrid, at 39ff (original edition in French: J. Baudrillard, *La Société de Consommation, ses Mythes, ses Structures* (1970) Éditions Denoël, Paris).

demands.[22] This presents us with certain problems in moving to a new concept of environmental justice.

These conceptions of welfare underpin the behaviour of individuals and moving to a new concept of justice requires those same individuals to change some of their behaviour and some of their internal beliefs and aspirations. They will, for example, have to renounce a certain standard of living - even if it is only a potential standard they are renouncing - for environmental reasons, but this is not easy for individuals to do.[23] Consequently, it is difficult for active environmental policies addressed to the rationalization of the use of natural resources which involve slowing down development, or slowing down the rate of growth in the production of goods to obtain social support.[24]

Normally, this difficulty is addressed through the idea of a new qualitative conception of development, different to the quantitative measuring of development in terms of capitalist accumulation.[25] During the Eighties, the idea of sustainable development became very popular as providing a suitable new concept of development. The idea underpinning it was that economic development, environmental protection and social justice would be combined in a single notion at the global level. The concept has, however, been criticized because of its ambiguity[26] and, in my opinion, it appears still to rely on the belief of the inexhaustibleness and resilience of natural resources.[27]

Despite this, the idea of sustainable development has attained a certain level of success and has been incorporated into constitutional texts and used in the case-law

[22] Social democracy tries to encapsulate the best of both worlds (liberalism and socialism), relying on the exploitation of natural resources to feed the social metabolism as well. See Crook et al (supra note 6) at 84.
[23] See, for example: R. Canosa Usera, *Constitución y Medio Ambiente* (2000) Dykinson, Madrid, at 37.
[24] See P. Knoepfel, 'Zur Wirksamkeit des heutigen Umweltschutzrechts', *Umweltrecht in der Praxis / Le Droit de l'environnement dans la pratique* (1994), at 231.
[25] Many environmental law scholars have pointed to this. Among Spanish academics, which are my primary source in this paper, see: Domper Ferrando, 'El Medio Ambiente: Planteamientos Constitucionales' in G. Gómez Orfanel (ed), *Derecho del Medio Ambiente* (1995) Ministerio de Justicia e Interior, Madrid, at 31; and D. Loperena Rota, *El Derecho al Medio Ambiente Adecuado* (1998) Civitas, Madrid, at 75.
[26] See Jositsch (supra note 18) at 117.
[27] For a similar opinion, see: N. Ridoux, *Menos es Más. Introducción a la filosofía del Decrecimiento* (2009) Los libros del lince, Barcelona, at 151 (original edition in French: N. Ridoux, *La Décroissance Pour Tous* (2006) Parangon, Lyon).

of constitutional courts.[28] The point is to improve the life of people at the global level, maintaining the environment capable of securing both inter- and intra-generational stability of welfare.[29] We therefore must reconsider the 'development' part of the idea of sustainable development and adopt a definition which moves away from a permanent process of capital accumulation, with a growing consumption of resources.[30]

We need a new pattern of development within a global framework of justice for all, based on the idea of a fair use of natural resources. For this reason, the irresponsible stimulation of economic growth in terms of capital accumulation would have to be revised.[31] To achieve this, I argue that the new definition of welfare must draw on a social ethos not based on possessive individualism,[32] but adapted to the global ecosystem's carrying capacity.[33] The idea of the constitution as a project of social change and the use of public policies to put limits on individual economic behaviour, typical of the WECT, provides a good mechanism to do that.[34]

Environmental Justice and New Lifestyles: A Critique of Consumerism as a Paradigm of Welfare

The next task is to address the question of which concept of welfare to use to define the minimal quality of life for the population around the world, recognising the scarcity and vulnerability of natural resources. Our first premise is that it is unsound to understand welfare in terms of the average capacity of consumption in richer countries. As discussed above, economic growth, social justice and environmental

[28] See, for example: Polish Constitution of 1997 (Article 6) (available at http://ww.senat.gov.pl/k5eng/dok/konstytu/2.htm); Swiss Constitution of 2000 (Article 3(2) and 73) (available at http://www.admin.ch/ch/e/rs/1/101.en.pdf); and the Treaty of the European Union (Article 3(1) of the Consolidated Version after the entering in force of Treaty of Lisbon, 2007) (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF). On case law from constitutional courts, see for example, the Spanish case: STC 64/1982, November 4th, FJ 2.
[29] See Jositsch (supra note 18) at 96.
[30] See, for example: Margalef (supra note 3) at 343.
[31] See R. Meier and F. Walter, *Umweltabgaben für die Schweiz* (1991) Rüegger, Chur and Zurich, at 31ff.
[32] See P. Macchia, *Normativa a Tutela Dell'Ambiente e Disciplina del sistema Produttivo Nell'Ordinamento Giuridico Elvetico* (1994) Jovene, Neaples, at 4.
[33] See E. Gudynas, 'Derechos de la Naturaleza y Políticas Ambientales' in A. Acosta and E. Aguirre (eds), *Derechos de la Naturaleza. El Futuro es Ahora* (2009) Abya-Yala, Quito, at 49.
[34] See C. Gethmann, 'Individuelle Freiheit und Umweltschutz aus philosophischer Sicht', in M. Kloepfer (ed), *Umweltstaat als Zukunft* (1994) Economica, Bonn, at 42.

protection, seem to be impossible to attain for all given the limited carrying capacity of the system.[35]

There are three possible tools to use to help address this question of welfare: technology (how efficiently we use natural resources), population (how many use natural resources) and consumption (how many natural resources are being used).[36] Theoretically we could rely on certain technological innovations and try to enhance our knowledge of nature.[37] The problem with this approach is, however, that, technology based on the Western modern techno-scientific paradigm has been part of the problem and it seems clear that new technologies can only solve old problems by creating new ones.[38] With regards to the question of population, measures suggested for its control tend to approach Neo-Malthusianism and conflict with the concepts of human dignity and freedom.[39]

Given these limitations we must therefore focus on the third element - consumption and economic growth.[40] As indicated earlier this requires a redefinition of welfare. A key issue to be addressed in this reform is the notion of need, which has been given a very generous interpretation in the North in terms of consumption of goods and services.[41] This gives rise to predatory attitudes regarding the environment and other people[42] and so this conception must be revised.

This leads to two major problems: (i) how to make richer people consume less; (ii) how to define a sustainable lifestyle. I suggest that this is best achieved by moving away from a focus on rights and entitlements to a focus on responsibility towards

[35] See A. Dobson, *Justice and the Environment. Conceptions of Environmental Sustainability and Dimensions of Social Justice* (1998) Oxford University Press, Oxford, at 14ff.
[36] See Jositsch (supra note 18) at 117, for the three factors mentioned.
[37] See A. Petitpierre, *Environmental Law in Switzerland* (1999) Kluwer-Stämpfli, Den Haag-London-Boston-Bern, at 31-32.
[38] On a new (holistic and transcultural) paradigm of knowledge and the necessity of (a more open) social definition of the priorities of scientific research, see, among others: R. Fornet-Betancourt, 'Ciència, Tecnologia i Política en la Filosofia de Panikkar' in I. Boada (ed), *La Filosofia Intercultural de Raimon Panikkar* (2004) CETC, Barcelona, at 126; and M. Palacios 'La Cultura Bioética' (2001) 162/163 *Sistema*, at 110.
[39] See, for example: M. Gispert Cruells and A. De Albornoz de la Escosura, 'La Etnobotánica: Alternativa Para El Siglo XXI' (2000) Alcina Franch; and Calés Bourdet (supra note 3) at 347.
[40] See A. Gorz, 'Ecología y Libertad' in *Crítica de la Razón Productivista* (2008) Libros de la Catarata, Madrid, at 76 (original edition in French: A. Gorz, *Écologie et Liberté* (1977) Galilée, Paris; the Spanish text used is an abridged selection of the original Spanish translation, published in 1979).
[41] See D. Murswiek, 'Freiheit und Umweltschutz aus Juristicher Sicht' in M. Kloepfer (ed), *Umweltstaat als Zukunft* (1994) Economica, Bonn, at 65.
[42] See M. Barnard, 'Advertising. The Rethorical Imperative', in C. Jenks, *Visual Culture* (1995) Routledge, London and New York, at 33-34.

others and nature. The concept of environmental justice would then draw its content not only from the notion of responsibility but also quality of life, stewardship, care and community solidarity.[43] This reinterpretation would move us from a parasitic idea of the environment to establishing a social trust over it.

It would also enable a new idea of human welfare to be built, based on the idea of quality of life and linked to new conceptions of public participation and responsibility.[44] This minimal quality of life for all human beings, would allow each to be autonomous and empowered, within the limitations placed on the use of natural resources and the requirements to respect other human beings, to pursue their own projects of life. This, as Nobel Prize winner Amartya Sen has underlined,[45] would prevent predatory capital accumulation and irrational economic growth.

Having reached this point, it seems that the WECT could have remarkable strengths in coping with environmental constraints and their implications, provided its idea of welfare is revised, but it would not really give individuals and communities enough room to pursue their projects of life and define their ideas of welfare. As it acts as a stimulus for government to engage actively in improving quality of life for their population, the WECT program of social transformation can reduce freedom of action for individuals and communities. Where this happens the Constitution can become closed and subsequently threaten pluralism.[46]

[43] For these ideas, a major reference are the works of Hans Jonas. See, for example: H. Jonas, *El Principio de Responsabilidad - Ensayo de una Ética para la Civilización Tecnológica*, Herder, Barcelona (original edition in German: H. Jonas, *Das Prinzip Verantwortung: Versuch einer Ethik für die Technologische Zivilisation* (1979) Insel, Frankfurt; edition in English: H. Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (1985) University of Chicago, Chicago). For the ecofeminist contribution to ethics of care, see: V. Held, *The Ethics of Care: Personal, Political, Global* (2006) University of Oxford Press, Oxford.

[44] See Jositsch (supra note 18) at 97; Murswiek (supra note 13) at 50.

[45] See: A. Cortina, *Por una Ética del Consumo* (2002) Taurus, Madrid, at 203ff; and D. Thürer, 'Recht der Internationalen Gemeinschaft und Wandel der Staatlichkeit' in D. Thürer, J. Aubert and J. Müller (eds), *Verfassungsrecht der Schweiz / Droit constitutionnel Suisse* (2001) Schulthess, Zurich, at 59.

[46] This has been underlined in the recent constitutional developments in Bolivia and Ecuador, where a robust social state - at least in the constitutional text - appears as a threat for discrepancy, political pluralism and cultural minorities. See J. Echeverría, 'Complejización del Campo Político en la Construcción Democrática en el Ecuador' in F. Burbano de Lara (ed), *Transiciones y Rupturas. El Ecuador en la Segunda Mitad del Siglo XX* (2010) FLACSO Ecuador & Ministerio de Cultura, Quito, at 86.

My idea of environmental justice demands government activity to propel social change and redistribution of goods and harms, but demands also government restraint in order to leave room for people to take their own decisions.

A Conclusion: Environmental Justice in a Plural World

The key arguments presented here are that we must both induce responsibility and care for nature and human beings, fix limits on social behaviour, and leave room within these limitations for pluralism in which individuals and communities would have the possibility of defining their own projects of life, their idea of happiness, their priorities and their idea of welfare. For this reason, we must be cautious in giving public powers tools of social intervention. There could, of course, be a temptation to define the contents of welfare from a (supposedly) universal point of view within the dense constitutional discourse of social change in the WECT, but this temptation must be avoided. The definition of the idea of welfare must be left to individuals and communities in a world of diversity and pluralism, with the proviso that they must take account of the limitations posed by the scarcity and vulnerability of natural resources.

Each community would then have its space for decision making in accordance with their own cultural background. This would give rise to different circles of consensus.[47] Within these different community consensuses, some autonomy must be left to individuals. Precisely how much autonomy was left or what its shape would be would be defined by the cultural priorities of that community. At a higher level, different communities can be aggregated to define a shared core of consensus. They would then agree to some limitations on their autonomy while leaving room to each of them to preserve its identity. I imagine a multi-space shaped by different ranges of consensus at community, state, regional or global level, where welfare is defined and re-defined in a permanent social debate in different spaces of social dialogue.

This requires an open attitude to allow rules to evolve within the flow of intercultural dialogue. In order to make decision making in complex multi-spaces of action possible, it is necessary to establish common rules and principles at each level which are based on the consensus of the communities located at lower levels (shared rule),

[47] It is not only a question of distribution, but of recognition of the political role of different individuals and communities in the definition of priorities and the way harms and benefits are to be distributed. See, in this sense, D. Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories (2004) 13 *Environmental Politics*, at 537.

which would have their respective spaces for decisions within this framework (self-rule).[48] What the federal WECT brings to this is a good procedure in which this decision making can take place. It provides a tradition of designing rules to regulate processes to cope with diversity, entailing shared rule and self-rule. It is this that makes it the most suitable approach to dealing with the creation of consensus and limitation of rights at different levels of decision making.

At the highest level of consensus, human rights, redefined according to the idea of environmental justice presented before, would place limitations on decision making at all lower levels. The global consensus established in these terms would serve as a defence for the most vulnerable people, for people in the future and for the environment and the diversity of life. In this scenario, environmental justice serves to ensure a fair distribution of burdens and an equitable access to goods. It thus both provides the founding principle for global consensus and redefines human rights to address scarcity of resources.

In conclusion, I have (i) defined environmental justice in a wider way, taking into account the problems of distribution of environmental harms and of goods derived from the use of natural resources, (ii) linked this idea to a process of social transformation at the global level propelled by public action which has been inspired by the WECT, and (iii) avoided the menaces to pluralism implicit in any dense constitutional discourse. These three points seem to be a way to reach the goals posed by the five points in the introduction and make environmental justice a central idea in global governance.

[48] See J. Jaria i Manzano, 'Circles of Consesus. The Preservation of Cultural Diversity through Political Processes' (2012) 8 *Utrecht Law Review*, at 99.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

ENVIRONMENTAL JUSTICE AND MARINE GOVERNANCE IN THE CARIBBEAN

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Introduction

The Caribbean Sea is the world's second largest sea (2.5 million square kilometres) with a coastline 55,383 km long and is home to 116 million people. Thirty six states with very different capacities have legal claims in this geo-economic, political, social, cultural and environmental space.[1] This brings challenges in formulating and executing common regional marine policy. In addition, the singular nature of this space, forged over centuries of geological and political vagaries, leave the region both rich in ecosystems and vulnerable to the consequences of its degradation.[2]

The marine ecosystem and shoreline of these states are both vital in terms of economic resources[3] and threatened by activities such as shipping[4] and tourism.[5]

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[1] On the American Continent: Belize, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Venezuela. Small Island developing states: Antigua & Barbuda, Barbados, Cuba, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, St Kitts & Nevis, St Vincent & Grenadines, St. Lucia, Trinidad and Tobago. Overseas Territories (OTs): Guadeloupe, Martinique, St Martin, Saint Barthélemy (of France); Aruba, Bonaire, Curaçao, St. Eustatius, St. Marteen (of The Netherlands); Anguilla, British Virgin Islands (BVI), Cayman Islands, Montserrat (of the United Kingdom); United States Virgin Islands (USVI), Puerto Rico (of the USA).

[2] J. Agard, A. Cropper and K. Garcia, 'Caribbean Sea Ecosystem Assessment. A Sub-Global Component of the Millennium Ecosystem Assessment' (2007) Caribbean Marine Studies, Special Edition.

[3] J. Machinea, *InserciónInternacional y Políticas de Desarrollo Productivo in Visiones del Desarrollo en América Latina* (2007) edited by J. Machinea and N. Serra, ECLAC, at 357.

Traditionally, Caribbean states have been able to dedicate very limited resources to marine environmental governance. Populations tend to be low - ranging from approximately eleven million in Cuba to almost 38,000 persons in St. Kitts and Nevis. The Caribbean Small Island Developing States (SIDS) share many of the challenges of SIDS situated elsewhere on the globe. These include weak and vulnerable economies that are largely dependent on external drivers for development. They also suffer from insularity and vulnerability to devastating almost annual hurricanes and limited institutional capacity.[6]

All of the States would therefore benefit from a strong marine governance regime that would enable them to both manage and utilise one of their greatest assets sustainably, equitably and effectively. As this paper demonstrates, however, the current architecture is rather weak and this creates problems for ensuring that environmental justice is delivered. The paper ends by suggesting options to strengthen existing structures to ensure environmental justice, improved governance and environmental sustainability.

Existing Marine Governance

Jörg and VanDeever, in their analysis of regional sea governance schemes, consider the development of regional seas governance as a three-stage process. The first stage is to overcome cooperation challenges to develop an international institution for scientific and technical work. The second stage is to adopt actual multilateral policy making. The third stage involves improving implementation and monitoring of environmental targets.[7]

In the Caribbean, the first two stages are in operation through two main governance mechanisms: the Caribbean Sea Commission[8] (CSC) and the Caribbean

[4] A. Singh, *Governance in the Caribbean Sea: Implications for Sustainable Development* (2008) Research Paper, United Nations/Nippon Foundation Fellowship (available at http://www.un.org/depts/ los/nippon/unnff_programme_home/fellows_pages/fellows_papers/singh_0809_guyana.pdf).
[5] The Ocean Conservancy, *Cruise Control: A Report on How Cruise Ships Affect the Marine Environment* (2002), at 68.
[6] L. Briguglio, B. Persaud, B. and R. Stern, *Toward an Outward-Oriented Development Strategy for Small States: Issues, Opportunities, and Resilience Building* (2006) World Bank.
[7] B, Jörg and S D. VanDeveer, 'Regional Governance and Environmental Problems' in R. Denemark (ed), *The International Studies Encyclopedia* (2010) Blackwell Publishing.
[8] L. Andrade 'The Role of the Caribbean Sea Commission (CSC) in Regional Governance' (2010) *Expert Consultation on Operationalisation of the Caribbean Sea Commission*,

Environmental Programme[9] (CEP). The third stage is however yet to be managed in a coordinated and sustainable way and it is this that presents a real threat to delivering environmental justice.

The CSC dates back to 2006 and was created by the Association of Caribbean States (ACS).[10] It promotes international recognition for the Caribbean Sea as a 'special area' within the context of sustainable development. This initiative arose out of the Barbados Program of Action adopted in 1994 after the first Global Conference on the Sustainable Development of Small Island Developing States.[11] Member states through the CSC engage in regional and multilateral processes relating to the preservation of the resources of the Caribbean Sea such as the Caribbean Large Marine Ecosystem (LME) Project[12] and the United Nations (UN) Regular Process.[13] The Commission is composed of a Bureau, a Budget Committee and three Sub-Commissions (scientific and technical, governance, public information and outreach and legal). It is still to be fully operationalized and steps are being taken to establish a Secretariat to advance the Commission's work.[14]

The CSC's main goals in the short and medium term are: obtaining a UNGA resolution which outlines special area designation; an Organisation of American States Resolution which facilitates the process towards the implementation of the CSI at the wider hemispheric level; the establishment of a common Caribbean ocean policy; increased participation of regional organisations in the work of the CSC and the participation of the CSC in other ocean governance processes. The Commission's goals have to date been aligned with the Global Environmental Facility funded Caribbean Large Marine Ecosystem Project.[15] It has also garnered the support of the UN General Assembly in a resolution recognising the need to support

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Association of Caribbean States (available at http://www.acs-aec.org/Events/CSea_Experts_Seminar.htm).

[9] CEP, 'About us' (available at http://www.cep.unep.org/about-us).

[10] N. Girvan, 'The Caribbean Sea is Special. The Greater Caribbean This Week' (2002) (available at http://www.acs-aec.org/column/index43.htm).

[11] R. Insanally, 'The Caribbean Sea: Our Common Patrimony' (undated) (available at http://www.acs-aec.org/About/SG/Girvan/Speeches/Caribbean_Sea.htm#_ftn1).

[12] Andrade (supra note 8). This project is also supported by the UNEP-Caribbean Environment Programme's Regional Coordinating Unit (UNEP-CAR/RCU) that also supports other regional GEF environmental projects including Invasive Species and Ballast Water management and monitoring.

[13] ACS/CERMES-UWI, *Report of the Expert Consultation on the Operationalisation of the Caribbean Sea Commission: Building a Science-policy Interface for Ocean Governance in the Wider Caribbean* (2010) CERMES Technical Report No. 33, at 14.

[14] Ibid.

[15] Ibid.

its work- known as The Caribbean Sea Initiative (CSI).[16] In 2011 the Organisation of American States General Assembly also passed a resolution in support of the CSI[17] and towards the end of 2011 the CSC developed a Memorandum of Understanding with the regional University of the West Indies to begin common work to support the Initiative.[18] In addition the Food and Agriculture Organisation has invited the CSC to be part of its Fisheries Process.

The Commission has therefore made progress in delivering the second stage of Jörg and VanDeever's scheme for the development of regional seas programmes, but progress has been slow in the development of a focused work program. This is in large part because the Commission still cannot count on the financial, human and technical support from member states necessary to establish the Secretariat. Nor does it seem to have the mandate for monitoring and implementation of targets. It has instead a mandate to promote information sharing, assist in the development of policy and to garner international support for regional projects.

The CEP in turn was established in 1981 when Caribbean States sought the assistance of UNEP to protect marine and coastal ecosystems of the Wider Caribbean Region within the UNEP Regional Seas Program.[19] Its role is to promote regional cooperation to protect and ensure the sustainable development of the region's marine environment and coastal and marine resources. It is buttressed by the regional framework agreement: the 1986 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (the Cartagena Convention) and its accompanying Protocols on Oil Spills, Biodiversity and Land Based Sources of Marine Pollution.[20] The CEP is mainly involved in information management and exchange, environmental education, capacity building and technology transfer and training. It facilitates the production of technical

[16] UN Resolution A/RES/65/155 (Annex II) *Towards the Sustainable Development of the Caribbean Sea for Present and Future Generations* (dated 25 February 2011).
[17] ACS, 'OAS Approves Resolution "Support for the Work of the Caribbean Sea Commission"' *ACS News Release* NR/010/2011 (available at http://www.acs-aec.org).
[18] ACS, 'Signing of a Memorandum of Understanding Between the Association of Caribbean States (ACS) and the University of the West Indies (UWI)' *ACS News Release* NR/004/2011 (available at http://www.acs-aec.org).
[19] The Wider Caribbean Region (WCR) includes 33 island and continental countries - insular and coastal States and Territories with coasts on the Caribbean Sea and Gulf of Mexico and the waters of the Atlantic Ocean adjacent to these States and Territories.
[20] *Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region*; *Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean Region*; *Protocol Concerning Pollution from Land-Based Sources and Activities*. See CEP, 'About the Cartagena Convention' (undated) (available at http://www.cep.unep.org/cartagena-convention).

guidelines and manuals, integrated management plans and national contingency plans for marine emergencies such as oil spills. The CEP's recent projects - funded through the Global Environmental Facility (GEF) - include the Demonstration of Innovative Approaches to the Rehabilitation of Contaminated Bays in the Wider Caribbean Region, Reducing Contamination of the Caribbean Sea in Central America by Pesticide Run Off and Integrating Watershed and Coastal Area Management in Caribbean SIDS.

The CEP's two main governing bodies are the Intergovernmental Meeting (IGM) on the Action Plan and the Meeting of the Contracting Parties of the Cartagena Convention. The former provides policy guidance and general oversight and approves the biennial work plan and meets every two years, jointly with the latter. The two coexist because states resolved at the establishment of the Cartagena Convention that the IGM, which predates the Convention, should continue to exist alongside the Cartagena Meeting of Contracting Parties. Similarly there are two monitoring bodies within the CEP, which also meet jointly and biennially - the Monitoring Committee to the Action Plan and the Bureau of Contracting Parties to the Convention. These bodies provide recommendations to the IGM. The Convention's Protocols also have their scientific and technical meetings.

In practice it would be fair to say that although the CEP is sustained by a legally binding framework and the Caribbean Action Plan (which demarcates regional policy), it facilitates only technical cooperation and does not have a mandate for wider environmental governance. That is, it has no mandate to institute monitoring, target setting or enforcement. It also lacks the political commitment and regular involvement of states and resources needed to make it a strong monitoring and implementation agency.

Social and Environmental Justice - The Caribbean

Environmental justice requires special attention to low-income and disadvantaged communities which are disproportionally at risk and traditionally likely to receive fewer benefits from natural resources and development efforts.[21] It thus fits well with the debate on marine governance in the Caribbean that brings together both SIDS and the overseas territories of some powerful developed States. Four key

[21] G. Bryner, 'Environmental Justice' in Denemark (supra note 7).

considerations are relevant to embed environmental justice into the regional architectures in the Caribbean: capacity building for better governance; greater focus on social equity issues; the need to address issues of intergenerational equity across specific issue areas such as health and the environment; and structured participatory mechanisms.

Falk and Strauss and others argue that states continue to be the principal agents in environmental governance and that they should be strengthened to be able to guide the process.[22] This is particularly true in the Caribbean. States are best placed to effectively harness financial and legal resources to facilitate compensatory justice through their legislature and executive by ensuring compliance with international environmental law and principles, especially in favour of the economically and socially marginalised. There have also been positive signs of good governance initiatives at the domestic level that promote inclusiveness and the institutionalised participation of stakeholders, but these have had varying degrees of effectiveness.[23] Generally the challenge of improving traditional systems of single party parliamentary government that tend to preclude inclusiveness, transparency and accountability remains in place. There is therefore a need for regional governance initiatives to include capacity building programmes to help strengthen both national and regional governance structures. These efforts should focus on ensuring equity and participatory decision-making that includes stakeholders and draws *inter alia* on local ecological knowledge.[24]

[22] See: F. Falk and A. Strauss, 'Toward Global Parliament' (2001) 80 *Foreign Affairs* 212; and L. Elliot, 'Transnational Environmental Harm, Inequity and the Cosmopolitan Response' in P. Dauvergne (ed) *Handbook of Global Environmental Politics* (2005) Edward Elgar Publishing.

[23] See, for example, the Jamaican National Council on Ocean and Coastal Zone Management and the recent success of the Coastal Zone Management Unit of Barbados that has rehabilitated important beaches on the island. The National Council on Ocean and Coastal Zone Management. 'Towards Ocean and Coastal Zone Management in Jamaica' (available at http://www.nepa.gov.jm); and Barbados Ministry of the Energy and the Environment, 'Director's Messsage: 25 Years and Counting'(2009) 7(1) *On and Offshore:The Newsletter of the Coastal Zone Management Unit* 1.

[24] P. McConney and S. Salas, 'Why Incorporate Social Considerations into Marine EBM?' in L. Fanning, R. Mahon and P. McConney (eds) *Towards Marine Ecosystem-Based Management in the Wider Caribbean* (2011) Amsterdam University Press. See further on the role of institutions: L. Fanning, R. Mahon, P. McConney, I. Angulo, F. Burrows, B. Chakalall, D. Gil, M Haughton, S Heileman, S Martinez, O. L'ouverture, A. Oviedo, S. Parsons, T. Phillips, C. SantizoArroya, B. Simmons and C. Toro, 'A Large Marine Ecosystem Governance Framework' (2007) 31 *Marine Policy* 434-443. See further on the importance of culture in participatory governance: J Palacio, C Coral and H. Hidalgo, 'Territoriality, Technical Revitalisation and Symbolism in Indigenous Communities' in Y. Breton, D. Brown, B. Davy, M. Haughton and L. Ovares (eds), *Coastal Resource Management in Wider Caribbean: Resilience, Adaptation and Community Diversity* (2006) Ian Randle Publishers.

Second, governance should be sensitive to the particularities of environmental injustice in the region. Bullard highlighted the importance of class and race in framing the social inequity issues related to the environment.[25] In the Caribbean class and race shape much of the economic and social discourse related to social equity.[26] Lloyd Best, prominent Caribbean economist, argued that the region has not yet departed from post-independence constructs that perpetuate the oppression of the lower classes.[27] Protecting society and the environment are two sides of the same coin.[28] One illustration of the problem is the perceived inequity in the region's tourism industry where profits stay with large cruise liners and hotels run by multinationals or the domestic private sector while poor local populations have limited access to bathing beaches or work under inequitable labour conditions in the sector.[29] Both distributive justice[30] and procedural justice[31] must form an important part of the regional marine governance mandate to remove even the perception that those historically marginalised classes and races lack equal access to environmental decision making and ecosystem services.

Third, the issues of intra- and inter-generational equity must be addressed. These issues are widely recognised and enshrined in the 1948 *United Nations Universal Declaration on Human Rights*[32] (Article 29), the 1992 *Rio Declaration on Environment and Development of the United Nations Conference on Environment and Development*[33] (Principle 6) and several environmental treaties.[34] For the Caribbean

[25] See R. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (1990) Westview; and R. Bullard, 'Levelling the Playing Field through Environmental Justice' (1998-1999) 23 *Vermont Law Review*453.
[26] S. Ryan 'Social Stratification in Trinidad and Tobago: Lloyd Braithwaite Revisited' in S. Ryan (ed), *Social and Occupational Stratification in Contemporary Trinidad and Tobago* (1991) The Institute for Social and Economic Research.
[27] L. Best, *Race, Class and Ethnicity: A Caribbean Interpretation* (2009) Centre for Research on Latin America and the Caribbean, York University.
[28] F. Berkes and A. Folke, 'Back to the Future: Ecosystem Dynamics and Local Knowledge' in L. Gunderson and C. Holling (eds), *Panarchy: Understanding Transformations in Human and Natural Systems* (2002) Island Press, at 121.
[29] See, for example, the attempt made by a beach-front property owner in Barbados in 2010 to block wider access to the beach ('Paynes Bay beach access being blocked' *Nation News,* 30 September 2010).
[30] T. Frank, *Fairness in International Law and Institutions* (1995) Clarendon Press.
[31] See: J. Paavola and L. Ian, *Environmental Values in a Globalising World: Nature, Justice and Governance* (2005) Routledge; and D. Shelton, 'Equity' in D. Bodansky, J. Brunnée and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007) Oxford University Press, 640.
[32] UN General Assembly Resolution 217 A (III).
[33] A/CONF.151/26 (Vol. I) Chapter I, Annex I.
[34] E. Weiss, 'Intergenerational Equity: a Legal Framework for Global Environmental Change' in E Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (1992) United Nations University Press.

SIDS this means determining the best way to use limited national budgets to ensure short term social welfare (basic sanitation, infrastructure, health, education) while investing in cleaner technologies and monitoring and surveillance efforts that will transform these countries into blue and green economies.

Fourth, structured participatory mechanisms are necessary to draw in non-state actors to decision making. The value of participatory decision making is now widely recognised,[35] but while it has been advanced in areas such as the European Union[36] it is also particularly important in the Caribbean where weak political will often is more a function of limited capacity within government ministries to handle multiple portfolios than an unwillingness to apply good environmental governance.[37] Participatory decision-making could in this context also ensure that the much needed scientific, technical and logistical support in policy formulation, monitoring and implementation is provided.

Proposals to Enhance Existing Structures

As indicated earlier, the CEP through its biennial IGM, develops general regional policy, but its secretariat is in no way a surveillance and enforcement agency. The CSC is still to be operationalized and does not, at least in the short to medium term, contemplate such governance mechanisms. What is proposed here are three additions or modifications to existing structures and a new type of policy. The first modification is the creation of a more inclusive policy formulation body (an 'environmental council' that benefits from non-regional resources via a 'group of friends'). The second is a better resourced regional environmental executive through issue specific sub committees for more efficient use of limited regional resources. The third is a legal and judicial enforcement mechanism to ensure compliance and thus support the work of governance. The fourth element is that a clearer articulation of a common regional environmental policy be given.

[35] See most notably the *UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* signed at Aarhus, Denmark, on 25 June 1998 (available at http://www.unece.org/env/pp/welcome.html).
[36] Public Participation Directive, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.
[37] P. McConney, 'National Level Interactions with Regional Organisations', *Expert Consultation on Operationalisation of the Caribbean Sea Commission*, Association of Caribbean States (available at http://www.acs-aec.org/Events/CSea_Experts_Seminar.htm).

At present policy formulation at both the CEP and the CSC is the purview of states. The proposed Council, if it becomes the main environmental policy and decision making body for the region, can work for consensus from among all relevant stakeholders to enhance one of the key aspects of procedural justice in the environmental context - participatory decision making. It is assumed that these stakeholders would include the scientific community,[38] issue specific regional environmental and development organisations (such as the Caribbean Environmental Health Institute, the Caribbean Community Climate Change Centre, the Organization of Fishing and Aquaculture in Central America etc.), government ministries, urban and coastal community based organisations, fisheries, specially disadvantaged groups, infrastructure development agencies, environmental NGOs, multilateral development banks (Caribbean Development Bank, the Inter-American Development Bank) and industry (shipping, tourism etc.). Regional policy and environmental targets can then emerge from shared discussion among the region's representative groups providing greater legitimacy in the decision making process. This more stable structure institutionalises the ad-hoc consultation with local communities and interest groups now practiced at the implementation stage for some projects. The challenge here is to ensure fair representation and active participation, especially from disadvantaged groups.

The workings of this Council could be enhanced by providing a mechanism for global participation through for example a 'Group of Friends of the Caribbean Sea', which could, at the request of the Environmental Council provide technical and financial assistance and could be an advisory body to the Council. Participation would be open to non-regional states, international institutions, multinational corporations and non-state actors that have historic, commercial or philanthropic links with the Caribbean. Such a group may facilitate global distributive justice by providing a permanent forum for international assistance to the region. It would provide an institutionalised framework allowing wealthier global communities, states and groups outside the region to assist low-income communities in their efforts to ensure that ecosystem services in the region are available to themselves and to future generations. Although this group would not have voting rights, its participation in and

[38] The importance of the scientific and technical communities at this level cannot be overstated. They enhance legitimacy and provide the empirical justification for the Council's decisions. See further: P. Haas, 'Protecting the Baltic and North Seas' in P. Haas, R. Keohane and M. Levy (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (1993) MIT Press, at 133.

contribution to deliberations may provide much needed insight into best practices and sources of funding that can facilitate regional work and projects.

The second level of governance to strengthen the CEP or the CSC would be issue specific sub-committees which have a strong implementation mandate. While the CSC contemplates these sub-committees and the CEP has Scientific and Technical Advisory Committees (STACs) under the Specially Protected Areas and Wildlife and Land-based Sources and Activities Protocols, these Committees are largely advisory bodies with no executive mandate and limited human, technical and financial resources. What is proposed is that these committees should implement policy through and with the resources of environmental agencies of member states and regional organisations, supported by the scientific community. Distributive justice demands more than good intentions and this novel proposal focuses on the reality facing SIDS in facilitating distributive justice. At present the countries of the region, though willing to address inter- and intra-generational inequity, lack the capacity to apply the measures and deploy the mechanisms to ensure environmental justice is achieved on an individual basis. The goal here would be to have a regional environmental executive that can work across states and agencies and thus avoid duplication of resources. National agencies may specialise across the region in areas of environmental conservation, surveillance and protection through the creation of clusters that work together with local authorities to implement domestic and regional projects. These sub-committees, acting like a regional environmental executive, can benefit from the support (technical and financial) of the Group of Friends and implement the specific decisions of the Environmental Council on a day to day basis.

The third level is a Legal and Monitoring Committee. It should report to the Environmental Council and work with issue specific sub-committees to monitor and ensure compliance with international and regional agreements, Council targets and environmental principles. This Committee, working with and through the issue specific sub-committees, should have powers to take timely action to prevent, mitigate and ensure that compensation is given (by recourse to dispute settlement procedures in international or domestic forums) in cases of breaches of environmental law in maritime matters. The inclusiveness of the Council will allow the socially or economically marginalised access to a complaints and dispute resolution system and will thus be the guardian of regional environmental justice.

The fourth element of governance that is necessary is a common regional environmental foreign policy that is implementation driven. This is needed especially to address competing values within the region and to ensure that the environment receives the attention that it deserves within policy making more generally. This has traditionally been a challenge for the Caribbean.[39] While some states depend heavily on tourist revenue from cruise ship visitors, others are transhipment ports while others are engaged in mining or oil production each of which carries its own risks to marine ecosystems. In addition, Caribbean foreign policy is influenced by what Alons calls 'interest mediation'.[40] In this context this means that, as a result of multidirectional mobilisation by the non-governmental sector, environmentalists have less of a chance to shape foreign policy in favour of the environment. Instead government attention and finance have been drawn to issues such as culture, women's rights, health and education.[41] A common regional environmental policy, that clearly articulates a common implementation path to redress social and environmental injustice, would help address this issue at the regional and then domestic levels. While the Caribbean has the Action Plan articulated through the CEP, greater commitment to specific targets, clear lines of accountability and timeframes for execution will enhance this regional policy.

It would be simplistic to assume that these proposals may be easily implemented. While an overview of a possible system has been presented, its details should be the fruit of consensus among stakeholders. Above all, strong political will to develop regional maritime governance and a willingness to cede elements of sovereignty for the execution of projects is needed.[42] Some of the discussions within the Caribbean Sea Commission through the Caribbean Sea Initiative do show a willingness of states to move beyond existing structures to greater cohesiveness in regional maritime governance. More is, however, needed to ensure an inclusive governance system able to deliver environmental justice across the regime.

[39] F. Jackman, 'Future Directions of Caribbean Foreign Policy: The Oceans' in K. Hall and M. Chuck-A-Sang (eds) *CARICOM: Policy Options for International Engagement* (2010) Ian Randle Publishers.
[40] G. Alons, 'Predicting a State's Foreign Policy: State Preferences between Domestic and International Constraints' (2007) 3 *Foreign Policy Analysis* 211.
[41] UNEP Regional Office for Latin America and the Caribbean, Mexico. *GEO Latin America and the Caribbean: Environment Outlook 2003* (2003) UNEP, at 282.
[42] On the difficult issues of sharing sovereignty in the Caribbean, see: D. Pollard, 'Unincorporated Treaties and Small States' (2007) 33 *Commonwealth Law Bulletin* 420.

Conclusion

There is growing political will for and non-state interest in a stronger regional marine governance framework for the Caribbean. The region's present environmental governance architecture should however be reworked to rest more firmly upon a foundation of social and environmental justice that weighs heavily in favour of inclusiveness for both those responsible and those suffering from environmental harm. Regional development in environmental governance is however stymied by the inherent vulnerabilities and handicaps of SIDS. The proposals contained herein suggest a way to work around limitations to secure a protected marine environment for future generations.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: AUSTRALIA
Considering the Myriad Developments of 2011

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Introduction

Environmental developments in Australia in 2011 have been dominated by the passage through the Federal parliament of the *Clean Energy Legislation 2011*. This package addresses many aspects of alternative energy and greenhouse gas emissions control. Other important environmental matters include the continuing debate on management of the Murray-Darling Basin together with increasing concern over coal seam gas extraction. These developments are overviewed below.

The Murray Darling Basin

The implementation of the Water Act 2007, concerned with the management of the nationally significant Murray-Darling Basin, continues to be controversial. Contentious matters range from determining the volume of water that should be diverted for environmental services and extend towards developing an understanding of the impact of coal seam gas extraction on the region. The Murray-Darling Basin Management Plan, which was released in 2010, recommended that 3000GL to 4000GL of water be diverted to the environment. This created a public backlash from those who held existing water entitlements and resulted in a revision of the plan. In late May 2011, the Murray-Darling Basin Authority announced that it planned to divert less than 3000GL for environmental purposes - an announcement that coincided with the resignation of a group of leading scientists who had been working on the plan. The second matter flows from an inquiry, announced by the Australian Senate, into

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the management of the Murray-Darling basin. Part of this inquiry includes a special examination of the impact of coal seam gas extraction - also an awkward issue for other regions of Australia. The report is due to be released in late 2011.[1]

Coal Seam Gas Extraction

As with other jurisdictions, coal seam gas extraction has emerged as a contentious issue in Australia. Extraction is most likely to occur in New South Wales and Queensland although other areas, such as Western Australia, are possible candidates. The Australian Government favours the use of coal seam gas as an energy source, claiming it is cleaner than coal or oil because it generates lower greenhouse gas and other emissions.[2] Licenses for exploration and drilling have been granted in districts extending from St Peters, within the boundaries of Sydney, to the Western Sydney region and Western Australia's Pilbara. Following the grant of approval to extract natural gas from the Pilbara region, Tony Burke, the federal Minister for Sustainability, Environment, Water, Population and Communities, commented that: 'the strict conditions [imposed] on the proposed project will help to protect threatened and migratory species such as dugongs, marine turtles, sawfish, dolphins and whales and the marine environment.' Notwithstanding the Government's optimism, coal seam gas extraction has generated significant public protests. The farming community, tourist industry and wine industry have all raised concerns that coal seam gas mining will contaminate ground water and aquifers and that these concerns have not been adequately investigated.

Biodiversity and the Hawke Inquiry

At the end of 2009 the Federal Government released a review of the *Environment Protection and Biodiversity Conservation Act 1999* - the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, chaired by Dr Hawke. In August 2011 the Federal Government released its response to this report. The report made 71 recommendations for amendments to the *Environment Protection and Biodiversity Conservation Act* (1999) that would have strengthened the involvement of the Federal Government in environmental matters. It identified five processes to enhance this involvement - harmonisation, accreditation,

[1] For further details see: http://www.aph.gov.au/senate/committee/rat_ctte/mdb/info.htm.
[2] See *Background Note - The Development of Australia's Coal Seam Gas Resources*, July 2011, (available at http://www.aph.gov.au/library/pubs/bn/sci/CoalSeamGas.htm.)

standardisation, simplification and oversight. These processes focus on drawing together environmental regulation at the State and Territory levels. The Federal Government accepted 56 of the recommendations, two of which relate to the creation of new matters of national environmental significance: namely, ecosystems of national significance and vulnerable ecological communities. Notwithstanding these additions, the majority of the recommendations accepted by the Federal Government focus on advancing strategic approaches for a more streamlined assessment process in order to cut 'red tape for business and [improve] the timeliness of decision making'.[3]

Tasmanian Forests

Land clearing is a major issue for the protection of the Australian environment. For the last thirty five years, bitter campaigns have been fought against the backdrop of the Tasmanian forest industry. On 7 August 2011, an accord was reached between the Federal and Tasmanian Governments when they entered into the Tasmanian Forests Intergovernmental Agreement. The Agreement provides a $AU276 million package to allow the Tasmanian forest industry to adapt in a sustainable manner while at the same time preserving high conservation old growth forests. The assistance package includes $AU85 million to support those whose livelihood will be affected by the reduction of native forest harvesting and $AU43 million to protect high conservation areas. Immediately upon the signing of the Intergovernmental Agreement, the Tasmanian Government placed 430,000 hectares of native forests into an informal reserve, an arrangement which will be formalised when the Tasmanian and Federal Governments enter into a detailed conservation agreement.

Disbanding of the Department of the Environment

Following a change of government in New South Wales, the incoming premier, Barry O'Farrell, announced that the New South Wales Department of Environment, Climate Change and Water (Department of the Environment), would be abolished and its functions and responsibilities subsumed into other departments, such as the Premier's Department. The latter will also oversee National Parks and the Environment Protection Authority (EPA). The EPA is currently undergoing a

[3] The full response can be accessed from: http://www.environment.gov.au/epbc/publications/epbc-review-govt-response.html.

restructure and will shortly be established as an independent statutory authority. It is anticipated that as part of the abolition of the Department of the Environment, the Department of Primary Industries will be allocated the management of marine national parks and land clearing.

Recent Legislative Developments

The Federal Government's *Clean Energy Legislation 2011*, introduced by the Gillard Government, has dominated legislative developments over the last six months. The legislation consists of 18 statutes designed to establish an Emissions Trading Scheme (ETS), supplemented by the *Steel Transformation Plan Act 2011*. The latter specifically addresses the manufacture of steel and provides $300 million over four years to assist the Australian steel industry to operate in a low carbon economy. At the time of writing, the *Clean Energy Legislation 2011* had been passed by the House of Representatives on 12 October 2011, the Senate on 8 November 2011 and was awaiting Royal Assent.

Carbon pricing has been a polemic and highly politicized issue in Australia for a number of years. In 2009, the Rudd Government shelved plans to introduce a cap-and-trade emissions scheme, known as the Carbon Pollution Reduction Scheme, due to lack of bipartisan support. In a similar vein, once the Gillard Government announced its intention to introduce a carbon pricing mechanism, the opposition made a promise 'in blood' to repeal the legislation if their party were to gain power.

Notwithstanding this controversy, the *Clean Energy Legislation 2011* is for all intents and purposes, law. The legislation recognizes that it is in the national interest to minimize average global temperature increases to no more than 2 degrees Celsius beyond pre-industrial levels. Accordingly, a key objective of the legislation is to set a price on carbon emissions to encourage investment in clean energy and to support Australia's economic growth.

Three key features of the *Clean Energy Legislation 2011* are the introduction of a Carbon Pricing Mechanism, the creation of a Clean Energy Regulator and the establishment of a Clean Energy Authority. The legislation targets approximately 500 of the nation's highest polluters, referred to as 'liable entities'. These include firms such as electricity producers, mining companies, and heavy industry firms, as well as

a number of public authorities responsible for managing land fill. The liable entities contribute to approximately 60 percent of Australia's carbon emissions making Australia's scheme a broad-based one. Direct carbon emissions from agriculture, fisheries and forestry product sectors are excluded from the carbon pricing mechanism. However, from 2014-2015 the Government will extend the mechanism to heavy on-road vehicles.

The Carbon Pricing Mechanism commences on 1 July 2012 with the imposition of a fixed price per ton of carbon emitted - a procedure that has led to the pricing of carbon to be dubbed as a 'carbon tax'. From 1 July 2012, liable entities will pay $23 per ton and the price will increase to $24.15 on 1 July 2013 and $25.40 on 1 July 2014. During these first three years there will be no cap on the number of units that liable entities can acquire. The cap starts from 1 July 2015 when the regime converts to a trading scheme that is fully market-based. Due to the fact that it is anticipated to cost the average family approximately $9.90 per week in higher living costs the carbon price mechanism is proving to be unpopular - at least in these early stages. The Government, however, proposes to offset higher living costs by introducing tax cuts and additional benefits for those on welfare and pensions.

As part of the regime, the Government has also announced a $1.7 billion Land Sector Package which includes the $429 million Carbon Farming Futures Program. The funds will be used for research into strategies to reduce carbon emissions by agricultural activities as well as creating support for the Carbon Farming Initiative (CFI). The CFI will provide accreditation for projects that reduce emissions or store carbon and where the projects meet international standards can also be accredited as 'Kyoto Compliant'.

The *Clean Energy Regulator Act 2011* establishes the Clean Energy Regulator as a statutory authority to administer the Carbon Pricing Mechanism, enforce the law and educate the public. In addition, the Clean Energy Regulator will work closely with existing regulatory bodies such as the Australian Securities Investment Commission and the Australian Competition and consumer Commission. The *Climate Change Authority Act 2011* establishes the Climate Change Authority as an independent review body to advise the Government.

Recent Jurisprudence

Case law and enforcement over the last six to twelve months have focused on procedural matters regarding litigation commenced in the public interest as well as issues relating to land clearing and habitat degradation.

In the context of public interest litigation, costs orders can be a significant determinant of whether plaintiffs pursue a case. Hence the courts are mindful of the impact of such orders in encouraging or discouraging litigation. In *Australians for Sustainable Development Inc v Minister for Planning*[4] the plaintiffs challenged a development approval made by the Minister for Planning for the Barangaroo site in Darling Harbour, Sydney. The approval included the provision of 900 parking spaces which would have involved substantial excavation, and the use of the excavated material as land fill in a proposed public park. The Barangaroo site was once a gas works and the Environment Protection Authority believed that disturbance of the site would present risks to human health and facilitate the streaming of toxins into Sydney Harbour. Accordingly, the Authority indicated that the site needed to be de-contaminated prior to excavation. The plaintiff used these facts to challenge the development approval, arguing that the development did not comply with *State Environment Planning Policy No 55 - Remediation of Land* (SEPP 55), which provides guidelines for managing contaminated land.

The case was heard in the Land and Environment Court in February 2011 and two weeks after the completion of the hearing, the New South Wales Minister for Planning made a special order by executive action that SEPP 55 did not apply to the Barangaroo project. Judgement in the litigation was delivered on 10 March 2011, by which time, the main ground for the plaintiff's case no longer applied. Justice Biscoe had no choice but to dismiss the application. Yet, as his honour pointed out, had the Minister not issued an order to exempt the Barangaroo development from SEPP 55, the plaintiffs would have won their case.[5] His honour also pointed out that the timing of the order meant that the parties had expended substantial resources on the litigation. In view of the lateness of the amendment, Biscoe J ordered that the Minister should pay the costs of the plaintiff on an indemnity basis.[6]

[4] [2011] NSWLEC 33.
[5] Para 298.
[6] Paras 298-302.

With respect to unauthorized land clearing and habitat degradation, the Federal Government aims at remediation of the damage. One means of achieving this outcome is to secure an enforceable undertaking. For example, on 12 October 2011, the Federal Department of Sustainability, Environment, Water, Population and Communities secured an enforceable undertaking from Springvale Coal Pty Limited and Centennial Angus Place Pty Limited with respect to environmental damage caused by long wall mining operations. The damage included erosion, loss of habitat and an increased susceptibility of the area to weed infestation. The companies entered into a voluntary undertaking to contribute $1.45 million towards a fund administered by the Australian National University to research protection of wetland areas.[7]

In the second case, a delegate of the Federal Minister for Sustainability, Environment, Water, Population and Communities made a remediation determination on 17 May 2011, against Douglas Rutledge for authorizing or permitting the clearing of 30 hectares of the Weeping Myall Woodland. This Woodland is listed as an endangered ecological community and the Government was able to stop the clearing before the site was irreparably damaged. The determination ordered that Mr Rutledge cease farming activities in the area and repair or mitigate the damage.[8]

Finally, a case from the New South Wales Land and Environment Court dealt with the types of matters that judges take into account when settling a penalty for environmental crimes. In the case of *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (no 4)*[9] the defendant was found liable, through its contractor, for breaching section 12(1) of the *Native Vegetation Act 1993 (NSW)* by clearing seven species of native vegetation. The issue before the court was how to determine the appropriate penalty. Justice Pepper noted that courts should synthesize 'objective and subjective circumstances surrounding the commission of the offences'.[10] The objective circumstances could include a deterrence factor. However, the defendant maintained that the penalty should not include a deterrence factor because, from its point of view, this was an isolated

[7] For more information, see: http://www.environment.gov.au/epbc/compliance/pubs/enforceable- undertakingcentennial.pdf.
[8] A copy of the determination may be found at: http://www.environment.gov.au/epbc/compliance/pubs/ remediation-determination-rutledge.pdf.
[9] [2011] NSWLEC 211.
[10] Para 23.

incident where the defendant had otherwise 'operated faultlessly since 1973'.[11] The court disagreed and considered it important that the defendant was a property development company that owned a large portfolio of properties in New South Wales. Accordingly, there could be commercial motivation for land clearing, making deterrence an important consideration in the imposition of a penalty.[12] The defendant was fined $200,000.

A Critical Consideration of Recent Domestic Developments

One trend from this report is the predilection by Government towards development without adequate public consultation and an appropriate level of transparency. The growth in coal seam gas extraction is a case in point. Similarly, the circumstances surrounding the decision in *Australians for Sustainable Development Inc v Minister for Planning* reveal the shabby side of Ministerial discretion. The design and implementation of effective planning laws goes to the heart of sustainable development. It is, therefore, a questionable use of Ministerial powers to change these laws by special orders so as to ward off a likely defeat. Such a course of action not only lacks transparency and accountability, but also raises more fundamental issues regarding the democratic validity of these powers.

On an analogous note, the decision by the premier of New South Wales to disband the Department of the Environment is perplexing. While the Premier considers that his decision has 'elevated' environmental issues to his direct attention, environmentalists have criticized the decision as a political cave-in to factional interests. In particular, the shifting of responsibility for land clearing to the Department of Primary Industries can be seen as an endorsement for the agriculture product sector, which has long considered land clearing a problematic issue. The danger is that by disbanding the Department of the Environment, environmental issues and policies will potentially be overshadowed by commercial considerations.

At the Federal level, the Government's response to the review of the *Environmental Protection and Biodiversity Conservation Act 1999* has been largely positive. As already noted, the government has accepted the creation of two new matters of national environmental significance, ecosystems of national significance and

[11] Para 130.
[12] Para 131.

vulnerable ecological communities. Henceforth, proposals and developments that are likely to have a significant impact on these two matters will need to be better addressed in accordance with the *Environmental Protection and Biodiversity Conservation Act 1999.* However, this encouraging outcome needs to be counterbalanced against the fact that the bulk of the 56 recommendations accepted by the Federal Government relate to streamlining assessments for development applications, especially in a strategic context. This signals a greater reliance on State and Territory processes, which could lead to a reduced role for the Federal Government, contrary to the tenor of the Hawke review.

Turning to a much more positive event, the passage of the *Clean Energy Legislation 2011* is timely. Australia is one of the worst carbon polluters, producing approximately 500 million tonnes of carbon per annum. Up till the passage of the legislation, industry could regard this as an externality because manufacturers and service providers were permitted to pollute without a fee or penalty. With the advent of the Clean Pricing Mechanism, industry will need to take the cost of pollution into account in the same manner as other production costs such as raw materials and labour. It is anticipated that the Emissions Trading Scheme will provide economic encouragement for industry to develop cleaner ways of producing energy. Although some critics indicate that the legislation does not go far enough and should have targeted reductions in coal mining, the scheme is an historic step forward and does much to promote investment in clean energy technology.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: BOTSWANA
Indigenous Peoples' Rights to Water

Bugalo Maripe*

Introduction

Although there is no recent development on mainstream environmental issues in Botswana, the question of water as a basic human need, which has been in the country's programme of action for a long time, has culminated in decisions of the highest courts. The significance of water and its centrality to life is generally acknowledged. Water is essential for the substance of the life of every living organism. Water is life.

Lately, the international community has taken it upon itself to bring to the fore the significance of water. The *United Nations Committee on Economic, Social and Cultural Rights Report on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights* (*ECOSOC Report*) as well the recognition by the United Nations General Assembly in July 2010 (*UNGA Resolution*) are indicators of the importance placed by the international community on water issues as a human right with attendant implications.

In Botswana, the significant development features a clash of policy in respect of water needs and the rights of indigenous peoples. This is the case especially with respect to the Basarwa. This paradox has given rise to litigation in what is described here as the Central Kalahari Game Reserve Cases.

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The Setting

Botswana, a landlocked country in Southern Africa, is generally flat and its climate largely arid and semi-arid with the extreme south-western part of the country falling under the arid zone. Most rainfall occurs as localized showers and thunderstorms. The mean annual rainfall ranges from 250 mm in the extreme southwest to 650 mm in the extreme northeast. Rainfall is erratic and unreliable. The country is prone to drought, which has since 1980, become a permanent feature of the country. Water is therefore a scarce resource in Botswana. In some cases, people have turned to natural fluids from wild plants as a forced alternative for water. However, this depends on the availability of the requisite plants and in any event it is seasonal, whereas the need for water is perennial. This has presented a challenge to the Government to ensure that at all times people are provided with water.

In the arid zone of the country lies the Central Kalahari Game Reserve (CKGR). This area signifies the center for conflict between avowed state policy supporting development, and fundamental rights of marginalized groups. The following quotation gives a background for the formation of the CKGR.

> 'The CKGR is a vast unique wilderness in an area in excess of 52000 square kilometers. It was created as a game reserve in 1961, and at the time of its creation, it was the largest game reserve in Africa. .. The creation of the reserve resulted from the recommendations… to carve out a large portion of the inner part of the Kgalagadi desert, where Basarwa and some Bakgalagadi who were already resident therein, could continue to follow their traditional hunting and gathering way of life. It is not an insignificant piece of land, it being about the size of Belgium. It has a harsh climate, is prone to droughts and has limited and unreliable rainfall.'[1]

The *Basarwa* are indigenous to the CKGR, having lived there for hundreds of years, possibly many centuries. After it was declared a game reserve, the Government provided them with basic essential services such as water while in the reserve. Towards the end of the mid 1980s, the Government determined that the *Basarwa* living in the CKGR should be relocated outside the reserve. The Government said it was necessary to extend the benefit of services to all its citizens including the *Basarwa,* who, as the Government put it, were disadvantaged by living in an area in

[1] Per Dow J in *Sesana v AG* [2006] 2 BLR 633, at 685.

which only minimal services were provided, and at great cost to the taxpayer.[2] According to Government, the *Basarwa* were losing out on the economic growth of the country, and it was in their interest to relocate them to places where they would benefit from the country's economic growth just like any other citizen.[3] The Government then created new settlements outside the reserve, which settlements were provided with water, schools, medical clinics and other essential services.[4] Those who agreed to relocate were compensated for vacating their old settlements and were given land to grow vegetables and rear small stock that they were given as part of the compensation.[5] Some however, refused to relocate, saying they could not sever links with their ancestral land.[6] When it became clear that efforts to persuade them to relocate were failing, the Government informed those who refused to relocate that the basic and essential services being provided in old settlements in the CKGR would be terminated.[7] On 31 January 2002, the Government terminated the provision of basic and essential services to those who refused to relocate to the new settlements. It also withheld the special game licences it had provided to the *Basarwa* and refused their entry into the CKGR unless they had been issued with entry permits.

The *Sesana* Case[8]

The *Basarwa* who remained in the reserve applied to the High Court for several orders, *inter alia*, that the termination by the Government of the provision of basic and essential services (such as water, food rations to those registered as destitutes and orphans, healthcare through mobile clinics and ambulance services, transport for children attending school outside the reserve) was unconstitutional. They argued that the Government was obliged to restore these services; that those individuals forcibly removed by the Government from the CKGR had unlawfully been despoiled of their possession of land; that such possession should immediately be restored; and that the refusal to issue the *Basarwa* with special game licenses or allow them access to

[2] Opinion of Judge Phumaphi, at 746.
[3] Opinion of Judge Dow, at 719.
[4] Opinion of Judge Dow, at 696.
[5] Opinion of Judge Dow, at 718.
[6] Opinion of Judge Phumaphi, at 761.
[7] Opinion of Judge Dibotelo, at 657-660.
[8] *Sesana and Others v AG* [2006] 2 BLR 633.

the reserve without a permit was unconstitutional.[9] They were successful in respect of some of these claims; and were unsuccessful in others.

A summary of the decision is as follows; that the termination in 2002 by the Government of the provision of basic and essential services to the applicants in the CKGR was neither unlawful nor unconstitutional;[10] the Government was not obliged to restore the provision of such services to the applicants in the CKGR;[11] that prior to 31st January 2002, the applicants were in possession of the land, which they lawfully occupied in their settlements in the CKGR (this was a unanimous decision), that the applicants were deprived of such possession by the Government forcibly or wrongly and without their consent;[12] that the Government's refusal to issue special game licenses to the applicants was unlawful (this was a unanimous decision), that the Government's refusal to issue special game licenses to the applicants was unconstitutional;[13] and that the Government's refusal to allow the applicants to enter the CKGR unless they were issued with permits was unlawful and unconstitutional.[14]

In a minority judgment, Judge Dow considered that the termination included water and food rations for those destitute and orphans. She noted that these were essential for the survival of the recipients and terminating them entailed endangering life, a constitutionally protected right. She therefore held that their termination was unlawful and unconstitutional as it threatened the constitutional right to life, and being so, Government was under an obligation to restore those services.[15] She furthermore held that these services were terminated or withheld to force the *Basarwa* to move out of the CKGR.[16] From the summary of the decision it appears, and it is believed in the country, that the *Basarwa* were largely successful.

The Government appears not to have mustered good grace on the outcome of the case. Perhaps the greatest indication of absence of grace by Government was a refusal by it to allow the *Basarwa* in the CKGR to re-commission, at their own cost, a borehole that was previously used to supply water to the residents of the CKGR. This

[9] For a comprehensive summation of all the forms of relief sought by the applicants, see the judgment of Dibotelo J in *Sesana and Others* v *Attorney General* [2006] 2 BLR 633, at 636-637.
[10] Per Dibotelo and Phumaphi JJ, Dow J dissenting.
[11] Ibid.
[12] Per Dow and Phumaphi JJ, Dibotelo J dissenting.
[13] Ibid.
[14] Ibid.
[15] See page 723-725 of the judgment.
[16] Ibid.

borehole had been de-commissioned as a way of terminating the supply of basic and essential services to the CKGR in 2002. This issue led to the *Mosetlhanyane* case.

The Mosetlhanyane Case[17]

This is a sequel to the *Sesana* case in which the court had held that the termination of food and water supplies to the people living in the CKGR was not unconstitutional and that the Government was not obliged to supply these services to people who chose to remain in the reserve.

In 2002, in pursuit of its stated policy, the Government proceeded to decommission a borehole from which water was supplied to the residents of the CKGR. This borehole had been drilled in 1985 by De Beers, a diamond prospecting company, for prospecting purposes in Mothomelo in the CKGR. In consequence of the decommissioning, the residents suffered serious water shortages and had to travel very long distances to fetch water. Following the decision of the High Court in the *Sesana* case, the residents requested the Government to permit them, at their own expense, to re-commission the borehole so that they could use the water for domestic use. They also requested permission, at their own expense, to sink additional wells and boreholes for the same purpose. Government did not respond even after numerous follow-ups. The residents then launched an application in the High Court alleging that the refusal by the Government to grant their requests was unlawful and unconstitutional. The High Court dismissed their application.

The Court of Appeal reversed the High Court and held that the *Basarwa* had the right, at their own expense, to re-commission the borehole at Mothomelo and to sink one or more boreholes and to abstract water for domestic purposes. It held further that, by refusing to grant the requests of the Applicants, the Government had subjected the *Basarwa* to inhuman and degrading treatment contrary to the Constitution.[18] The court observed that after the 2002 'relocations':

> 'a pump engine and water tank, which had been installed for purposes of using the borehole at Mothomelo were dismantled and removed. It is not far-fetched to conclude as a matter of overwhelming probability that this was designed to

[17] *Matsipane Mosetlhanyane* v *AG* MAHLB-000393-09 (unreported).
[18] Para 22.

induce the residents to relocate by making it as difficult as possible for them to continue residing inside the CKGR'.[19]

The Appellants' account of the human suffering due to lack of water, which the court found to be uncontested,[20] was described as 'a harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert'.[21]

It is significant that the Government's position had shifted in this case. While in the *Sesana* case the Government had said they wanted the *Basarwa* to move out of the reserve so they may better be able to enjoy the country's economic benefits like all other citizens, in the *Mosetlhanyane* case, the Government argued that the continued presence of *Basarwa* in the reserve would compromise government initiatives to protect wildlife in the area.[22] This argument was dismissed. The court found a violation of constitutional rights through the exercise of a 'value judgment', which entitled the court to have regard to international consensus on the importance of access to water. Two documents swayed the balance in favour of the *Basarwa*. The first was the *UNGA Resolution* which recognizes the right to safe and clean drinking water as a fundamental human right. The second was the *ECOSOC Report*, which acknowledges that:

> 'water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.'[23]

It furthermore states that:

> 'Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that: indigenous peoples' access to water resources on their ancestral is protected from

[19] Para 7.
[20] Para 8.
[21] Para 4.
[22] Para 10.
[23] *ECOSOC Report*, Introduction.

encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water.'[24]

The court found that there is a constitutional requirement, based on an international consensus, for Government to refrain from inflicting degrading treatment to peoples in its territory. Implicitly by refusing to facilitate access to water by the *Basarwa*, Government had violated the constitutional requirement. The court came to this conclusion partly on the basis that the *Water Act*[25] that allows any lawful occupier of land, without a water right, to use any borehole, or indeed drill one, for the purpose of abstracting water for domestic use. Since the *Basarwa* were in lawful occupation of the land, and they required water for domestic purposes, they were not constrained by the provisions of the *Water Act* to resuscitate the Mothomelo borehole, and therefore any act preventing the use of the borehole was unlawful.

As such, the court departed from its long practice of not enforcing rights recognized in international treaties unless they have been incorporated into domestic law by legislation.[26] In the past, the courts had only taken international treaties into account as aids to interpreting domestic law. However, the *Mosetlhanyane* case appears to indicate that the judiciary is now prepared to recognize and give domestic effect to substance rights contained on international instruments. This is commendable as it should prevent the situation where the Government undertakes international obligations and refrains from making those enjoyable by individuals on the domestic scene by resort to dualistic principles of international law.

Where violations against the Constitution and allegations of threats to human survival are made, it is incumbent upon a court to examine the deeper issues and not limit itself to the question of statutory interpretation. This is specially so where, as in the *Mosetlhanyane* case, there was not only an allegation of an infringement of constitutional rights, but also grave human rights violations threatening life itself. Denial of means to obtain water threatened the survival of the *Basarwa* and amounted to what was described in the *Sesana* case as condemning the community to death by starvation. It is significant to note that in this case the Government never raised any limitations based on resource constraints. Neither did it allege any form of inconvenience were the permission to be granted. Instead, the Government's

[24] *ECOSOC Report*, para 16(d).
[25] Cap 34:01.
[26] See, for example: *Good* v *AG* [2005] 2 BLR 337.

position was that if the *Basarwa* in the CKGR wanted services, they had to secure them outside the reserve. In other words, the *Basarwa* had taken a risk by remaining in the CKGR and would not be heard to complain of circumstances they themselves created. This view was rejected by the court, which held the refusal to allow the CKGR residents to recommission the borehole at their own expense, amounted to inhuman and degrading treatment contrary to the Constitution. It would seem the Government had disregard for its obligations towards citizens and treated itself as a private party vis-à-vis the CKGR residents. It would seem the attitude of the Government was motivated by a desire for revenge following the 'success' of the *Basarwa* in the *Sesana* case. One would have expected the Government to handle with grace the pronouncements of the court and demonstrate its commitment to the rule of law. Notwithstanding the attitude of the Government, it is heartening to note that the borehole is now running and supplying water to the communities in the CKGR thanks to the assistance of Gem Diamonds, which provided financial assistance in recommissioning the borehole.

Conclusion

One effect of these decisions is to secure the right of a disadvantaged group, the *Basarwa*, to remain on state land even against the avowed wishes of Government. It also demonstrates the difficulty that may be encountered by litigants who try to enforce claimed environmental rights within the legal framework of Botswana, and particularly given the absence of a constitutional provision to that effect. The absence of a clear constitutional right is a hindrance and may often prejudice especially vulnerable groups such as the *Basarwa*. The converse is that the introduction of such a right, depending on the conditions that are made on its application, will go a long way in ameliorating the situation and would secure the enjoyment of the rule of law based on visible, concrete and uniform standards. The case further cements the sound principle that denial of vital necessities of life, such as water, amounts to inhuman and degrading treatment. Commendably, the court did read into the constitutional provisions certain rights, such as rights to water, that the international community recognizes as fundamental. The cases effectively transformed this interest into one of the gamut of rights exercisable by individuals against the Government. Finally, this jurisprudence emanating from the CKGR demonstrates that the allocation of scarce national resource often requires a careful balance to be struck between many competing interests or rights - in this case including the fair and

equitable sharing of national resources, environmental concerns and the rights of the *Basarwa* to live in their natural environment with all the rights available to a human being. Given that all government policies should ultimately benefit human beings, this should not be particularly difficult.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: CANADA
National Parks

Laurel Pentelow*

Introduction

In 2010 Canada commemorated a milestone, the 125th anniversary of the creation of its first national park - Rocky Mountain National Park at Banff. The creation of this park and subsequently the national park system in Canada, which has been expanded to now include 42 parks and park reserves, was undoubtedly a feat to celebrate. Further, the year 2011 also signifies a landmark year - one hundred years ago, in 1911, the Dominion Parks Branch (now Parks Canada), was created. The creation of a specific parks agency was a global first and over the decades the Canadian Park Service has been continually proven a leader in protected area policy and development.[1] On the 25th anniversary of the parks service, M.B. Williams, a civil servant with the then Dominion Parks Branch, reflected that 'an anniversary merely affords a convenient moment to stand back and look at the design and see how it is working out'.[2] In this same spirit, on the anniversary of these two events in Canada's national park system's history, it seems only natural to look back and to look forward at the law and policy that has, and will continue to, guide this agency. This country report will provide an overview of some of the first work done by the Parks Service in Canada, then will look at current developments in Canadian protected areas law and policy and will finally draw some conclusions about how these priorities are made

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[1] C. Campbell, 'Governing a Kingdom: Parks Canada, 1911-2011' in C. Campbell (ed) *A Century of Parks Canada, 1911-2011* (2011) University of Calgary Press, 14.
[2] M. Williams, *Guardians of the Wild: The Story of the Canadian National Parks* (1936) Tomas Nelson & Sons, 138.

and provide insights into new ways to encourage the creation of national protected areas and to advance conservation policy in Canada.

There have been many changes made to the Parks Service over the years, including name changes and the movement of the agency within the federal departmental structure.[3] These administrative changes occurred alongside deeper changes in policies (for example conservation versus preservation), the way parks were created (for example in an ad-hoc fashion versus under a system plan) and new challenges facing park creation (for example public interest, automobile tourism, local citizen concerns, Aboriginal interests).[4]

Throughout the 100 years of its existence, the Park Service in Canada has often been on the cutting-edge of protected area law and policy. Even early on, when the national park network was just beginning to grow, Canada proposed a relatively advanced idea of national park management being guided by the dual purposes of use and protection (often referred to as the 'dual mandate' under which Parks Canada still operates). That is, national parks were, and still are, expected to both preserve natural landscapes and facilitate their use by Canadians today and in the future. This 'use' is generally considered to refer to tourism, recreation and scientific research,[5] but, at times, it seems to have been broadened to include mineral development and extraction, the latter of which is both more controversial and a much larger challenge for protected areas management.

Interestingly, this use versus preservation conflict did not initially exist within the same national parks, as is the case today, but rather in the policies guiding the parks service for new park creation. Early on, there was pressure to expand the park network into Ontario where the majority of Canadians were living, in order to increase visitor numbers.[6] At the same time there was an identified need to create parks in Saskatchewan and Alberta to protect wildlife such as moose and elk.[7] These two pressures lead first to the development of national parks with different identified

[3] Between the creation of the first national park in 1885 and present day, Canada's parks service has had many different official titles, including the Canadian National Parks Branch, the National Parks Branch, the Parks Canada Program and the Canadian Parks Service. Today, Canada's parks service is called Parks Canada.
[4] K. McNamee, *National Parks of Canada* (1984) Key Porter Books Ltd, 18; and Campbell (supra note 1) 10.
[5] P. Wilkinson, 'Ecological Integrity, Visitor Use and Marketing of Canada's National Parks' (2003) 21(2) *Journal of Park and Recreation Administration* 63.
[6] Campbell (supra note 1) 5.
[7] Ibid.

purposes, and later to the incorporation of the dual mandate within each individual park.

With the release of the *National Park System Plan* in 1970, Canada again led the way in protected area policy, being the first country in the world to publish such a document which has since become a standard conservation policy tool.[8] For Canada, the system plan provided for park creation in a more directed way (the goal became, and still is, at least one park in each of Canada's 39 natural regions),[9] instead of the seemingly ad hoc way parks had been created in previous times.

The 1974 amendments to the *National Parks Act* showed how Aboriginal rights to the land could be addressed in relation to parks and conservation. This amendment included allowing for traditional hunting and fishing practices within national parks and the creation of a new type of protected area, a 'national park reserve', which is protected area land that will become a full national park in the future provided land claims in the area are settled.[10]

As environmental science has continued to advance, the parks service has persisted in trying to incorporate new concepts into their policy and management, one of which has been the identification of ecological integrity as the number one priority for park management. This was done initially through the 1988 amendment to the *National Parks Act* which stated that the '[m]aintenance of ecological integrity through the protection of natural resources shall be the first priority when considering park zoning and visitor use in a management plan'.[11] Further legal entrenchment of this concept followed in 1998 with the passage of the *Parks Canada Agency Act*[12] which also referred to managing for ecological integrity. The newest piece of national park legislation in Canada, the *Canada National Parks Act* again highlighted that '[m]aintenance of ecological integrity through the protection of natural resources shall be the first priority of the Minister in the consideration of park zoning and visitor use'[13]

[8] P. Kopas, *Taking the Air: Ideas and Change in Canada's National Parks* (2007) UBC Press, 58.
[9] Canadian Heritage (Parks Canada), *National Park System Plan* (1997) Government of Canada, 5.
[10] Campbell (supra note 1) 10.
[11] *National Park Act*, R.S.C 1985, c. N-14, section 5(1.2).
[12] *Parks Canada Agency Act*, S.C. 1998, c. 31.
[13] *Canada National Parks Act*, S.C. 2000, c.32, section 8(2).

and further that ecological integrity indicators and objectives are to be drafted for each park within their management plan.[14]

Current Developments in Canadian Protected Areas Law & Policy

While there have been no new comprehensive laws focused on Canada's national parks since the introduction of the new *Canada National Parks Act* in 2000, there have been significant developments including the creation of new protected area land, government announcements regarding potential sites for new marine-based protected areas and policy changes to keep pace with new challenges addressing the park system. Some of these proposals continue to illustrate the Canadian Park Service's desire to be on the leading edge of protected area developments.

One of the biggest recent national park developments was the expansion of Nahanni National Park Reserve in Canada's arctic. Expanding this national park reserve, which is located in the Northwest Territories, was heralded by the then Minister of the Environment (responsible for Parks Canada), the Honourable Jim Prentice, as 'the greatest conservation achievement in a generation'.[15] This expansion made Nahanni six times larger than it originally was, increasing its area of protection to 30,000 square kilometres.[16] The legislation was tabled on June 9 of 2009 and *An Act to Amend the Canada National Parks Act to Enlarge Nahanni National Park Reserve of Canada* received royal assent just nine days later, on June 18 of the same year. Unfortunately though, this expanded national park reserve still struggles with the same challenges that emerged early in the 20th century for James Harkin (the first commissioner of the Canadian Park Service) – the struggle between use and protection. The massive area protected by this national park reserve is interrupted by one relatively small area which remains unprotected, in large part due to current mineral and hydrocarbon development.[17] In reference to omitting this area from protection within park boundaries, the legislative backgrounder noted that while drastically increasing the protection of the Nahanni ecosystem, there is still a desire

[14] Ibid, section 11(1).
[15] Government of Canada, 'Government of Canada Announces the Expanded Boundary for Nahanni National Park Reserve of Canada' (*Canada News Centre*, 9 June 2009) (available at http://news.gc.ca/web/article-eng.do?m=/index&nid=457789.)
[16] Ibid.
[17] S. Banks and M. Barbudo, *Bill C-38: An Act to Amend the Canada National Parks Act to Enlarge Nahanni National Park Reserve of Canada* (Parliament of Canada Legislative Summary LS-654E) 2.

to ‘provide economic development opportunities for the people of the region’.[18] In some ways this statement shows an attempt to balance preservation with use in line with the mandate of Parks Canada although, because the area set aside for extractive uses is not actually designated park land, the situation is a bit different. Still, this battle between use and preservation is very evident in and around Nahanni National Park Reserve.

More recently, the Federal Government, along with the Provincial Government of Nova Scotia, announced their intention to table legislation to create a new national park reserve protecting Sable Island, a remote sandbar home to many wild horses and historically a location where many vessels have been shipwrecked.[19] Like Nahanni and many other parks in the national system, there is concern over whether mineral exploration will be allowed on or nearby the new national park reserve.[20] At present, the Federal and Provincial Governments have agreed that legislation will prohibit surface drilling for petrochemicals within one nautical mile of the island to be protected, but some are concerned this will not preclude horizontal drilling from a rig outside the buffer area.[21] It remains to be seen, as the legislation has not yet been tabled, what the end result will be. In any case, it appears that once again the dual mandate under which Parks Canada must operate will result in challenges for managers. In the case of Sable Island, though, there have also been concerns about visitor use, especially considering that up until this designation, the area received less than 250 people a year. With its new designation, visitor numbers are likely to drastically increase.[22]

On top of these two designations, the Government and the Park Service appear to again be targeting an area of protected area development which is in need of attention - marine protected areas. It is well acknowledged that the creation of marine protected areas lags behind the creation of land-based ones.[23] In fact, while land based protected areas cover approximately 12.2 percent of the global land base, only

[18] Ibid.
[19] O. Moore, ‘Sable Island Set for National Park Status’ *Globe and Mail* (Toronto, 17 October 2011).
[20] Ibid.
[21] Ibid.
[22] ‘Sable Island Named National Park’ *CBC* (Toronto, 17 October 2011).
[23] A. Gillespie, *Protected Areas and International Environmental Law* (2007) Martinus Nijhoff Publishers, 97.

5.9 percent of territorial seas and 0.5 percent of extraterrestrial seas are protected.[24] In Canada there are only eight national marine protected areas and four national marine conservation areas. In contrast, there are 42 nationally protected parks and park reserves.[25] Recently, though, the Government has taken several steps to lay the groundwork for more marine-based protected areas, particularly in the north of Canada. In June 2010, the Government announced two marine protected areas of interest[26] - one off the coast of Newfoundland and Labrador; and the other in the Laurentian Channel off the Pacific North Coast near Queen Charlotte Sound.[27] Just two and a half months later, the Government released another proposal; this time to form a network of marine protected areas in Canada's north.[28] In December of the same year, yet another proposal for protecting part of Canada's northern marine environment came in the form of a statement that set proposed boundaries for a marine park in Lancaster Sound (part of the Northwest Passage).[29] Although there seems to have been a focus on Canada's north in the recent past, there have been some proposals for new protected areas in other parts of Canada. These include, for example, three new marine areas of interest - one in Eastern Nova Scotia and two in the Gulf of St. Lawrence - released in mid-2011. Furthermore, in September 2011, the *National Framework for Canada's Network of Marine Protected Areas* was approved in principle.[30] It is designed to guide the management and development of nationally protected marine areas. It is important to remember that while these developments do seem promising, the majority of them are proposals and have not yet been firmly established in law. Importantly, in reference to the dual mandate that has already been extensively discussed, this means it is not clear how the use

[24] UNEP and WCMC, *Biodiversity Indicators Partnership,* Indicator Factsheet 1.3.1 (2010) World Database on Protected Areas.
[25] Because the focus of this piece is on Canada's National Park Service and national park system, these numbers refer only to land and marine environments nationally protected and do not take into account provincially protected areas.
[26] Marine protected areas, in Canada, are created and managed by Parks Canada under the *National Marine Conservation* Act. Some, however, have also been created and managed by the Department of Fisheries and Oceans Canada through the *Oceans Act*.
[27] Government of Canada, 'Government of Canada Protects Canadian Oceans and Wildlife' (*Canada News Centre*, 8 June 2010) (available at: http://news.gc.ca/web/article-eng.do?mthd=advSrch& crtr.page=1&nid=538329&crtr.kw=government%2Bof%2Bcanada%2Bprotects%2Bcanadian%2Boceans%2Band%2Bwildlife.)
[28] Office of the Prime Minister, 'Backgrounder: Protect Arctic Marine Wilderness (*Canada News Centre*, 26 August 2010) (available at http://news.gc.ca/web/article-eng.do?mthd=advSrch&crtr.page=1 &nid=556019&crtr.kw=protected%2Barea.)
[29] G. Galloway, 'Ottawa sets up Arctic Marine Park' *Globe and Mail* (Toronto, 6 December 2010).
[30] Fisheries and Oceans Canada, 'National Framework for Canada's Network of Marine Protected Areas' (2011) (available at www.dfo-mpo.gc.ca/oceans/publications/dmpaf-eczpm/framework-cadre2011-eng.asp.)

versus preservation challenge will play out, particularly with regards to shipping and resource extraction in marine protected areas.

There have also been changes in park management over the past couple years, largely in reference to agreements with Aboriginal peoples who have established interests in national park land. One of these developments was an agreement between the Government of Canada and the Council of the Haida Nation over shared control of management, planning and operations regarding the waters which surround Gwaii Haanas National Park Reserve and Haida Heritage Site.[31] A more recent development is the ongoing consultation being held by Parks Canada with regards to the proposed *National Parks of Canada Wild Animal Regulations*. These regulations aim to extend and enhance protection of wild species and their dwellings within national parks[32] and to better regulate the use of firearms and other weapons,[33] all the while respecting obligations laid out under land claim agreements and other agreements between Aboriginal Communities and the Government of Canada.[34] Consultations on these proposed regulations, although open to the entire public, are specifically targeted at the Aboriginal Communities which are party to *The Western Arctic (Inuvialuit) Claims Settlement Act*, also known as the Inuvialuit Final Agreement.[35] The focus on these Aboriginal communities has to do with ensuring that there are provisions within these new regulations which adequately address the implementation of subsistence harvest quotas for these communities within three national parks that were established in Canada's arctic under the Inuvialuit Final Agreement.[36]

[31] Parks Canada, 'Government of Canada and Council of the Haida Nation Agree to Share Management of the Waters Around Gwaii Haanas' (*Canada News Centre*, 16 January 2010) (available at http://news.gc.ca/web/article-eng.do?mthd=advSrch&crtr.page=2&nid=506189&crtr.kw=gwaii.)
[32] *National Parks of Canada Wild Animal Regulations* (Draft for Public Consultation) 2011-06-17 SOR 15:06, section 3(1)(h).
[33] Ibid, section 4-7.
[34] Ibid, section 12.
[35] Parks Canada, *Backgrounder: Proposed National Parks of Canada Wild Animal Regulations- Implementation of Subsistence Harvest Quotas in Ivvavik National Park, Aulavik National Park, Tuktut Nogait National Park* (2011) Parks Canada, 1.
[36] Ibid.

Canadian Protected Area Development in Relation to Broader Government Goals

As the motivation for this paper was the 125th anniversary of the creation of Banff National Park and the 100th anniversary of the Canadian Parks Service, it seems natural to look at the past and present as indicators for future law and policy developments that may guide Canada's national park system. It is well acknowledged that Canada's first national park, Rocky Mountain (now called Banff), was more a consequence of a desire by the Canadian Government to get people to travel west and of the Canadian Pacific Railway (CPR) company to make money on increased rail ticket sales than it was an attempt to preserve wilderness.[37] Resource exploitation, achieved by designating the hot springs a national park and encouraging visitors, fitted nicely within the stated policy of John Macdonald's Government which was focused on nation building and subduing and exploiting the Canadian west.[38]

While the roots of Canada's first national park in political and economic considerations is well known, it is less widely recognised that national parks have time and again been used to further more generalized national goals and policy. In the late 1940's when Canada's Federal Government was attempting to convince the British Colony of Newfoundland to join Confederation, a part of the package being offered was the creation of a new national park, Terra Nova, within Newfoundland boundaries.[39] In present day we can again see how the Canadian Government is using protected areas to further more general national goals and policies. The best example at the moment can be seen when looking at the Harper Government's emphasis on 'Canada's Northern Strategy' and the expansion of Nahanni National Park Reserve (located in the Northwest Territories) along with the proposals for several new arctic marine protected areas which were discussed above. As Prime Minister Harper has stated on multiple occasions, the Government recognises the importance of the 'use it or lose it' approach.[40] That is, defending Canada's arctic sovereignty requires a presence in the North, and designating protected areas, undertaking associated mapping, creating management plans, facilitating staff visits and promoting potential tourism, helps with this goal.

[37] Kopas (supra note 8) 27.
[38] K. McNamee, *National Parks of Canada* (1994) Key Porter Books Ltd, 20.
[39] Kopas (supra note 8) 5.
[40] 'Arctic of "strategic importance" to Canada: PM' CBC News (Toronto, 19 August 2009).

The creation of national protected areas and the development of parks policy are clearly influenced by other (seemingly unrelated) government policy areas. While this may be a source of concern for supporters of environmental protection, it may also present opportunities. For instance, because broad government policy is often very well expressed to the public, those pushing for protected areas could take this knowledge and use it to press for new park creation which aligns with a targeted government policy or specific area of the country. Directing efforts at a specific area of the country is much easier to understand and perhaps organize support for, and as we have seen, protected area creation is already in full swing in a Government targeted part of Canada – the arctic. Finding a way to push for new protected areas in line with a specific government policy may be more difficult. An illustration of this would be the designation of more 'peace parks' (like Waterton Lakes-Glacier National Parks which straddle the Canada-USA boarder) if improving Canada-USA relations was a stated government priority.

As the 100th anniversary of Canada's Park Service comes to a close, understanding and gleaning lessons from the law and policy developments which have occurred over the past century hopefully sets the Park Service up for continued success in designating increasingly more protected areas and another 100 years as a leader in protected area policy.

IUCN Academy of Environmental Law
eJournal
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COUNTRY REPORT: PEOPLE'S REPUBLIC OF CHINA
Water and Soil Conservation Law

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Introduction

Soil erosion is a serious problem in China. The Second National Telemetry survey (2000) found that 3.56 million square meters of land under China's jurisdiction (37.1 percent) suffers from soil erosion. This includes 1.65 million square meters of water-eroded areas and 1.91 million square meters of wind-eroded areas. It is estimated that the annual economic loss from soil erosion is around 2.25 percent of China's GDP. A recent example is the mudslide in Zhouqu, Gansu Province on 8 August 2010 which led to a death toll of 1478. The Chinese Government has assessed the economic loss from this disaster to be around 400 million Chinese Yuan.

The State Council of China issued its first *Regulation on Water and Soil Conservation* in 1982. The Regulation was replaced by the *Water and Soil Conservation Law* (*WSCL*) in 1991. Twenty years on, the *WSCL* does not adequately address current issues of soil erosion in China. The Ministry of Water Resources of China commenced revision of the *WSCL* in 2005. On 25 December 2010, the National People's Congress adopted the amendments to the *WSCL*. The new *WSCL* entered into force on 1 March 2011. This country report discusses these amendments and their legal implications.

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The new *WSCL* contains seven chapters with 60 clauses. The chapters come under the following headings: (1) General Principles; (2) Planning; (3) Prevention; (4) Rehabilitation; (5) Monitoring and Supervision; (6) Liabilities; and (8) Miscellaneous. Chapter 2 is a completely new chapter, which aims to provide better planning measures for water and soil conservation in China. The amended legislation contains major developments which are intended to strengthen planning, prevention, rehabilitation, monitoring and supervision of water and soil conservation.

Planning

As mentioned above, there is a new planning chapter in the *WSCL*. This chapter requires the central and regional government to conduct regular soil erosion investigations.[1] Regional government is obliged to designate soil erosion Key Prevention Areas and Key Rehabilitation Areas.[2] The Water Resources Department of regional government is appointed as the competent department for water and soil conservation planning. The legislation also requires the Water Resources Department to work with other relevant departments.[3]

Chapter 2 provides detailed planning requirements. Contents of the planning must include: the situation of soil erosion; different soil erosion areas; and water and soil conservation objectives, tasks and measures. There are two types of planning (general planning and specific planning). The legislation requires that Water and Soil Conservation planning be coordinated with general land-use planning, water resources planning, urban and rural planning and environmental planning.[4] In addition, if the planning of infrastructure, mining, urban construction and public service may cause soil erosion, preventive and rehabilitation measures should be included in the planning procedures following consultation with the Water Resources Department.[5]

[1] Article 12.
[2] Ibid.
[3] Article 14.
[4] Article 13.
[5] Article 15.

Prevention

The new *WSCL* pays particular attention to water and soil conservation in special areas. The amended legislation requires construction that might result in soil erosion be limited or prohibited in ecologically vulnerable areas as well as areas with serious soil erosion.[6] Reclamation of hillsides with a slope of over 25 degrees for cultivation of corps is forbidden. Cultivation of economic forestry is allowed only under the condition that measures are taken to prevent soil erosion.[7] Stripping vegetation and digging up tree stumps in soil erosion Key Prevention Areas and Key Rehabilitation Areas are banned.[8] Furthermore, Article 21 prohibits *fa cai*[9] collection.

The new *WSCL* provides preventive measures for soil erosion caused by construction projects. Construction projects are required to avoid soil erosion in Key Prevention Areas and Key Rehabilitation Areas. Where such avoidance is impossible, a higher standard of preventive measures shall be applied to construction projects that occur in these special areas.[10] A Water and Soil Conservation Plan is necessary for construction projects in mountainous, hilly and sandstorm areas.[11] The plan must include the following components: objectives, applicable scope, measures and investment.[12] An approved plan is a pre-condition for commencing construction projects.[13] Waste sands, rocks, earth, tailings and residues created by construction projects shall be recycled.[14] Further, if wastes cannot be utilized, they must be disposed of in a specially designated area.[15] Moreover, the new *WSCL* obliges owners and users of water and soil conservation facilities to strengthen the management and maintenance of these facilities and ensure the proper function of these facilities.[16]

[6] Article 17.
[7] Article 20.
[8] Article 21.
[9] The last two syllables of this name in Cantonese sound the same as another Cantonese saying meaning 'struck it rich'. The huge need of fa cai in Chinese market caused the 'fa cai rush' in Inner Mongolia province, which almost destroyed the ecosystem of several grasslands and caused serious soil erosion. See further: http://en.wikipedia.org/wiki/Fat_choy.
[10] Article 24.
[11] Article 25(1).
[12] Article 25(2).
[13] Article 26.
[14] Article 25.
[15] Article 28.
[16] Article 24.

Rehabilitation

The new *WSCL* encourages enterprises and individuals to contribute to the rehabilitation of soil erosion. The rehabilitation of soil erosion on barren hills, valleys, hillocks and desolated beaches will be supported by government funding and tax relief.[17] There are however, no further details on how this scheme would operate. The legislation does require that soil erosion caused by construction projects must be rehabilitated and there exist specific requirements for the protection of soil during construction projects.[18] The new *WSCL* creates a 'soil and water conservation compensation fee', which will be applied to construction projects when rehabilitation is not possible.[19]

Government responsibilities for rehabilitation are emphasized in the new *WSCL*. Regional government is responsible for enhancing the management of soil and water conservation projects.[20] Furthermore, more investment is to be made for the prevention and rehabilitation of water and for soil conservation in the source basins of rivers as well as drinking water protected areas. A water and soil conservation ecological benefits compensation fund is incorporated into the national ecological benefits compensation fund.[21] In addition, more detailed rehabilitation measures are provided for water-eroded areas and wind-eroded areas, which include compelling regional governments to play a leading role to rehabilitate soil erosion.[22]

Monitoring and Supervision

The Water Resources Department of the central government is required to improve the National Water and Soil Conservation Monitoring Network.[23] Since the entry into force of the new *WSCL*, it is now the responsibility of national and provincial water resources departments to regularly publish the results of monitoring. Article 42 also requires that information on impacted areas, changing situations, damage, as well as soil erosion prevention and rehabilitation measures are published. The staff of

[17] Article 33.
[18] Article 38.
[19] Article 32.
[20] Article 30.
[21] Article 31.
[22] Article 35.
[23] Article 40.

the Water Resources Department is authorized to take measures such as conducting on-site investigations and detaining illegal construction machines.[24]

Construction companies responsible for large or medium size construction projects that may cause soil erosion must monitor and report soil erosion themselves (no clear definition of "large" or "medium" is provided in the *WSCL*). If the construction company is not able to do the job, it can delegate the monitoring work to qualified institutions. The construction company and qualified institutions must follow national technical standards, rules and procedures in the process.[25]

Where disputes that concern soil erosion arise between different administrative areas, regional governments must first negotiate with each other to solve the problem. If the issue cannot be resolved, the dispute will be decided by the higher level government.[26]

Legal Implications

The new *WSCL* is much improved in comparison to its 1991 predecessor. However, in order to achieve better water and soil conservation, the implementation and enforcement of the new *WSCL* needs further attention. The new legislation requires the Chinese Government at both central and regional levels, to play a leading role in combating soil erosion. The Government is granted too much power. The question of governmental supervision remains. Issues left unresolved by the new *WCSL* include the lack of an independent body to hold government institutions accountable if they fail in their obligations under the *WCSL*. Article 47 of the new *WSCL* does provide that responsible staff of the Government may be punished by higher level government if they are not doing their job. It does not address the issue of whether the Government can be sued by enterprises or individuals under the new legislation. Public participation has long been known as an incentive for action by government but this aspect is missing in the new *WSCL*. The role of individuals and enterprises in water and soil conservation is limited in the new *WSCL* to invest or participate in rehabilitation.[27]

[24] Article 44.
[25] Article 41.
[26] Article 46.
[27] Article 30.

Conclusion

Following the entry into force of the new *WSCL*, in theory China has better legal tools to cope with its serious soil erosion problems. It is true that the new *WSCL* has greatly improved in four aspects: planning, prevention, rehabilitation as well as monitoring and supervision. Practical questions remain over the implementation and enforcement of the legislation. One example is the absence of the public participation within the new *WSCL*. As a result, it is unclear how the Government will be held accountable if it fails its obligations under the legislation. Comparative studies of soil and water conservation legislation and cross-institutional learning with other jurisdictions on issues of implementation have the potential to provide better outcomes for soil and water conservation in China.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: COLOMBIA
Mining Code Partially Unconstitutional

Jimena Murillo Chávarro*

Introduction

It is well known that economic growth and development often conflict with the environment. Thus it is important to promote sustainable development policies in order to diminish the impact that industry and other economic activities can have on the environment. One of the best tools to do so is adopting legislation that while allowing development, takes into account environmental and social protection.

In Colombia, mining has been considered for decades as one of the activities that contribute greatly to economic growth in the country. However, this activity should be developed as sustainably as possible to reduce the negative impacts upon the environment; since this activity is likely to adversely affect our natural resources such as water, soil and ecosystems.

In Colombia there are a number of norms regulating mining and related activities. One of the most important norms is the *Mining Code* adopted in 2001. This Code was recently partially amended by *Law 1382* of 2010.

Some months later, a constitutional lawsuit challenged *Law 1382* of 2010, because it was considered that some constitutional provisions were violated during process leading to its adoption. In this report I briefly examine the ruling of the Colombian Constitutional Court regarding the constitutionality of the challenged norm.

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The Mining Code as Amended by Law 1382 of 2010

In 2010, the Colombian Parliament adopted *Law 1382*, which partially amended the Colombian *Mining Code*.[1] The main object of this new legislation was to modernise the national mining activity; to amend some of the provisions of the *Mining Code* that had not proved to be effective in the management of mineral resources; to modify mining concession contracts in order to facilitate foreign investment; and to establish procedures that allow a safe and efficient mining activity, taking into account sustainable development criteria whilst encouraging economic growth.

Some of the amended provisions are specifically aimed at improving environmental protection in the context of mining. Article 3 of *Law 1382*, for example, provides various rules to ban mining in areas of environmental importance, including: areas declared for protection and development of natural renewable resources; those areas that make up the National Park System; natural parks of regional character; protected forest reserve areas and other forest reserve areas; paramo ecosystems; and wetlands designated under the Ramsar List. This article however also allows for the exceptional authorization of mining activities in forest reserve areas, through: removal from the general exclusions regime; and a request to the Ministry of Environment to mark out forest reserve areas in terms of a specific law.[2]

Article 4 of *Law 1382* requests that the Ministry of Mining and Energy develop a National Mining Plan, taking into account the environmental policies, norms and guidelines established by the Ministry of Environment, Housing and Territorial Development. In addition, article 8 provides that when areas that correspond to separate mining titles for the same mineral belong to the same beneficiary and are located close to one another without being contiguous, those areas can be integrated. One of the pre-requisite conditions for the integration of these areas is the obligation to amend the existing environmental license or to request a new license to the competent environmental authority for the integrated area.

[1] Law 685 of 2001.
[2] Law 2 of 1959.

Constitutional Lawsuit

Law 1382 of 2010, which partially amended the *Mining Code*, was challenged as unconstitutional, since some superior provisions that should have been complied with were violated.[3] The main argument was that the constitutional right to prior consultation afforded to indigenous and afro-descendant communities was violated. According to the *Constitution*, whenever a legislative or administrative measure may directly affect indigenous or afro-descendants, these people should be consulted about the proposed measures, through appropriate procedures and through their representative institutions.[4] Since *Law 1382* of 2010 affected the rights of indigenous and afro-descendant communities by regulating activities likely to be conducted in areas where these communities are settled, and because these communities also participate in mining activities as part of their cultural traditions, it was argued that these communities should have been consulted regarding the proposed legislative reforms.

The Constitutional Court therefore examined whether there had been a violation of the above constitutional right and if so, what impact this would have on the validity of *Law 1382*. The court acknowledged that in previous rulings it had recognized that when regulating matters such as territory, land use and exploitation of natural resources in areas where indigenous and afro-descendants are settled, prior consultation with these communities was required.[5] The court also analysed the possibility of drawing a distinction between those aspects of *Law 1382* which required prior consultation and those that did not.

The court ultimately ruled that: (i) all provisions contained in *Law 1382* are likely to be implemented in indigenous and afro-descendants territories; (ii) the provisions are systematically articulated to reformulate the concept of mining in the country; and (iii) the exploitation of mineral resources is a crucial aspect in the protection of the indigenous and afro-descendants cultural and ethnic diversity. It accordingly held that it was not feasible to draw the above distinction.[6] As a result, the court concluded that the whole of *Law 1382* was unconstitutional as the process leading to its adoption had contravened the constitutional imperative of prior consultation with

[3] Case No. C-366-11 (available in Spanish at http://www.corteconstitucional.gov.co/relatoria/2011/c-366-11.htm).
[4] Article 330.
[5] Paragraph 13(2).
[6] Paragraph 40(1).

indigenous and afro-descendant communities. The court also stated that this unlawful act could not be remedied and *Law 1382* should accordingly be removed from the Colombian legal order.

However, the court also held that the nullification of *Law 1382* could have an adverse effect on other valuable legal rights enshrined in the Constitution, particularly regarding the protection of the environment.[7] In this regard the court specifically referred to the provisions contained in *Law 1382* which seek to improve environmental protection in the context of mining. The court therefore considered the possibility of suspending the effect of the judgment. It held that there was available precedent enabling it to do so. Referring to its main function to serve as guardian of the integrity and supremacy of the Constitution, and the undesirability of creating a legal lacuna, it held that it was vested with the power to defer the effect of declaring a law unconstitutional until Parliament adopted a new law compatible with the Constitution.[8] The court accordingly declared *Law 1382* unconstitutional but postponed the effect of this declaration for two years to enable the Government and Parliament sufficient time to adopt new legislation in compliance with the constitutional imperative to consult in advance with indigenous and afro-descendant communities. The Court also stated that in the event of such legislation not being adopted in the two-year period, the nullification of *Law 1382* would stand.

Conclusion

The Colombian Constitutional Court is known as a very progressive court in Latin America thanks to its rulings. In this judgment, the court was compelled to simultaneously balance two constitutional rights, namely: prior consultation of indigenous and afro-descendants communities; and the protection of the environment. It ultimately reached a creative solution by suspending the effect of its ruling for two years, thereby providing for interim environmental protection until such time as the procedural rights accorded to the above communities could be adhered to.

[7] Paragraph 45.
[8] Paragraph 43(1).

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: DENMARK
New Government, New Rules

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Introduction

The general election on 15 September 2011 led to a change in government. A new 'left-wing' minority government came into power consisting of the Social Democrats, the Socialist Party and the Social Liberal Party. The new government replaced the former 'right-wing' minority government after 10 years in power. The new government has declared its intentions to implement a green restructuring process, including a strong focus on renewable energy, climate change adaptation and the chemicals sector. One of the few initiatives presented so far by the new government is an energy strategy.

'Our Energy' - The New Government's Energy Strategy

On 25 November 2011, the new Danish Government published its new plan 'Our Energy'. The main objective is to convert the country to 100 percent renewable energy use by 2050. The strategy presents specific measures for fulfilling the Government's goal of stimulating green growth and is based on the previous government's 'Energy Strategy 2050'. It pushes the pace of developments further. Within the area of increased energy efficiency and savings the focal points are the electricity grid system, existing buildings, 'the public leads the way' and challenging targets with respect to the efficiency of electrical products. Smart grids, intelligent

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networks and electrical cars are essential elements and subsequent strategies are to be proposed. As far as renewables are concerned, wind energy and biomass have the highest priority. Wind generation is to cover 50 percent of electricity use by 2020 and all electricity and heating should be based on renewables by 2035. By 2020, transportation should at least be based upon ten percent bioenergy. Research money will, however, also be devoted to solar, tidal energy and green transport technologies. Moreover, it is proposed to ban the installation of oil fired burners in new and existing buildings as from 2013 and 2015 respectively. The new initiatives are to be financed by consumers through grid tariffs, 'public service obligations' (PSO) and by a new supply security tax.

By 2020, the initiatives are expected to lead to extensive reductions in energy consumption, making it possible for half of the country's electricity consumption to be satisfied by wind power. Coal is to be phased out of Danish power plants by 2030, and by 2035 all electricity and heating will be generated using renewable sources. The long-term goal of the plan is to implement an energy and transport network that relies solely on renewable energy sources. A concurrent goal is to position Denmark as a leader in developing climate-friendly technology.

It is estimated that the new initiatives will have the positive result that Denmark's greenhouse gas emissions will be cut by 35 per cent by 2020, compared with 1990 levels. This would put us well on the way towards meeting the EU's goal of an 80 to 95 per cent reduction by 2050. The strategy will form the basis for inviting the opposition to negotiations to reach a new political agreement that will cover the period till 2020.

New Nature and Environment Appeal Board

As of 1 January 2011, the former Nature Protection Appeal Board and the Environmental Protection Appeal Board were merged into one new administrative appeal board - the Nature and Environment Appeal Board.[1] The new Nature and Environment Appeal Board has been established as a so-called 'combination board' in the sense that the composition of the board may differ from one type of case to another. In essence the new board has two distinct compositions: 1) a lay composition as in the former Nature Protection Appeal Board and 2) an expert

[1] Act No. 483/2010.

composition almost equal to the former Environment Protection Appeal Board. It is possible that in special cases the two board compositions may join into one combined board. It is also possible that an appeal case in special circumstances may be transferred from the lay board to the expert board and vice versa.

The lay board consists of a chairman (permanent staff qualified as judge), two Supreme Court judges and seven members appointed by Parliament. The expert board consists of a chairman and a number of experts - normally two or four. The experts are for each appeal case selected from a list of experts appointed by the Minister for the Environment on the basis of nominations from a number of environmental and business organisations. The former Environmental Protection Appeal Board operated with two lists of experts based on nomination by environmental organisations on the one hand and business organisations on the other, ensuring an equal representation. This mechanism has been abandoned in the new board. The lay board mainly deals with appeals related to planning and nature protection, while the expert board mainly deals with appeals related to pollution and chemicals. The board has a fairly wide discretion to delegate decision-making to the chairman. While the real changes regarding the powers and the functioning of the board have been limited, there may be some advantages regarding flexibility to combine appeals under different pieces of legislation in one procedure. Furthermore, it appears that the new board has made an effort to ensure a more efficient process.

Recent Statutory Developments

New Rules for Exploitation of Geothermal Energy - Amendments to the Subsoil Act

The *Subsoil Act*[2] has been amended by Act No. 541 of 30 June 2011, to introduce a new Chapter (4a) on the granting of licences for exploration for and production of geothermal energy. In Denmark, there is considerable potential for extracting geothermal heat. Three licences have been granted and more applications received. To a great extent the new regulatory framework for geothermal energy matches the licensing system for exploitation of oil and natural gas. Companies are required to have a licence to initiate activities. Licences are granted within a defined area through licensing rounds for a 6-year exploration period and 30 years' production

[2] Act No. 293 of 10 June 1981 as later revised by the *Consolidated Act* No. 960 of 13 September 2011 on the Use of the Danish Subsoil.

period. The selection criteria relate to the applicants' expertise and financial capacity and the proposed work programme for exploration or production activities. An optional selection parameter is based on the amount that applicants are prepared to pay for a licence. Consideration of any lack of efficiency or non-compliance with obligations under previous licences may be included in the evaluation.

Amendments include options for prioritizing the use of the subsoil[3] and principles for third party access to existing infrastructure.[4] The *Subsoil Act* lays down the basic framework for oil and gas exploration and production in the Danish subsoil and on the Danish continental shelf. Today, the Act has particular relevance for exploitation of oil and gas, salt and geothermal energy, transportation by pipeline and the storage of natural gas or CO_2 and the required licences and public supervision in this connection. The Act has previously implemented Directive 94/22 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons, parts of *EU Directive* 85/337 as amended on assessments of the environmental consequences, parts of *EU Directive* 2009/147 on the conservation of wild birds, parts of *EU Directive* 92/43 on the conservation of natural habitats and of wild fauna and flora.

Geological Storage of CO_2 - Amendments to the Subsoil Act

The potential for reducing CO_2 emissions by capturing and storing CO_2 from major point sources such as power stations has led to adoption of new rules at the European level and in Denmark. The *Subsoil Act* has been amended by Act No. 541 of 30 June 2011 to implement the *EU Directive* 2009/31/EC on geological storage of carbon dioxide that enables, but does not require Member States to establish CO_2 storage sites. The Minister for Climate, Energy and Buildings may grant an exclusive licence for exploration and use for storage purposes for a defined area and within specific time limits. A geological formation in the subsoil shall only be selected as a CO_2 storage site, if there is no significant risk of leakage, and if no significant environmental or health risks exist. A CO_2 stream shall consist overwhelmingly of carbon dioxide, and no waste or other matters may be added for the purpose of disposal. The licensee shall establish and maintain a register of the quantities and

[3] Section 5.
[4] Section 16.

composition of CO_2 delivered and injected, and set up a programme for monitoring the facilities before the injection of CO_2 is initiated.

The closure of a CO_2 storage site is subject to ministerial approval, and the licensee shall draw up and comply with a post-closure plan. Legal obligations relating to the storage site may be transferred to the Minister provided that all available evidence indicates that the stored CO_2 will be completely and permanently contained; that at least 20 years have passed after the closure; that an amount to cover the expected monitoring costs for a period of 30 years will be paid; and that the CO_2 storage site has been sealed and the injection facilities have been removed. The licensee shall provide financial security for the estimated costs of all obligations connected to the CO_2 storage license. Potential users are entitled to use CO_2 transport networks and CO_2 storage sites against payment if there is the necessary capacity. The establishment and operation of pipeline facilities for transporting and storing CO_2 may only take place pursuant to a licence, subject to conditions regarding routing, dimensions, ownership and payment for use. The more technical aspects of the Directive are implemented in an executive order.

The amendments do not involve any decision on the use of CO_2 storage in Denmark. The current Danish policy is to await results from several European pilot projects on CO_2 storage. However, more interest is devoted to the possibility of injecting the CO_2 into the oil fields as this has the added benefit of enabling more oil to be produced. This method is not yet being used in the oil fields of the North Sea, primarily because the method is considered to be very expensive.

Waste Sector Reform

Since 2002, the Danish Government has been working on a major reform of the waste sector. The aim has been to make an administrative reform of the waste sector to make it more efficient, and to liberalise the handling of specific categories of waste. The reform has been divided into three main phases. The first phase included the liberalisation of source-separated waste for recovery from businesses and the introduction of more uniform procedures in the municipal handling of waste, ensuring more transparency and less administrative burdens for the waste producers and handlers. The first phase will be completed by the end of 2011. The second phase will commence in 2012 and concerns the waste incineration sector. This implies that

a decision will be made as regards how far the liberalisation of waste for energy recovery should go. Today, waste handlers are free to export waste from businesses for energy recovery, whereas the waste market within Denmark has not been liberalized and is still subject to a municipal control of waste streams. The third phase concerns the administration of waste for disposal and the organisation of waste disposal facilities.

A major legislation package implementing the first phase of the waste reform entered into force in January 2010. However, it turned out to be rather problematic to implement the reform initiatives due to difficulties in administering the adopted schemes and launching the new centralized electronic procedures. The legislative package implementing the first phase of the reform has thus been subject to several adjustments, but will be completed with the latest adjustments of the charges for handling business waste at the municipal recycling depots. The latest adjustments will enter into force from 1 January 2012.

With the completion of the first part of the waste reform program, source-separated waste for recovery from businesses has been liberalized and businesses can freely export business waste for energy recovery to facilities outside Denmark. This implies on the one hand that the municipalities are no longer allowed to collect waste for recovery from businesses, except from what is voluntarily handed in at the municipal recycling depots. On the other hand the municipalities still have an obligation to handle all waste for energy recovery, also waste from businesses, unless a company chooses to export this for energy recovery. Phase two of the waste reform will continue in 2012 based on a Government Official Report published in December 2010, which so far has been the only government initiative to commence the debate on the liberalisation of waste for energy recovery.

Recent Case Law

Wind Turbines – The Østerild Case

A controversial case in Denmark has been the establishment of a national testing station for large-scale wind turbines – the Østerild case. The establishment of the testing station has been specified in Act of Parliament.[5] According to the Act, it is

[5] Act No. 647/2010.

possible to erect seven wind turbines of up to 250 m total height. The Østerild area is a primarily state-owned forest area. According to the Act, clear cutting of up to 550 ha of forest is possible. Some of the forest land will be replaced by wetlands and other nature restoration initiatives. There has been a substantial local opposition to the testing station due to negative effects on neighbouring properties and objections to the necessary expropriation of private property. In addition, the clear cutting of forest together with the potential negative effects on nearby Natura 2000-areas (bird protection and habitat areas designated according to the EU Birds Directive and Habitats Directive) has been controversial. A complaint was lodged in August 2010 to the EU Commission by the Danish Nature Conservancy Organisation on the basis that the environmental impact assessment and the habitat assessment are insufficient. Furthermore, an appeal has been lodged before the Danish courts (the Western High Court) by an organisation (Organisation for a Better Environment) on its own and on behalf of a number of neighbours questioning the validity of the Act and the lawfulness of the planned expropriations. The Western High Court has, in a ruling of 29 August 2011, accepted the right of appeal of the organisation in relation to the claim regarding the validity of Act and also the right of appeal of the affected neighbours in relation to the expropriations. However, the Western High Court has denied the granting of interim relief or injunction, even though the Court recognised that it could not be excluded that the environmental assessments prior to the adoption of the Act did not fulfil the requirements of the Habitats Directive. A ruling on the merits of the case is pending.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: ERITREA
Regulation of Ozone Depleting Substances

Zerisenay Habtezion*

Introduction

As part of the international effort to address global air pollution and climate change, the *Vienna Convention for the Protection of the Ozone Layer* as well as its *Montreal Protocol* and the Protocol's amendments[1] enjoy global adherence.[2] They have been hailed as a very effective regime to substantially reduce the production and use of ozone-depleting substances (ODSs).[3] The 'spectacular' and 'extraordinary' success of the ozone international regulatory regime is such that there has been a 98 percent reduction in the consumption of ODSs between 1986 and 2008 globally[4] and that, by 2050, the ozone layer is expected to return to its natural level.[5] All countries in Africa have ratified the *Montreal Protocol*, although the region contributed only a very small

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The author gratefully acknowledges the valuable assistance of Kibrom Tesfagabir.
[1] The regime on protection of the stratospheric ozone layer is composed of the following agreements: *Vienna Convention for the Protection of the Ozone Layer* (1985); *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987). The Protocol has been further strengthened through five amendments: *London Amendment to the Montreal Protocol* (1990); *Copenhagen Amendment to the Montreal Protocol* (1992); *Montreal Amendment to the Montreal Protocol* (1997); and *Beijing Amendment to the Montreal Protocol* (1999).
[2] For the status of ratification, accession, or approval of the agreements on the protection of the stratospheric ozone layer (as of October 2011), as provided by the Depositary, the United Nations Office of Legal Affairs, see http://ozone.unep.org/new_site/en/treaty_ratification_status.php.
[3] R. Steinberg, 'Power and Cooperation in International Environmental Law' in A. Guzman & A. Sykes (eds) *Research Handbook in International Economic Law* (2007) 485.
[4] United Nations *The Millennium Development Goals Report* (2010) New York, 54.
[5] C. Sunstein, 'Of Montreal and Kyoto: A Tale of Two Protocols' (2007) 31 *Harvard Environmental Law Review* 1, at 4.

percentage of the global consumption of ODSs and almost zero percent[6] of production of same.[7] Eritrea is one of these countries. Besides acceding to the *Montreal Protocol* and its amendments[8], the country has adopted regulations[9] on ODSs and ODSs-based equipment and products.[10] This report presents a brief review of these regulations.

ODSs: Overall Context

Chlorofluorocarbons (CFCs), Halons and Methyl bromide are the main Ozone Depleting Substances (ODSs). R-11, R-12, R-22 and R 115 commonly known as Freon gases also are some of the chemicals that fall into this group. These ODSs are employed in many day-to-day activities - coolants (like CFCs) are used in refrigerators and air conditioners; halons in fire extinguishers; methyl bromide in fumigation of soil, flowers, fruits and grain stores; foams in plastic industry and insulation; these and other ODSs as propellants in aerosols and other related purposes. ODSs lead to depletion of the ozone layer which in turn countenances the penetration of the dangerous Ultra Violet (UV) radiation to the Earth.[11] Exposure to UV radiation can lead to serious diseases such as skin cancer, eye cataracts, and can affect the immune system. Increased UV radiation is also dangerous for marine life and to terrestrial animals and crop production.[12]

The international community started to pay attention to the environmental problems linked to the ozone layer during the 1970s when scientists discovered holes of the ozone layer at the two poles of the planet.[13] The *Vienna Convention* came into being in 1985 as a legal response, followed by the *Montreal Protocol* in 1987. The latter sets out a mandatory timeline for the phase out of ODSs and this timeline has been reviewed regularly, with phase out dates accelerated in accordance with scientific

[6] With the exception of South Africa, there has never been a country in Africa that has ever produced ODSs.
[7] United National Environment Programme, *Patterns of Achievement - Africa and the Montreal Protocol* (2009) (available at http://www.unep.org/roa/docs/pdf/patternofachievements/PatternsAchievement-2009.pdf.)
[8] Eritrea has acceded to the all of the agreements on protection of the ozone layer listed in Note 1 (see table Eritrea's Accession to the Ozone Agreements).
[9] Legal Notice No. 117/2010.
[10] Government of Eritrea, Legal Notice No. 117/2010 'Regulations for the Issuance of Permit for the Importation or exportation of Ozone Depleting Substances (ODS) and Ozone Depleting Substances Based Equipment or Products'.
[11] UNEP (supra note 7).
[12] For the science of ozone depletion see D. Hunter, J. Salzman & D. Zaelke, *International Environmental Law* 2nd edition (2002) 527-531.
[13] Ibid.

understanding and technological advances, usually in the form of amendments.[14] The *Montreal Protocol* has also produced other significant environmental benefits. The phase out of ODSs is responsible for delaying climate change by up to 12 years.[15] All parties to the ozone accords have been phasing out ODSs and reverting to Ozone friendly alternatives[16].

ODSs: Eritrean Context

Historically, ODSs had been used in Eritrea largely in connection with imports of refrigerators and air-conditioners containing such substances. Surveys conducted between the years 2006 and 2010 by the Department of Environment show that such equipment and products are mostly found in the Eastern lowlands, mainly in the port cities of Massawa and Asseb. Smaller numbers of such equipment also exists in other parts of the country, including the western lowlands and the highlands.[17]

Like almost all African countries, Eritrea does not produce ODSs. On the consumption side, again as in most African countries, the country has managed to decrease its consumption of ODSs by cutting down on imports of ODS and equipment and products that utilize ODSs such as refrigerators and air-conditioners. In 1996 the consumption of ozone-depleting substances in Ozone Depletion Potential (ODP) metric tons was 43.2 - this decreased to 3.1 by 2008.[18] In contrast, two of the biggest consumers of ODSs in Africa, Nigeria and Egypt, have decreased their consumptions from 5,111.1 and 2,944.9 metric tons in 1996 to 312.7 and 726.2 metric tons in 2008, respectively.[19] The two countries that have managed to reduce their ODSs consumption closer to zero are São Tomé and Príncipe and the Comoros

[14] See note 1 above for list of the amendments.
[15] United Nations Environment Programme, *Ozoneaction* (2008) (Special issue dedicated to HCFC Phase out: Convenient Opportunity to Safeguard the Ozone Layer and Climate) (available at: http://www.unep.fr/ozonaction/information/mmcfiles/3139-e-oanHCFCspecialissue.pdf.)
[16] Some of the alternatives are: R-134a, R-404a, R-600a and Ammonia as coolants; CO_2, foam and dry powder as fire-extinguishers; solarisation, steam and biological control as fumigants; CO_2, R-134a and R-152a in the foam industry. The use of ODS has also a devastating economic impact in developing countries like Eritrea, as most of these chemicals have phased out since 2010. So unless the country implemented steps to keep up with global trends, it would be left with old and obsolete equipment and machines.
[17] GoE, *Introductory Note on Ozone Depleting Substances and its Global and National Response* (2011) (Unpublished).
[18] United Nations Environment Programme, *Assessing Progress in Africa toward the Millennium Development Goals* (2011) 77.
[19] Ibid.

- each consuming 0.2 metric tons in 2008.[20] Table 1 below shows an estimate of import/consumption of common ODSs in Eritrea for the periods 2005-2009. Again, the downward trend is consistent with indicators globally as well as in Africa.

Since acceding to the *Vienna Convention* and the *Montreal Protocol*, the Government of Eritrea (GoE) has been conducting activities in furtherance of its commitments under the Convention[21] and the Protocol.[22] Some of the activities being undertaken include: awareness campaigns;[23] surveys on ozone depleting substances[24] and ozone depleting substance based equipment;[25] identification of ozone friendly equipment and products for importation;[26] and sensitization on the need for development of regulatory tools on ODSs and ODS based equipment.[27]

Table 1: Import/consumption of common ODSs in tones/year in Eritrea

Year	**R-12***	**R-22****
2005	29.6	31
2006	3.6	1.8
2007	3.1	13.6
2008	2.5	4.7
2009	1.7	1.8

Source: GoE 2011 (unpublished)

*Dichlorodifluoromethane (R-12), is a colorless gas, is a chlorofluorocarbon halomethane (CFC), often used as a refrigerant and aerosol spray propellant.
** Chlorodifluoromethane or difluoromonochloromethane (R-22) is a hydrochlorofluorocarbon (HCFC), is a colorless gas once commonly used as a propellant and in air conditioning applications and has high ozone depletion potential and is a potent greenhouse gas, with a high global warming potential.

[20] Ibid. The two lowest importers of ODSs in Africa for this time frame are Comoros and Cape Verde Islands - the former's consumption of ODSs decreased from 2.3 metric tons/year in 1996 to 0.2 in 2008 while the latter's consumption of ODSs decreased from 2.3 to 0.8 metric tons for same time span. São Tomé and Príncipe also reduced its consumption from 4.3 metric tons/year in 1996 to 0.2 metric tons/year in 2008.
[21] Article 2(2)(b) of the *Vienna Convention* states that parties shall 'adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer'.
[22] GoE (supra note 17).
[23] Ibid. These awareness campaigns targeted decision makers, customs officers, investors, import - export companies, refrigerators technicians, students and community representatives. There has also been training on good refrigeration practices; and the identification of ODSs and ozone friendly substances and products.
[24] Ibid.
[25] These purchases included refrigerant analyzers for the customs officers and other retrofitting and recycling equipment to refrigeration.
[26] Alternatives to ozone-friendly products are now manufactured widely in many countries including some developing countries such as India, China and Brazil. Many of these products have labels representing that they are ozone-friendly. In the absence of such labels, verification of the contents, normally included on the products themselves or in accompanying documents, would normally show whether they contain CFCs or ozone-friendly alternatives.
[27] The sensitization effort in regulation of ODSs culminated in the promulgation of Legal Notice No. 117/2010.

Legal Response: Legal Notice No. 117/2010

The Regulations as an International Obligation

The *Eritrean Constitution* does not say much on international treaties except for the fact that the President may negotiate and sign international agreements[28] and that the National Assembly shall ratify these agreements by law.[29] However, the country's *National Environmental Management Plan* (*NEMP-E*) notes that the country needs to actively participate in international effort on the environment.[30] Specifically, *NEMP-E* observes that Eritrea shall participate in the global effort to protect the ozone layer.[31] As noted earlier, Eritrea is a party to all agreements on ODSs. The country, therefore, has an obligation to regulate the substances, equipment and products that come within the purview of these agreements. There is also an economic rationale for this. By acceding to these accords, the country in effect avoids becoming a dumping ground for ODSs and ODS based-equipment and products banned in almost all other countries. In addition, Eritrea would expect to benefit from technology and financial support that accrue to parties to the treaty.[32] Table 2 provides a list of the agreements on protection of the ozone layer and the dates of Eritrea's accession to them.

Table 2: Eritrea's Accession to the Ozone Agreements

Name of Agreement	**Date of Accession**
Vienna Convention	10 - 3 - 2005
Montreal Protocol	10 - 3 - 2005
London Amendment	5 - 7 - 2005
Copenhagen Amendment	5 - 7 - 2005
Montreal Amendment	5 - 7 – 2005
Beijing Amendment	5 - 7 – 2005

Source: UNEP, *Status of ratification, accession, acceptance or approval of the agreements on the protection of the stratospheric ozone layer* (2011) *UNEP/OzL.Pro.WG.1/31/INF/1-UNEP/OzL.Pro/ImpCom/46/INF/1.*

[28] *Eritrean Constitution* (1997), article 44(6)
[29] Ibid, article 32(4).
[30] GoE *National Environmental Management Plan for Eritrea* (1995), 117-122.
[31] Ibid, 34.
[32] See: *Vienna Convention* (article 4); Montreal Protocol (articles 10 and 10A).

General Features of the Regulations

Legal Notice No. 117/2010, titled 'Regulations for the Issuance of Permit for the Importation or exportation of Ozone Depleting Substances (ODS) and Ozone Depleting Substances Based Equipment or Products' contains 12 articles and 4 annexes.[33] It was promulgated on 23 August 2010. These Regulations constitute the first attempt at dealing with the environmental and health risks posed by ODSs in Eritrea. As a matter of established legislative practice, regulations/legal notices are ordinarily issued by government agencies that are empowered by pertinent enabling legislation.[34] Eritrea has not as yet promulgated an umbrella environmental proclamation which would have ordinarily empowered the Ministry of Land, Water and Environment (MLWE) to issue regulations governing the various matters of environmental concern such as ODSs. The absence of such a proclamation has therefore led to the issue of these regulations by the Government of Eritrea.

The objectives of Legal Notice 117/2010 are to: '(1) track the total quantity of ozone depleting substances imported to or exported from Eritrea; (2) control and limit the ozone depleting substance imported to or exported from Eritrea; (3) ensure that ozone depleting substances are imported or exported through formal import permits; (4) promote the use of ozone friendly substances, products, equipment and technology; and (5) phase out the use or consumption of ozone depleting substances and products'.[35]

Breadth of ODSs Regulated

Legal Notice 117/2010 aims to regulate the use, exportation, importation and handling of all ozone depleting substances listed in Annex I (which provides a list of controlled ODSs and their mixtures, categorized in ODS group, substances, trade name, tariff code number and chemical formula) and ODS-based products and equipment listed in Annex II (also categorized by name of equipment/product and customs code tariff numbers). The latter products and equipment include: automobile and truck air conditioning units (whether incorporated in vehicles or not); domestic and commercial refrigeration and air conditioning heat pump equipment (such as

[33] The four annexes are: Annex I: List of Controlled ODSs and their Mixtures; Annex II: ODS based Products and Equipment Controlled by these Regulations; Annex III: Application Forms; and Annex IV: Designated Ports of Entry or Export.
[34] An enabling law is referred to as a 'Proclamation'.
[35] Article 3.

refrigerators, freezers, dehumidifiers, water coolers, ice machines, air conditioning and heat pump units); aerosol products, except medical aerosols; portable fire extinguishers (halons); Insulation boards, panels and pipe covers; and prepolymers.[36] Also included are 'products that are transported in consignments of personal or household effects or in similar non-commercial situations; and any person who imports or distributes ozone depleting substances, technology or products which uses or contains ozone depleting substances'. The Regulations do not however apply to 'the restricted use of Methyl Bromide as fumigant for pre-shipment and quarantine purposes'.[37] This exception is limited to specific agricultural use as set out in the provisions of Annex I of Legal Notice No. 114/ 2006.[38]

Permitting Regime

As mentioned above, there is no production of ODSs in Eritrea, as is the case in almost all countries in Africa. The primary way in which Legal Notice 117/2010 seeks to regulate ODSs is, therefore, by regulating the import, export and consumption of these substances and associated equipment and products. Accordingly, the Regulations specifically prohibit the import or export of ODSs listed in Annex I and II without obtaining a permit from the MLWE.[39] Legal Notice 117/2010 empowers the MLWE to further regulate the permits by setting permitting conditions and determining the type and quantity of chemicals to be imported and/or exported into/out of the country.[40] Customs officers are also empowered to, among others things, check import or export permit issued for an ODS and/ or ODS-based equipment or products, at every points of entry/exit.[41]

Control on Imports and Exports

A control on imports and exports of ODSs in bulk is a key feature of any national regulatory regime on ODSs.[42] Legal Notice 117/2010 seeks to regulate ODSs by

[36] Article 4(1)(b).
[37] Article 4(2).
[38] Legal Notice No 114/2006 'Regulations for Importation, Handling, Use, Storage and Disposal of Pesticides' regulates pesticide imports through permit requirements; rules on labeling and packaging as well as inspection and disposal. The full text of the Regulations is available at http://faolex.fao.org/docs/pdf/eri68051.pdf.
[39] Articles 5-6.
[40] Article 7.
[41] Article 9.
[42] United Nations Environment Programme & Stockholm Environmental Institute, *Regulations to Control Ozone Depleting Substances: A Guide Book* (2000), xxv-xxvii.

instituting a standardized system for such control. Article 8 accordingly obliges importers and exporters to: (1) submit the application for import or export permits three months in advance of the intended time for import or export; (2) import or export the ODS or ODS-based equipment or product for which he obtained a permit during the period indicated in the permit; (3) keep a register of the type and quantity of ODS sold; (4) submit annually a report to the Department of the quantities of ODS imported or exported; (5) obtain approval before shipping any ODS; (6) submit a copy of the permit to the customs officials at the port of entry; and (7) check for proper labeling of ODS.[43]

Regulatory Powers

Legal Notice 117/2010 empowers the MLWE to: (1) issue a permit exemption for the importation or exportation of ODS and ODS-based equipment or products; (2) set the conditions of permit and determine the type and quantity of chemicals to be imported and/ or exported into and out of Eritrea; (3) determine the number of licensed importers/ exporters allowed to import/export ODS and ODS-based equipment or products at a given time; (4) suspend or cancel the permit of a holder who fails to meet any of the conditions/ requirements of the permit, or fails, without good cause, to use the permit within the time stipulated under these regulations; and (5) monitor the importer or exporter that imports or exports during the period indicated in the permit.[44]

These regulatory powers are welcome for two reasons. First, they constitute an important initial step to establish a reliable system to control and monitor the import and export of ODSs though the MLWE, a government agency that has the resources and the expertise to deal with the challenge. Secondly, given the multiple usage and application of chemicals (such as in agriculture, industry and home use) and the fact that the powers and responsibilities of some government agencies in the country are

[43] Article 8. Article 8 further requires that labeling include: (a) the name of the ODS or of the Product; (b) the name and address of the manufacturer of the ODS or of the product; (c) the name of the country of origin or destination of the ODS or of the product; (d) a statement which reads 'Not Ozone Friendly', 'Ozone Depleting', 'this substance/product is harmful to the Ozone Layer', 'No CFC', 'Ozone Friendly' or 'CFC free' as the case may be, in a clearly legible letter; and (f) a symbol indicating that the substance or product is harmful to the Ozone Layer.
[44] Article 7.

blurred on certain areas of regulatory concern,[45] it is sensible to delineate the powers and responsibilities over ODSs.

Concluding Remarks

The regulatory success at national and international levels on ODSs epitomizes the potency of cooperation in tackling the major environmental woes of our planet. If nothing else, Legal Notice 117/2010 is a welcome addition to the global effort at protecting the ozone layer. It is an example of how all nations, whatever their standing on the international plane, could contribute in the fight against global environmental challenges.

Seen within the context of the anatomy of environmental regulation in Eritrea, Legal Notice 117/2010 is also a step in the right direction. The environmental and economic rationales for the legislative action are self-evident. On the enforcement side, the challenge will be making sure that implementation of these Regulations is not dwarfed by resource handicaps. Training of all enforcement agents, including customs officers, will need to be amplified. The MLWE should exert all effort, including by exercise of its regulatory powers under article 7, to ensure that a reliable system of control of ODSs is in place and that the consumption of ODSs is judiciously monitored. The ultimate objective should be getting to zero imports and zero consumption of ODSs. In the same vein, effort should be made to make sure that 'leakages' in the form of contraband ODSs and ODS-based equipment or products do not undermine the objectives of the new law.

Finally, Legal Notice 117/2010 will not be served by the country's overall environmental regime, which is still at an embryonic stage. There is still no framework environmental proclamation and the institutions involved in environmental regulation have huge resource constraints. Commitment and effort need to be redoubled, therefore, to deal with 'the other pieces of the puzzle' in environmental governance in the country.

[45] For instance, there have been a number of examples of regulatory and institutional overlap on wildlife, forests and pesticide regulation between the Ministries of Agriculture and the Ministry of Land, Water and Environment.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: FRANCE

Renewable Energy, Nanoparticles and Access to Water

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Abstract

In 2011, France incorporated the EU Directives regarding the environment and renewable energy into its domestic legal regime. It also announced its first national plan on adaptation to climate change in July 2011. To deal with the urgency of climate change in the context of an economic recession, public authorities have opted to support research to develop new sources of energy. In that regard, a controversial ecological and socio economic issue in 2011 was the potential development of shale gas. 2011 was also marked by a draft decree regarding an annual statement on commercialized nanoparticles. This draft decree is to be read in conjunction with the recommendation adopted by the European Commission on nanoparticles. The key factor to determine what is a nanoparticle is size. However, a degree of flexibility has been built into the definition for reasons explained by the authors. The Commission has urged various key actors to adopt this definition. Another important development has been the adoption by France of legislation regarding access to water services. This legislation aims, among other things, to provide easier access to water for the poorer segments of the population. However,

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some critics are of the view that it does not go far enough, noting that an opportunity was missed to clearly recognize 'the right to water' and that it also fails to address the needs of homeless persons.

Country Report

Si les années 2009 et 2010 furent celles des deux lois issues du médiatique Grenelle de l'environnement, l'année 2011 est principalement celle de l'adoption des décrets d'application de loi 2010/788 portant engagement national pour l'environnement.[1] Loin d'être achevé, ce processus normatif s'est heurté à une série de difficultés politico-économiques et juridiques. De plus, il s'avère difficile d'apprécier les évolutions du droit français de l'environnement sans tenir compte de celles du droit de l'Union européenne.

Ainsi, outre la transposition des directives de l'UE dans le domaine de l'environnement et des énergies renouvelables, la France a présenté son premier plan national d'adaptation au changement climatique en juillet 2011.[2] En toile de fond de l'urgence climatique, l'actuelle récession économique conduit les autorités publiques à soutenir la recherche vers d'autres sources énergétiques. En 2011, le gaz et l'huile de schiste ont suscité de vives controverses écologiques et socio-économiques. Diligentée par le gouvernement sur le sujet, une mission d'inspection estime les gisements d'huiles de schiste dans le bassin parisien à 100 millions de m3 techniquement exploitables et dans le sud de la France à 500 milliards de m3 pour ce qui concerne le gaz de schiste.[3] Dans le prolongement du rapport mitigé de la mission d'information de l'Assemblée nationale,[4] la loi 2011/835[5] interdit l'exploration et l'exploitation des mines d'hydrocarbures liquides et gazeux par forages suivis de fracturation hydraulique et institue une commission nationale d'orientation et de suivi de l'évaluation des techniques. Toutefois, les associations environnementales restent très réservées sur l'applicabilité de cette loi en l'absence notamment de définition de

[1] Loi 2010/788 du 12/7/2010, JORF n°160 du 13/7/2010 p 12905. Cette loi comporte 257 articles répartis en 6 titres. Sa mise en œuvre nécessite l'adoption de près de 200 décrets sans compter les arrêtés.
[2] Plan national d'adaptation au changement climatique, juillet 2011, 188 p. Site web du ministère de l'environnement.
[3] Rapport d'étape du 21 avril 2011, 56 p. www.developpement-durable.gouv.fr/Mission-d-inspection-sur-les-gaz.html.
[4] Rapport d'information sur les gaz et huile de schiste, n°3517 du 8/6/2011, FM. Gonnot et P. Martin, 148.
[5] Loi 2011/835 du 13 juillet 2011, JORF n°162 du 14/7/2011 (loi adoptée selon la procédure accélérée engagée par le gouvernement.

la fracturation hydraulique. De même, le poids de l'argumentaire économique mis en avant par la mission d'inspection pour justifier le recours à cette richesse nationale risque de peser fortement sur la construction de l'encadrement juridique prévisible de ces activités d'exploration et d'exploitation.

L'année 2011 est aussi celle de la présentation du projet de décret relatif à la déclaration annuelle des substances à l'état nanoparticulaire mises sur le marché conformément à la mise en œuvre de la loi Grenelle II. Ce projet de décret, qui vient d'être adopté par le gouvernement[6], offre un exemple instructif à propos de l'imbrication délicate entre le droit français et le droit de l'Union européenne et de la détermination complexe d'une définition des nanomatériaux. La prolifération des produits de consommation courante intégrant des nanomatériaux[7] et les interrogations scientifiques persistantes sur les risques associés aux nanomatériaux ont d'une manière naturelle poussé les autorités européennes et nationales à amorcer une régulation des nanotechnologies. Cette régulation, qui s'inscrit dans une application du principe de précaution, s'est matérialisée au niveau national par l'adoption d'un mécanisme de *déclaration obligatoire des substances à l'état nanoparticulaire mises sur le marché*.[8] Son champ d'application est partiellement délimité par la définition qui est retenue dans le décret d'application n° 2012-232 des termes *substances à l'état nanoparticulaire*. Après certains hésitations, le gouvernement français s'est logiquement aligné sur la définition du terme nanomatériau produite par la Commission. La multiplication des interventions règlementaires, suivant des logiques verticale[9] et horizontale,[10] a logiquement fait émerger au niveau européen le besoin d'une définition juridique de référence des nanomatériaux destinée à prévenir une différenciation (incidente) des niveaux de protection de la santé humaine et de l'environnement. Afin de maintenir la confiance dans son action de maîtrise du risque nanotechnologique, la Commission

[6] Décret n° 2012-232 du 17 février 2012 relatif à la déclaration annuelle des substances à l'état nanoparticulaire pris en application de l'article L. 523-4 du code de l'environnement, JORF du 19 février 2012, p.2863.
[7] En 2011, l'initiative américaine The Project on Emerging Nanotechnologies inventoriait plus 1 300 produits commerciaux basés sur les nanotechnologies.
[8] Article 185 de la loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (dite Grenelle 2), JORF n°160 du 13 juillet 2010, p.12905.
[9] Existence d'interventions aux niveaux national et européen.
[10] Au niveau européen, l'on constate l'adaptation de plusieurs règlementations sectorielles aux spécificités des nanomatériaux Par exemple, le règlement 1223/2009/CE du Parlement européen et du Conseil du 30 novembre 2009 relatif aux produits cosmétiques, JOUE n° L 342 du 22 décembre 2009, p.59 ou encore le règlement communautaire 1333/2008/CE du Parlement européen et du Conseil du 16 décembre 2008 sur les additifs alimentaires, JOUE n° L 354 du 31 décembre 2008, p.16.

européenne s'est engagée à répondre favorablement à la demande formulée par le Parlement européen de production d'une définition transversale du terme *nanomatériau*.[11] Si la définition formulée dans la recommandation du 18 octobre 2011 relative à la définition des nanomatériaux[12] est fondée sur une base scientifique relativement affirmée, qui participe de son application recherchée par les parties prenantes, son unicité revendiquée est relativisée par une certaine souplesse assumée par la Commission européenne aux fins essentiellement de protection optimisée de la santé humaine et de l'environnement.

La Commission européenne définit au point 2 de sa recommandation un nanomatériau comme

> 'un matériau naturel, formé accidentellement ou manufacturé contenant des particules libres, sous forme d'agrégat ou sous forme d'agglomérat, dont au moins 50 % des particules, dans la répartition numérique par taille, présentent une ou plusieurs dimensions externes se situant entre 1 nm et 100 nm.'

La référence exclusive au critère de la taille, qui se situe dans la ligne d'autres approches adoptées au niveau international,[13] est justifiée par la Commission dans un mémo d'octobre dans les termes suivants: 'size is the only universally applicable, clear and measurable criterion which can be used to identify materials'.[14] Cette position est conforme à l'opinion exprimée par le SCENIHR (Scientific Committee on Emerging and Newly Identified Health Risks) dans un avis publié en décembre 2010.[15] Les valeurs concernant la taille sont des valeurs rigides (dont la définition s'appuie sur des observations scientifiques) qui contribuent à la force exécutoire de la définition.[16] La limite haute de 100 nm a été choisie en raison de la capacité des particules de dimension inférieure à 100 nm à franchir les barrières biologiques protégeant les tissus et organes. La limite basse de 1 nm est justifiée par la nécessité de distinguer les nanomatériaux des atomes et molécules qui sont les

[11] Cf Résolution du Parlement européen du 24 avril 2009 sur les aspects réglementaires des nanomatériaux, P6_TA(2009)0328.
[12] Recommandation 2011/696/UE de la Commission du 18 octobre 2011 relative à la définition des nanomatériaux, JOUE n° L 275 du 20 octobre 2011, p.38.
[13] Par exemple au sein de l'ISO.
[14] MEMO/11/704 du 18 octobre 2011 Questions and answers on the Commission Recommendation on the definition of nanomaterial.
[15] Opinion on Scientific Basis for the Definition of the Term 'Nanomaterial', Scientific Committee on Emerging and Newly Identified Health Risks, December 2010.
[16] Rejet logique par la Commission de l'utilisation du terme *approximativement* (de 1 à 100 nm) que l'on rencontre dans diverses définitions à caractère non règlementaire.

constituants des substances. Par dérogation à cette limite basse, doivent toutefois être considérés comme des

> 'nanomatériaux les fullerènes, les flocons de graphène et les nanotubes de carbone à paroi simple présentant une ou plusieurs dimensions externes inférieures à 1 nm.'[17]

Suivant une précision apportée par la Commission européenne dans son mémo d'octobre 2011, les matériaux nanostructurés avec une structure interne ou en surface à l'échelle nanométrique ne constituent pas des *nanomatériaux*. Cette précision permet d'éviter que des prescriptions qui peuvent avoir des conséquences économiques importantes s'appliquent à des matériaux qui ne semblent pas véhiculer de risques pour la santé humaine ou l'environnement.[18] Les matériaux se présentant sous la forme de poudre, de suspension, de solution ou de gel ne pourront revendiquer la qualité de *nanomatériau* qu'à la condition que la répartition numérique par taille des particules qui les composent, dans la classe de 1 à 100 nm, soit supérieure au seuil de 50%. La mesure de la répartition numérique par taille ne pouvant être appliquée aux agglomérats et agrégats (pour la mesure de la répartition de leurs particules primaires), la recommandation prévoit également, à son point 5, une qualification *nanomatériau* pour les matériaux qui exprimeront une surface spécifique en volume supérieure à 60 m2 /cm3.[19] Les résultats de l'analyse de la répartition numérique par taille conduisant, normalement, à une reconnaissance plus fréquente de la qualité de *nanomatériau*, ils devront prévaloir (seulement lorsqu'ils conduisent à cette reconnaissance) sur les résultats de l'analyse de la surface spécifique en volume.[20]

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[17] Point 3 de la recommandation 2011/696/UE, précitée.

[18] Sont explicitement visés dans le mémo, les matériaux nanoporeux, les nanocomposites (y compris les nanoalliages), les puces, ou encore les matériaux non particulaires tels que les protéines ou les micelles présents, par exemple, dans la mayonnaise. La présence des nanocomposites dans cette liste peut apparaître surprenante car des doutes sont souvent avancés sur la sécurité de certains d'entre eux, comme par exemple les nanomédicaments se présentant sous la forme de capsules nanostructurées. La Commission, toutefois, ne ferme pas la porte à une actualisation future de la définition qui permettrait de les incorporer dans la définition.

[19] La surface spécifique en volume se calcule via l'emploi de la méthode BET (méthode mise au point par Brunauer, Emmett and Teller). Cette méthode d'analyse est uniquement applicable aux matériaux solides secs (agglomérats, agrégats) et aux poudres.

[20] A priori, la mesure de la répartition numérique par taille et la mesure de la surface spécifique en volume supérieure sont en concurrence uniquement pour l'analyse des poudres. En effet, les matériaux solides enfermant des nano-objets (comme les agglomérats, les agrégats) ne peuvent faire l'objet d'une mesure de la distribution en taille de leurs particules primaires. En l'absence de méthodes de mesure harmonisées, la Commission précise qu'il conviendra d'utiliser à défaut les meilleures méthodes disponibles. Lorsque cela sera faisable il conviendra dans les règlementations sectorielles *d'élaborer […] des méthodes*

L'unicité de la définition présentée par la Commission européenne est exprimée à travers l'invitation adressée, aux États membres, aux agences de l'Union européenne et aux opérateurs économiques à utiliser la définition du terme *nanomatériau* figurant dans la recommandation

> 'lorsqu'ils adoptent et mettent en oeuvre des actes législatifs, des politiques et des programmes relatifs aux produits issus des nanotechnologies.'[21]

Au surplus, il est spécifié au considérant 4 de la recommandation que la définition visée

> 'devrait servir de référence pour déterminer si un matériau doit être considéré comme un nanomatériau aux fins de la législation et des politiques de l'Union.'

Si la forme juridique de l'intervention retenue par la Commission européenne ne contribue pas à asseoir comme référence la définition délivrée (la recommandation ne lie pas ses destinataires que sont les Etats membres, agences de l'Union et opérateurs économiques), elle facilite cependant l'adaptation programmée de la définition à l'évolution des connaissances scientifiques et techniques.[22] L'unicité revendiquée de la définition est affectée d'une manière plus sensible à la baisse par la possibilité reconnue de diminuer le seuil de répartition numérique par taille (fixé normalement à 50%) jusqu'à 1%

> 'lorsque cela se justifie pour des raisons tenant à la protection de l'environnement, à la santé publique, à la sécurité ou à la compétitivité.'[23]

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de référence et des méthodes de mesure normalisées, ainsi qu'un corpus de connaissances sur les concentrations caractéristiques en nanoparticules de certains ensembles représentatifs de matériaux (Considérant 15 de la recommandation 2011/696/UE, précitée).

[21] Point 1 de la recommandation 2011/696/UE, précitée.
Remarquons que le terme *nano* utilisé dans les domaines pharmaceutique et médical n'est pas impacté par la définition délivrée dans la recommandation suivant l'indication formulée par la Commission au considérant 17 de sa recommandation.

[22] La forme de la recommandation peut facilement être modifiée par la Commission. Le point 5 de la recommandation prévoit un réexamen de la définition avant 2015. Les questions relatives au maintien du seuil de 50% de la distribution en taille ainsi que de l'exclusion des matériaux non particulaires comme les nanomatériaux complexes à nanocomposants feront l'objet d'une attention particulière.

[23] Point 2 paragraphe 2 de la recommandation 2011/696/UE, précitée.

La définition figurant dans la recommandation ne préjuge également pas de la possibilité de fixer des exigences supplémentaires dans les législations de l'Union. Il sera ainsi possible de limiter l'application de dispositions règlementaires aux matériaux qui seront manufacturés, insolubles, bio-persistants[24] ou encore d'élargir l'application de la réglementation à des matériaux dont la taille pourra dépasser la limite haute des 100 nm.[25] Dans cette dernière hypothèse, l'objectif est d'assurer, dans un contexte sectoriel nécessairement particulier, une maîtrise optimale du risque nanotechnologique.

L'année 2011 est aussi celle de l'adoption de la loi n°156-2011 du 7 février 2011, relative à la solidarité dans les domaines de l'alimentation en eau et de l'assainissement[26] qui entrera en vigueur au 1er janvier 2012. Si cette avancée dans la mise en œuvre du droit à l'eau en France est saluée, le manque d'ambition du texte et l'absence de consécration nette de ce droit sont en revanche déplorés.[27] L'allocation de solidarité pour l'eau prévue par l'article 2 de la loi, doit permettre d'aider au paiement des fournitures d'eau ou des charges collectives afférentes.[28] Même si ce dispositif améliorera sans doute le système de solidarité existant[29] en faveur des ménages démunis, sa portée demeure limitée. Avant d'expliquer le nouveau mécanisme mis en place, tâchons d'expliquer cette timidité du législateur en ce domaine.

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[24] Par exemple, le règlement 1223/2009/CE du Parlement européen et du Conseil du 30 novembre 2009 relatif aux produits cosmétiques (précité).
Rappelons que le terme nanomatériau défini par la Commission dans sa recommandation vise les matériaux naturels, formés accidentellement et manufacturés.

[25] Il est affirmé au considérant 6 de la recommandation 2011/696/UE, précitée qu'il *est possible que l'utilisation d'une limite supérieure unique soit trop restrictive aux fins de la classification des nanomatériaux et qu'il soit plus judicieux d'adopter une approche différenciée*. Cette 'approche différenciée' fait sans doute echo à la proposition de définition présentée par le SCENIHR dans son avis de décembre 2010, précité, où il refusait d'exploiter une limite haute unique.

[26] Loi n°156-2011 du 7 février 2011 *relative à la solidarité dans les domaines de l'alimentation en eau et de l'assainissement*, JO n°0032 du 8 février 2011, texte n°1, p. 2472.

[27] *Cf.* Fortuné AHOULOUMA, *Vers une effectivité du droit à l'eau en France ? La loi relative à la solidarité dans les domaines de l'alimentation en eau et de l'assainissement*, AJDA n°33, 10 octobre 2011, p. 1887-1890.

[28] Mentionnées à l'article 6 de la loi n°90-449 (modifiée) du 31 mai 1990 *visant à la mise en œuvre du droit au logement*, JO n°127 du 2 juin 1990, p. 6551. Auparavant, l'aide n'incluait pas le défaut de paiement des charges locatives.

[29] Dispositif – étroitement lié au droit à un logement décent instauré par la loi n°90-449 du 31 mai 1990 (JO n°127 du 2 juin 1990, p. 6551) – régi par l'article L.115-3 du Code de l'action sociale et des familles, qui garantit aux ménages en difficulté un accès continu à l'eau en cas de factures impayées, à condition qu'ils aient adressé une demande d'aide (*cf.* le décret n°2008-780 du 13 août 2008 *relatif à la procédure applicable en cas d'impayés des factures d'électricité, de gaz, de chaleur et d'eau*, JO n°0189 du 14 août 2008, texte n°3, p. 12877).

Certes, le droit à l'eau, aujourd'hui largement reconnu, reçoit des acceptions différentes[30] et ne jouit encore que d'une faible effectivité; mais ce n'est probablement pas l'explication principale à l'ambition sociale limitée de la législation française. L'explication réside plus certainement dans l'équilibre à trouver entre l'acceptabilité sociale du prix de l'eau et les coûts de protection de l'environnement aquatique. En effet, le droit français et le droit de l'Union européenne insistent particulièrement sur ce point.[31] Par conséquent, le droit à l'eau n'est point conçu comme générateur de gratuité; il ne fait qu'adapter le principe de recouvrement des coûts afin de tenir compte de la situation socio-économique des usagers: on appelle cela la tarification sociale.

La doctrine française reproche à cette loi de n'instaurer qu'une nouvelle aide sociale et de ne pas consacrer un véritable droit de l'eau. Le chemin semblait pourtant ouvert par la loi sur l'eau et les milieux aquatiques de 2006, qui avait établi la tarification progressive[32] (le coût du m^3 croît avec le volume consommé). La loi de 2011 ne subordonne plus l'aide à l'existence de factures impayées, et prévoit une nouvelle possibilité de financement[33] du Fonds de Solidarité pour le Logement, grâce auquel les départements peuvent préserver l'accès à l'eau des foyers en difficulté. Ainsi, les collectivités pourront tenter d'éviter à ces ménages les impayés[34] plutôt que

[30] *Cf.* les diverses références citées par la résolution de l'Assemblée générale des Nations Unies n°A/RES/64/292 du 28 juillet 2010 sur le droit de l'homme à l'eau et à l'assainissement…Il ne peut pas exister de réponse universelle à ce droit mais uniquement des réponses locales (Conseil d'Etat, *L'eau et son droit*, rapport public annuel 2010, p. 238). Par ailleurs, si ce droit est reconnu, ce n'est pas nécessairement pour lui-même ; la doctrine débat sur sa nature autonome ou, au contraire, dérivée d'autres droits fondamentaux (droit à la vie, droit à un environnement sain, etc.).

[31] *Cf.* l'article 9 §1 de la directive n°2000/60/CE du Parlement européen et du Conseil *établissant un cadre pour une politique communautaire dans le domaine de l'eau* du 23 octobre 2000, JOCE n°L327 du 22 décembre 2000, p. 0001-0073 (récupération des coûts des services liés à l'utilisation de l'eau); Communication de la Commission au Conseil, au Parlement européen et au Comité économique et social, *Tarification et gestion durable des ressources en eau* (COM/2000/ 477 final) du 26 juillet 2000 (non publiée).

[32] Loi n°2006-1772 du 30 décembre 2006 *sur l'eau et les milieux aquatiques*, JO n°303 du 31 décembre 2006, texte n°3, p. 20285 (article 1er); la tarification progressive est critiquée en ce qu'elle récompense surtout les ménages autonomes sans prendre en compte les besoins particuliers des plus démunis (*cf.* AHOULOUMA, op. cit.).

[33] Les services publics d'eau et d'assainissement pourront verser une subvention au FSL d'un maximum de 0,5% du montant HT des redevances qu'ils perçoivent: financement non obligatoire, limité et source d'inégalités de moyens sur le territoire (*cf.* futur L.2224-12-3-1 du Code général des collectivités territoriales).

[34] L'idée est de prévenir les coupures d'eau afin de préserver un accès continu à l'eau potable.

d'y remédier. Au-delà de cette question, subsiste un problème: les sans-abris semblent oubliés du système.[35]

Etant donné l'importance vitale d'une eau douce de qualité, d'aucuns affirment que le prix de l'eau, notamment en France, est trop faible[36] - d'où des gaspillages et surconsommations (déresponsabilisation). Par ailleurs, la seule gratuité, que l'on aurait *a priori* pu lier au droit à l'eau mais incompatible avec le principe du pollueur-payeur, n'est pas intéressante dès lors que la consommation des usagers défavorisés dépasse la quantité vitale accordée. Au sein du triptyque développement durable, une tarification équilibrée aboutit à mettre en balance, d'une part, les objectifs économiques et environnementaux et, d'autre part, les objectifs sociaux.[37] La loi renforce ainsi la politique de redistribution, mais sans aller jusqu'à la gratuité des 1ères tranches de consommation.

[35] En effet, celui-ci subordonne *in fine* l'assistance à l'existence de factures et donc, *a priori*, à celle d'un logement.
[36] *Cf.* J.-P. BARDE, *Une fiscalité négative : les subventions nuisibles à l'environnement*, Revue française de finances publiques, n°114, 1er avril 2011, p. 27. En 2011, le prix moyen du m^3 d'eau en France oscille autour de 3 €.
[37] *Cf.* COM (2000) 477, § 2 .3, précitée.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: GERMANY
Local Responses to International Developments

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Introduction

Developments in German environmental policy in 2011 have been marked by the nuclear disaster at the Fukushima power plant in Japan and political responses to the challenges posed by it. Never since the early 1970s has a single event had such deep impacts on the shaping of German environmental policy. The pre-Fukushima 'Energy concept for an environmentally friendly, reliable and affordable energy supply' of the Federal Government,[1] while it did not depart as a matter of principle from the policy of gradual phase-out of nuclear energy that had been adopted in 2002, had stressed the role of nuclear energy as a cost efficient transitional solution for global climate protection ('bridging technology'). It had envisaged prolonging the maximum operation times of the 17 existing nuclear power plants. Two amendments to the *Nuclear Energy Act* and two financial laws adopted in late 2010 implemented this concept. The most important piece of legislation, the 11th Amendment of the *Nuclear Energy Act*,[2] prolonged the maximum operation times of nuclear power plants by an additional eight years for older facilities and twelve years for newer ones.

In response to the Fukushima disaster and the ensuing negative opinion of the vast majority of Germans toward nuclear energy, the Federal Government reversed its nuclear energy policy to focus almost entirely on renewable energy ('energy turn').

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[1] *Federal Parliamentary Document* 17/3049.
[2] Law of 8 December 2010, *Federal Gazette* 2010 (Part 1), 1814.

The findings of an ad hoc 'Ethics Commission on Safe and Secure Energy Supply' and a safety evaluation of all German nuclear power plants by the Reactor Safety Commission helped to prepare and legitimise the new policy. As an immediate response, the Government ordered the preliminary closure of eight nuclear power plants. As a second step, the Government did not only decide to restore the phase-out policy as adopted in 2002, but strengthened it by ordering the immediate permanent closure of these eight nuclear powers plants and setting fixed phase-out dates for the remaining nine nuclear power plants. To fill the gaps in energy supply - the share of nuclear energy in the total electricity supply before Fukushima was 23 per cent - and further reduce greenhouse gas emissions, the accelerated expansion of renewable energy was given high priority. The potential of green energy had been investigated by the German Council on Environmental Policy that found that by 2050 Germany could satisfy its whole energy demand by renewable sources of energy. Following the findings of the Council and the recommendations of the 'Ethics Commission', the Federal Government decided to set more ambitious targets for renewable energy, especially with respect to electricity.

Statutory Developments

Mirroring the policy turn from nuclear energy to renewable energy, in 2011 the Nuclear Energy Act was amended again. A statutory package of six laws or amendments was adopted (one further bill remained stalled in Parliament due to disagreement by the Bundesrat, the representation of the States).

The 13th Amendment of the *Nuclear Energy Act*[3] of July 2011 fixed exact dates for the closure of all German nuclear power plants. The Act provided that eight nuclear powers plants, among them the seven oldest, are to be closed immediately. For the rest staged closure dates were determined such that the last plant would be severed from the grid by 2022. The extended operation times awarded in 2010 were withdrawn and those set in 2002 restored. Some flexibility was added to ensure that plants ordered to close early can sell their remaining operation times and others can be fully operational until their allotted closure date by buying additional operation times. The 12th Amendment of the *Nuclear Energy Act*,[4] which had mainly transposed

[3] *Federal Gazette* 2011 (Part 1), 1704.
[4] *Federal Gazette* 2010 (Part 1), 1817.

the *EU Directive* on the nuclear safety of nuclear installations[5]and reinforced safety requirements, was not affected by the amendment.

The *Europe Adjustment Act for Renewable Energy*[6] of April 2011 and the further Amendment of the *Renewable Energy Act* (*REA*)[7] of July 2011 constitute the major impetus for an accelerated use of renewable sources of energy in Germany, especially for electricity. The *REA Amendment* of July 2011 provides ambitious staged targets for renewable electricity, a share of 35 per cent by 2020, 50 per cent by 2035, 65 per cent by 2040 and 80 per cent by 2050 - the present share being 20 per cent. The 14 per cent target for heating and cooling as established by the *Renewable Energy Heat Act* of 2008 has been left unchanged.

The two new laws also changed the remuneration for fed-in energy from renewable sources. The *REA Amendment* of July 2011 additionally introduced market-based elements into the German system for promoting renewable electricity. Since 1990 and in a reformed version since 2000, Germany has adhered to a fixed-tariff system for the promotion of renewable electricity. Grid operators, transmission grid operators and public utilities have to connect all sources of renewable electricity to the grid, feed in all renewable electricity offered with priority and remunerate the producer at a fixed rate. The costs are equally redistributed country-wide in the whole electricity transmission and distribution system and ultimately passed on to the end users of electricity. Practically, the consumer must subsidise the expansion of renewable electricity. The fixed tariff is varied and decreases over time based upon the source of renewable electricity and the size of the facilities.

The new laws rearrange the fixed tariffs. They reduce the remuneration for land-based wind and photovoltaic energy, in the latter case adding a flexible total capacity cap to control excessive extension of capacity. Preference is given to offshore wind energy, the remuneration of which has been increased among other means, by postponing the beginning of the degression period from 2015 to 2018. To improve the efficiency of the subsidisation system, the *REA Amendment* of July 2011 no longer mandates public utilities to buy and distribute the fed-in electricity. Rather, the distribution grid operators shall market it on the electricity exchange or over the counter and public utilities are only required to pay the difference between the fixed

[5] Directive 2009/71/Euratom.
[6] *Federal Gazette* 2011 (Part 1), 619.
[7] *Federal Gazette* 2011 (Part 1), 1634.

tariff and the market price achieved. Moreover, the generators of renewable electricity are encouraged to directly market the electricity themselves.

The expansion of the share of renewable electricity in the total electricity supply envisaged by the new legislation, raises problems of security of supply. Due to the climatic conditions in Germany, renewable electricity is dependent on weather and freshwater levels and is not available in equal quantities throughout the year. Moreover, offshore wind energy is generated far away from consumption centres and is transmitted over large distances. The German grid is designed for decentralised supply and cannot easily be adjusted to local or temporary peaks and deficits of renewable power generation. Therefore, as part of the energy law package, the Amendment of the *Energy Act*[8] of 26 July 2011 and the new *Act on Measures for Speeding-Up Grid Extension*[9] of 27 August 2011 envisage various measures for extending the transmission grid and improving its performance in respect of the new technological challenges. Under the former Act, industry is required to develop programmes for the extension of the electricity grid and its technological improvement. The latter Act introduces a federal planning procedure for the extension of the grid. It consists of a comprehensive federal plan that determines the corridors of long-distance transmission lines and a new planning permission procedure for individual transmission lines or segments of such lines. The planning permission procedure is a well-established part of German administrative procedures and widely used for the planning of infrastructure projects. The innovation brought about by the new Act is that to improve public acceptance, it introduced elements of better coordination of affected authorities, more effective NGO participation, mediation and optional compensation of municipalities that suffer from overland transmission lines without having any advantages from them.

Finally, as part of the energy law package, the Amendment of the *Federal Building Code*[10] of 22 July 2011 obliges municipalities to consider climate protection in local planning. In particular, they are empowered to prescribe active measures for the use of renewable energy and energy efficiency in the local building plans. This is a new element of local planning since in the past the municipalities could only require house owners to construct new buildings in such a way that renewable energy could be

[8] *Federal Gazette* 2011 (Part 1), 1554.
[9] *Federal Gazette* 2011 (Part 1), 1690.
[10] *Law for Strengthening the Climate-Friendly Development in the Cities and Municipalities - Federal Gazette* 2011 (Part 1), 1509.

used, without being able to prescribe such a use. In essence, the municipalities can now develop an autonomous local policy of climate protection through the use of renewable energy.

Apart from energy law, the Government draft[11] on transposing *EU Directive* 2008/98 on Waste has not yet climbed over all parliamentary hurdles. While there is agreement between the two chambers of Parliament on most issues, the limitation of the monopoly of municipalities in the field of domestic wastes for recovery has remained controversial. The Government and the majority of the Bundestag (House of Representatives) want to introduce a liberalisation whereby private collection and recovery are permissible unless there are paramount interests that militate for the contrary; this requirement would then be specified by reference to the functioning and organisational security of municipal waste management. By contrast, the Bundesrat and the municipalities insist on retaining the present monopoly of the municipalities for domestic waste management, arguing that 'cherry picking' by private business should not be allowed.

Recent Case Law

Judicial developments in 2011 have been dominated by a landmark judgment of the European Court of Justice on the conformity of the standing requirements of the German *Environmental Remedies Act*[12] (*ERA*) with the *EU Public Participation Directive*.[13] This Directive was adopted for transposing Article 9(2) of the *Aarhus Convention on Access to Information, Public Participation and Access to Justice* with respect to national decisions subject to the *EU EIA Directive*[14] and the *EU Directive on Integrated Pollution Prevention and Control*.[15] In conformity with the *Aarhus Convention*, Article 10a of the *EIA Directive* (as amended by Directive 2003/35) in principle respects the dichotomy between objective and subjective systems of judicial review of administrative action in Europe. It provides that standing of individuals is conditional on a sufficient interest or, where national law so requires, on the violation of a subjective right. The parties may specify the details, considering the need to grant the public concerned broad access to justice. As regards associations, Article

[11] *Federal Parliamentary Document* 17/6052.
[12] *Federal Gazette* 2006 (Part 1), 2816.
[13] Directive 2003/35/EC.
[14] Directive 85/337/EC, as amended.
[15] Directive 2010/75/EU.

10a declares that associations for the protection of the environment are deemed to have a sufficient interest or, alternatively, to be holders of a right that can be violated.

The German law on standing in administrative matters follows the narrow 'protective norm theory'. Under the *Administrative Court Procedure Act*[16] standing of individuals depends on the violation of a right, which means that plaintiff must assert the violation of a legal norm that is designed to protect individual interests. Environmental laws are considered to be protective of individual interests insofar as they protect human health against significant risk. However, precautionary provisions contained in such laws as well as laws that protect the environment as such do not normally confer standing on affected citizens.

The subjective standing concept also has important consequences for association standing. Under general law, associations are not allowed to vindicate the public interest according to their charter. In nature conservation, associations that fulfil certain conditions have statutory standing, limited to certain infrastructure facilities and exceptions in protected areas. Since this type of association suit was not sufficient to comply with Directive 2003/35, the *ERA* introduced a new statutory association suit that covered a broader range of decisions and laws. In an attempt to marry the German protective norm theory and the *Aarhus Convention*'s concept of association standing, the *ERA* created an odd hybrid limiting the grant of standing to the assertion, by the association, of the violation of norms that establish individual rights. This limitation was challenged in an association suit that concerned the application of the EIA requirements and EU nature conservation law to the authorisation of a coal-fired power plant (Trianel case). The competent Administrative Court of Appeal of Münster (like the majority of legal commentators) had doubts about the conformity of the *ERA* with Article 10a of the *EIA Directive* as amended by Directive 2003/35, and referred the question to the European Court of Justice for a preliminary ruling.

On 12 May 2011, the European Court of Justice[17] held that the *ERA* standing requirements for associations were not consistent with the Directive. The Court underlined that national transposition must be based on the objective of giving the public concerned wide access to justice and enabling it to challenge the legality of a

[16] *Federal Gazette* 1991 (Part 1), 686.
[17] Case 115/08, Bund fürUmwelt- und Naturschutz/Bezirksregierung Arnsberg, available at www.curia.europa.eu.

decision without limiting the pleas that can be brought forward. Relying on the principles of wide access to justice and effectiveness of EU environmental law, the Court held that environmental associations are accorded a particular role in verifying compliance with EU law. Therefore, association standing cannot depend on conditions which only natural persons can fulfil. Rather, the associations must be entitled to comprehensively invoke the violation of all EU environmental law, more exactly: of national law based on EU law.

As a consequence of this decision, Germany will have to amend the *ERA* and create an association suit in its own right. In the meantime, as stated by the EU Court, Article 10a of the Directive has a direct effect.

Critical Consideration of Recent Developments

The response of German environmental policy and law to the Fukushima disaster certainly is motivated more by the perceptions of German politicians as to the public opinion and less by sound science and technology-based judgement. The specific contingencies that arose at Fukushima - a combination of an earthquake and a tsunami - is not one that can realistically be expected in Germany. The accidents at Three Mile Island in 1979 and Chernobyl in 1986 represent much more what might happen in Germany and these did not lead to an abrupt flight from nuclear energy. What one can learn from Fukushima is that the unthinkable may indeed occur and that redundancy of crucial safety and security measures must be pursued. In the German case it may be added that given the backdrop of the safety assessment carried out by the Reactor Safety Commission, the selection of eight powers plants for immediate closure was not based on rational grounds. Although under Article 14 of the *Federal Constitution* the legislature is in principle entitled to determine the contents and limits of private property and can restructure legal regulation of a field of business activities, the requirements of equal treatment and proportionality must be observed and an adequate balancing of all interests affected performed. The Government takes the view that the right of operators of nuclear facilities that are to be closed to sell remaining operation times constitutes an adequate compensation. However, a specific assessment whether there is a realistic possibility to do so has not been undertaken. Merely speculative economic considerations are not sufficient

to justify an intervention into property.[18] Ultimately, these questions will have to be decided by the courts or - in the case of one foreign operator - an investment arbitration tribunal; three of the four operators of German nuclear power plants have announced that they will seek judicial redress.

The German policy for the promotion of renewable energy based on the fixed-tariff system has been very successful if one only considers effectiveness. The present share of renewables in total electricity supply is 20 per cent and that in total end energy consumption is 10.9 per cent. Compared with 3.1 and 1.9 per cent, respectively in 1990, this is a tremendous increase which nourishes the hope that the ambitious new targets can be met in the future. However, Germany is paying a high price for the accelerated phase-out of nuclear energy - both in terms of higher energy costs and lesser security of supply and possibly also in terms of higher carbon dioxide emissions. The approach of heavily relying on renewable energy has already been addressed in the Country Report for 2010 and does not need to be further specified here. What may be added, though, is that it remains to be seen whether the envisaged speeding-up and technological innovation programme for extending and restructuring the grid will be as successful and occur as rapidly as expected. If this is not the case, it might be necessary to rely more than is desirable on fossil fuels. Moreover, the high degree of permanent subsidisation of renewable energy does not particularly contribute to maintaining the competitiveness of the industry on the world market. On the other hand, there is no denying that there are also opportunities for restructuring the entire electricity generating and distribution system through decentralisation and technological innovation.

The reported judicial developments indicate that Germany sometimes relies too much on its perceived role as a pioneer of substantive environmental policy and law in Europe and is not always well prepared to adjust to more modern common European concepts, especially in the field of procedure. The present writer in the early 1970s had pleaded for the introduction of a full-fledged association suit in environmental matters. Against the backdrop of the traditional aversion to 'self-appointed guardians of the public interest', it has been a long path to introducing association suits in the field of nature conservation - at federal level only in 2002 -

[18] Federal Constitutional Court, decision of 14 July 1981, 1 BvL 24/78, Decisions vol. 58, 137, at 148.

and the final step towards having a comprehensive association suit in environmental matters had to be enforced by the European Court of Justice.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: ICELAND
Constitutional Provisions for the Environment

Gudmundur Jonsson*

Introduction

Icelandic environmental law has undergone major review in recent years. Two recently published documents highlight the recent changes in Icelandic environmental law and they are the subject of discussion in this report.

The first is the recommendations of the Constitutional Council on amendments of the *Icelandic Constitution*. Among the main changes in the recommendations are new provisions in the 2nd Chapter regarding environmental protection and natural resources. If the recommendations of the Constitutional Council are transposed into the *Constitution* it will have significant effect on the status of environmental law in Iceland.

The second is the *White Paper on Legislation Regarding the Protection of Icelandic Nature*. This *White Paper* was prepared by the Nature Conservation Act Review Commission for the reform of the current nature conservation legislation and provides a detailed analysis of Icelandic environmental law. The document is one of the most detailed writings on environmental law in Icelandic literature.

The aim of this report is to give an overview of these recent developments in Icelandic environmental law and some reflections and critical considerations. The report is divided into three main parts. Part 1 provides a summary of the content of

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the recommendations of the Constitutional Council regarding changes to the *Icelandic Constitution* and the *White Paper on Legislation Regarding the Protection of Icelandic Nature*. Part 2 provides a critical consideration and reflection on the two documents. Part 3 recommend possible new research agendas for the IUCNAEL.

Recommendations of the Constitutional Council

The Constitutional Council was appointed by the Icelandic Parliament (Althingi) with a parliamentary resolution on the 24th of March 2011[1] following controversial elections. Its main task was to discuss the results of the constitutional committee, appointed by the Parliament on 16th of June 2010, and make recommendations regarding amendments to the current *Constitution*. The Council has now finished its task and presented Parliament on the 29th of July 2011, with a Bill to create a new constitution.[2]

In this Bill there are three articles that directly address the environment and natural resources, namely Articles 33-35. Each of these articles will be discussed separately, starting with an English translation of the article and then a short overview of the Council's rationale for its formulation and inclusion.

> **Article 33 - Nature and environment of Iceland**
> Iceland's nature constitutes the basis for life in the country. All shall respect and protect it.
>
> All shall by law be accorded the right to a healthy environment, fresh water, unpolluted air and unspoiled nature. This means that the diversity of life and land must be maintained and nature's objects of value, uninhabited areas, vegetation and soil shall enjoy protection. Earlier damages shall be repaired as possible.
>
> The use of natural resources shall be such that their depletion will be minimised in the long term and that the right of nature and coming generations be respected.

[1] *Parliamentary Resolution on the Appointment of a Constitutional Council,* 2010-2011, Doc 930, Subj 549 (available at http://www.althingi.is/altext/139/s/1120.html).
[2] For further information about the Constiutional Council and its work, see: http://www.stjornlagarad.is/english/.

> The right of the public to travel in the country for lawful purposes with respect for nature and the environment shall be ensured by law.[3]

The first paragraph is a mission statement for the new articles on the environment. It imposes obligations on the public regarding the protection of nature and reiterates the importance of the nature and natural resources as a basis for the welfare of the country. The focus of the second paragraph is the duty of the Government to ensure a healthy environment by law with references to international obligations arising from the *Convention on Biological Diversity*.[4] The last sentence of the second paragraph imposes a duty on the Government to repair earlier damages to the extent that is possible. This is an important step in implementing Iceland's international obligations under Article 8 (f) of the *Convention on Biological Diversity* dealing with the rehabilitation and restoration of degraded ecosystems.

The concept of sustainability is the underlying rationale in the Council´s argument, particularly relating to the third paragraph. References are made to the *Brundtland Report*, the general principles on sustainability arising from the 1992 United Nations Conference on Environment and Development in Rio de Janeiro and constitutional provisions from other jurisdictions on the protection of nature (the Constitutions of Sweden, Finland, Switzerland and France are used as examples). The right to public access is the essence of the fourth and the final paragraph. The aim is to give this right a constitutional protection and leverage against other constitutionally protected rights, such as the inviolability of private property.

> **Article 34 - Natural resources**
> Iceland's natural resources that are not private property shall be the joint and perpetual property of the nation. No one can acquire the natural resources, or rights connected thereto, as property or for permanent use and they may not be sold or pledged.
>
> Publicly owned natural resources include resources such as marine stocks, other resources of the ocean and its bottom within Iceland's economic zone and the sources of water and water-harnessing rights, the rights to

[3] Translations of the articles are based on the translations of the Constitutional Council found on http://www.stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf.
[4] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

geothermal energy and mining. The public ownership of resources below a certain depth under the earth's surface may be determined by law.

In the use of natural resources, sustainable development and public interest shall be used for guidance.

The public authorities, along with those using the natural resources, shall be responsible for their protection. The public authorities may, on the basis of law, issue permits for the use of natural resources or other limited public goods, against full payment and for a modest period of time in each instance.

Such permits shall be issued on an equal-opportunity basis and it shall never lead to a right of ownership or irrevocable control of the natural resources.

Article 34 is an attempt by the Constitutional Council to put an end to a long debate on the use and ownership of Iceland´s rich natural resources. The heart of the debate has been around the concept of ´property of the nation´ that is used in Article 34 (paragraph 1) and the use of exploitable marine resources (for example pledging of harvest rights). The ´property of the nation´ concept is already in use to some extent in Icelandic legislation, notably in Article 1 of the *Fisheries Management Act*,[5] but does not seem to have an established basis in Icelandic property law.[6]

Paragraphs 3 - 5 of Article 34 imposes some duties on the Government regarding the allocation of rights to natural resources, including: ensuring payment for the use of them (full payment); that allocation will not lead to full ownership; and a prohibition on the long-term alienation of resources. This reflects recent debates on the pricing and long-term leasing of geo-thermal resources.

Article 35 - Information on the environment and the parties concerned

The public authorities shall inform the public on the state of the environment and nature and the impact of construction thereon. The public authorities and others shall provide information on an imminent danger to nature, such as environmental pollution.

[5] No. 116/2006 (*Lög um stjórn fiskveiða* No. 116/2006).
[6] K. Haraldsdóttir, 'Property Rights in Water and Social Conflict: An Example from Iceland' (2011) *Special Edition – Water Law: Through the Lens of Conflict* 1 (available at http://www.rurallawandpolicy.edu.au/journal/index.php/ijrlp/article/view/33/21).

> The law shall secure the right of the public to have the opportunity to participate in the preparation of decisions that have an impact on the environment and nature as well as the possibility to seek independent verdicts thereon.
>
> In taking decisions regarding Iceland's nature and environment, the public authorities shall base their decisions on the main principles of environmental law.

The main aim of paragraphs 1 and 2 of Article 35 is to ensure the implementation of the *Aarhus Convention*[7] in Icelandic law. There are three main pillars in the Convention but the focus of Article 34 is to ensure the implementation of the third pillar of the Convention (Article 9) regarding public access to courts or tribunals in environmental matters. The third paragraph provides a constitutional status for the main principles of environmental law and the aim is to ensure that they will be used as guidance when public authorities take decisions regarding the environment and nature.

The White Paper on Legislation Regarding the Protection of Icelandic Nature

The Nature Conservation Act Review Committee was appointed by the Minister for the Environment in November 2009. The subject of the Committee was to suggest reforms to the current *Nature Conservation Act*[8] (*NCA*) and with special emphasis on the following:[9]

- objectives of the *NCA* and definitions;
- role of public authorities regarding implementation of the *NCA*;
- the right to public access;
- protection of landscapes;
- protection of genetic resources;
- the Nature Conservation Plan and the Natural Heritage Registry; and
- ban on off-road driving.

[7] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).
[8] No. 44/1999.
[9] The Nature Conservation Act No. 44/1999 Review Committee, *White Paper on Legislation for the Protection of Icelandic Nature* (Ministry of the Environment, 2011), 19.

The main outcome of the committee was a *White Paper on Legislation for the Protection of Icelandic Nature* (*White Paper*) that was handed to the Minister on the Environment on the 31st of August 2011. The Committee's Report is divided into two parts. It contains a detailed analysis on the general foundation of Icelandic legislation on nature conservation (first part) and specific issues relating to reformed legislation on nature conservation (second part).[10] The aim of the following discussion is to give a short overview of the main results of the Report.

The Committee emphasised the need to implement the principles of environmental law into national legislation. The aim of such implementation would be to ensure that the principles would be used as guidelines in environmental governance. One of the most important recommendations of the Report was the need for a reformed system of protected areas categories to ensure that the aims and objectives of protection are clear. The new system would be based on the IUCN Protected Areas Categories System and contain eight categories that would make assessment of the performance of protection easier.

Other recommendations on reform were:

- strengthening the legal status of the Natural Heritage Registry and the Nature Conservation Plan;
- implementing clear and comprehensive legislation regarding invasive species in accordance to international obligations;
- clarifying the right to public access and dispute resolution relating to that right;
- adding a new chapter to the *NCA* dealing with genetic resources; and
- creating a new simplified structure in the governance of nature conservation.

All of the above-mentioned recommendations of the Committee are based on detailed analysis in the Report. The foundation of many of the recommendations is to comply with international obligations in environmental law and a comparative analysis of other jurisdiction, for example from Norway and Sweden.

[10] Ibid, 22-23.

Reflections and Critical Considerations

There are political considerations that must be kept in mind regarding the implementation of the recommendations of the Constitutional Council and the NCA Review Committee. The parliamentary process consists of mediation and compromises, especially on controversial issues like ´the property of the nation´ and the discussion on the recommendations is subject to changes.

The circumstances around the appointment and the authority of the Constitutional Council have been a focal point in recent political and legal debates. The Council was appointed with a parliamentary resolution on the 24th of March 2011 despite the decision of the High Court of Iceland that ruled the elections for the Council invalid on the grounds that there were procedural flaws in the election process. This has raised concerns about the authority and the mandate of the Council, and on the validity of the recommendations and how they will be processed through Parliament. The recommendations of the Council were presented to the Parliament in the form of a Report but it is still unclear what process the recommendations will be subject to in Parliament.

For these reasons it is unclear if the recommendations of the Council will be transposed into a new constitution and how this could be done. The recommendations could easily receive the same fate as many earlier recommendations on the amendment of the *Constitution* that have not passed through the parliamentary process. On the other hand, if the recommendations do serve as a basis for a new constitution with emphasis on the protection of nature it will have significant effects on the status of environmental law. It is important to include provisions on the protection of the environment in the *Constitution* to give leverage against other constitutionally protected rights, mainly the right to private property. The parliamentary process should also add some depth to the Council´s arguments and perhaps lead to change in some of the recommendations on the environment.

The purpose of the *White Report on the Protection of Icelandic Nature* was to serve as a foundation for the Ministry of the Environment to create a new bill for a Nature Protection Act. The main results of the Report were a set of general recommendations about nature conservation legislation and proposed reforms. Some

of these recommendations were transposed into a Bill amending the current *NPA*. Other recommendations, mainly regarding the restructure of environmental protection governance, are more difficult to deal with because they span many administrative and governmental levels and require co-operation between ministries and other authorities. Unfortunately such co-operation is rarely reached in Icelandic governance.

Possible New Research Agendas

One of the most interesting questions to look at in the terms of the Council´s recommendations is the effect that constitutional provisions on environmental protection will have on the interpretation of other rights, such as the inviolability of property rights. The inviolability of private property is fundamental principle of the *Icelandic Constitution* and the importance of property's constitutional status has been emphasised in numerous cases before the High Court.

It is in the nature of environmental legislation to impose restrictions on private property rights. When regulatory controls imposed on the use of rights are contested, the constitutional status of the inviolability of private property weighs heavily against non-constitutional considerations. It is interesting to consider if, and to what extent, this balance could change with constitutional provisions on environmental protection. This could be especially important in cases regarding exploitation of national resources. A comparative analysis of the balance between constitutional provisions on the protection of the environment and exploitation of natural resources against other fundamental rights, such as private property rights, would therefore be a feasible research agenda for the IUCNAEL.

Conclusion

The *White Report on Legislation Regarding the Protection of Icelandic Nature* and the recommendations of the Constitutional Council are among the most significant proposals to reform Icelandic environmental law. The Constitutional Council´s proposal will have great effect in Icelandic environmental law if they form part of a new constitution and will lift environmental law to a higher status in Icelandic law. Political issues are of concern. There is a lack of certainty about the implementation of the recommendations but it is clear from the recent developments in Icelandic law

that awareness of the importance of environmental matters is growing. We will probably see fundamental changes in Icelandic environmental law in the near future.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: INDIA
Mixed Results on Many Fronts

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Introduction

In 2011, India witnessed many administrative and policy changes with great significance for its natural environment. The historic Green Tribunal became functional, and important rules for wetland conservation and e-waste management were promulgated. Many progressive statutes are in process, and some have already become subject to intense discussions and debates at public and policy-making levels. The country is expanding endangered species protection by introducing new conservation policies and initiatives, for example for gharial conservation. The nation's climate change stance did not shift from its earlier position of not committing to serious emission cuts, though the country continues to be proactive at the policy level. The judiciary revealed its interpretative power through many judgments and directives, and the courts emphasized the importance of environmental impact assessment, taking the activity to a more prominent level.

Statutes

The Indian Parliament has not created any new Acts related to environment since late 2010. However, some rules have been created to strengthen various Acts.

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National Green Tribunal Rules

The *National Green Tribunal Act* 2010 that came in to force last year has been strengthened through the issuance of various rules and notifications for its proper implementation.[1] Rules on the procedures and practices of the National Green Tribunal (NGT) and the financial and administrative status of its Chairperson have been published. The Rules envisage the establishment of four regional benches. Delhi has been set as the principal place of sitting for the Tribunal, and necessary technical and administrative appointments have been made. The NGT had its first hearing on July 4, 2011. With the establishment of NGT, the Supreme Court's Central Empowerment Committee's (CEC) role has been reduced to cases on the violation of the Court's order in the Godavarman case.

The Wetlands (Conservation and Management) Rules (2010)

The Central Government published the *Wetlands (Conservation and Management) Rules*[2] in December 2010. These *Rules* constituted the Central Wetland Regulatory Authority, with representatives from the Ministries of environment and forestry, water resources, tourism, agriculture, social justice, members from the pollution control board, and experts in ornithology, limnology, hydrology and ecology. The *Rules* have critical significance in India's conservation history, as it is for the first time that such eco-sensitive areas have secured legally enforceable protection. A party of the *Ramsar Convention*, India has been running its National Wetlands Conservation Programme since 1985-86. To date, 115 wetlands have been identified for conservation and management. The *National Environment Policy* (2006) also recognizes the importance of the country's wetlands, of which 25 feature in the Ramsar list of wetlands of international importance.

The *Rules* cover: wetlands in the Ramsar list; wetlands in ecologically important and sensitive regions such as protected areas (national parks and wildlife sanctuaries) and reserved forests; wetlands in UNESCO World Heritage sites; all high-altitude wetlands (more than 2,500-m high); wetlands of more than or equal to 500 ha area; mangroves and coral reefs and wetlands in areas of historic, bio-diversity, and heritage importance; and wetlands of significant natural beauty. Acknowledging the

[1] See further: http://moef.nic.in/modules/recent-initiatives/NGT/.
[2] The *Wetlands (Conservation and Management) Rules* (2010) can be accessed at: http://moef.nic.in/downloads/public-information/Wetlands-Rules-2010.pdf.

current threats of drainage, landfill, pollution, hydrological alterations and overexploitation of the wetlands in India, the *Rules* prohibit wetland-reclamation and the creation or expansion of industries within wetlands. It also prohibited solid-waste-dumping, discharge of untreated waste and industrial effluent, and manufacturing, handling, storage or disposal of hazardous materials in wetlands. The *Rules* also prohibit permanent construction within 50 meters of the mean flood level. Water-harvest, diversion, interruption and agriculture within wetlands have also been regulated.

E-waste (Management & Handling) Rules (2011)

The *E-waste (Management & Handling) Rules*[3] (2011) will come into effect on May 2012. The *Rules* makes the producer of any electrical and/or electronic equipment responsible for the collection and management of the e-waste generated in the process. It stipulates that the producer must provide contact information for collection centers to the consumers to facilitate the return of used electronic equipment. The producer is obliged to inform the public about hazardous constituents and the handling of such substances. The *Rules* also list: (a) the responsibilities of the consumer, dismantler and recycler; (b) the procedures for seeking authorization and registration for handling e-waste with the State Pollution Control Board; and (c) reduction of hazardous substances in the manufacture of electrical and electronic equipment.

Acts in the Pipeline

The following Bills with direct environmental implications are under consideration at various levels of government and Parliament. Of this, the *Biotechnology Regulatory Authority Bill* has already drawn much criticism from the public, media, scientists and activists.

- *Agriculture Bio-Security Bill* (2011).
- *National Food Security Bill* (2011).
- *Nuclear Regulatory Authority Bill* (2011).
- *Biotechnology Regulatory Authority of India Bill* (2011).

[3] The *E-waste (Management & Handling) Rules* (2011) can be accessed at: http://www.moef.nic.in/downloads/rules-and-regulations/1035e_eng.pdf.

- *Wildlife (Protection) Amendment Bill* (2011).
- *Draft Animal Welfare Act* (2011).
- *Mines and Minerals (Development and Regulation) Bill* (2011).
- *Land Acquisition, Rehabilitation and Resettlement Bill* (2011).

Policy

Minister Jairam Ramesh was replaced by Ms. Jayanthi Natarajan in July 2011 as the Minister for the Environment. Many view this as a move from the ruling political coalition to control the pro-environmental stance of the Ministry of Environment and Forests (MoEF) under the reign of Minister Ramesh.

Valuing Natural Resources

In February 2011, the MoEF initiated a major programme to value India's natural resources, biodiversity and ecosystem services. This programme formed part of the Economics of Ecosystems and Biodiversity (TEEB) study, initiated by the G8 and the Ministries of many developing countries. In initiating the programme, Minister Ramesh stated, 'We are committed to developing a framework for green national accounts that we can implement by 2015, and we are confident that the 'TEEB for India' study will be the key facilitator'. India's intention to borrow from TEEB's vision of creating a new form of economy, which quantifies natural capital and makes nature a new item in the market, might strongly influence the country's future policies and laws on natural resources. The MoEF will lead the programme, with private participation. An India-TEEB Implementation Taskforce will conduct a survey of biodiversity and ecosystem services, and calculate the "Green Domestic Product" of the country, so as to create a framework for the state governments to pursue.

Tiger Conservation

In January 2011, the Union Cabinet created four Inspector-General posts in the three regional offices of the National Tiger Conservation Authority (NTCA).[4] The NTCA, formed in 2006 based on the recommendations of the Tiger Task Force, covers 17 states (39 tiger reserves). The NTCA will now be able to improve its functioning by

[4] See further: http://moef.nic.in/downloads/public-information/Press%20Brief-Cabinet%20Decision-NTCA.pdf.

monitoring the status of the animal and addressing the ecological and administrative concerns relating to their conservation at regional level.

Gharial Conservation

In February 2011, Minister Ramesh announced the formation of a National Tri-State Chambal Sanctuary Management and Coordination Committee for gharial conservation. Once abundant, the gharial (*Gavialis gangeticus*) has less than 200 breeding individuals left in the wild. Listed as *Critically Endangered* in the IUCN Red List, the reptile's largest remaining habitat is the National Chambal Sanctuary. The Committee, represented by various ministries and departments, research institutions such as the Wildlife Institute of India, the Madras Crocodile Bank Trust's Gharial Conservation Alliance, and non-governmental organizations, will develop strategies for research and protection of the animal and its habitat. The project will evaluate the biological, ecological and socio-economic status of dependent riparian communities. Minister Ramesh ruled out further construction of dams in the Chambal River.

National Ganga River Basin Authority

The Union budget allocation to the National Ganga River Basin Authority in 2010–2011 was doubled to Rs5 billion. In June 2011, the Government of India also signed an agreement with the World Bank for $1 billion to be invested in cleaning the Ganga River.

Forest Clearance

Through a notification issued in May 2011, the MoEF decided to allow state governments to clear up to five hectares of forest land for public infrastructure projects in 60 left-wing extremist-affected districts. The earlier threshold for such diversion was two hectares. This move could be seen as a strategic move to accelerate infrastructure development in regions which had become breeding grounds for extremists.

Climate Change Policy (2011)

The past year didn't see India moving towards concrete legislation for climate change regulation or mitigation. But as in 2010, India emphasized its planning and policy-level moves at various international negotiations on the subject.

At the 16th Conference of Parties (COP16) to the United Nations Framework Convention on Climate Change (UNFCCC) in Cancun (Mexico), India emphasized its point on equitable access to carbon 'space'. Minister Ramesh noted at the Conference that, '[e]quity is key to the climate change negotiations'. He continued stating that, '[t]he phrase equitable access is not the right to pollute, but the right to sustainable development'. India clearly pointed out that developing countries require development which cannot be impeded by commitments on emission cuts. Similar to the stance of the BASIC (Brazil, South Africa, India and China) countries on equitable access being the pre-requisite for any climate change agreement, India clearly wanted to take the discussions to the developed nations, who dominate available atmospheric carbon space.

Minister Ramesh announced in Cancun that India will reduce the emissions intensity of the country's GDP by 20-25 percent by 2020 at a 2005 reference level, through proactive policies. India will push a low-carbon strategy as a key element for its *Twelfth Five Year Plan* (2012-2017).[5] India has taken steps to diversify its energy-fuel use. It will set up 20,000 MW of solar power by 2022 and increase its share of nuclear power from three percent to six percent in the coming decade. Another strategy will be the Green India Mission to increase the quality and quantity of forest cover in the country. India will also engage in partnerships with neighboring countries to deal with global change. In short, in Cancun, India reiterated its stance on technological cooperation and pro-active policy/planning-level action, but gave no commitments on new carbon cuts that would impede its growth.

In February 2011, the Indian Council of Forestry Research and Education (ICFRE) became India's first Designated Operational Entity (DOE) accredited by the Clean Development Mechanism of the *United Nations Framework Convention on Climate Change* to validate and certify functions under 'afforestation and reforestation'.

[5] See further: http://planningcommission.nic.in/reports/genrep/Inter_Exp.pdf.

National Mission for a Green India

India launched in February 2011, a *National Mission for a Green India*, under the *National Action Plan on Climate Change*.[6] The goal of the *Mission* is to respond to climate change through adaptation and mitigation by enhancing carbon sinks in sustainably managed forests and other ecosystems; adaptation of vulnerable species/ecosystems to the changing climate; and adaptation of forest-dependent communities. As part of the *Mission*, five million hectares of new forest/tree cover will be achieved and another five million hectares will be improved in quality, which will in turn enhance ecosystem services such as biodiversity, hydrological services and carbon sequestration. The success of the *Mission* will increase the livelihood-income for three million forest-dependent households with annual carbon dioxide sequestration reaching 50-60 million tons by 2020.

Collaboration with the World Bank

In January 2011, India and the World Bank entered into discussions aimed at further strengthening their 'partnership to advance India's green-growth agenda'. The World Bank will provide two-year support to sustainable development, focusing on better environmental safeguards for infrastructure projects, improved environmental governance, air and water quality standards, and climate change.

Renewable Energy Certificates

In November 2010, India's Central Electricity Regulatory Commission introduced a new *Scheme for Renewable Energy Certificates* (*REC*) to enable distributors to meet their Renewable Purchase Obligation and also to encourage green energy generation. Under the *Scheme*, producers are granted a certificate (solar and non-solar) per megawatt of renewable energy they contribute to the electricity grid. Entities and states can buy and sell these tradable RECs to meet their targets.

[6] See further: http://moef.nic.in/downloads/public-information/GIM-Report-PMCCC.pdf.

Case Law

The Supreme Court of India

In the case of *Anand Arya and Another vs. Union of India and Others*, decided in December 2010, the construction of a park at Noida (State of Uttar Pradesh) was contested by the applicants as causing harm to the ecological balance of the Okhla Bird Sanctuary. The applicants argued that the Uttar Pradesh Government was cutting down a forest without the permission of the Central Government and the Apex Court, in breach of the *Environment Protection Act* (1986) and the *Forest (Conservation) Act* (1980). The Central Empowerment Committee of the Court found that the project site was not a forest area, according to available government records, but the panel criticised the Uttar Pradesh Government for not identifying ecologically sensitive zones, as in this case the project site fell adjacent to a bird sanctuary. The Supreme Court did not stop the construction, but directed oversight of the project by an expert committee.

In *Kalyaneshwari vs. Union of India and Others,* the petitioner sought a writ of mandamus to ban the use of asbestos and for the constitution of an expert panel for identifying the victims suffering from asbestos-induced diseases. The Court ruled, in the absence of existing law banning asbestos in the country, despite its adverse health effects, it could not ban the substance or its use. While dismissing the petition, the Apex Court highlighted the need to follow the guidelines of the International Labour Organization as a safety measure to be complied with by the industries, and asked the governments to ensure safe and controlled use of asbestos.

In *Krishnadevi Malchand Kamathia and Others vs. Bombay Environmental Action Group and Others*, decided in January 2011, contempt of court petitions were filed against the appellant for destroying mangrove areas through the construction of a new bund wall. This violated previous orders issued by the Court and the District Collector. The Supreme Court ruled that the appellants were guilty of wilful defiance of earlier court orders, and that they purposely damaged the mangroves and other vegetation of the wetland of the Coastal Regulation Zone-I area. The Court ordered restoration of the height and width of the old bund, failing which the District Collector could recover the costs of doing so from the appellants as arrears of land revenue.

In *Jagpal Singh and Others vs. State of Punjab and Others*, the Supreme Court criticised the action of state authorities in allotting public utility land in favour of a

person or in permitting an encroacher to occupy such land. This decision was followed by the Allahabad High Court in *Ram Naumee vs. State of U.P. and Others*, decided in April 2011, where the respondents were directed not to allot or lease out public pasture or any such plot to any person.

Cases Highlighting the Crucial Role of Environmental Impact Assessment

In several judgments by the High Courts of various states, the judiciary has highlighted the environmental impact assessment (EIA) requirements for clearing land for industrial and mining projects. This is significant as the role and credibility of EIAs has been under public scrutiny.

In *M/s Vedanta Aluminium Ltd* vs. *Union of India and Another*, the High Court of Orissa held in July 2011, that the Vedanta Company had carried out construction of a bauxite refinery without the required environment clearance.[7] Although the petitioner argued that it had not violated any pollution parameters, the High Court ruled that continuing construction work without obtaining environmental clearance violated the *EIA Notification* (2006).

In a combined judgment in *Court on its own Motion* vs. *State of Himachal Pradesh and others* and *Lafarge India Pvt. Ltd*. vs. *Union of India and others*, the Himachal Pradesh High Court (in August 2011) set aside the environmental clearance of a cement factory and adjoining mining site as the environmental authorities had not visited the mining site prior to issuing the authorisation.[8] The matter was referred back to the environmental authorities, who were asked to submit a report within two months and after following the prescribed procedure.

In *Talaulicar & Sons Pvt. Ltd* vs. *Union of India*, decided by the Bombay High Court at Goa in August 2011, the court observed that in the absence of a renewal or extension to an expired environment clearance, the developers were restrained from carrying out any mining activities until obtaining a further environment clearance.[9]

[7] The judgment can be accessed at: http://www.ercindia.org/files/OHC_Judgement_WPC%2019605%20OF%202011.pdf.
[8] The judgment can be accessed at: http://www.ercindia.org/files/HP%20High%20Court%20Lafarge%20Judgment.pdf.
[9] The judgment can be accessed at: http://www.ercindia.org/files/Judgement%20by%20High%20Court.PDF.

In other cases, judicial decisions have broadened the scope of EIA beyond the concept of 'projects'. In *Mohd Kausar Jah* vs. *Union of India and others* and *Shyam Bahadur Sakhya* vs. *Union of India and Others*, decided by the Allahabad High Court in April 2011, the court equated the 'activity' of sand mining to the concept of a 'project' in the *EIA Notification* (2006). It accordingly held that an environmental clearance was required to carry out the activity.

Challenges and Opportunities

As India continues to boost its industrial development domestically by opening up more of its resources for commercial exploitation and internationally by resisting commitments on emission cuts, environmental laws face new challenges. Loss of biodiversity still ranks highest among the threats faced by the nation's environment. Species such as the river dolphin, gharial and Indian lion are on the verge of extinction. Mining and industrial projects, legally and illegally, have been encroaching forest regions. Ironically, it is the resistance from the forest-dwelling communities and environmentalists - and not the agencies meant to enforce law - that frequently keeps these activities in check. Moreover, the penalties under the current environmental laws often fail to stop environmental crime (be it pollution, habitat destruction or poaching), as there is huge disparity between penalties and the economic benefits of non-compliance.[10] No new legislation, for the protection of biodiversity, which faces rapid degradation, has been introduced in 2011. The issue of genetically modified (GM) food crops is still intensely contested. The new *Biotechnology Bill* and the removal of Minister Ramesh (who had been cautious regarding the need of the biotechnology in food production) has triggered debate in the public domain about moves favouring corporations selling GM technology.

Given these circumstances, the need of India's legislative, executive and judiciary for high quality scientific data cannot be overstated. The move of the MoEF towards a TEEB study takes the country's environmental discourse more towards the market, where nature is accorded an economic value. Further legislative, judicial and policy developments should however be based on solid scientific information, and not on market demands and trade negotiations. Even where such data is available it requires innovative and sound jurisprudence to interpret the information.

[10] C. Abraham, *Environmental Jurisprudence in India* (1999) Martinus Nijhoff Publishers, 74.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: ITALY
Public and Private Interests in Water

Nicola Lugaresi*

Introduction

The main issues for Italian environmental law in 2011 relate to two referendums on water services held in June. Not surprisingly they were at the center of both the legal and political agenda, provoking a heated and, unfortunately, ideological debate. This focused on general principles, forgetting that the referendum is a precise institutional tool to abrogate a specific piece of regulation. Instead of considering the consequences of the repeal, Italian parties and social groups, followed by the media, engaged in a theoretical fight based on self-serving interpretations and misrepresentations. The discussion revolved round domestic political matters, becoming a poll against (or in favour of) the Government, reflecting a well-established and distressing habit of Italian politics.

The two referendums were known as the 'referendums for public water'. The 'yes' supporters (that is, the people who wanted neither private management of water services, nor private profits from water services) put forward a sort of syllogism: water is a vital resource for individuals and communities (major premise); law should protect people's life and dignity (minor premise); water must be a fundamental right water must be public itself and managed by public bodies and water must not be a tradable good (conclusions). The major premise is correct, but too general: water in a developed country has a different value than water in an underdeveloped and thirsty country. The minor premise is correct, although not always implemented. The

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conclusions must be revised, taking into account the specific situation of a developed country.

Leaving aside politics and focusing on the legal aspects, the two referendums, which are technically complex, intervened on different levels. The first referendum was commonly known as the referendum against privatization of water services, the second one as the referendum against profit on water services. To be more precise, the first could have been described as a referendum against (legislative and administrative) biases in support of the privatization and private management of water services; the second one as a referendum against the explicit inclusion of private profit in water services tariffs. The 'yes' won, the two pieces of legislation were repealed, but the two referendums themselves were not able to directly lead to a robust legal context, calling for more legislative steps to resolve the un-answered challenges.

The Italian poll had the merit of drawing attention to important water issues (the right to water, the management of water services, the costs of water), but the legal arrangements for water services regulations are still to be redefined. The referendums merely limited the possibility of advantaging public management over private management and ruled out the option to include private profit into water pricing.

A Critical Consideration of the Recent Domestic Developments

The two referendums are connected - even if in a different and lesser way than was depicted by media and political parties. The first 'water referendum' did not concern only water services. The abrogation of Article 23-*bis* (Decree-law n.112/2008) affected all local public services of general economic interest, removing the legislative favour for their private management. The second 'water referendum' concerned the tariff for public water services. The abrogation of a (little) part of Article 154 (Decree-law n.152/2006), determined that the calculation of the tariff should not take into account the adequacy of the return on invested capital. Unfortunately, after the referendums, the substantial legal effects are not clear, leaving local public administrators waiting for an intervention from the legislator. This suggests that the citizens voted knowing what they were going to repeal (at least formally) but not what would replace the repealed regulations.

As for the first referendum, the main 'technical' issue was the relationship between private management and public management of water services (actually, all local services): the former (private management) was the rule; the latter (public management) was the exception. Article 23-*bis* (Decree-law n.112/2008) affirmed that derogations from private management must have been justified by peculiar economic, social, environmental and geo-morphologic characteristics of the specific territorial context. While the law emphasised the preference for the private management of public services, it is also true that local administrations have the duty to express the grounds for their decisions. In other words, regardless of the existence of 'peculiar characteristics', they should justify (and should have justified) the exercise of their discretionary powers, considering the public interest (efficiency of the service; reasonable costs; financial feasibility; environmental protection) as the fundamental criterion. If water services can be better managed by private parties, private management will be the option to choose, but if public agencies offer a more satisfactory management, the peculiarity of the characteristics is demonstrable as the basis of their decision.

Unfortunately the choice between private and public management becomes an ideological issue while it could be more reasonably driven by the common principles and rules of administrative law. Water interests are not better served affirming that water is a vital and fundamental resource (which water is), but are best served by finding the best management solutions.

As for the second referendum, ruling out the chance to compensate private investment with the tariff does not prohibit, nor makes unattractive, private management. The new version of Article 154 (Decree-law n.152/2006) does not include the return on invested capital among factors to be considered to determine the water tariff, but does not prohibit that private profit be considered and guaranteed out of the tariff. Such a guarantee affects the public budget and therefore weighs on general taxation. The part of water costs linked to private profit will not be covered automatically by water users, but by taxpayers, two categories that overlap almost completely. There will be some distortions from this reality. Italy is sadly known for the high rate of tax 'dodgers' and the incidence of water tariffs and taxes differs between individuals, according to their water consumption and (declared) income.

Relying more on taxes than on tariffs is an alternative. It can be appreciated or criticized for its social and economic consequences, but it is just a way to distribute costs: 'there is no such thing as a free lunch'. Moreover, water pricing in general, and water tariffs in particular, are (economic) regulatory means that can be used, and must be used (as it happens with Article 9, *EU Directive* 2000/60/EC) to protect water resources from excessive usage and waste, avoiding 'the tragedy of the commons'. A higher price for water (still low compared to other developed countries) can have functional and direct effects on promoting water savings (that may be lost in using general taxation as the means of payment for water).

In conclusion, the Italian water referendums (and the related political debate) show how fundamental, general principles (such as water as a vital and finite resource, and therefore a fundamental right; and socio-economic solidarity) can be used to justify different choices that should take into account all the factors involved. In particular, the right to water cannot and should not lead to 'one-size-fits-all' regulations in countries experiencing different levels of water stress, regulated by diverse legal systems and characterized by very different socio-economic conditions.

Possible New Research Agenda for IUCNAEL

IUCNAEL research could focus not only on general principles about water (the right to water; the alternative between private and public management; water pricing; water solidarity) but also on specific regulations enacted by different States and regional organizations. The research should compare solutions, provide guidelines and strategies to legislators and policy-makers, avoiding demagogy and ideology, in order to adopt efficient, fair and consistent laws that can face water issues under a different, more coherent, perspective.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: KENYA
Constitutional Provisions on the Environment

Collins Odote*

Introduction

When Kenya adopted a new *Constitution*[1] on 4 August 2010, it gave constitutional recognition to environmental management. Hitherto, its *Constitution* was not only silent on environmental issues, its treatment of land and property focused on private property rights at the expense of sustainable management.[2] This happened despite the fact that the environmental crisis brings into question political arrangements and the constitutional order that exists to validate and regulate those arrangements.[3]

The Environmental Law Institute has surveyed constitutional law provisions in African constitutions. The reason for constitutional recognition of environmental issues are given as including: constitutional environmental provisions provide a 'safety net' for resolving environmental problems; constitutional recognition elevates the status of environmental rights and protection to the same level as human rights and thus reduces their subordination to other priorities like economic development; and the

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[1] Republic of Kenya, *Constitution of Kenya* (2010).
[2] D. Ogolla and J. Mugabe, 'Land Tenure Systems and Natural Resource Management' in C. Juma and J. Ojwang, *In Land We Trust: Environment, Private Property and Constitutional* Change (1996) Initiative Publishers and Zed Books, Nairobi and London Acts, 85-116.
[3] J. Ojwang, 'The Constitutional Basis for Environmental Management' in C. Juma and J. Ojwang, *In Land We Trust: Environment, Private Property and Constitutional* Change (1996) Initiative Publishers and Zed Books, Nairobi and London, 49.

existence of procedural rights alongside the substantive environmental rights in constitutions enhance environmental governance.[4]

Kenya has a rich and diverse natural resource base. The majority of its population relies on natural resources for their livelihoods. However, the country has numerous environmental challenges requiring legislative intervention. The county's new *Constitution* provides a framework for the sustainable management of the environment and natural resources. This report discusses key developments in 2011 seeking to implement these provisions.

Summary of the Constitutional Provisions

The *Constitution of Kenya* addresses issues of environmental governance in several articles.[5] The preamble notes that the country's environment should be sustained for the benefit of future generations.[6] Article 10 of the *Constitution*, detailing national values and principles of governance for implementation of the *Constitution*, recognizes the achievement of sustainable development as an essential principle of governance.

Environmental management is recognized as a constitutional right within the Bill of Rights.[7] Article 42 guarantees the right to a clean and healthy environment, which includes 'the right to have the environment protected for present and future generations through legislative and other measures'[8] and 'to have obligations relating to the environment fulfilled'.[9] The obligations placed on the State include:[10]

- ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of accruing benefits;

[4] Environmental law Institute and United Nations Environment Programme, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2007) 2nd Edition, Washington, 2.
[5] For a more in-depth discussion of the constitutional provisions relating to the environment in Kenya's new *Constitution*, see: R Kibugi, 'New Constitutional Environmental Law in Kenya: Changes in 2010' (2011) 2 *IUCNAEL eJournal* 136-142.
[6] *Constitution of Kenya*, Preamble.
[7] *Constitution of Kenya*, Article 42.
[8] Ibid.
[9] Ibid.
[10] *Constitution of Kenya*, Article 69.

- promoting the achievement and maintenance of a tree cover of at least ten percent of the land area in Kenya;
- protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of communities;
- encouraging public participation in the management, protection and conservation of the environment;
- protecting genetic resources and biological diversity;
- establishing systems of environmental impact assessment, environmental audit and monitoring of the environment;
- eliminating processes and activities that are likely to endanger and degrade the environment; and
- utilizing the environment and natural resources for the benefit of the people of Kenya.

Every person is under a duty to cooperate with State organs and other persons to protect and conserve the environment.[11] The *Constitution* contains provisions on access to justice, giving every person the right to apply to court for redress whenever they feel that the right to a clean and healthy environment 'has been, is being or is likely to be denied, infringed or threatened'.[12] This is a marked improvement from the previous constitutional framework where accessing courts to vindicate environmental rights was met with serious procedural hurdles (particularly on standing).

The *Constitution*, by dint of Article 70, explicitly provides that when seeking to enforce the right to a clean and healthy environment, an 'applicant does not have to demonstrate that any person has incurred any loss or suffered any injury'.[13] Further, and in accordance with the requirements of Principle 10 of the *Rio Declaration*, the *Constitution* also recognizes and seeks to promote public participation and access to information.[14]

The other critical environmental concern relates to the manner in which natural resources are exploited. In addition to a general call for their sustainable use and conservation,[15] the *Constitution* provides a framework for negotiation of contracts

[11] *Constitution of Kenya*, Article 69(2).
[12] *Constitution of Kenya*, Article 70(1).
[13] *Constitution of Kenya*, Article 70(3).
[14] *Constitution of Kenya*, Article 35 read together with Article 69.
[15] *Constitution of Kenya*, Article 69.

relating to natural resources, which process must involve Parliament.[16] Such investments must benefit local communities and their economies.[17] The rationale is to address past practices where natural resource contracts for investments and exploitation were shrouded in secrecy, fostering corruption and disadvantaging local communities. Related to these provisions are those for land ownership and management. The right to land has been a contested issue in Kenya since the colonial period.[18] It formed a major reason for the agitation for constitutional reform.[19] The *Constitution* recognizes that land belongs to all Kenyans and can be held by them collectively as a nation, as communities or as individuals.[20] It also makes fundamental reforms in the terms under which land is held, the institutional architecture for its management and the policies that regulate such management, with the establishment of a National Land Commission responsible for managing public lands. Kenya adopted a *National Land Policy* in August 2009 to 'guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity'.[21] The *Policy* consists of 'measures and guidelines, which the government shall implement to achieve optimal utilization and management of land, and from which laws governing land administration and management shall be drawn'.[22] It represents the first time since independence that Kenya has such a policy on land and largely accords with the requirements of the *Constitution*.

The last provisions with direct bearing on environmental management relate to those addressing the structure of government. Kenya has since independence generally had a centralized government system. With the *Constitution* this has been reformed to address its shortcomings especially relating to accountability, service delivery, public participation and efficient management of resources. The reform has seen the adoption of a devolved system of government with two levels.[23] The *Constitution* divides the country into forty-seven counties each of which has a legislative arm and executive arm headed by a county governor. The relationship between the national

[16] *Constitution of Kenya*, Article 71.
[17] *Constitution of Kenya*, Article 66(2).
[18] For a discussion of the importance of land in the context of Kenya, see: Ogolla et al (supra note 2) 94-5; P. Kameri-Mbote, 'Land Tenure and Sustainable Environmental Management in Kenya' in C. Okidi et al *Environmental Governance in Kenya: Implementing the Framework Law* (2008) East African Educational Publishers, Nairobi; and P. Kameri-Mbote, 'The Land Question in Kenya: Legal and Ethical Dimensions' in E Gachenga et al *Governance, Institutions and the Human Condition* (2009) Law Africa Publishing Ltd, Nairobi, 219-246.
[19] *Ibid.* See also Chapter V of the *Constitution*.
[20] *Constitution of Kenya*, Article 61(1).
[21] Republic of Kenya, *Sessional Paper Number 3 of 2009 on National Land Policy* (2009).
[22] Ibid, 11.
[23] *Constitution of Kenya*, Article 6.

and devolved governments is detailed in the *Constitution* to ensure that there is complementarity and cooperation between the two levels.

Implementing the Constitution

While the adoption of the *Constitution*, through a referendum on 4 August 2010 and its promulgation on 27 August 2010 marked a turning point in the country's governance systems in all spheres including environment and natural resources, the impact of these reforms depends on the implementation of the constitutional principles. These actions are particularly critical when viewed against past assessments that point to a history of the existence of good constitutional frameworks without application and acceptance.[24]

To help inculcate constitutionalism and promote the implementation of the *Constitution*, the Constitutional Implementation Commission was established.[25] Its mandate includes monitoring, facilitating and overseeing legislation and administrative procedures to implement the *Constitution* and working with Constitutional Commissions to ensure adherence to the *Constitution*.[26] The Commission is required to regularly report to Parliament[27] and through it to the people of Kenya on the implementation of the *Constitution*; and to enable corrective action to be taken to entrench a constitutional culture within Kenyan society. In its latest progress report the Commission reports that the country has made commendable progress but that the process is dogged by challenges including impunity, disagreements amongst stakeholders and the quality of Bills passed.[28]

Three areas are important to highlight with regard to the implementation process. These relate to: the work of the Land Use, Environment and Natural Resources Task Force appointed to align the laws relating to land use, environment and natural Resources; reforms within the Judiciary; and progress in development and enactment of new laws.

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[24] For a discussion of this concept referred to as the existence of constitutions without constitutionalism, see: H. Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Paradox' in D. Greenberg et al *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) Oxford University Press, New York, 65-82.
[25] *Constitution of Kenya*, Article 5 of the Sixth Schedule.
[26] *Constitution of Kenya*, Article 6 of the Sixth Schedule.
[27] *Ibid.*
[28] Commission for the Implementation of the Constitution, *Third Quarterly Report, July-September 2011* (available at *http://cickenya.org/sites/default/files/reports/CIC%203rd%20Quarter%20Report%20.pdf*).

Work of the Land Use, Environment and Natural Resources Task Force

On 19 November 2010, the Minister for Environment and Mineral Resources appointed a Task Force to advise on implementing the environmental provisions.[29] By the time the Task Force mandate came to an end in November 2011, it had contributed to the enactment of the *Environment and Land Court Act*,[30] made proposals for the finalization of a *Mineral Bill* and developed proposals on amendment to the *Environmental Management and Coordination Act*.[31]

The Task Force faced numerous challenges. While the new *Constitution* makes a strong case for public participation in enacting law or implementing public policies,[32] including in environmental matters,[33] the process of the Task Force involved limited public consultation. Secondly, bureaucratic challenges impacted on the outputs. Membership and enthusiasm of the Task Force members waned during the life of the committee such that the envisaged work was not fully complete. This highlights the need for ministries to play an active role in implementing the *Constitution* and reforming institutions of government where necessary.

Environment and Land Court Act

Concerns about how non-specialized court systems handle environmental and land issues have accelerated the creation of environmental courts and tribunals worldwide,[34] reflecting the need to provide expeditious and cost effective justice, and the challenges facing ordinary courts including accessibility, delay, cost, complexity, lack of legal and technical expertise and quality of decisions.[35]

[29] *Gazette Notice* No. 13880, 1 November 2010.
[30] Act No. 19 of 2011. Required under Article 162 of the *Constitution* and discussed in detail below
[31] Act No. 8 of 1999.
[32] *Constitution of Kenya*, Article 10.
[33] *Constitution of Kenya*, Article 69.
[34] G. Pring and C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) The Access Initiative, 1.
[35] Ibid. See further: A. Mumma, 'The Role of Administrative Dispute Resolution Institutions and Processes in Sustainable Land Use Management: The Case of the National Environment Tribunal and the Public Complaints Committee of Kenya' in N. Chalifour et al, *Land Use Law for Sustainable Development* (2007) Cambridge University Press, USA, 253.

In 2000 Kenya established, under the *Environmental Management and Coordination Act*, the National Environmental Tribunal with powers to hear disputes arising from the decisions of the country's National Environmental Management Authority (NEMA). The Tribunal has members with legal and scientific and technical knowledge. It is not bound by the strict rules of evidence.

The *Constitution* provides for a specialized body to hear disputes relating to 'the environment and use and occupation of, and title to, land'.[36] Parliament enacted the *Environmental and Land Court Act* to establish the Environment and Land Court in 2011. This Court has the same status as the High Court with its own registrar and presiding judge. While establishing the Court is laudable, it raises several legal challenges. The Act establishing the Court did not link it to the mainstream judiciary under the *Constitution*, which has delayed the efficient operation of the Court. The policy making body for the broader judiciary is the Judicial Service Commission.[37] The Act does not provide any link between the Environment and Land Court and the Commission, and the Registrar of the court is not linked in any way to the Chief Registrar of the Judiciary. At around the same time that the *Environmental and Land Court Act* was passed, the Chief Justice appointed three judges with one as the head to the Land and Environmental Division of the High Court, a division that had been established administratively in 2007. This raises questions about the relationship between the Land and Environment Division of the High Court and the Land and Environment Court. It is necessary to resolve this disconnect to ensure that the Land and Environment Court operates as part of the general judicial structure and not as a quasi-judicial body.

Urban Areas and Cities Act

As with federal governments, the devolved government of Kenya envisages sharing of functions and competencies between the national and devolved government. In the field of the environment, the national government has the powers of 'protecting the environment and natural resources with a view to establishing a durable and sustainable system of development', while the county governments have the

[36] *Constitution of Kenya*, Article 162(2)(b).
[37] *Constitution of Kenya*, Articles 171-172.

functions relating to agriculture, health, pollution control and county planning and development,[38] all of which have implications for environmental management.

The *Constitution* envisages the promulgation of several laws. One is to provide for the governance and management of urban areas and cities.[39] In 2011, Parliament passed the *Urban Areas and Cities Act*.[40] Urbanization, if not properly managed, has profound negative impact on the environment.[41] The *Urban Areas and Cities Act* provides for the sustainable management of Kenya's urban areas and cities. It makes provision for the integrated development planning of all urban areas, identifying environmental plans as a key component of integrated development.[42]

Reforming the Judiciary

The judicial branch of Government was the subject of focus during the review of Kenya's previous *Constitution*. Reports by task forces (including those appointed by the Judiciary) returned a damning verdict on the state of the Kenyan Judiciary, characterizing it as opaque and corrupt, and the judicial officers as incompetent.[43] This had negative implications in environmental governance and sustainable development. Courts worldwide have an important role to play in promoting sustainable development.[44] A review of cases decided in Kenya before 2002 revealed a judiciary that was not assertive and that preferred to dismiss environmental cases on technical as opposed to substantive grounds.[45] However, in

[38] *Constitution of Kenya*, Fourth Schedule.
[39] *Constitution of Kenya*, Article 184.
[40] Act No. 13 of 2011.
[41] For a discussion of the environmental challenges that urbanization poses to developing countries, see: P. Hassan, 'Urbanization and Environmental Challenges' in Chalifour et al (supra note 35) 334-351.
[42] *Urban Areas and Cities Act*, Section 36.
[43] For a discussion on the sorry state of the Judiciary before the adoption of the new *Constitution*, see: Republic of Kenya, *Report of the Committee on the Administration of Justice* (1998); Constitution of Kenya Review Commission, *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts* (2002); Republic of Kenya, *Report of the Integrity and Anti-Corruption Committee* (2003); Republic of Kenya, *Report of the Sub-Committee on Ethics and Governance of the Judiciary* (2006); Republic of Kenya, *Report of the Committee on Ethics and Governance of the Judiciary* (2007); Republic of Kenya, *Final Report of the Task Force on Judicial Reforms* (2010).
[44] For a discussion of the role of the judiciary in promoting sustainable development, see: B. Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9 (2&3) *Asia Pacific Journal of Environmental Law* 109-211; and P. Kameri-Mbote and C. Odote 'Courts as Champions of Sustainable Development**:** Lessons from East Africa' (2009) 10(1) *Sustainable Development Law & Policy* 30.
[45] See further: M. Makoloo et al, *Public Interest Environmental Litigation In Kenya: Prospects and Challenges* (2007) ILEG.

the recent past the Kenyan Judiciary has started being assertive and become innovative champions of sustainable development. This is evident from not only the number of cases on environmental matters that the courts in Kenya have heard in the recent past, but also from the content of the judgments. The case of *Peter K. Waweru vs. Republic*[46] is representative of this new approach. The applicants, property owners In a town in Kenya, filed an application in the High Court of Kenya challenging the constitutionality of their charge for the offence of discharging raw sewage into underground water contrary to the provisions of the *Public Health Act*.[47] Their main ground for challenging the charge was that the action was discriminatory since not all landowners undertaking similar activities in the town had been similarly charged. The court, while upholding the application went ahead to discuss the environmental implication of the action of discharging the water and held that this action was contrary to sound environmental management. Although brought to court under the former *Constitution*, the court had no hesitation in adopting the reasoning of the Pakistan case of *Shehla Zia vs. Wapda*,[48] stating that the right to life includes the right to a clean and healthy environment. In the words of the court, 'It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together'.[49]

This is in line with the tenor to the new *Constitution*'s provisions on the environment and the focus on a vibrant and reformed judiciary.[50] The *Constitution* provides that judicial authority in Kenya derives from the people[51] and is to be exercised in accordance with listed principles, which include: dispensing justice to all without regard to their status; expeditious dispensation of justice; and a focus on substantive justice without undue regard to procedural technicalities.[52] Reforms introduced by the *Constitution* have focused on increasing the quality of delivery of justice, improving the management of the judiciary, appointment of more judges and reconstituting the Judicial Service Commission. The reforms have seen the vacation of office of Justice Gicheru as Chief Justice and the appointment of the current Chief Justice, Justice Willy Mutunga, following a public recruitment process, the first of its kind in Kenya. A

[46] 1 Kenya Law Reports (Environment and Land) 677-700(20006).
[47] Chapter 242, Laws of Kenya.
[48] Pld 1994 SC 693.
[49] Ibid, 691.
[50] *Constitution of Kenya*, Chapter 10.
[51] *Constitution of Kenya*, Article 159(1).
[52] *Constitution of Kenya*, Article 159(2).

substantive Deputy Chief Justice has been appointed together with twenty-eight new judges to the High Court. Furthermore, a Supreme Court has been created. These reforms have resulted in a more robust judiciary and increased public confidence in this institution.

A Strategy for Nationwide Civic Education

The Government, through the Ministry of Justice, National Cohesion and Constitutional Affairs and in collaboration with non-state actors, finalized a *Strategy for Nationwide Civic Education*[53] in June 2011. The *Strategy* identified several result areas for civic education programmes, one of which is sustainable management of the environment and natural resources. A draft *Manual on Land, Environment and Natural Resources* has already been produced and is to be validated in 2012 as the basis for nationwide civic education campaigns.

Prospects for the Future

Kenya's new constitutional dispensation is pointing to brighter prospects in the management of the environment. There is attitudinal change within the country, greater environmental consciousness being inculcated through a nation-wide and sustained civic education programmes and legislative reform to align existing legislation to the new *Constitution*'s ethos. Ongoing reforms address environment, water, irrigation, land, minerals, wildlife and forestry. In each of these areas, collective expertise and comparative information will be required.

As highlighted in this country report, the implementation process is not without its challenges. Analytical and in-depth review of the implementation process could not only serve as useful lessons for other countries undergoing similar constitutional reforms, but could also highlight areas where the academy could through research and collaborative initiatives help the Kenyan process. In the final analysis, Kenya's constitutional and legal landscape for environmental governance continues to improve and creates numerous opportunities for scholarship. In many areas the country is pioneering innovative and modern solutions to environmental challenges facing the country, the continent and the globe.

[53] Ministry of Justice, National Cohesion and Constitutional Affairs, *Kenya National Civic Education Programme Strategy and Implementation Plan*, June 2011(Unpublished, on file with author).

IUCN Academy of Environmental Law
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ISSUE 2012 (1)

COUNTRY REPORT: NETHERLANDS
Climate Change and Coasts

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Introduction

The impact of climate change on coastal areas probably is among the most discussed elements of adaptation policy and law. This is not surprising given the expected effects of climate change on the coasts. The Intergovernmental Panel on Climate Change (IPCC) projects an accelerated sea-level rise of up to 0.6m by 2100, or more if the potential breakdown of the West Antarctica and Greenland ice sheets is taken into account, with levels continuing to rise for many centuries beyond 2100.[1] Storms temporarily exacerbate higher water levels, by 20-110 centimetres.[2] Increasing storm intensity and larger storm surges as a result of climate change will combine with rising sea-levels to cause more coastal erosion and damage sea defences, which may lead to inundation of low lying areas. In north-western Europe, the situation is further aggravated by soil subsidence, which is an after effect of the last glacial period ending 10,000 years ago. By 2100, the Netherlands will have experienced soil subsidence of 1.0m on today's level. The combined effect of sea-level rise, storm surge and subsidence in the Netherlands will be equivalent to a relative sea-level rise of 2.1m by 2100. In addition to that, the Dutch delta is also confronted with altered precipitation and run-off under climate change, which may lead to freshwater estuarine flooding. It is the combination of all of these factors (high river water levels, a storm at sea and increased relative sea-level), which makes deltas such as the Netherlands particularly vulnerable.

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[1] IPCC *Fourth Assessment Report, Climate Change: Impacts, Adaptation and Vulnerability* (2007) 317.
[2] Taking the North Sea area as an example, see: IPCC (supra note 1) 325 (Figure 6.4).

Nearly nine million people live in low-lying parts of the Netherlands. About 65 per cent of the country's GNP is generated here. Without the protection of dikes, dunes, and hydraulic structures (such as storm surge barriers), approximately 60 per cent of the country would be flooded regularly. Since 1000 years, artificial dikes have been in place to protect areas that are below mean sea-level, much of which are actually drained marshes and lakes or land reclaimed from the sea, against flooding by the sea and the rivers. For centuries, laws aimed at stringent dune management and building and keeping rigid sea-defence structures, culminating in current legislation which, since the 1990's, requires that the coastline has to be maintained at its 1990 position, irrespective of future sea-level and other conditions. This approach has been criticized because it may not be the optimal response to climate change. Instead, increasing coastal dynamics and enhancing natural processes are thought to provide a more resilient coastline in the long run. This insight is slowly entering Dutch coastal adaptation policy and law, as will be shown below. Most of the land on the coastline, particularly the sand dunes and the dikes, is owned by the state. This, obviously, makes the implementation of coastal adaptation measures easier than in cases where coastal property is privately owned, such as is often the case in other countries such as the United States and Australia.

New Coastal Adaptation Legislation

The first important step towards a total revision of coastal adaptation law and policy was the publication of the influential report titled *Working Together with Water - A Living Land Builds for its Future*[3] (the *Report*) by the Sustainable Coastal Development Committee (Delta Committee) in 2008. This Delta Committee was given the mandate to formulate a vision on the long-term protection of the Dutch coast and its hinterland. The Government asked the Delta Committee to come up with recommendations on how to protect the Dutch coast and the low-lying hinterland against the consequences of climate change over a long term. The Delta Committee approached this issue in a holistic way, with its vision embracing 'interactions with life and work, agriculture, nature, recreation, landscape, infrastructure and energy'.[4]

[3] Sustainable Coastal Development Committee, *Working Together with Water. A Living Land Builds for its Future* (2008) (available from the website of the committee at http://www.deltacommissie.com.)
[4] Ibid, 7.

In 2011, the final elements of the legal framework that provides the basis for coastal adaptation measures for 21st century were adopted by Parliament. These elements, discussed below, will be inserted into existing water legislation. The Netherlands has taken a holistic approach to all water issues, in line with the EU's *Water Framework Directive*[5] (*WFD*). The *Water Act* (2009) and the accompanying *Water Ordinance* (2009) cover all water law, including rules on the prevention of flooding and the development of a marine strategy. The Act and Ordinance implements three EU Directives that deal with high-water situations: the overarching *WFD* and the more specific *Floods Directive*[6] and *Marine Strategy Framework Directive*.[7] Although water policy in general has been decentralized to water boards (based on regional weirs), responsibility for the main dikes and embankments of coastal waters and of the major rivers rests with the Minister of Infrastructure and the Environment and the national water management agency (*Rijkswaterstaat*). Management of all waters by water boards and the Minister is overseen by the provincial authorities, but the ultimate legal responsibility rests with the Minister. The Minister has to cooperate with the other authorities involved, but has far-reaching powers to either force cooperation or overrule other authorities if necessary.[8]

The *National Water Plan (2009-2015)* stipulates the overarching water policies and incorporates the four river basin management plans as required under the *WFD*. The *National Water Plan* is accompanied by a more specific policy document called *Water Safety 2009-2015*.[9] The *National Water Plan* is the policy framework for three programmes relevant to coastal adaptation: the *National Flood Defence Construction Programme*; the *Sand Nourishment Programme*; and the *Room for the River Programme*. Under the *National Flood Defence Construction Programme*, the primary weirs (weirs that are in direct contact with sea water) are reviewed every five years, taking climate change scenarios for the Dutch coast into consideration. Those weirs that fail to meet required standards must be reinforced immediately. In a dedicated programme, special attention is given to priority 'weak links', which have been identified along the coast. These links are currently being strengthened so that they can withstand a 1:4000 year storm by 2015.

[5] Directive 2000/60/EC.
[6] Directive 2007/60/EC.
[7] Directive 2008/56/EC.
[8] *Water Act*, Article 3(13).
[9] Available at http://www.rijksoverheid.nl/onderwerpen/water-en-veiligheid/.

The *National Water Plan*'s main response to sea-level rise is by large-scale beach nourishment along the entire Dutch coast, in a manner that disturbs natural processes as little as possible, and at a scale necessary to keep pace with the actual sea-level rise. Under the *Sand Nourishment Programme*, sand nourishment takes place along the Dutch coast to replenish eroded beaches. An innovative experimental sand nourishment project is proposed under the Programme. The so called 'sand engine' project involves the dredging and positioning of a super dune of sand in the sea in such a way and in a location, that enables hydrological forces to spread the sand to where it is needed. If the experiment is successful, the sand engine will replace regular artificial sand nourishment.

Under the *Room for the River Programme*, water storage areas to be used for controlled flooding were designated in land use plans and natural floodplains were expanded using a combination of land use controls and compulsory acquisition.[10] These natural floodplains were developed to deal with high water levels in the river and to simultaneously create additional wetlands under nature conservation laws, primarily the EU's *Natura 2000* network, a network of protected areas instituted as a consequence of the EU's *Birds and Habitats Directives*.[11]

While most of these policies are implemented under the *Water Act*, some are executed under the *Spatial Planning Act*. The *Water Act* contains safety norms for dikes and embankments, which vary between a 1:250 and 1:10 000 probability that critical water levels might be reached in any given year, depending on the number of people and infrastructure protected by the dike.[12] The specific requirements for dikes and embankments in terms of height and strength are derived from that norm. These norms are currently subject to debate as they are considered to take insufficient account of sea-level rise and increased storm intensity. A 0.7m sea-level rise increases the flood risk by a factor 10, and if we include the expected soil subsidence by 2100 of 1.0m, plus an additional 0.5m sea-level rise during storms, the situation is even much worse. Therefore, the influential Delta Committee, in its aforementioned *Report* (2008), advised the Dutch Government to increase the safety norms at least with a factor 10 by 2013 (up to a factor 100 for some areas), and have these

[10] The programme's international website (available at http://www.roomfortheriver.nl) contains much information on the programme, including its main implementing spatial plans.
[11] See J. Verschuuren, 'Climate Change: Rethinking Restoration in the European Union's Birds and Habitats Directives' (2010) 28(4) *Ecological Restoration* 431-439.
[12] *Water Act*, Article 2(2) and Annex II.

increased safety norms implemented before 2050.[13] This recommendation is currently being researched and debated. It is expected that in 2014, a final decision will be reached on the necessary safety norms.

The *Water Act* contains a range of provisions aimed at protecting land against flooding, including:

- Procedural provisions on decisions to create or change coastal or river defence works.[14]
- A provision granting the Minister the power to take all necessary measures in case of danger.[15] A danger is defined as 'circumstances as a consequence of which water management works are under an immediate and serious threat or can become under such a threat'.[16] The Minister is even allowed to take measures that are against the law, as long as they do not infringe the constitution or international law.[17]
- The obligation to organize exercises to deal with dangerous situations. Sometimes, international exercises are organized as well. In 2009, the exercise 'EU FloodEx' tested international assistance during a worst case flood scenario in the North Sea area on the Dutch coast. The exercise showed that in such a case an international response is necessary, but also that there are many shortcoming associated with poor cooperation of the various response services involved.[18]
- The duty on property owners to allow people appointed by the authorities to enter or do works in any place that they deem necessary, and the power of authorised officers to enter a property without the owner's consent.[19]
- The duty on property owners in water storage areas to allow their land and other property to be flooded.[20] A prohibition on owners of property in a water storage area to build anything that is considered to be an obstacle

[13] Sustainable Coastal Development Committee (supra note 3) 49.
[14] *Water Act*, Article 5(5) - 5(13).
[15] *Water Act*, Article 5(30).
[16] *Water Act*, Article 5(28).
[17] *Water Act*, Article 5(30).
[18] See R. Beerens et al, *EU FloodEx: An Analysis of Testing International Assistance During a Worst Credible Flood Scenario in the North Sea Area* (2010) (available at http://library.wur.nl/WebQuery/hydrotheek/lang/1949028.)
[19] *Water Act*, Article 5(20) - 5(24).
[20] *Water Act*, Article 5(26).

for water storage. This is regulated through the relevant spatial plans at provincial and municipal level.

- The possibility for property owners in water storage areas to claim compensation in respect of loss or damage suffered as a result of flooding or restrictions on land use.[21]
- Compulsory acquisition of land where this is necessary for dike and embankment works.[22]
- A prohibition on interfering with coastal and river defence works without a permit.[23]

As stated above, the *Delta Act on Water Safety*[24] was adopted by Parliament in 2011. This Act contains three important amendments to the *Water Act* (2009) in order to complete the regulatory framework for coastal adaptation. First, it establishes the *Delta Programme*, a new annual plan with a six-year planning horizon detailing all measures necessary to combat floods and water scarcity as a consequence of climate change. Secondly, it creates institution of a Delta Commissioner who works under the direct responsibility of the Government. His main task is to oversee implementation of the *Delta Programme*. This task will primarily involve coordinating the activities of all local, regional and national competent authorities in the field of coastal adaptation. The first Delta Commissioner and his staff are already in office since 2010, on the basis of a preliminary ordinance (so as to lose no time during the legislative process).[25] Thirdly, it establishes the Delta Fund, which will provide the resources required to implement the *Delta Programme*. The Act stipulates that, as of 2020, € 1 billion has to be made available annually under the Fund. Until 2020, the considerably lower existing annual budget will be available (because of the financial crisis, the necessary additional funds cannot be made available before 2020).

Conclusion

With all the legislation described above, the legal, administrative and policy framework to combat the expected impact of climate change on the Netherlands coasts should be ready, so that we can now move into the implementation phase. Concern, however, remains whether these new requirements will be sufficient. The

[21] *Water Act*, Article 7(14) - 7(15).
[22] *Water Act*, Article 5(14).
[23] *Water Ordinance*, Article 6(12).
[24] Parliamentary Documents No. 32 304.
[25] For more information, see: http://www.deltacommissaris.nl.

new legislative requirements were developed on the basis of an expected sea-level rise of 0.85m by 2100. There are, however, growing concerns on a possible rapid loss of the Greenland ice sheet, which will significantly add to currently expected level of sea-level rise in the North Sea area.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: NEW ZEALAND
Reforms to the Resource Management Act

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Introduction

During 2011, the Ministry for the Environment (MfE) has consulted on the Phase II reforms to the *Resource Management Act* (1991) (*RMA*). These reforms build on the Government's focus of simplifying and streamlining processes evidenced in the *Resource Management (Simplifying and Streamlining) Amendment Act* (2009). The Government's objectives for the *RMA* Phase II reforms are (inter alia): to provide greater central government direction on resource management; to improve economic efficiency without compromising environmental integrity; and to avoid duplication of processes under the *RMA* and other statutes. This report offers some preliminary views on the reform agenda and the scope for further improvements in *RMA* practice.

National and Regional Guidance

The *RMA* provides an elaborate hierarchy of planning documents to guide decision-making by local government councils. Critical components of the planning hierarchy are national policy statements (NPS) and national environmental standards (NES) prepared by central government. However, national guidance has been slow to emerge and councils have been left in a policy vacuum to decide how they should administer the *RMA* through regional policy statements (RPS), regional plans and district plans.

NPS are now being prepared, notified, and litigated before Boards of Inquiry specially

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constituted to make recommendations on how submissions should be decided. However, most recently in relation to the NPS on indigenous biodiversity, the Minister for the Environment has chosen to consider submissions himself, based on recommendations from the Ministry, as an alternative to constituting a Board of Inquiry.

Comparison with other common law jurisdictions indicates that a suite of NPS will be required. In the United Kingdom, for example, the Secretary of State for the Environment has prepared 25 planning policy guidance notes. It will therefore take some time before the suite of NPS required to administer the *RMA* has been prepared, notified and is fully operative.

By nature, NPS and NES are high-level documents. Comparison with national planning guidance in other jurisdictions indicates that they may either provide policy guidance that will be directly applicable to all persons exercising functions, powers and duties under the relevant statute including landowners and developers; or provide guidance that merely has direct effect on councils and will not have immediate effect upon other persons. Where national guidance merely has direct effect on councils there will inevitably be a time delay while subordinate documents in the planning hierarchy are prepared or changed to give effect to the national guidance. Given the critical need to provide greater central government direction on resource management within a reasonable time period, there is a strong argument that NPS should be drafted in a way that ensures they will be directly applicable on all persons exercising functions, powers and duties under the *RMA* without the need for further subordinate action by councils.

Various methods have been used in the United Kingdom to prepare national and regional planning policy guidance notes. For example, the regional planning policy guidance note (RPG) for East Anglia (United Kingdom) was prepared by a standing committee of all councils in the region with each council being represented by an elected councilor and an expert member of staff. This collaborative method removed the need for the consultation before the RPG was notified and avoided the risk of litigation after notification because relevant stakeholders were involved in the process and reached consensus on the RPG submitted to the Secretary of State for approval.

A similar approach could be adopted regarding the preparation of NPS and NES.

Relevant stakeholders would include representatives from all councils, local authority associations, network utility operators and requiring authorities, professional bodies (e.g. RMLA), business and industry associations, and non-government associations. The Land and Water Forum is an example of collaborative governance, but that model was only designed to produce issues and options for consultation and therefore does not have the same streamlining advantages as the UK experience in East Anglia.

For the 11 regions in New Zealand where a two-tier system of local government remains in place, a similar collaborative approach could be adopted regarding the preparation of RPS to replace the current process under Schedule 1 of the *RMA*. Natural justice could be safeguarded by providing persons excluded from the process with a right of appeal on questions of law. Currently, the *RMA* provides a framework in Schedule 1 for councils to agree on consultation regarding RPS preparation or change, but the framework does not guarantee that a collaborative approach will emerge from the consultation process. More importantly the consultation process is limited and does not provide for wider stakeholder engagement.

District Plans

The majority of resource consents granted (69 percent) are land use consents. The *RMA* takes a permissive approach to land use activities and consent is not required unless the proposed activity is contrary to a rule in a plan. As a result, landowners and developers will be keenly interested in the plan preparation process. They will be concerned about any adverse effect on their property rights. In the absence of any statutory entitlement to compensation in relation to the adverse effect of restrictions on private property, the provisions in section 32 which require plans to be soundly based on good evidence and Schedule 1 that provides for submission, hearing and appeal rights, are important constitutional guarantees against the abuse of discretionary power.

Generally, the *RMA* provides a litigation-based method of environmental conflict resolution. Disputes regarding notified plan provisions and notified resource consent applications are generally resolved via formal hearings before decision-makers, and alternative methods of environmental conflict resolution are optional. In the context of council decisions on resource consent applications, for example, provision is made in

the *RMA* for prehearing meetings to assist in resolving submitter concerns regarding the effects of proposed activities, but uptake of the opportunity for prehearing meetings is low (34 percent). Experience before the Environment Court is similar with mediation occurring in relation to only 39 percent of appeals filed with the court.

While the right to be heard is deeply engrained in the common law approach to administrative decision-making, it is clear from a public law perspective that the right to be heard can be guaranteed by a variety of methods. The Minister has indicated a preference that collaborative methods of environmental conflict resolution should be used as an alternative to formal litigation. When drafting legislation, the Government makes a deliberate policy choice about how natural justice will be guaranteed and the methods that will be used to provide hearing rights. As a result, there is an opportunity when considering *RMA* reform to select alternative methods of environmental conflict resolution as the primary method for hearing submissions. Internationally, a variety of alternative methods are used. For example, the United States EPA has developed negotiated rule making, a mediation-based method that encourages stakeholders to arrive at consensus on how regulations should be drafted. Negotiated rule making is also gaining some traction in Australia and is promoted by ELRANZ as a good example of collaborative decision-making.

Negotiated rule making normally works in the following way. Before the negotiated rule making commences, ground rules are prepared setting the deadline for completion of the process, the objectives of the process, the responsibilities and commitments of participants, and providing a definition of 'consensus'. A list of issues is identified for discussion, and participants are provided with relevant background materials. The mediator provides focus and manages the process, and participants discuss each issue. When participants have agreed on a conceptual solution the regulator provides a draft regulation for review. Draft regulations are subject to further discussion and review by the participants until consensus agreement is reached. Typically, the negotiated rule making process takes six to twelve months to complete and involves monthly multi-day meetings.

Giving effect to the preference for collaborative methods of environmental conflict resolution will require a change from voluntary mediation. It would also require investment in further commissioner training to ensure that all mediators would be appropriately qualified and experienced to manage the negotiated rule making

process. But it will not provide resolution of all issues in all cases, and as a result formal hearing before a decision-maker will remain a secondary method for environmental conflict resolution.

Adopting negotiated rule making should however provide consensus on the plan provisions required to address most issues. Where consensus cannot be achieved on a particular issue the process should identify the provisions where disagreement remains, the regulatory options discussed, and the reasons for disagreement. That would provide foundation for a focused hearing to decide any outstanding issues.

Whether any formal hearing that may be required to resolve any outstanding issues should be conducted before the relevant council or the court is a secondary policy consideration. But where alternative methods of environmental conflict resolution have narrowed the scope of any outstanding issues there would not appear to be any overriding public law reason why the issues should not be decided by the court.

Adopting negotiated rule making could reduce the time taken by councils to make decisions on submissions, and reduce the number and scope of any appeals. It is however interesting to note that Schedule 1 of the *RMA* was amended in 2009 as part of the streamlining and simplifying reforms. However, the reforms did not prescribe any statutory timetable for completing specific stages in the Schedule 1 process (e.g. public notice of submissions) apart from an overall requirement to complete the process from notification to giving notice of decisions on submissions within a two-year period. Prescribing a statutory timetable for submissions to be referred to negotiated rule making within a period of six months from notification of the plan could assist in meeting this requirement. While improving practice is laudable, previous research commissioned by the Ministry indicated that the time taken to prepare plans and designate infrastructure projects in New Zealand was similar to the timeframes experienced in other OECD jurisdictions. As a result, current processes under the *RMA* do not appear to place the New Zealand economy at a comparative disadvantage.

Harmonizing Laws

There are 67 councils exercising territorial jurisdiction in New Zealand via the preparation and administration of their district plans. The issues that they encounter when drafting objectives, policies and rules for a residential zone will be similar. The same position will apply regarding other land-use zoning provisions found in district plans.

Economic activity and infrastructure however does not necessarily fit neatly within the administrative boundaries of councils. There has been considerable debate in Australia at both federal and state level about the harmonization of environmental laws to reduce barriers for economic activity and streamline and simplify process.

Attention has focused on Victoria where a two-stage approach is used for land use planning. Under the Victoria Planning Provisions (VPP), the Department of Planning and Community Development is responsible for preparing a template from which district plans are sourced and constructed. The VPP provide a menu of zone provisions that can be applied to any block of land or any specific site. They provide of a range of residential, business, industrial and rural zones. For example, they provide for six different types of residential zone. Each set of zone provisions defines the purpose of the zone, contains an activities table, and sets out subdivision standards and development controls.

The menu of zoning provisions is supplemented by a menu of overlays that provide additional controls that can be applied in the context of any of the zones. For example, in the context of any one of the residential zones, it may be appropriate to apply overlays dealing with vegetation protection, heritage, design or neighbourhood character.

Other menus supplement these provisions and provide requirements for specific uses and developments (e.g. advertising signs, car parking and home occupations), general information on the administration of the plan, definitions and documents to be incorporated by reference.

Councils are responsible for preparing district plans using provisions taken from the VPP. Based on site-specific information about land use suitability they decide which

zone is most appropriate for any particular block or site in their area. The same factors determine whether any overlays or particular provisions (or any combination of them) should also apply to the subject land. The basic rules that apply to any Residential 1 Zone land in Victoria will therefore be the same, and the differentiating factor between one site and another will be any overlays or particular provisions that also apply to the site. While the combination of overlays and particular provisions will vary from site to site, the rules that apply in relation to a specific overlay or particular provision will also be the same throughout the state.

Adopting the VPP approach in New Zealand could provide a number of advantages. It would provide for a single debate about drafting objectives, policies and rules. It would reduce complexity by providing uniform provisions capable of consistent interpretation by a variety of decision-makers. It would enable councils to focus more specifically on land use suitability and zoning issues based on site-specific information, and simplify and streamline the plan preparation process. Overall, adopting the VPP approach would allow city and district councils to engage in a collaborative approach with other stakeholders and prepare template provisions for approval by the Minister as NES.

Statutory Disconnection

Another concern recorded in the consultation document is the disconnection between the various environmental statutes under which planning documents are prepared and consents and permits are required for development. There appear to be three broad points that underlie this concern.

First, environmental law in New Zealand is governed by over 35 statutes but planning documents prepared by councils focus almost exclusively on the exercise of functions, powers and duties under the *RMA*. There is no express statutory direction for councils to prepare policy statements or plans in an integrated and holistic way that give effect to their environmental management functions under all relevant statutes. While the *RMA* will remain as the cornerstone for environmental management, broadening the scope of planning documents may assist in reducing disconnection between different statutory regimes.

Second, the relationship between planning documents prepared under the *Local Government Acts* (*LGA*) 1974 and 2002 and the *RMA* is blurred. For example, city and district councils have a broad range of non-*RMA* functions regarding community wellbeing, environmental health and safety, infrastructure, and recreation and culture. The focus of *LGA* plans will therefore be much wider than environmental planning and will coordinate council functions generally. Providing a clearer distinction (or statement of relationship) between planning required for different council functions would avoid the risk that environmental management will be become subordinate to other local government objectives. For example, spatial planning evolved in the United Kingdom to provide statutory guidance in relation to land use planning in a similar way to RPS in New Zealand. Spatial planning was initially provided for under local government legislation relating to establishment of the Greater London Authority but was subsequently provided for under the *Planning and Compulsory Purchase Act* (2004). As a result, there will be a need to clearly define whether spatial planning in Auckland has a wider local government management objective, or a more focused environmental management objective.

Third, integrated management of natural and physical resources is a key feature of the *RMA*. Providing for environmental planning and land use planning in a single statute was ground breaking in 1991. Some jurisdictions, such as the United Kingdom, still manage these functions under separate legislation. While the *RMA* was designed on the premise that multiple consents may be required (in addition to any consents required under other statutes), other jurisdictions have taken the concept of integrated management further. The *Integrated Planning Act* (1997) and the *Sustainable Planning Act* (2009) in Queensland (Australia), for example, provide one system for all development related assessment by central and local government. Providing for a single application system under all 35 statutes listed in the *Environment Act* (1986) under which consents can be granted (including the *RMA*) is a matter that demands careful consideration. To date integrated development applications have not featured on the *RMA* reform agenda.

Conclusion

The time lapse between enactment of the 2009 amendments and the current reform agenda is too short for any conclusions to be made about whether the amendments have been efficient or effective or delivered the desired legislative outcome. Empirical

analysis will also be difficult as biannual *RMA* monitoring and reporting has only covered plan changes and variations since 2005, and no overall monitoring is currently undertaken regarding the Schedule 1 plan preparation process.

If the *RMA* Phase II reform proposals are to be taken further, there will need to be a mind-shift away from voluntary mediation if alternative methods of environmental conflict resolution such as negotiated rule making are to replace the current Schedule 1 process for district plan preparation. Adopting alternative methods may also require councils to relinquish control of the plan preparation process following notification and be bound by the mediated outcome. Natural justice will also require mediators to be appropriately qualified and independently appointed. The Environment Court would remain relevant as a backstop for deciding any outstanding issues. Further simplifying and streamlining could be achieved by adopting the two-stage approach used for preparing district plans in Victoria.

Overall, the success of any further reform will require national planning guidance and a collaborative approach to regional planning guidance. It now falls to the re-elected National Government to determine how it wishes to give effect to the *RMA* Phase II reform agenda through the legislative process during 2012.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: NIGERIA

Recent Developments in the Niger Delta of Nigeria

Saheed Alabi*

Introduction

The Federal Government of Nigeria (FGN) requested the United Nations Environment Programme (UNEP) to carry out an environmental assessment of Ogoniland due to perpetual oil spillages and gas flaring by the multinational oil companies, specifically Shell Petroleum Development Company (Nigeria) Ltd (SPDC). The *Environmental Assessment Report*[1] (*EA Report*) was finalised and submitted to the FGN in August 2011 for review and implementation.

The aim of this country report is to determine the sincerity of the FGN in finding the lasting solution to the severe environmental degradation in Ogoniland. This is imperative because of the historic failures of the Nigeria Government to implement recommendations contained in environmental assessment reports of this nature and to enforce judicial decisions.[2] It is also necessary so as to ascertain whether the commissioning of the *EA Report* was simply a political gimmick to project to the world that Nigeria is working in the interest of establishing a healthy environment for the people of the Niger Delta, following civil unrests in the area which have been partly responsible for lowering crude oil exports. Another potential area of concern is whether there is any provision within Nigeria's domestic legislation for compelling the Government to implement the *EA Report*'s recommendations should it fail to do so.

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[1] UN Development Programme (Emergency Response Division), *Environmental Assessment of Ogoniland Report* (2011). The full *EA Report* is available at http://www.unep.org/nigeria/.
[2] Climate Justice Programme 'Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again' (2007) available at http://www.climatelaw.org/media/2007May2.

Alternatively, would it be more desirable to invoke provisions of international laws to compel Nigeria to implement these recommendations? Whilst it has been suggested that SPDC and the FGN should contribute US$1 billion as starting capital for the implementation of the *EA Report*'s recommendations, it is unclear whether the SPDC and FGN are under any obligation to do so. What is furthermore unclear is the implication of their failure to make such a contribution.

The Ogoniland and Shell Petroleum Development Company

Ogoniland is situated in the Niger Delta Region of Nigeria. It has huge deposits of petroleum and natural gas. According to the national census conducted in 2006, about 1 million people inhabit the area.[3] The Ogoni people are predominantly farmers and fishermen due to natural endowment of creeks, rivers and mangroves surrounding them.[4]

The SPDC has been prospecting for oil in Ogoniland for decades without complying with oil exploration procedures. This has caused spillages that have contaminated the entire region. As a result, the environment has become unhealthy and there is a continuous imbalance in the ecosystems. The SPDC has failed persistently to comply with local regulatory requirements or international best practices due to complicity by the FGN. The FGN has entered joint ventures with SPDC, through which the Government, operating through the Nigerian National Petroleum Corporation (NNPC), acquires 55 percent of any such venture.[5] The relationship between the SPDC and the Ogoni community went sour after the killings of Ken Saro-Wiwa and eight others by the Nigerian Government in 1995.[6] These nine personalities were chieftains of the Movement for the Survival of the Ogoni People (MOSOP), which led many non-violent protests against the persistent environmental degradation of Ogoniland. The killings led to the suspension of Nigeria from the Commonwealth of Nations. Moreover, the massive protests by MOSOP in 1993 resulted in the

[3] National Population Commission Nigeria, *Population Distribution By Age, Sex and Marital Status Tables: 2006 Census Priority Tables* (2006) Vol 5, (available at http://www.population.gov.ng/.)
[4] *EA Report* (supra note 1).
[5] Shell Petroleum Development Company, *Shell at a Glance*, (available at http://www.shell.com.ng/home/content/nga/aboutshell/at_a_glance/.)
[6] Greenpeace, 'Ken Saro Wiwa and 8 Ogoni People Executed: Blood on Shell's Hands' (London, 10 November 1995), and BBC News, 'Nigeria Hangs Human Rights Activists' (London, 10 November 1995).

withdrawal of SPDC operations in Ogoniland.[7] Nevertheless, the environmental harms left behind continue to affect the ecosystems and the residents have no other alternative than to live in this highly polluted environment.

The UNEP *EA Report* on Ogoniland

The FGN requested UNEP to conduct an environmental assessment (EA) as a way of building trust - namely that the FGN is interested in achieving peace and a healthy environment in Ogoniland.[8] The UNEP *EA Report* is composed of assessments based on fieldwork undertaken in the area over a period of 14 months. During this period, different samples were taken from the soil, water, sediment, air and plant and fish tissue for analysis. The findings show that in most parts of Ogoniland, drinking water is largely contaminated, which poses health risks to the inhabitants. The mangroves and farmlands are severely polluted which undermines the operations of local farmers.[9] Poverty is rife and there are no basic amenities, no adequate health centres and schools.

Furthermore, the scope of the *EA Report* covers diverse issues such as industry practices, institutional issues, public health, land, sediment, vegetation, air pollution, contaminated groundwater and surface water. The *EA Report* shows that petroleum hydrocarbons are present in large quantities in contaminated soil, swamplands, sediments and groundwater systems.[10] The pollution of soil and water has been attributed to a loss of the clay layer across Ogoniland, which resulted in constant exposure of the groundwater to surface oil spillages. The same level of pollution is also detected in the vegetation, aquatic resources and public health, which have undermined the livelihoods of Ogoni people. There are other identified problems that are related to 'oil industry practices' and institutional issues, for example: the unregulated decommissioning of infrastructures; and the poor maintenance of existing infrastructure.[11] Similarly, the method of environmental remediation applied by SPDC has been historically weak and insufficient. These problems have been compounded by the failure of the regulatory bodies established to monitor the

[7] Human Rights, Watch *The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria* (1995) (available at http://www.unhcr.org/refworld/docid/3ae6a7d8c.html.) See also: Shell 'Ogoni Land', (available at http://www.shell.com/home/content/environment_society/ society/nigeria/ogoni_land/.)
[8] *EA Report* (supra note 1).
[9] Ibid.
[10] Ibid.
[11] Ibid.

activities of these multinational oil companies to fulfil their responsibilities. These regulatory bodies not only lack competent technical expertise and resources, but also often rely on the oil companies for logistic reports.[12]

Ogoniland needs to be restored to its former glory after years of environmental degradation. The UNEP *EA Report* makes several recommendations to clean-up Ogoniland from oil pollution and gas flaring, because there is possibility for its environmental restoration.[13] Whilst there are numerous recommendations posited by UNEP, which may bring lasting improvements to Ogoniland and Nigeria, this country report focuses on two cogent ones, the clean-up process and the contribution of financing to implement it.

Implementation and Funding

Ogoniland has been projected to be one of the world's largest oil spillage rehabilitation projects. It has been estimated that it may take in the region of 25 to 30 years to rehabilitate the area. Whilst time is extremely important, it is not certain whether there will be imminent change in Ogoniland, specifically relating to the public health of its ageing population. Although, the *EA Report* provides procedures for funding and implementing its recommendations, it is not sure whether the Committee appointed to review the *EA Report* will adopt them. The *EA Report* recommends that the FGN should establish the Ogoniland Environmental Restoration Authority (OERA), which will manage and supervise the implementation of all the recommendations within the first period of ten years.[14] In relation to funding, the *EA Report* recommends that an Environmental Restoration Fund for Ogoniland (ERFO) should be set up as the 'overall cost of the clean-up should not be an obstacle to its implementation'. In addition, it recommends that starting capital in the sum of US$1 billion should be contributed by SPDC and FGN, capital which should be used to fund the activities of the OERA, such as the 'environmental restoration of Ogoniland, including capacity building, skills transfer and conflict resolution'. Whilst the *EA Report* does specify the manner in which the contributions should be made, it follows that neither the FGN nor the SPDC is under any obligation to make such contributions. Moreover, the *EA Report* does not constitute a legal obligation on the Government. The Government may therefore decide whether to adopt all the

[12] Ibid.
[13] Ibid.
[14] Ibid.

recommendations contained in the *EA Report* or a select few of them. Furthermore, the *EA Report* fails to clarify whether the initial sum of US$1 billion is a once-off investment, or subject to periodic renewal given that the clean-up of Ogoniland may take up to 30 years.[15] The *EA Report* contains no estimated overall cost for implementing its recommendations, probably owing to the fact that the initial capital may not be sufficient in the long run. The *EA Report* is also silent about the process to be followed should more funds be required, such as which parties will be responsible to contribute these funds and when.

Corruption remains the bane of Nigeria's institutional authorities. The Niger Delta Development Commission (NDDC), for example, which is in charge of developing the region, has been undermined by high levels of corruption by its officials.[16] Recently, the Senate President of Nigeria's National Assembly (David Mark) described the NDDC as a failure. He accused the leadership of substituting their own personal interests for those of the Commission.[17] If the funding for rehabilitating Ogoniland is managed by the OERA (as recommended by UNEP) with Nigerian officials in full capacity, what is the assurance that the OERA will not suffer the same fate as that of the NDDC? Another obstacle, which may impede the successful review of the recommendations by the FGN, is ethnic discrimination. For instance, the lawmakers representing Ogoni people both at the state and federal level have accused the FGN special committee tasked with reviewing the *EA Report* of marginalisation.[18] They allege that the FGN has failed to consult them or include Ogoni indigenes in the process to review the Report. On 8 November 2011, three months after the *EA Report* was handed by UNEP to the FGN, members of MOSOP protested about the failure of the Nigerian Government to implement any of its recommendations.[19] This may lead to further civil unrest by the Ogoni people, which may in turn further delay the rehabilitation of the area.

Failure to Implement and Domestic Legal Solution

[15] Ibid.
[16] K. Akogun, 'NDDC a Failure Says Mark' *Thisday Newspaper* (Lagos ,17 November 2011) (available at http://www.thisdaylive.com/articles/nddc-a-failure-says-mark/102995/.)
[17] Ibid.
[18] B. Abdullahi, 'Ogoni Lawmakers Flay FG over UNEP Report' *Dailytrust* (Port Harcourt, 21 November 2011) (available at http://dailytrust.com.ng/index.php?option=com_content&view=article&id=148156:ogoni-lawmakers-flay-fg-over-unep-report&catid=1:news&Itemid=2.)
[19] J. Onoyume, 'Ogoni Protest Non-Implementation of UNEP Report' *Vanguard* (Lagos, 8 November 2011) (available at http://www.vanguardngr.com/2011/11/ogoni-protest-non-implementation-of-unep-report/.)

So what are the potential legal consequences of the FGN and SPDC failing to implement the recommendations contained in the *EA Report*? For this type of report to have legal weight, the National Assembly must approve the review. Its legal status furthermore depends on whether the *EA Report* is adopted in whole or in part. Assuming, the *EA Report* is reviewed and adopted in whole by the National Assembly and backed by the assent of the President, it will become enforceable under the domestic laws through the judiciary. In Nigeria, both at the state and federal levels, there are three arms or institutions of governance. This justifies the idea that 'state powers in legal and political conceptions are divided between the three institutions: the executive, the legislature, and the judiciary'[20] and each institution should be independent of each other. In Nigeria, however, the opposite is the case. The executive often influences the activities of the legislature and the judiciary. Furthermore, the executive often fails to execute and comply with the laws made by the legislature or the decisions made by the judiciary. In *Jonah Gbemre vs. SPDC & Others*[21] the Federal High Court granted the relief sought by the plaintiff, namely that the SPDC immediately stop flaring gas near the plaintiff's community because its actions violated the enjoyment of community's right to life and dignity enshrined in the *Nigerian Constitution*.[22] This decision was a landmark victory for Niger-Delta communities, but the victory was short-lived because SPDC failed to comply with decision of the court due to complicity by the executive arm of the FGN. Nothing was done to enforce this decision or to make SPDC comply with existing laws against gas flaring. Therefore, there appears to be little hope in approaching the court to compel the FGN or SPDC to implement the recommendations in the *EA Report*, even were it to be ratified by the National Assembly.

As with many jurisdictions, Nigeria as a political state appears reluctant to enforce reports where its agencies and officials are implicated. The Report submitted by the Human Rights Violations Investigation Commission (HRVIC) headed by the retired Justice of the Supreme Court of Nigeria (Chukwudifu Oputa), for example, has not

[20] H. Yusuf, 'Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria' (2008) 30(2) *Law and Policy* 30 (2) 194-226. See also, M. Vile, *Constitutionalism and the Separation of Powers* (1967) Clarendon Press, Oxford.
[21] *Jonah Gbemre vs. Shell Petroleum Development Company (Nigeria) Limited & Ors*. Unreported Suit No. FHC/B/CS/53/05 delivered on the 14th of November, 2005.
[22] *Constitution of the Federal Republic of Nigeria* (1999), Sections 33(1) and 34(1). See also *African Charter on Human and People's Rights*, Articles 4, 16 and 24.

been reviewed let alone implemented.[23] There is little precedent of the FGN faithful implementing recommendations submitted to it whether in whole or part. Therefore, if the FGN fails to implement the UNEP *EA Report*, it appears that there is little to be done to compel it to do so, even were the judiciary to seek to compel it to do so.

Failure to Implement and International Enforcement

An interesting question that remains is whether the *EA Report* creates any binding international obligation on Nigeria? The answer to this is negative as it does not constitute a bilateral agreement or treaty. Furthermore, UNEP cannot be regarded as an international organisation. It is rather a programme of the United Nations in the area of environmental development.[24] As a result, the *EA Report* is not binding on Nigeria. Invoking international legal principles such as the 'the no harm rule' or 'state responsibility'[25] to compel Nigeria to implement the Report's recommendations should prove futile as no harm has been done to the environment of another state. Before these international legal principles can be invoked, there must have been harm caused to the environment of another country[26] and this is not the case in respect of the oil pollution in Ogoniland. However, if it were possible to regard the grievous environmental damage in Ogoniland as crime against humanity based on the findings contained in the *EA Report*, it is may be possible to compel the FGN and SDPC to implement the *EA Report*'s recommendations and compensation could feasibly be awarded by the International Criminal Court in this regard. Therefore, making environmental damage by government, it's agencies and private entities a crime against humanity requires further research in legal scholarship.

[23] The Commission is regarded as 'The Oputa Panel'. The Report titled *Human Rights Investigation Violation Investigation Commission of Nigeria* is available at http://www.nigerianmuse.com/ nigeriawatch/oputa/.
[24] See generally the activities of the United Nations Environment Programme (http://www.unep.org/).
[25] P. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2001) OUP, Oxford.
[26] See: *Trail Smelter Case* (United States v Canada) (1941), Vol III *Reports of International Arbitral Awards (1905-1982)* (2006) United Nations.

Conclusion

It is evident that an attempt to frustrate the cleanup of Ogoniland by the FGN and SDPC will aggravate civil unrest in the Niger Delta. More attacks on facilities of the NNPC and SDPC are imminent. The FGN should as soon as possible adopt the recommendations in the UNEP *EA Report*, by setting up appropriate authorities for its implementation. Furthermore, there should be transparency in the review of the *EA Report* by the Nigerian Senate, through involving the indigenes of the Ogoniland as members of the review committee. This would also aid in avoiding further allegations of marginalisation. If it is not realistic that the initial capital of US$ 1 billion can be contributed by the FGN and SDPC, the Nigeria Government may seek alternative sources. Nigeria is a member of the *United Nations Framework Convention on Climate Change* and the *Kyoto Protocol*. It is eligible as a developing country and a party of the *Kyoto Protocol* to apply for funding to 'finance concrete adaptation projects and programmes' such as the restoration of the mangroves in Ogoniland.[27] Nigeria could also seek to attract Clean Development Mechanism projects under the *Kyoto Protocol* (subject to willing developed country partners of course) to address some of the activities associated with cleaning up Ogoniland. Furthermore, Nigeria could also apply to the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) for funding to implement programmes aimed at restoring Ogoniland's mangroves, which would qualify as National Programmes for Reducing Emissions from Deforestation and forest Degradation (REDD+).[28] These types of projects would not only be beneficial for Ogoniland, but the global community as a whole, as they have the capacity to remove or reduce greenhouse gases from the atmosphere.

Notwithstanding all my criticisms levelled against the FGN, it should perhaps be commended for requesting UNEP to carrying out the EA in Ogoniland. It is just hoped that that the so-called Nigerian factors[29] do not undermine the implementation of the *EA Report*'s recommendations.

[27] Kyoto Protocol, Article 12. See further: A. Macdonald, 'Improving or Disproving Sustainable Development in the Clean Development Mechanism in the Midst of a Financial Crisis?' (2010) 6(1) *Law, Environment and Development Journal* 1.
[28] See generally on the activities UN-REDD Programme (http://www.un-redd.org).
[29] These are factors responsible for economic sabotage and mediocrity such as corruption, ethnic discrimination and politics to mention but a few.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: NIGERIA
Legal Developments, 2009-2011

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Introduction

Under the general powers conferred on the Minister, Federal Ministry of Environment (FMoEN), by section 34 of the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act* (2007), thirteen Regulations were signed into law on 28 April 2011 and published in the *Federal Republic of Nigeria Official Gazette* (Abuja) on 9 May 2011. These are additional to an earlier set of eleven Regulations made by the same Minister, which were signed into law on 30 September 2009 and published in the *Federal Republic of Nigeria Official Gazette* between 2-20 October 2009. This Country Report briefly presents a general overview of recent legal and policy initiatives facilitated by the National Environmental Standards and Regulations Enforcement Agency (NESREA).

The Nigerian Context

The Federal Republic of Nigeria is located in the West African Sub-Region. It is bordered by the North Atlantic Ocean to the south, Benin Republic to the west and Cameroon to the east. Nigeria comprises of 910,770 sq km land area and 13,000 sq km water area. Under the *National Environmental (Coastal and Marine Area Protection) Regulations* (2011), 'the coastal zone stretches within 500 meters of high tide line on the landward side'. The country is richly endowed with natural resources, including biological, physical, mineral and energy resources. Its climate varies from

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equatorial in the south, tropical in the middle belt and arid in the north. The terrain is varied with rugged hills, undulating slopes, gullies, water-logged areas (wetlands/Fadamas), flat and undulating land surfaces. The major natural resources include forests, crude oil, natural gas, solid minerals (such as bitumen, tin, limestone, columbite, iron ore and coal) and fisheries. Major industries are petroleum, agro-processing and manufacturing, agriculture, iron and steel processing, plastics, pharmaceuticals and textiles. Agriculture and petroleum stand out as mainstay of the nation's economy. Since the 1970s, oil has been the lead revenue earner bringing with it environmentally destructive industrial activities.

The critical environmental problems the country faces are: waste management; sanitation (especially in city centers and periphery-urban slums); environmental degradation (including desertification, flood, erosion and deforestation); oil and gas pollution; loss of biodiversity; environmental data management; the lack of enforcement of environmental laws; and climate change consequences.

Nigeria came into existence in 1914 with the amalgamation of the Southern and Northern Protectorates by the British Colonial Administration. It was not until 1988 that serious attention was given to the protection of the nation's environment. The country's environmental paradigm shift was prompted by the 1987 illegal dumping of toxic wastes at the Koko Port, situated in the south of the country. The *Federal Environmental Protection Agency Act* (1988) (*FEPA Act*) established the Federal Environmental Agency (FEPA) with responsibility for monitoring and enforcing environmental protection measures. In 1999, the Federal Ministry of Environment was created to boost commitment to environmental protection. The creation of a Federal Ministry of Environment, with an expanded mandate and a direct voice in the Federal Cabinet, is expected to mark a turning point in environmental management. Section 20 of the *Constitution of the Federal Republic of Nigeria*, expresses that: 'The State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. It was hoped that this constitutional expression would enable the nation's environmental management vision, '[t]o ensure a cleaner and healthier environment for Nigerians'. It is however questionable whether this provision in the non-justiciable Chapter II of the *Constitution* can promote the interest of the environment and the people.

The National Oil Spill Detection and Response Agency (NOSDRA) is charged with responsibility for the implementation of the *National Oil Spill Contingency Plan*. The National Environmental Standards and Regulations Enforcement Agency (NESREA) has responsibility for the enforcement of standards, regulations and all national laws and international agreements and treaties on environment to which Nigeria is signatory. NESREA takes the driving seat as the 'Chief Environmental Enforcement Agency of the Federal Government'. Its stated mission is '[to] inspire personal and collective responsibility in building an environmentally conscious society for the achievement of sustainable development in Nigeria'. Some State governments have established ministries of environment in addition to the State Environmental Protection Agency.

The *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (2007) superseded the FEPA Act (1988)*. Section 8(k) of the statute mandates NESREA to present for the Minister's approval proposals for guidelines, regulations and standards on environment matters (excluding the oil and gas sector), such as: atmospheric protection; air quality; ozone depleting substances; noise control; effluent limitations; water quality; waste management and environmental sanitation; erosion and flood control; coastal zone management; dams and reservoirs; watersheds; deforestation and bush burning; other forms of pollution and sanitation, and the control of hazardous substances and removal control methods. Section 34(c) empowers the Minister to make regulations 'generally for the purposes of carrying out or giving full effect to the functions of the Agency' under the Act.

2009/2011 Environmental Regulations

Exercising the above powers accorded to it under *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act* (2007), NESREA published the following broad array of sectoral regulations in 2009:

- *National Environmental (Wetlands, River Banks and Lake Shores Protection) Regulations*;
- *National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations;*
- *National Environmental (Sanitation and Wastes Control) Regulations*;

- *National Environmental (Permitting and Licensing System) Regulations*;
- *National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations*;
- *National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations*;
- *National Environmental (Ozone Layer Protection) Regulations*;
- *National Environmental (Food, Beverages and Tobacco Sector) Regulations*;
- *National Environmental (Textile, Wearing Apparel, Leather and Footwear Industry) Regulations*;
- *National Environmental (Noise Standards and Control) Regulations*; and
- *National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations*.

In May 2011, the following additional thirteen regulations were published:

- *National Environmental (Protection of Endangered Species in International Trade) Regulations*;
- *National Environmental (Soil Erosion and Flood Control) Regulations*;
- *National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations*;
- *National Environmental (Desertification Control and Drought Mitigation) Regulations*;
- *National Environmental (Surface and Groundwater Quality Control) Regulations*;
- *National Environmental (Coastal and Marine Area Protection) Regulations*;
- *National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations*;
- *National Environmental (Electrical/Electronic Sector) Regulations*;
- *National Regulations (Non-Metallic Minerals Manufacturing Industries Sector) Regulations*;
- *National Environmental (Construction Sector) Regulations*;
- *National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations*;
- *National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries Sector) Regulations*; and

- *National Environmental (Domestic and Industrial Plastic, Rubber and Foam Sector) Regulations*.

Inherent in these Regulations are salient areas of synergy and features relevant for regulating the environment. Some points of synergy include: the adoption of licensing and permit system; the inclusion of the polluter pays principle; the use of environmental management plans; the introduction of effluent pollution abatement measures; the use of monthly discharge monitoring report; the recognition of environmental auditing; obligations to embrace best practices; and the implementation of stiffer fines, punishment and sentencing; and capacity building initiatives.

Domesticating Multilateral Environmental Agreements

Section 12(1) of the *Constitution* provides that, 'No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. The recent regulations are significant responses to need for the country to domesticate some of the critical multilateral environmental agreements (MEAs) to which Nigeria is a party. The following are some of the major international and regional environmental treaties that Nigeria has ratified or acceded to:

- *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*;
- *Africa-Eurasia Migratory Water Birds Agreement*;
- *Convention on Migratory Species*;
- *Convention to Regulate International Trade in Endangered Species of Flora and Fauna* (*CITES*);
- *Abidjan Convention on Marine and Coastal Environment*;
- *United Nations Convention on the Law of the Sea*;
- *Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal*;
- *Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement of Hazardous Wastes within Africa*;
- *Vienna Convention for the Protection of the Ozone Layer*;
- *Montreal Protocol on Substances that Deplete the Ozone Layer*;

- *United Nations Framework Convention on Climate Change*;
- *Kyoto Protocol*;
- *Convention on Biological Diversity*;
- *Bio-Safety Protocol*;
- *Stockholm Convention on Persistent Organic Pollutants*; and
- *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*.

Scrutiny of the recent twenty-four national environmental regulations shows that international treaties largely set the tone for the new laws. Nigeria has taken a bold step with the recent environmental regulations, filling the historic regulatory gap in the country's environmental management system.

Route of Subsidiary Legislation

In the future, this large volume of regulations will largely define the country's environmental legal instruments. A strategy of subsidiary legislation through regulation under the principal statute is informed by the comparative advantage inherent in the process of 'subsidiary legislation' law-making, namely, avoiding the delay/long process of passage of bills through the national legislature. The new regulations reveal clearly that there is now more cohesion and coherence in the country's environmental regulation. This is a welcome development, and the barely four-year old NESREA is determined to prove that it is up to the task and is unequivocal about the protection of the nation's environment. Nigeria now has stringent environmental protection laws and regulations to control human and corporate business activities adversely impacting on the environment.

NESREA and Inter-Agency Cooperation

Much of the success of NESREA will however depend on inter-agency cooperation. At the Murtala Muhammed International Airport (Lagos) on 18 April 2011, a woman who attempted to smuggle a rare turtle out of the country was arrested by officials of the Nigeria Quarantine Service. The seized turtle was transferred to the Oyo State National Park in Ibadan. The spirit of cooperation and collaboration amongst members of the Inter-Governmental Agencies, including the Nigeria Customs, Immigration, Nigeria Quarantine Service, NESREA and others, to halt trading in

endangered species, has increased. NESREA observed that public awareness and training programmes put in place have contributed to the new vigilance by staff members of the Inter-Agency committee on *CITES* at the nation's borders, the airports and seaports. The trade suspension placed on Nigeria under *CITES* was lifted in August 2011. The new spirit of collaboration has ushered in a reinvigorated era of *CITES* implementation. Efforts for effective *CITES* enforcement and the new stringent laws and regulations through the *National Environmental (Protection of Endangered Species in International Trade) Regulations* (2011) influenced the lifting of trade suspension imposed on Nigeria by the *CITES* Standing Committee.

'Oil and Gas' Exclusions from NESREA's Mandate

The 2009/2011 environmental regulations deal with challenges ranging across wetlands, river banks and lake shores protection; watershed, mountainous, hilly and catchment areas; sanitation and wastes control; permitting and licensing systems; access to genetic resources and benefit sharing; mining and processing of coal, ores and industrial minerals; ozone layer protection; food, beverages and tobacco sector; textile, wearing apparel, leather and footwear industry; noise standards and control; chemical, pharmaceutical, soap and detergent manufacturing industries; protection of endangered species in international trade; soil erosion and flood control; control of bush, forest fire and open burning; desertification control and drought mitigation; surface and groundwater quality control; coastal and marine area protection; control of vehicular emissions from petrol and diesel engines; electrical/electronic sector; non-metallic minerals manufacturing industries sector; construction sector; standards for telecommunications and broadcast facilities; base metals, iron and steel manufacturing/recycling industries sector; and the domestic and industrial plastic, rubber and foam sector.

However, this coverage raises vital issues. What is the scope of the regulated community under the new regulations? Who is 'in' and who is 'out'? What is the rationale behind the exclusion of any particular industrial sector from governance by the nation's chief environmental enforcement agency, NESREA?

Oil and gas operations are expressly excluded from NESREA's regulatory mandate. Section 8(k) of the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act* states that the NESREA shall make proposals for new or

amended guidelines, regulations and standards on the environment, other than in the oil and gas sector. The functions of the Agency specified under the Act are exclusive of 'the oil and gas sector'.[467] The power of the Agency is also restricted concerning the oil and gas sector.[468] This exclusion will fuel criticism in the wake of the new Regulations released by NESREA, particularly because these are relatively stringent. One is bound to wonder why the oil and gas sector which is critical to the nation's economy, but is notoriously environmentally destructive, will be governed by 'softer' laws, regulations and the supervision of the Department of Petroleum Resources (DPR) with limited oversight of oil spills by NOSDRA, an arm of the Federal Ministry of Environment.

There is accordingly a need to review the environmental governance provisions that exclude the oil and gas sector from the purview of NESREA. Existing laws such as the *Petroleum Act* (2004), *Oil Pipelines Act* (2004) and *Petroleum (Drilling and Production) Regulations* (1969), which control activities of the petroleum companies, should ideally be inferior to NESREA's broader environmental laws and regulations. Moreover, on a strict interpretation of the law, DPR's powers are subordinate to NESREA, which operates under a law that states 'an act to provide for the establishment of the National Environmental Standards and Regulations Enforcement Agency charged with responsibility for the protection and development of the environment in Nigeria and for related matters', effectively becoming the nation's Environment Ombudsman and Chief Environmental Enforcement Agency.

Implications for the 2011 UNEP Environmental Assessment of Ogoniland

On 14 August 2011, the United Nations Environment Programme (UNEP) submitted its *Environmental Assessment of Ogoniland* (the Report) to the Federal Government of Nigeria (FGN). UNEP had carried out an independent study of an area of 1,000 square kilometers in Ogoniland Rivers State, the site of oil industry operations for over 60 years. Ogoniland not only evokes sad memories of the judicial murder of environmental activist, Ken Saro Wiwa and nine others, but also sad recollections of large scale environmental pollution, ecosystems destruction and systematic human rights abuses.

[467] Section 7(g),(h),(j) and (k).
[468] Section 8(g),(l),(m) and (n).

The UNEP project surveyed 122 km of pipeline rights of way and visited oil spill sites, oil wells and other oil-related facilities in Ogoniland, including decommissioned and abandoned facilities, based on information provided by: the Government Regulators; Shell Petroleum Development Company (Nigeria) Ltd (SPDC); and communities living in and around Ogoniland. The UNEP's field observations and scientific investigation found that oil contamination in Ogoniland is widespread and severely impacting many components of the environment. Although the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity and the Ogoni people (and the Niger Delta generally) live with this pollution every day. The Report concludes that 'the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate' and that 'industry best practices and SPDC's own procedures have not been applied, creating public safety issues'.

The Report identified eight emergency measures, from a duty of care point of view, which warrant immediate action:

- Ensure that drinking water wells where hydrocarbons were detected are marked and people are informed of the danger;
- Provide adequate sources of drinking water to those households whose drinking water supply is impacted;
- People in Nsisioken Ogale who have been consuming water with benzene over 900 times the WHO guideline are recorded on a medical registry and their health status assessed and followed up;
- Initiate survey of all drinking water wells around those wells where hydrocarbons were observed and arrange measures (1-3 above) as appropriate based on the results;
- Post signs around all sites identified as having contamination exceeding intervention values warning people not to fish, swim or bathe in these;
- Inform all families whose rainwater samples tested positive for hydrocarbons and advise them not to consume the water; and
- Mount a public awareness campaign to warn individuals who are undertaking artisanal refining that such activity are damaging their health.

It noted that environmental restoration of Ogoniland 'could prove to be the world's most wide-ranging and long term oil clean-up exercise ever undertaken if contaminated drinking water, land, creeks and important ecosystems such as

mangroves are to be brought back to full productive health'. It estimates that this restoration process could take up to 30 years and that it will cost $1 billion (USD) in the first 5 years. The Report further found that overlapping authorities and responsibilities between ministries and a lack of resources within key agencies, has implications for environmental management on-the-ground, including enforcement.

The oil and gas sector must be brought within Nigeria's holistic environment and regulatory framework. It does not make sense or promote effective environmental governance to exclude the oil and gas sector from the NESREA regulatory regime. There are inextricable linkages between the diverse sectors within the nation's environment. If the comprehensive Report is read in tandem with the totality of the newly released environmental regulations and against the backdrop of NESREA's surveillance, monitoring, inspection, and enforcement roles, it is obvious that this exclusion has contributed largely to the operational style of the oil and gas sector.

Conclusion

A great deal of attention and detail has gone into the drafting of the country's latest multiple environmental protection regulations. The NESREA has brought to fruition the long awaited comprehensive legal instruments of a world-class standard, providing greater potential for the protection of the environment and enhancement of the goals of sustainable development in the country. Nigeria's environmental values expressed through the *National Policy on Environment* have been resoundingly articulated in the recent regulations. However, it is imperative that the activities of the regulated community and the authorities towards achieving the stipulated goals be congruent with the country's long-term environmental values.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: PHILIPPINES
Climate Change, Sustainability and Resilience

Gloria Estenzo Ramos*

Introduction

The World Risk Index 2011[1] (Index), conducted by the UN University Institute for Environment and Human Security in Germany, ranks the Philippines as the third most vulnerable to disaster risks and natural hazards. Manila, the densely populated capital, is particularly noted as of 'extreme risk'.

Considered a disaster epicenter, the Philippines is the world's top recipient of cyclone occurrence, buffeted by at least twenty typhoons annually. Damage to infrastructure and agriculture this year from typhoon Pedring alone reached P12.34 billion,[2] higher than the P10.9 billion[3] damage from the 2009 typhoon Ondoy.[4]

With climate change, the frequency and severity of cyclones and other devastating consequences are inevitable, a fact acknowledged by the Philippine *National Framework Strategy on Climate Change 2010-2020* (*Framework Strategy*):

> 'The Philippines, an archipelagic nation of over 90 million people, now faces threats from more intense tropical cyclones, drastic changes in rainfall

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[1] The *Index* (available at www.ehs.unu.edu) shows the risk of various countries and regions from disaster, with a focus on 'exposure, susceptibility of the population, coping capacities and adaptation strategies'.
[2] Equivalent to almost US$285m.
[3] Equivalent to US$ 252m.
[4] See further: http://www.abs-cbnnews.com/nation/regions/10/07/11/typhoon-pedring-damage-surpasses-ondoy.

> patterns, sea level rise, and increasing temperatures. All these factors contribute to serious impacts on our natural ecosystems – on our river basins, coastal and marine systems, and their biodiversity – then cascading to impacts on our food security, water resources, human health, public infrastructure, energy and human settlements.
>
> Indeed it is unequivocal that climate change will have serious implications on the country's efforts to address poverty and realize sustainable development for current and future generations – ultimately making climate change an issue of intergenerational equity.'[5]

Climate change does exacerbate the chronic poverty challenge confronting the country. The worst climate victims are the poor and those with no voice in governance. As of 2009, 26.5 percent of the population lived below the national poverty threshold,[6] 8.4 years behind the *Millennium Development Target* to reduce poverty by 50 percent.[7] A recent survey conducted by the Social Weather Stations, showed 52 percent of families rated themselves as poor.[8]

Participant states in the 2005 World Conference on Disaster Reduction, and signatories to the *Hyogo Declaration*, affirmed that '[d]isasters have a tremendous detrimental impact on efforts at all levels to eradicate global poverty; the impact of disasters remains a significant challenge to sustainable development'. Philippine officials know only too well that calamities push back efforts to reduce poverty and attain targets set under the *Millennium Development Goals*. The 'adverse weather conditions which negatively affected the fishing subsector' is among the official justifications for the slow growth in the Philippine economy.[9] Climate change also worsens biodiversity loss and destruction. The Philippines, as a mega-biodiversity hotspot, suffers from 'demands arising from development and utilization activities, population expansion, poor environmental protection, and external factors such as climate change, however, have placed the country's environment and natural resources under grave threat'.[10]

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[5] Preface to the *Index* (available at www.ehs.unu.edu).
[6] See further: http://www.nscb.gov.ph/headlines/StatsSpeak/2011/111411_rav_joe_mv.asp#tab7.
[7] See further: http://www.nscb.gov.ph/headlines/StatsSpeak/2011/111411_rav_joe_mv.asp.
[8] Third Quarter 2011 Social Weather Survey, fielded over September 4-7, 2011 (available at www.sws.org).
[9] See further: http://www.neda.gov.ph/econreports_dbs/NIA/DG_Statements/DG%20Press%20 Statementniaq22011.pdf.
[10] *Philippine Development Plan*, 2011-2016, Chapter 10.

A signatory to various international conventions including the *United Nations Framework Convention on Climate Change*, the Philippines has a strong legal framework and mechanisms in carving the path towards sustainable development and in addressing climate change and poverty. The country is besieged and its progress retarded by issues of ineffective and inefficient governance, patronage politics, poverty issues, population pressures and corruption.[11]

Laws Addressing Climate Change

For decades, climate change was relegated into the background as a non-issue in the Philippines. In 2009, Typhoon Ondoy provided the much-needed wake-up call for the Government and stakeholders to 'get their act together' and pro-actively respond to climate change and instill governance reforms. Laws specifically addressing climate change (the *Philippine Climate Change Act* (2009))[12] and disaster risk reduction and management (the *Disaster Risk Reduction Management Act* (2010))[13] were enacted. The *Philippine Climate Change Act* mainstreamed climate change into government policies. The *Disaster Risk Reduction Management Act* strengthened the disaster risk reduction and management system, provided for development of the national disaster risk reduction and management framework, and institutionalised the disaster risk reduction and management plan. Both laws highlight the crucial role of local government units[14] (LGU) and local stakeholders in responding to climate change and disaster and vulnerability risk reduction.

Responsibility for ensuring the promotion of public health, safety and security of civil society as well as sustained service delivery for efficient and effective governance within their territorial jurisdictions lies with the LGU. Local Governments are duty-bound to be the first responders in cases of crises and emergencies since the local chief executive sits as chair of the Local Disaster Coordinating Council (LDCC)[15] with membership drawn from both the public and the private sectors. Under section 4 of

[11] In the *Corruption Perception Index* (2011) (available at cpi.transparency.org/cpi2011/results/#CountryResults), the Philippines placed 129th out of 182 countries, with a score of 2.6 in a scale of 0-10. In 2010, it ranked 134th among 178 countries, with a score of 2.4.
[12] Republic Act No. 9729.
[13] Republic Act No. 10121.
[14] Political and geographical units in the Philippines. As of June 30, 2010, local government units consist of 80 provinces, 122 cities, 1512 municipalities and 42,025 barangays. See further: www.dilg.gov.ph).
[15] Now known as Local Disaster Risk Reduction and Management Council.

the *Implementing Rules and Regulations* (*IRR*) of the *Philippine Climate Change Act*, that created the Climate Change Commission and provided for the mainstreaming of climate change into government policy formulations, LGUs are to be the frontline agencies in the formulation, update, planning, and implementation of climate change action plans in their respective areas. LGUs are also responsible for mobilizing and allocating necessary personnel, resources and logistics to effectively implement their respective action plans.[16]

Section 2 of the *Philippine Climate Change Act* provides that '[i]t shall be the policy of the State to enjoin the participation of national and local governments, businesses, nongovernment organizations, local communities and the public to prevent and reduce the adverse impacts of climate change and, at the same time, maximize the benefits of climate change and … to incorporate a gender-sensitive, pro-children and pro-poor perspective in all climate change and renewable energy efforts, plans and programs'.

Under the *Disaster Risk Reduction Management Act*, a Local Disaster Risk Reduction and Management Fund (LDRRM) is required for each LGU, where not less than 5 percent of the internal revenue allotment must be set-aside for this purpose. 70 percent of a LDRRM Fund may be used for pre-disaster activities to make the LGU's more proactive in disaster risk reduction.

Policies, structures, coordination mechanisms and programs with continuing budget appropriation to respond to climate change and disaster risk reduction and management are now institutionalized. Key implementing bodies and coordinating councils are established at both national and local levels.

Tasked to 'coordinate, monitor and evaluate the programs and action plans of the government relating to climate change', the Climate Change Commission (Commission), has promulgated the *Framework Strategy* and recently the *National Climate Change Action Plan* (*Plan*), as the road map for climate change adaptation and mitigation.[17]

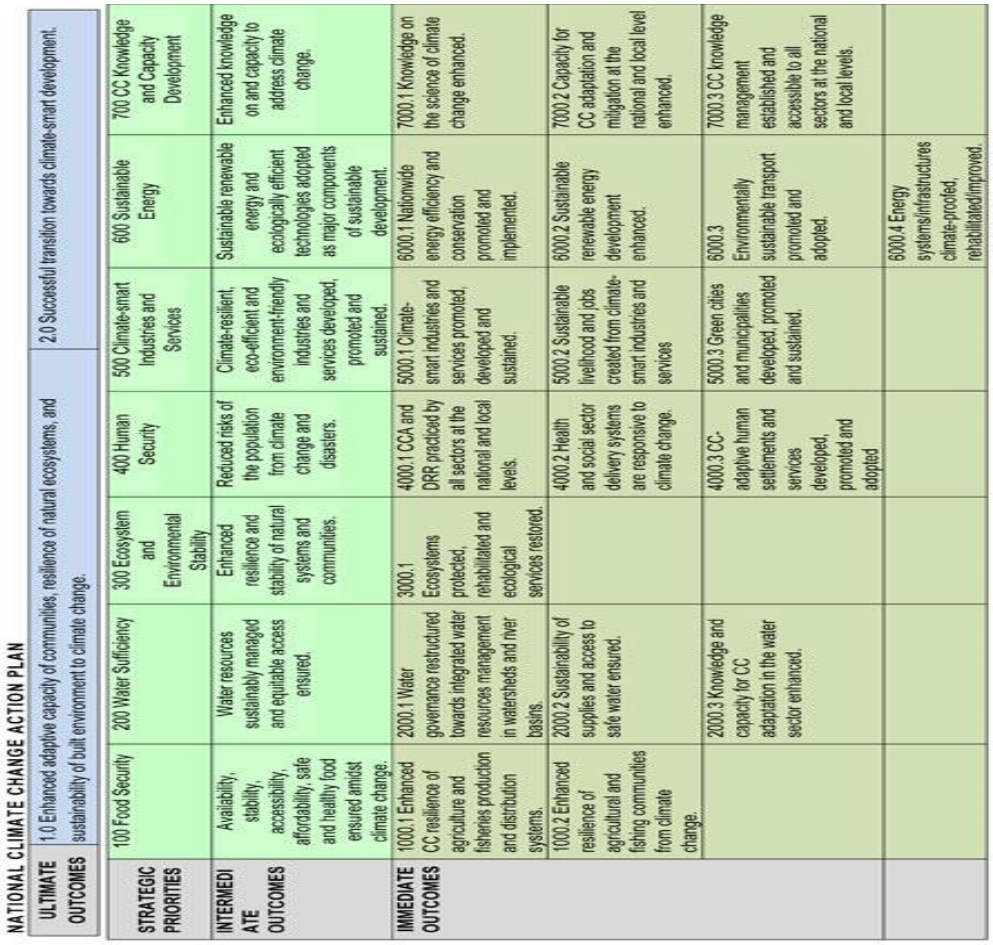
[16] See further: http://ncr.dilg.gov.ph/program2.html.
[17] See further: http://climate.gov.ph.

Recent Developments in Pursuing Climate Change Solutions

Recent Policy and Programs Emanating from the Executive Department

National Government

The adoption of the *National Climate Change Action Plan*[18] on 22 November 2011 caps the gigantic strides taken by the Philippine Government in recent years in putting in place the policies, institutions and mechanisms to fight climate change, build a climate-resilient citizenry and institutions and promote sustainable development. The ultimate goal of the Plan is 'to build the adaptive capacities of women and men in their communities, increase the resilience of vulnerable sectors and natural ecosystems to climate change and optimize mitigation opportunities towards gender-responsive and rights-based sustainable development'.



NATIONAL CLIMATE CHANGE ACTION PLAN

ULTIMATE OUTCOMES	1.0 Enhanced adaptive capacity of communities, resilience of natural ecosystems, and sustainability of built environment to climate change.					2.0 Successful transition towards climate-smart development.			
STRATEGIC PRIORITIES	100 Food Security	200 Water Sufficiency	300 Ecosystem and Environmental Stability	400 Human Security	500 Climate-smart Industries and Services	600 Sustainable Energy	700 CC Knowledge and Capacity Development		
INTERMEDIATE OUTCOMES	Availability, stability, accessibility, affordability, safe and healthy food ensured amidst climate change.	Water resources sustainably managed and equitable access ensured.	Enhanced resilience and stability of natural systems and communities.	Reduced risks of the population from climate change and disasters.	Climate-resilient, eco-efficient and environment-friendly industries and services developed, promoted and sustained.	Sustainable renewable energy and ecologically efficient technologies adopted as major components of sustainable development.	Enhanced knowledge on and capacity to address climate change.		
IMMEDIATE OUTCOMES	1000.1 Enhanced CC resilience of agriculture and fisheries production and distribution systems.	2000.1 Water governance restructured towards integrated water resources management in watersheds and river basins.	3000.1 Ecosystems protected, rehabilitated and ecological services restored.	4000.1 CCA and DRR practiced by all sectors at the national and local levels.	5000.1 Climate-smart industries and services promoted, developed and sustained.	6000.1 Nationwide energy efficiency and conservation promoted and implemented.	7000.1 Knowledge on the science of climate change enhanced.		
	1000.2 Enhanced resilience of agricultural and fishing communities from climate change.	2000.2 Sustainability of supplies and access to safe water ensured.		4000.2 Health and social sector delivery systems are responsive to climate change.	5000.2 Sustainable livelihood and jobs created from climate-smart industries and services	6000.2 Sustainable renewable energy development enhanced.	7000.2 Capacity for CC adaptation and mitigation at the national and local level enhanced.		
		2000.3 Knowledge and capacity for CC adaptation in the water sector enhanced.		4000.3 CC-adaptive human settlements and services developed, promoted and adopted	5000.3 Green cities and municipalities developed, promoted and sustained.	6000.3 Environmentally sustainable transport promoted and adopted.	7000.3 CC knowledge management established and accessible to all sectors at the national and local levels.		
						6000.4 Energy systems/infrastructures climate-proofed, rehabilitated/improved.			

[18] See further: http://climate.gov.ph/index.php/en/nccap-executive-summary.

The *Plan* is anchored on seven priority programs: Food Security; Water Sufficiency; Environmental and Ecological Stability; Human Security; Sustainable Energy; Climate Smart Industries; Services and Knowledge; and Capacity Development. The details are set out in the table above.

Some national agencies are also adopting initiatives to build the capacity of LGUs to mainstream climate change and disaster risk reduction and management. First, the Department of Interior and Local Government,[19] has issued guidelines, conducted capacity-building training and awarded grants and incentives, such as the Performance Challenge Fund aimed at jumpstarting 'local development projects to attain the Millennium Development Goals, boost local economic development and Disaster Risk Reduction Management and Climate Change and Adaptation'.[20] Secondly, the Department of Environment and Natural Resources[21] (DENR) has set up an Environmental Compliance Assistance Center (ECA Center) at the Environmental Management Bureau in Quezon City to help LGUs comply with environmental regulations. It also established the LGU-dedicated ECA Center website.[22] Thirdly, the Cabinet of the President has been clustered to focus on key areas including climate change and mitigation.[23] Under *Executive Order* No. 43, signed by the President on 13 May 2011, the five Cabinet clusters are: Good Governance and Anti-Corruption; Human Development and Poverty Reduction; Economic Development; Security, Justice and Peace; Climate Change Adaptation and Mitigation. The Climate Change Adaptation and Mitigation cluster is chaired by the DENR Secretary with the Climate Change Commission functioning as secretariat. Finally, the *Philippine Development Plan 2011-2016*[24] has been institutionalized. Dubbed as President Aquino's Social Contract with the constituents, the *Philippine Development Plan* provides the framework of his administration with 'good governance and anti-corruption' as overriding themes. It supports and implements 'effective and responsive social safety nets that will support and capacitate the vulnerable sectors of the society in addressing not only poverty but also the devastating effects of climate change'.[25]

[19] See further: www.dilg.gov.ph.
[20] DILG, *Memorandum Circular* No. 2011-123, dated 31 August 2011.
[21] See further: www.denr.gov.ph.
[22] See further: www.emb.gov.ph/ecacenter.
[23] See further: http://www.gmanetwork.com/news/story/220714/news/nation/aquino-signs-eo-establishing-5-cabinet-clusters.
[24] Available at: http://devplan.neda.gov.ph/.
[25] See further: http://devplan.neda.gov.ph/about-the-plan.php.

Local Government – Islands of Good Governance and Climate Leadership

Albay province (in Bicol), Puerto Princesa City (in Palawan) and San Francisco municipality (in Cebu) are award-winning models of initiatives aimed at building the capacity of stakeholders to face the climate crisis and to integrate sustainability in their programs and projects. Participatory governance through active civil society engagement is a common thread that connects them.

Albay leads the way in disaster risk reduction and management practices. It was declared a 'Global Local Government Unit (LGU) model for Climate Change Adaptation' by the UN-ISDR and the World Bank in 2008. The province has boldly initiated many innovative approaches to tackling disaster risk reduction (DRR) and climate change adaptation (CCA) and continues to integrate CCA in its DRM structure.[26] Considered as a local government exemplar in CCA, it recently inaugurated the first-in-the-world Climate Change Academy for LGUs 'to develop integrated competencies and provide information and technology for building the resilience of communities to climate change impacts'.[27]

Puerto Princesa[28] has achieved numerous international, national and local awards for achieving a balance between development initiatives and environmental protection. It looks at multi-stakeholdership as the best approach to implementing local climate change mitigation actions.[29] The Municipality of San Francisco, received the United Nations Sasakawa Award for Disaster Risk Reduction in 2011. It has integrated its *5-year Risk Reduction and Management Plan* in its programs and projects down to the purok level.[30]

Pending Bill to Address Funding of Climate Change Adaptation

Senate Bill 2811 seeks to establish the People's Survival Fund (PSF), a special trust fund for financing adaptation programs and projects based on the *Framework on*

[26] Province of Albay, Philippines: Responding to the Challenges of Disaster Risk Reduction and Climate Change Adaptation (available at http://www.preventionweb.net/files/section/230_Philippinesalbaycasestudy.pdf).
[27] See further: http://www.pia.gov.ph/?m=1&t=1&id=65717.
[28] See further: http://www.puertoprincesa.ph.
[29] See further: http://kitakyushu.iges.or.jp/docs/demo/puerto_princesa_philippines/presentation.pdf.
[30] San Francisco *5 - Year Municipal Disaster Risk Reduction and Management (MDRRM) Plan* (2011-2015) (available at http://unisdrhpps.net/confluence/download/attachments/9994301/San_Francisco_MDRRM_Plan_Package.pdf?version=1).

Climate Change. The Bill, already passed on third and final reading at the Senate, now awaits approval by the Lower House of Congress before it becomes law.

A Test Case on Ecological Sustainability in Mining Zones

While laws and policies are in place to help the country adapt to climate change, reduce vulnerability and poverty and promote sustainability, the DENR (the country's primary enforcement agency) has come under fire for its indiscriminate issuing of mining permits and failure to enforce relevant environmental laws. Citizens are now seeking novel remedies under the *Rules of Procedure for Environmental Cases* (2010) (the *Rules*).[31]

In August, 2011, a petition[32] for the issue of the Writ of Kalikasan (Nature) and a Temporary Environmental Protection Order (TEPO) was filed by indigenous peoples, residents and non-government organizations to: (a) prohibit the DENR and Mines and Geosciences Bureau (MGB) from processing and considering all pending and new applications for mineral agreements or financial technical assistance agreements in the Philippines; and (b) stopping all mining operations in the Zamboanga Peninsula, including the mineral exploration of MSSON Mining in Midsalip's forest reserve or watershed area until all environmental concerns were sufficiently addressed. The environmental issues raised involved giving effect to the 'statutory definition of carrying capacity of our ecosystems and whether public respondents' mindless issuances of mining tenements in biologically diverse Zamboanga peninsula have violated the principle of non-regression'. As of March 2011, the total land area of 808,269.09 hectares or about 51 percent of the region's total landmass, which covered critical protected areas, is subject to potential mining. The Supreme Court granted the petition for a Writ of Kalikasan against the mining operations in the area. However, it did not issue a TEPO. Instead, it directed the respondents to submit a return of the writ. The Supreme Court has designated the Court of Appeals to handle the reception of evidence for the parties.

[31] These rules formed the focus of the Phillipine Country Report published in *IUCNAEL e-Journal* 2011(1).
[32] *Phil. Earth Justice Center, Inc., et al vs. Department of Environment and Natural Resources*, G.R. No. 197754 (available at http://www.elaw.org/system/files/Writ+of+Nature+%28Kalikasan %29+v.+Mining+Phils.pdf).

Except for a handful of extraordinary LGUs with action-oriented leaders, effective climate change response is still in an arena of plans and discussions. It remains to be seen whether the adoption of the *National Climate Change Action Plan*, like a magic wand, will stir the stakeholders into action and help provide the longed-for solutions to the vulnerability and sustainability trials that the Philippines must surmount?

Against the backdrop of the country's dynamic governance structure, complex political system, poverty, political stability problems and the prevailing cultural values, the challenges to integrate climate change adaptation and DRRM in programs and projects are enormous. The President has to exhibit the political muscle that his predecessors failed to exercise, to make the LGUs key players in this process - and embed a participatory, transparent and accountable mindset of governance under the rule of law. The DILG Secretary has to start pressuring local chief executives to mainstream climate change in governance and to ensure that multi-sectoral local development councils (as policy-making and program monitoring bodies of each LGU) and the local DRRM councils are functional. Policy pronouncements, policies and laws for effective climate change response should be cascaded down to the stakeholders of the smallest political and geographical units, pursuing 'appropriate disaster reduction measures at that level to enable the communities and individuals to reduce significantly their vulnerability to hazards'.[33]

The new administration under President Benigno Aquino III has shown there is light at the end of the tunnel in societal reforms. There is a bigger 'space' for civil society engagement with Government, a fact that most civil society members acknowledge. President Aquino's actions and policies in curbing corruption, prosecuting erring public officials and widening the democratic space for governance by engaging with civil society, have generated increased trust from the citizens and even investors that genuine reforms can take place under the new administration.

In addition to initiatives by the national government, and perhaps as a sign of increased trust in the policies of the Aquino administration, foreign-assisted climate

[33] *Hyogo Declaration*.

change adaptation programs and projects are currently being implemented.[34] These are expected to help in strengthening community level capacities to reduce disaster risk at the local level.

It is imperative that the national administration re-examine its policies in promoting mining and fossil fuel industries, which are not sustainable for the longer term and may compound the miseries of devastated communities and worsen the ecological impacts. The administration's flagship programs must be congruent with the vision, goals and programs outlined in the *Philippine Development Plan* including incorporating the integrated ecosystem approach to attain sustainable development and reduce poverty. The clustering of the Cabinet hopefully paves the way for a more focused assessment and implementation of the over-all goals of this *Plan*.

Since time is of the essence, it is imperative that urgent concerted actions from all sectors are effected in moving towards long-term sustainability of the Government's policies and programs, and strengthening the capacity of its inhabitants and institutions in stemming the disastrous effects of climate change in the Philippines.

Possible New Research Agenda's for the IUCNAEL

There is a marked resistance by the influential policy makers towards effecting the goals and visions enunciated by the *Philippine Development Plan* and the *National Climate Change Action Plan*. Research and collaborative work on the *Plan*'s seven priority programs of Food Security, Water Sufficiency, Environmental and Ecological Stability, Human Security, Sustainable Energy, Climate Smart Industries and Services and Knowledge and Capacity Development would be a significant boost in educating stakeholders and in making the *Plan* a living reality in the country's climate-challenged communities.

[34] These include: the Millennium Development Goals Fund 1656: Strengthening the Philippines' Institutional Capacity to Adapt to Climate Change funded by the Government of Spain; the Philippine Climate Change Adaptation Project (which aims to develop the resiliency and test adaptation strategies that will develop the resiliency of farms and natural resource management to the effects of climate change) funded by the Global Environmental Facility(GEF) through the World Bank; the Adaptation to Climate Change and Conservation of Biodiversity Project and the National Framework Strategy on Climate Change (envisioned to develop the adaptation capacity of communities), both funded by the GTZ, Germany. See further: http://kidlat.pagasa.dost.gov.ph/cab/climate_change /Impacts.html).

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: SOUTH AFRICA
Recent Judicial, Legislative and Policy Developments

Michael Kidd*

Introduction

This report will be a brief overview of the more important developments in environmental law in South Africa during 2011. The year was relatively quiet and a lot of attention was given to the country's hosting of the UNFCCC COP17 at the end of the year. There were, however, some developments that warrant discussion. I will consider these under four headings: cases, legislation, policy and draft legislation.

Cases

The most important cases of 2011 were the twin Supreme Court of Appeal decisions in *Maccsand (Pty) Ltd and another vs. City of Cape Town and Others*[1] and *Louw NO vs. Swartland Municipality.*[2] I discussed the decisions in these cases in the courts *a quo* in a previous country report for this review.[3] Essentially, the central issue in both cases was whether a decision by the (national) Department of Minerals granting mining rights made it unnecessary for the applicants to apply for appropriate land-use planning (to the relevant local government bodies in terms of provincial legislation) where the land was not currently zoned for mining, which was the case in both of these cases. The Department was of the view that the granting of mining rights in terms of the *Mineral and Petroleum Resources Development Act* (*MPRDA*)[4]

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[1] [2011] ZASCA 141.
[2] [2011] ZASCA 142.
[3] *IUCNAEL eJournal*, Issue 2011(1).
[4] Act 28 of 2002.

effectively 'trumped' the planning legislation (the *Land Use Planning Ordinance in the Western Cape* (*LUPO*)), making it unnecessary for the holder of such rights to get planning permission. In the courts *a quo*, the Department had been unsuccessful - the courts had found that the planning legislation was not trumped by the *MPRDA* and that the rights holders had to obtain the relevant planning permission.

On appeal to the Supreme Court of Appeal, the court held in *Maccsand* that:

> 'not one of the considerations that the Minister is required to take into account is concerned with municipal planning. She does not have to, and probably may not, take into account a municipality's integrated development plan or its scheme regulations.'[5]

The court thus held that 'it cannot be said that the *MPRDA* provides a surrogate municipal planning function that displaces *LUPO* and it does not purport to do so'.[6] This means that, once a mining right has been issued, the holder will not be allowed to mine unless *LUPO* permits such mining.

The Department argued that this finding leads to a duplication of functions that the legislature could not have intended, but the court correctly stated that the *MPRDA* and *LUPO* 'are directed at different ends' resulting in no duplication.[7] In any event, there are other legal situations where duplication of functions exists and this does not render one or other of the functions redundant. Consequently, the SCA found against the appellants, confirming the original decision - the *MPRDA* does not displace *LUPO*.

In the court *a quo*, it was argued that the mining rights holder was required to obtain environmental authorisation in terms of the *National Environmental Management Act* (*NEMA*)[8] prior to the commencement of mining. *NEMA* requires environmental authorisation for certain activities specified and identified in terms of the Act, following some form of environmental impact assessment. The finding of the court *a quo* was not because the mining operations *per se* were identified activities (they were, but mining-related activities were not regarded as operational listed activities until such time as declared to be so – and such declaration was never made) but

[5] *Maccsand* case (para 33).
[6] Ibid.
[7] Ibid, para 34.
[8] Act 107 of 1998.

because on one of the sites the mining would result in the removal of indigenous vegetation and on the other, the mining would result in the transformation of land use from public open space to another land use, both of which were identified activities. The court *a quo*, delivering its judgment on 20 August 2010, after argument had been made in April 2010, was not aware that the relevant *NEMA* regulations had been repealed (and replaced by the 2010 *NEMA* regulations) on 2 August 2010. Consequently, the declaratory order of the court *a quo* had been made 'in the absence of a live, concrete dispute and served no purpose'.[9] Although asked to provide guidance as to the relationship between *NEMA* and the *MPRDA*, the court declined to do so, reasoning that the exercise was essentially academic.

The *Louw vs. Swartland* case on appeal was argued alongside the *Maccsand* appeal and the decision reached in this case rested on the same reasoning as in *Maccsand*.[10] In my view, both of these decisions are consistent with other cases where the courts have been faced with the relative applicability of national and provincial legislation in the land-use planning sphere,[11] and the decisions are correct.

Another two cases can also conveniently be dealt with together as they also deal with essentially the same legal issue: the cases of *Goede Wellington Boerdery (Pty) Ltd vs. Makhanya NO*[12] and *The Guguletto Family Trust vs. Chief Director, Water Use, Department of Water Affairs and Forestry*.[13] These cases both involved reconsideration of decisions of the Water Tribunal, an administrative tribunal established in terms of the *National Water Act.*[14] The initial administrative decisions, which had been taken on appeal to the tribunal, were both decisions relating to water use licences. In an application for a water use licence, section 27 of the Act requires the decision-maker to take into account 'all relevant factors', which include eleven factors that are specified in that section. These factors include factors relating to the likely effects of the water use, including how the use will affect the public interest, and its compliance with the national water resource strategy and water resource quality objectives. One of the factors is 'the need to redress the results of past racial and

[9] *Maccsand* case (para 37).
[10] Paras 10-35 of that judgment.
[11] See, for example, *City of Johannesburg Metropolitan Municipality vs. Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).
[12] Unreported case 56628/2020 (GNP).
[13] Unreported Case A566/10 (GNP).
[14] Act 36 of 1998.

gender discrimination' - the so-called 'transformation factor'.[15] In both of these cases, the Department refused to grant the licences because the applicants did not meet the requirements of the transformation factor (or, to be more accurate, did not meet the Department's understanding of what that factor entails). In effect, the Department had appeared to regard the transformation factor as a 'trump', in the sense that failure to meet the transformation factor criteria rendered consideration of the other relevant factors unnecessary.[16] The tribunal agreed with the Department's approach in both cases.[17]

The applicants in *Goede Wellington* asked the court to review the decision of the tribunal on the basis of its compliance with the *Promotion of Administrative Justice Act*.[18] In *Guguletto*, the appellants made use an appeal power in the *National Water Act* to appeal against the decision of the tribunal to the High Court.[19] In both cases, the powers of the High Court were essentially the same - review confined to questions of law rather than merits appeal. In both cases the courts held that the transformation factor was not a factor that could be exclusively determinative of the outcome of an application. In both cases, the courts held that the Department (and tribunal) had erred in deciding otherwise, and both decisions were set aside. Also in both cases, the court substituted its decision for the original decision, ordering that the licence be granted.

These judgments are significant in that they highlight the seriously flawed decision-making process in the Water Tribunal (these are not the only problematic decisions by that body, but further discussion is beyond the scope of this report). As essentially administrative law decisions, they are both difficult to fault. More can be said about the importance of transformation (affirmative action, in effect) than either of the courts in these two cases did, but that is also beyond the scope of this report. In my view transformation does warrant being accorded greater weight than other factors, but that does not mean that it can 'trump' all other factors.

[15] Section 27(109b) of the *National Water Act*.
[16] The Department argued that it had not done this and had considered all factors, but offered no evidence to this effect in the tribunal hearings.
[17] In fact, several parts of the two tribunal judgments are substantially similar to each other, suggesting that one judgment (it is not clear which) simply cut and paste from the other.
[18] Act 3 of 2000.
[19] In terms of s 49 of the *National Water Act*.

The final High Court decision of 2011 that falls under the heading of environmental law is *Eye of Africa Developments (Pty) Ltd vs. Shear.*[20] In the court a quo, the issue was whether an amendment to an environmental authorisation (record of decision - ROD) was a substantive one or not. This was important because, if it was, it was necessary to follow a procedural fairness process. The court decided that it was a substantive amendment.

On appeal, the SCA found that the purported amendment to the ROD had not, in fact, been made. The parties had been relying on a letter from the relevant official indicating that he was amenable to the amendment but he had not legally amended the ROD because the necessary jurisdictional facts for valid amendment were absent (there was no application for amendment as envisaged by regulation 40 and in compliance with the requirements of regulation 41 of the relevant *EIA Regulations* of April 2006 and, had the amendment been at the instance of the authority, regulation 45 had to be complied with as far as the process for amendment was concerned, and the facts indicated that it had not been followed).

The judgment does not specify what the basis of the appeal was, but on the basis that the purported amendment was invalid, the court dismissed the appeal. It is difficult to fault the reasoning of the court but it is interesting that the question of the validity of the 'amendment' did not even arise in the court a quo. It seems that all concerned, even the court, assumed its validity.

The final case worthy of mention was not a High Court decision but a decision of a Magistrate's Court. These judgments are not reported but I obtained a copy of the judgment and it is noteworthy not necessarily for the legal reasoning but the factual scenario. In the case of *S vs. Frylinck*,[21] the accused is an environmental consultant. He was being charged with both fraud and contravention of regulation 81(1)(a) of the 2006 *NEMA EIA Regulations*. The accused was found not guilty of fraud due to lack of intention. As for the second charge, the relevant regulation 81(1)(a) reads: 'A person is guilty of an offence if that person provides incorrect or misleading information in any document submitted in terms of these regulations to a competent authority'. The court held that the accused had been negligent and that the standard of his work (in compiling the report) had not measured up the standard of work

[20] [2011] ZASCA 226 (30 November 2011).
[21] North Gauteng Regional Magistrates' Court Case No. 14/1740/2010.

required. It appears that the main failure of the accused, in the eyes of the court, is that he failed to appoint or at least consult with a wetland specialist before he asserted that there was no wetland within 500 metres of the site.

On the factual evidence, I submit that the court was correct to have acquitted the accused of fraud because he had consulted scientists and the information that he had been provided suggested that there was not a wetland on the site. It was, consequently, not possible to conclude, on the facts, that he had intention to mislead the authorities, which would have been required for a successful prosecution of fraud. As for the statutory offence, the regulations do not specify the standard of fault required for contravention of regulation 81(1)(a), but the court decided that negligence was sufficient. From the facts set out in the judgment, it appears that the accused disregarded certain statements made by the expert that he did hire, and that there were enough pointers to warrant appointment of a specialist in wetland delineation. Contrary to the implications made by various media reports on the case, however, this was not a case of an environmental consultant completely ignoring the facts before him. His failure to measure up to the standard of the reasonable environmental consultant consisted of his failure to obtain advice from a suitably-qualified expert. This is the lesson that other consultants can derive from this case.

Sentencing was handed down in April 2011, and both Frylinck and his firm, Mpofu Consulting CC, were fined R80 000 each, with R40 000 of each being suspended. It is worth noting that the 2010 *EIA Regulations* that replaced the regulations applicable in the *Frylinck* case have more stringent maximum penalties for the equivalent offence: one year imprisonment and a fine not exceeding R1 million. This indicates the seriousness of the offence and the importance of environmental consultants' avoiding sloppy consideration of the developments under their review.

New Legislation

Although there has been no new original legislation (i.e Acts), there has been, as there usually is, considerable activity as far as delegated legislation is concerned (regulations and the like). The most significant is a notice that appeared late in the year. The Minister published a national list of ecosystems that are threatened and in

need of protection in terms of section 52 of the National Environmental Management: Biodiversity Act.[22]

According to the (very long) document, it 'contains the first national list of threatened terrestrial ecosystems and provides supporting information to accompany the list, including the purpose and rationale for listing ecosystems, the criteria used to identify listed ecosystems, the implications of listing ecosystems, and summary statistics and national maps of listed terrestrial ecosystems. It also includes individual maps and detailed information for each listed ecosystem'. This is the first list of ecosystems consisting of threatened ecosystems in the terrestrial environment. Future phases will deal with threatened ecosystems in the freshwater, estuarine and marine environments, and with protected (i.e. as opposed to threatened) ecosystems in all environments. Although MECs (provincial ministers, in essence) are given the power to declare ecosystems under section 52, they are encouraged to wait until the national lists are finalized before doing so.

The bulk of the notice contains individual references to the ecosystems. There are 225 ecosystems in total, amounting to a total of 11 547 000 ha, which is 9.5 percent of the total land area of the country. It is noteworthy that, in many of the ecosystems, relatively little if any of the land area identified is under formal protection at present.

The notice correctly identifies some of the legal ramifications of the listing. First, the list of threatened ecosystems is directly relevant to the environmental authorisation process. One of the listed activities is the clearance of 300m2 of more of vegetation, which will trigger a basic assessment[23] in, inter alia, any critically endangered or endangered ecosystem listed in terms of section 52. Then, according to section 54, the need for protection of listed ecosystems must be taken into account in municipal Integrated Development Plans (IDPs)[24] and by implication in Spatial Development Frameworks (SDFs).[25]

[22] Act 10 of 2004. The relevant government notice is GN 1002 in *GG* 34809 of 9 December 2011.
[23] The less intensive of the two types of EIA provided for in South African environmental law (*NEMA*).
[24] These plans have to be drawn up by municipalities and deal with all development planning issues in their areas of jurisdiction, physical and otherwise.
[25] Required as part of IDPs.

Somewhat mysteriously, there is no mention in the notice of any decision in terms of section 53 of the Act, which empowers the Minister to declare threatening processes in listed ecosystems. Such processes would require environmental authorisation in terms of section 24 of NEMA. Section 53 seems to me to be the primary legislative provision giving protection to listed ecosystems and it is therefore odd that it has not yet been utilised, nor even mentioned in the notice. Relying only on the legal provisions mentioned in the government notice for protection of these listed ecosystems would, in my view, be inadequate.

Policy

The most important policy document in 2011 was the *White Paper on the National Climate Change Response*. There are several aspects of the *White Paper* that will or may require legislative interventions and it also identifies a few aspects that can be achieved through the use of existing law. Currently, South African does not have dedicated climate change response legislation - some provisions in the air pollution legislation[26] could conceivably be used to target greenhouse gas emissions. The *White Paper* calls for further investigation of a carbon tax, and it is likely that South African will follow international trends in this regard - Australia's recent carbon tax and its response will no doubt be carefully considered.

It is worth mentioning that the *White Paper* needs to be evaluated overall in the context of the commitment set out in the *White Paper* to implement mitigation actions that will collectively result in a 34 percent deviation from 'business as usual' by 2020 and 42 percent by 2025. This commitment on the international plane is conditional on the provision of finance and technical assistance and on the implementation of a binding climate agreement. Domestically, however, it is now part of official policy and it must be regarded as a target to which the policy aims. The *White Paper* is sure to be followed by numerous interesting, not to say controversial, developments, both legal and otherwise, in years to come.

Draft Legislation

There were several draft legislative instruments published during the year. I will mention these only briefly because fuller discussion will be warranted once they are

[26] *National Environmental Management; Air Quality Act* (39 of 2004).

in final form. The most significant is the draft *Spatial Planning and Land Use Management Bill* of 2011. In its current form, this will radically overhaul the land use planning framework in the country. It is, in part, aimed at replacing the *Development Facilitation Act*,[27] the main body of which was declared unconstitutional in the *Gauteng Development Tribunal* case.[28]

The draft *National Environmental Management Laws Amendment Bill* is aimed at amending certain provisions in *NEMA*, the *Biodiversity Act* and the *Air Quality Act*. Most of the amendments have the objective of facilitating implementation and enforcement.

Similar objectives underpin the draft *National Environmental Management: Integrated Coastal Management Amendment Bill*. The first few years of the principal Act's operation have highlighted areas of concern regarding implementation of what is a rather radical departure from the preceding legislative regime and it is these implementation issues that are being addressed in the amendments.

Conclusion

In the aftermath of COP 17, 2012 promises some interesting environmental law developments leading on from the *White Paper on Climate Change* and the further progress of the draft Bills mentioned here. It will also not be surprising to see the *Maccsand* and *Swartland* cases being taken to the Constitutional Court.

[27] Act 67 of 1995.
[28] Supra note 11.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: SPAIN
Norm-Setting and Environment Protection

Lucía Casado*

Introduction

The norm-setting activity for environmental protection in Spain has been intense throughout 2011. Various environmental laws have been approved and several European Directives have been transposed, either by laws or by administrative regulations. Also, administrative regulations have been enacted to develop important environmental laws that were approved in 2007.

This period has shown the conflict of powers that exist between the State and the Autonomous Communities in some environmental matters. These conflicts are reflected in Constitutional Court decisions on water and constitutional appeals that have recently been lodged, such as that brought against the *Law on Geologic Storage of Carbon Dioxide*, and conflicts of jurisdiction presented to the Constitutional Court by some autonomous communities on issues of atmospheric protection and biodiversity.

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Intense Norm-Setting Activity by the State

Five New Environmental Laws

In the period covered by this report, five important environmental laws have been enacted: *Law* 40/2010 of 29 December, on geologic storage of carbon dioxide; *Law* 41/2010 of 29 December, on the protection of the marine environment; *Law 2/2011* of 5 March, on the sustainable economy that introduces reforms to confront the current economic crisis; *Law* 12/2011 of 27 May, on civil responsibility for nuclear damages or damages caused by radioactive material; and *Law* 22/2011 of 28 July, on waste and contaminated soils.

Law 40/2010 is based on the powers in Articles 149.1.23 ('basic laws on the protection of the environment'), 25 ('general bases of the mining and energy regimes') and 13 ('bases and coordination of the overall planning of the economic activity') of the *Spanish Constitution*. It was approved to incorporate into Spanish law *EU Directive* 2009/31/EC on the geologic storage of carbon dioxide, adapting it to the Spanish industrial, geological and energy context. Its purpose is to establish the legal framework for the geological storage of carbon dioxide (CO_2).

Law 41/2010 incorporates into the Spanish legal order *EU Directive* 2008/56/EC that establishes a framework for action for a policy on the marine environment. Also enacted on the basis of Article 149.1.23 of the *Spanish Constitution*, its purpose is to establish the legal basis for measures to achieve or maintain the marine environment, through planning, conservation, protection and improvement; and to ensure a sustainable use of marine resources, taking into consideration the general interest. The basic tool for this purpose is coherent planning of the activities practiced in the marine environment.

Law 2/2011, the *Law of Sustainable Economy*, is an important part of the *Strategy for Sustainable Economy*, approved by the Council of Ministers in November 2009. The law is very long (over 200 pages in the Official Gazette) and is structured in four titles, preceded by a Preliminary Title. The first is dedicated to improving the economic environment. The second addresses competitiveness and the third, environmental sustainability. The fourth deals with the tools for implementation and evaluation of the Law. The purpose of the Law is to support sustainable economic

development. It contains a number of legislative reforms intended to 'serve a balanced and durable growth, that is, sustainable'. Sustainable is understood in three senses: economically (that is steady growth and improving competitiveness, innovation and training); environmentally (including that sound and rational management of natural resources is pursued to promote new activities and new jobs); and socially (as a promoter and guarantor of equal opportunity and social cohesion). A specific title on environmental sustainability sets out provisions relating to aspects of environmental sustainability, from which some comprehensive reforms in the sectors concerned are addressed. These areas are sustainable energy, reduction of emissions, transport and sustainable mobility, and rehabilitation and housing.

Law 12/2011, on civil liability for nuclear damage or damages caused by radioactive materials nuclear, regulates civil nuclear liability in accordance with the international *Convention on Third Party Liability in the Field of Nuclear Energy* (1960) and the *Brussels Supplementary Convention* (1963). It also establishes a regime of civil liability for damage caused by accidents in which radioactive material other than nuclear material is involved.

Finally, the *Law* 22/2011, on waste and contaminated soils, which is largely basic legislation governing the protection of the environment, was passed to incorporate into Spanish law the *EU Directive* 2008/98/EC. The aim of this law is to: regulate the management of waste by improving the efficiency of resources; implement measures that prevent waste from being generated; and mitigate the adverse effects on human health and the environment associated with its generation and management. It also regulates the legal regime governing contaminated soils.

Other Interesting Environmental Regulations

It is worth mentioning the ratification by Spain, in the last year, of the *Protocol on Integrated Management of Mediterranean Coastal Zones* (2008); the *Statute of the International Renewable Energy Agency* (2009); and the *Protocol on Persistent Organic Pollutants* (1998) to the *Convention on Long-Range Transboundary Air Pollution* (1979).

Also, in the period under review, a number of administrative rules have been approved at the state level. Many of them have the nature of basic laws on environmental protection aimed at protecting the atmosphere, water, natural heritage and biodiversity. Some are regulatory developments of previous laws, while others have served to incorporate European Directives.

Many new laws address protection of the atmosphere. Some were enacted to implement the *Law* 34/2007 of 15 November, on air quality and atmospheric protection, and to incorporate a European Directive. In this group we find: (a) *Royal Decree* 100/2011 of 28 January, which updates the list of activities that are potential air polluters and sets the basic rules for its implementation; (b) *Royal Decree* 102/2011 of 28 January, on air quality improvement that integrates into Spanish law *EU Directive* 2008/50/EC on Ambient Air Quality and a Cleaner Atmosphere in Europe, and simplifies national legislation concerning air quality; (c) *Royal Decree* 687/2011 of 13 May, which amends *Royal Decree* 430/2004 of 12 March, and corrects the incomplete transposition of the *EU Directive* 2001/80/EC into the Spanish legal system; and (d) *Royal Decree* 430/2004 of 12 March, by which new rules on the limitation of air emission of certain pollutants from large combustion plants are established, and conditions for the control of air emissions from oil refineries are laid down, with the purpose of compensating for the incomplete incorporation of *EU Directive* 2001/80/EC into Spanish Law. Also relevant are detailed administrative rules to govern the greenhouse gas emission allowance trading scheme, among which is *Royal Decree* 101/2011 of 28 January, adopted to implement Law 13/2010 of 5 July.

Several important rules have also seen the light in the context of water, regulating bottle water, river basins, water quality and the regulation of public water resources. *Royal Decree* 1798/2010 of 30 December regulates the exploitation and marketing of natural mineral waters and bottled spring waters for human consumption. *Royal Decree* 1799/2010 of 30 December regulates the process of developing and marketing bottled prepared water for human consumption. These norms, issued largely under article 149.1.16 of the Spanish Constitution (which gives the State the exclusive power for managing issues of human health), were passed with the intention of separating into two the regulation of natural mineral waters and spring waters on the one hand, and prepared water on the other. Prior to this, both were regulated in terms of a single law, which led to some uncertainty and confusion.

Royal Decree 29/2011 of 14 January amends *Royal Decree* 125/2007 of 2 February (which fixes the territorial area of river basins) and *Royal Decree* 650/1987 of 8 May (which defines the territorial scope of basin organizations and water management plans).

Royal Decree 60/2011 of 21 January, on environmental quality standards in the field of water policy, has been enacted to transpose into Spanish law two directives: *EU Directive* 2008/105/EC on quality standards (EQS) in the field of water policy; *and EC Directive* 2009/90/CE which lays down, pursuant to the Water Framework Directive, the technical specifications for chemical analysis and monitoring of water quality. Finally, by means of *Royal Decree-Law* 12/2001 of 26 August, the autonomous communities have been required to envisage in their Statutes of Autonomy the executive jurisdiction of policing powers over public water resources within its territory. *Order ARM/2656/2008* of 10 September, which adopts water-planning instructions, has also been modified through *Order ARM/1195/2011* of 11 May. Mention should also be made of the delay that has occurred in approving the new water plans and the lack of compliance with the *Water Framework Directive* on this point. To date, the only plan to have been passed is the one governing the management of the river basin district of Catalonia (*Royal Decree* 1219/2011).

In the context of natural heritage and biodiversity, mention should be made of the approval of three regulations implementing and/or applying *Law* 42/2007, of 13 December 2007, on Natural Heritage and Biodiversity. These regulations have the character of basic legislation on environmental protection. First, *Royal Decree* 139/2011 of 4 February, provides for the development of the List of Wildlife in Special Protection Scheme and the Spanish Catalogue of Endangered Species, which develops some of the contents of Chapters I and II of Title III of Law 42/2007. Secondly, *Royal Decree* 556/2011 of 20 April, for the development of the Spanish Inventory of Natural Heritage and Biodiversity, develops Chapter I of Title I of the Law 42/2007. Thirdly, *Royal Decree* 1274/2011 of 16 September, approves the *Strategic Plan for Natural Heritage and Biodiversity 2011–2017*. The *Plan* is designed to guide the action that the general administration of the State will take on this issue. Its aim is to define the objectives, actions and criteria to promote conservation, the sustainable use and restoration of natural heritage, natural land and sea resources, biodiversity and geo-diversity.

It should also be pointed out that *Royal Decree* 1336/2011 of 3 October (issued under article 149.1.13 EC) has regulated the territorial contract as an instrument to promote the sustainable development of the rural environment and this concept has been introduced into Spanish law.

Also relevant is the Law 8/2011 of 28 April, laying down measures for the protection of critical infrastructure (developed by *Royal Decree* 704/2011 of 20 May). Among critical infrastructure located within the territorial scope of the law are, those related to the strategic sectors of water, energy and nuclear industry. The purpose of this law is to establish appropriate strategies and structures that will allow administrative bodies to manage and coordinate their actions, in order to improve Spain's prevention, preparedness and responses to terrorist attacks or other threats. The law also aims to regulate the obligations of public bodies and other operators in charge of critical infrastructure.

Of great importance is *Royal Decree-Law* 8/2011 of 1 July. Despite not being an environmental norm, it contains stipulations in relation to administrative silence and permits. It amends various environmental laws (pertaining to water, integrated prevention and control of the atmosphere, and natural heritage and biodiversity) with the purpose of withdrawing some of the competencies of the local authorities, although these may be substituted in other ways by which the administration can intervene in the activity of citizens.

Other regulations, concerning both environmental matters and other areas directly or indirectly related to the environment, have been enacted. We cannot list all of them, although we can mention some, such as: *Royal Decree* 1439/2010 of 5 November, amending the regulation on health protection against ionizing radiation, approved by the *Royal Decree* 783/2001 of 6 July; *Royal Decree* 1440/2010 of 5 November, which approves a new statute for the Nuclear Security Council; *Royal Decree* 187/2011 of 18 February, which establishes eco-design requirements for energy-related products; *Royal Decree* 459/2011 of 1 April, which sets mandatory targets for biofuels for 2011, 2012 and 2013; Royal Decree 13087/2011 of 26 September, on the physical protection of nuclear installations, materials and radioactive sources; and *Order* ARM/1783/2011 of 22 June (issued under article 149.1.23 EC) pertaining to environmental responsibility, which is of considerable importance for the

implementation of the requirement for a compulsory financial guarantee for environmental risks.

Environmental Case Law

Three judgments of the Constitutional Court on water are the most salient for this period. A major conflict of jurisdiction between the State and the Autonomous Communities is unfolding. Several Autonomous Communities have taken the opportunity to introduce provisions that increase their power over this resource, especially for intercommunity basins. Some statutes authorize the respective Autonomous Communities to assume powers that violate the traditional principle of unity of basin management. They reformulate the criteria so far established by Spanish water legislation, under which the State has jurisdiction over inter-community basins and the Autonomous Communities over intra-community basins. Article 51 of the Statute of Andalucía and Article 75 of the Statute of Castile and León are good examples. These provisions grant these communities exclusive jurisdiction over the waters of inter-community basins that pass through their territory.

This has raised an interesting debate about how to balance water management in the territory and the processes of territorial demarcation. The Constitutional Court in two rulings has recently addressed this: the *Decision* 30/2011 of 16 March and the *Decision* 32/2011 of 17 March. The Constitutional Court has declared Article 51 of the *Statute of Autonomy of Andalucía* and Article 75 of the *Statute of Autonomy of Castile and Leon* unconstitutional. The Court confirmed the pre-eminence of the criterion that waters belonging to the same basin have to be managed as a whole and in a homogeneous way, affirming the power of the State over intercommunity basins.

More recently, the Constitutional Court issued the *Ruling* 110/2011 of 22 June 2011 on the new *Statute of Aragon*, which contained some controversial stipulations on water. The Court upheld the constitutionality of: Article 19, which deals with water rights and establishes a criterion to avoid non-sustainable transfers of water to other basins; and Article 72, which deals with the jurisdiction of this community on water issues. With regard to the controversial fifth provision, which established a reserve of water of 6,550 hm^3 for the exclusive use of the Aragonese, the Constitutional Court considered it to be constitutional as long as it was not interpreted as being binding for

the State, which in the exercise of its exclusive jurisdiction under article 149.1.22 can decide on the appropriate volumes of water.

The Constitutional Court also issued *Ruling* 150/2011 of 29 September 2011, which rejected the appeal for legal protection presented by a citizen against a ruling of the High Court of Justice of the Community of Valencia. The latter court had rejected his claim that the Valencia City Council should pay damages for the noise pollution in his home. He alleged that his rights to physical and moral integrity, privacy and the inviolability of the home, determined in Articles 15 and 18 of the EC, had been infringed. The Court rejected the claim owing to a lack of evidence that the noise had had any real effect on the claimant's health or home, although there was a dissenting vote from one of the three judges. Paradoxically, the European Court of Human Rights did recognize that there was an infringement of Article 81 of the *European Convention on Human Rights* (the right to respect for his private and family life, his home and his correspondence), in a case of noise pollution in the *Ruling Martínez Martínez vs. Spain*, dated 18 October 2011. Despite the fact that the Constitutional Court had previously rejected the appeal for legal protection because of a lack of constitutional content, the ruling ordered Spain to pay the claimant 15,000 Euros because he had been putting up with the noise of a discothèque just a few metres from his home

Considering the Recent Developments

Environmental norm setting carried out during the reporting period has been marked by several key trends. Firstly, it was marked by the economic crisis in Spain (with considerable budget cuts) and the incorporation of standards of environmental sustainability in the economic field. This situation justifies the adoption of a macro law, the *Sustainable Economy Law*, aimed at creating suitable conditions for sustainable economic development whilst accelerating the development of a more competitive and innovative economy.

Secondly, the influence of *EU Directive* 2006/123/EC on services in the internal market continues to be fundamental. It allows for the prior authorization or licence to be substituted by other more flexible mechanisms of intervention such as communication or statements of responsibility. The amendment of several sectoral environmental laws in recent months are along these lines and eliminate the

traditional local licences, although they can still be substituted by other forms of verification and administrative control.

Thirdly, some of the trends highlighted in previous country reports remain. Many of the rules that been introduced in recent months have their origin in EU law, as outlined in the preceding pages. Spanish environmental law continues to largely trail EU law, which is one of the main drivers of innovation for Spanish environmental legislation. The trend of approving basic regulations as administrative regulations keeps spreading, even though the Spanish legal system, in accordance with constitutional jurisprudence, accepts that it is only exceptionally that basic standards are adopted in the form of administrative regulations. Many of the administrative regulations adopted are considered basic legislation.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: SPAIN (2011)

(Spanish Version)

Lucía Casado*

Introducción

La actividad normativa desarrollada por España en materia de protección del medio ambiente durante el último añoha sido intensa. En estos meses se han aprobado importantes leyes ambientales y se han incorporado, bien mediante ley, bien mediante reglamento, varias Directivas europeas en diferentes sectores ambientales. También se ha procedido al desarrollo reglamentario de varias leyes ambientales aprobadas en 2007.

En este período también se ha puesto de manifiesto la conflictividad competencial entre el Estado y las Comunidades Autónomas en algunos sectores ambientales. Así lo evidencian las Sentencias del Tribunal Constitucional recaídas en materia de aguas; y la interposición de nuevos recursos de inconstitucionalidad −como el presentado contra la reciente Ley de almacenamiento geológico de dióxido de carbono−, y el planteamiento ante el Tribunal Constitucional de nuevos conflictos positivos de competencia promovidos por algunas comunidades autónomas en materia de protección de la atmósfera y biodiversidad.

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La intensa actividad normativa desarrollada por el Estado en materia ambiental

Cinco Nuevas Leyes en Materia Ambiental

En el período analizado han visto la luz cinco leyes ambientales estatales de gran importancia: la *Ley* 40/2010, de 29 de diciembre, de almacenamiento geológico de dióxido de carbono; la *Ley* 41/2010, de 29 de diciembre, de protección del medio marino; la *Ley* 2/2011, de 5 de marzo, de economía sostenible, mediante la cual se llevan a cabo importantes reformas, para hacer frente a la situación de crisis económica actual; la *Ley* 12/2011, de 27 de mayo, sobre responsabilidad civil por daños nucleares o producidos por materiales radiactivos; y la *Ley* 22/2011, de 28 de julio, de residuos y suelos contaminados.

La primera de ellas, adoptada sobre la base de los títulos competenciales previstos en el artículo 149.1.23 ("legislación básica sobre protección del medio ambiente"), 25 ("bases del régimen minero y energético") y 13 ("bases y coordinación de la planificación general de la actividad económica") de la Constitución Española, se aprueba con el fin de incorporar al ordenamiento español la Directiva 2009/31/CE del Parlamento Europeo y del Consejo, de 23 de abril de 2009, relativa al almacenamiento geológico de dióxido de carbono −inscrita en el denominado paquete de energía y cambio climático−, adaptándola a la realidad industrial, geológica y energética de España. Su objeto es establecer el marco jurídico del almacenamiento geológico de dióxido de carbono (CO_2), en condiciones seguras para el medio ambiente, con el fin de contribuir a la lucha contra el cambio climático.

La segunda también incorpora al ordenamiento jurídico español una directiva europea (la 2008/56/CE, de 17 de junio, que establece un marco de acción comunitario para la política del medio marino). Se dota así el ordenamiento español de una norma jurídica específica para la protección del medio marino. Dictada sobre la base del artículo 149.1.23 de la Constitución, su objeto es establecer el régimen jurídico que rige la adopción de las medidas necesarias para lograr o mantener el buen estado ambiental del medio marino, a través de su planificación, conservación, protección y mejora; y asegurar, en su calidad de bien de dominio público bajo titularidad estatal, un uso sostenible de los recursos del medio marino que tenga en consideración el interés general. La herramienta fundamental a tal efecto es llevar a

cabo una planificación coherente de las actividades que se practican en el medio marino.

La Ley de economía sostenible es una de las piezas más importantes de la Estrategia para una Economía Sostenible, aprobada por el Consejo de Ministros en noviembre de 2009. Se trata de una Ley muy extensa (más de 200 páginas en el Boletín Oficial del Estado), estructurada en cuatro Títulos, precedidos de un Título preliminar. El Título primero se dedica a la mejora del entorno económico; el segundo, a la competitividad; el tercero, a la sostenibilidad medioambiental; y el cuarto, a los instrumentos para la aplicación y evaluación de la Ley.

El objeto de la Ley de economía sostenible es introducir en el ordenamiento jurídico las reformas estructurales para crear condiciones que favorezcan un desarrollo económico sostenible. Para conseguir este objeto, la Ley contiene un gran número de reformas legislativas. Con ellas se pretende "servir a un crecimiento, a un crecimiento equilibrado, duradero: sostenible. Sostenible en tres sentidos: económicamente, esto es, cada vez más sólido, asentado en la mejora de la competitividad, en la innovación y en la formación; medioambientalmente, que haga de la imprescindible gestión racional de los medios naturales también una oportunidad para impulsar nuevas actividades y nuevos empleos; y sostenible socialmente, en cuanto promotor y garante de la igualdad de oportunidades y de la cohesión social". La amplitud y complejidad de la Ley impiden realizar un examen detallado de la misma en el marco de esta crónica, por lo que únicamente se destaca la inclusión de un Título específico dedicado a la Sostenibilidad medioambiental. En él se recogen disposiciones relativas a distintos ámbitos de la sostenibilidad ambiental, desde la que se abordan algunas reformas globales de los sectores afectados. Estos ámbitos son el modelo energético sostenible; la reducción de emisiones; el transporte y la movilidad sostenible; y la rehabilitación y vivienda.

La Ley sobre responsabilidad civil por daños nucleares o producidos por materiales radiactivos regula la responsabilidad civil nuclear de conformidad con los Convenios internacionales de París de 29 de julio de 1960, sobre la responsabilidad civil en materia de energía nuclear, y de Bruselas, de 31 de enero de 1963, complementario del anterior. Asimismo, establece un régimen específico de responsabilidad civil por los daños que puedan causar accidentes en los que se vean involucrados materiales radiactivos que no sean sustancias nucleares.

Por último, la *Ley* 22/2011, de residuos y suelos contaminados, que tiene en su mayor parte el carácter de legislación básica sobre protección del medio ambiente, se aprueba con el fin de incorporar al ordenamiento jurídico español la *Directiva* 2008/98/CE *del Parlamento Europeo y del Consejo*, de 19 de noviembre de 2008. Esta Ley tiene como objeto regular la gestión de los residuos, impulsando medidas que prevengan su generación y mitiguen los impactos adversos sobre la salud humana y el medio ambiente asociados a su generación y gestión, mejorando la eficiencia en el uso de los recursos. También incluye la regulación del régimen jurídico de los suelos contaminados.

Otras Normas Ambientales De Interés

Desde una perspectiva internacional, cabe mencionar la ratificación por parte de España, del Protocolo relativo a la gestión integrada de las zonas costeras del Mediterráneo, hecho en Madrid el 21 de enero de 2008; del Estatuto de la Agencia Internacional de Energías Renovables (IRENA), hecho en Bonn el 26 de enero de 2009; y del Protocolo del Convenio de 1979 sobre la contaminación atmosférica transfronteriza a gran distancia provocada por contaminantes orgánicos persistentes, hecho en Aarhus el 24 de junio de 1998.

En el período analizado también se han aprobado a nivel estatal un gran número de normas de rango reglamentario, muchas de las cuales tienen el carácter de legislación básica de protección del medio ambiente, en los sectores de protección de la atmósfera, aguas y patrimonio natural y biodiversidad. De estas normas, algunas constituyen desarrollos reglamentarios de leyes previas; otras han servido para incorporar Directivas europeas.

En el ámbito de la protección de la atmósfera deben destacarse varias normas. Por un lado, las dictadas en desarrollo de la *Ley* 34/2007, de 15 de noviembre, de calidad del aire y protección de la atmósfera, y/o para incorporar alguna Directiva europea. En este bloque se encuentran el *Real Decreto* 100/2011, de 28 de enero, por el que se actualiza el catálogo de actividades potencialmente contaminadoras de la atmósfera y se establecen las disposiciones básicas para su aplicación; el *Real Decreto* 102/2011, de 28 de enero, relativo a la mejora de la calidad del aire, que procede a incorporar al ordenamiento español la *Directiva* 2008/50/CE del

Parlamento Europeo y del Consejo de 21 de mayo de 2008, relativa a la calidad del aire ambiente y a una atmósfera más limpia en Europa, y a simplificar la normativa nacional referente a la calidad del aire; el *Real Decreto* 687/2011, de 13 de mayo, por el que se modifica el *Real Decreto* 430/2004, de 12 de marzo, por el que se establecen nuevas normas sobre limitación de emisiones a la atmósfera de determinados agentes contaminantes procedentes de grandes instalaciones de combustión, y se fijan ciertas condiciones para el control de las emisiones a la atmósfera de las refinerías de petróleo, que subsana la incorporación incompleta de la *Directiva* 2001/80/CE *del Parlamento Europeo y del Consejo* de 23 de octubre de 2001 al ordenamiento jurídico español; y el *Real Decreto* 430/2004, de 12 de marzo, por el que se establecen nuevas normas sobre limitación de emisiones a la atmósfera de determinados agentes contaminantes procedentes de gandes instalaciones de combustión, y se fijan ciertas condiciones para el control de las emisiones a la atmósfera de las refinerías de petróleo, con el fin de subsanar la incorporación incompleta de la *Directiva* 2001/80/CE *del Parlamento Europeo y del Consejo* de 23 de octubre de 2001, al ordenamiento jurídico español. Por otro, las dictadas en relación con el régimen de comercio de derechos de emisión de gases de efecto invernadero, entre las que destacan el *Real Decreto* 101/2011, de 28 de enero –adoptado en desarrollo de la *Ley* 13/2010, de 5 de julio−, por el que se establecen las normas básicas que han de regir los sistemas de acreditación y verificación de las emisiones de gases de efecto invernadero y los datos toneladas−kilómetro de los operadores aéreos y de las solicitudes de asignación gratuita transitoria de instalaciones fijas en el ámbito de aplicación de la *Ley* 1/2005; y el *Real Decreto* 301/2011, de 4 de marzo, sobre medidas de mitigación equivalentes a la participación en el régimen de comercio de derechos de emisión a efectos de la exclusión de instalaciones de pequeño tamaño.

En materia de aguas, han visto la luz en este período importantes normas. En primer lugar, en el ámbito de las aguas envasadas, se han adoptado el *Real Decreto* 1798/2010, de 30 de diciembre, por el que se regula la explotación y comercialización de aguas minerales naturales y aguas de manantial envasadas para consumo humano; y el *Real Decreto* 1799/2010, de 30 de diciembre, por el que se regula el proceso de elaboración y comercialización de aguas preparadas envasadas para el consumo humano. Estas normas, dictadas mayoritariamente al amparo del artículo 149.1.16 de la Constitución, que atribuye al Estado la competencia exclusiva en materia de bases y coordinación general de la sanidad, se

aprueban con el fin de separar en dos normas independientes, en aras a una mayor seguridad jurídica, la regulación de las aguas minerales naturales y aguas de manantial, por un lado, y de las aguas preparadas, por otro, normativa que hasta entonces se contenía en una única disposición. En segundo lugar, mediante el *Real Decreto* 29/2011, de 14 de enero, se han modificado los *Reales Decretos* 125/2007, de 2 de febrero, por el que se fija el ámbito territorial de las demarcaciones hidrográficas; y 650/1987, de 8 de mayo, por el que se definen los ámbitos territoriales de los Organismos de cuenca y de los planes hidrológicos. En tercer lugar, se ha aprobado, con el carácter de legislación básica sobre protección del medio ambiente, el *Real Decreto* 60/2011, de 21 de enero, sobre las normas de calidad ambiental en el ámbito de la política de aguas, con el objeto de trasponer al ordenamiento jurídico español dos *Directivas*: la 2008/105/CE *del Parlamento Europeo y del Consejo*, de 16 diciembre de 2008, relativa a las normas de calidad ambiental (NCA) en el ámbito de la política de aguas; y la 2009/90/CE de la Comisión, de 31 de julio de 2009, por la que se establecen, de conformidad con la Directiva marco de aguas, las especificaciones técnicas del análisis químico y del seguimiento del estado de las aguas. Por último, también se ha conferido a las comunidades autónomas que lo tengan previsto en sus Estatutos de Autonomía, el ejercicio de la competencia ejecutiva sobre las facultades de policía de dominio público hidráulico dentro de su ámbito territorial, a través del *Real Decreto-Ley* 12/2001, de 26 de agosto; y se ha modificado, a través de la *Orden ARM/1195/2011*, de 11 de mayo, la *Orden ARM/2656/2008*, de 10 de septiembre, por la que se aprueba la instrucción de planificación hidrológica.

En este ámbito, también debe mencionarse el retraso con que España está acometiendo la aprobación de los nuevos planes hidrológicos y el incumplimiento de la Directiva marco de aguas en este punto, ya que hasta el momento únicamente se ha aprobado el Plan de gestión del distrito de cuenca fluvial de Cataluña, a través del *Real Decreto* 1219/2011.

En materia de patrimonio natural y biodiversidad, merece especial atención la aprobación de tres Reglamentos de desarrollo y/o aplicación de la *Ley* 42/2007, de 13 de diciembre, del Patrimonio Natural y la Biodiversidad, que tienen el carácter de legislación básica sobre protección del medio ambiente. En primer lugar, el *Real Decreto* 139/2011, de 4 de febrero, para el desarrollo del Listado de Especies Silvestres en Régimen de Protección Especial y del Catálogo Español de Especies

Amenazadas, que desarrolla algunos de los contenidos de los capítulos I y II del Título III de la *Ley* 42/2007. En segundo lugar, el *Real Decreto* 556/2011, de 20 de abril, para el desarrollo del Inventario Español de Patrimonio Natural y la Biodiversidad, que desarrolla el capítulo I del Título I de la Ley 42/2007, de 13 de diciembre. Y, en tercer lugar, el *Real Decreto* 1274/2011, de 16 de septiembre, que, en aplicación de esta Ley, aprueba el Plan estratégico del patrimonio natural y de la biodiversidad 2011-2017. Este Plan se configura como instrumento de planificación de la actividad de la Administración General del Estado en la materia y tiene como objeto el establecimiento y la definición de objetivos, acciones y criterios que promuevan la conservación, el uso sostenible y la restauración del patrimonio, los recursos naturales terrestres y marinos, la biodiversidad y la geodiversidad.

También debe mencionarse la regulación, mediante el *Real Decreto* 1336/2011, de 3 de octubre –dictado al amparo del art. 149.1.13 CE−, del contrato territorial como instrumento para promover el desarrollo sostenible del medio rural, incorporando esta figura al ordenamiento jurídico español.

Además de la normativa destacada, debe mencionarse la *Ley* 8/2011, de 28 de abril, por la que se establecen medidas para la protección de las infraestructuras críticas (desarrollada por el *Real Decreto* 704/2011, de 20 de mayo), en la medida en que dentro de las infraestructuras críticas ubicadas en el territorio nacional a que se aplica se hallan, entre otras, las vinculadas a los sectores estratégicos del agua, la energía y la industria nuclear. El objeto de esta Ley es establecer las estrategias y las estructuras adecuadas que permitan dirigir y coordinar las actuaciones de los distintos órganos de las Administraciones públicas en materia de protección de infraestructuras críticas, previa identificación y designación de las mismas, para mejorar la prevención, preparación y respuesta de España frente a atentados terroristas u otras amenazas que afecten a estas infraestructuras; y regular las especiales obligaciones que deben asumir tanto las Administraciones públicas como los operadores de aquellas infraestructuras que se determinen como infraestructuras críticas.

También tiene una gran importancia el *Real Decreto-Ley* 8/2011, de 1 de julio. A pesar de no tratarse de una norma ambiental, contiene previsiones de interés para este ámbito en materia de silencio administrativo y de licencias. En particular, en relación con esta última cuestión procede a modificar diversas leyes ambientales (en

materia de aguas, prevención y control integrados de la contaminación, ruido, responsabilidad medioambienta, calidad del aire y protección de la atmósfera y patrimonio natural y biodiversidad), con el fin de suprimir determinadas licencias de competencia municipal, sin perjuicio de su sustitución por otros medios de intervención administrativa en la actividad de los ciudadanos.

Asimismo, se han aprobado en este período otras normas reglamentarias, 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, como el *Real Decreto* 1439/2010, de 5 de noviembre, por el que se modifica el Reglamento sobre protección sanitaria contra radiaciones ionizantes, aprobado por el *Real Decreto* 783/2001, de 6 de julio; el *Real Decreto* 1440/2010, de 5 de noviembre, que aprueba un nuevo Estatuto para el Consejo de Seguridad Nuclear; el *Real Decreto* 187/2011, de 18 de febrero, relativo al establecimiento de requisitos de diseño ecológico aplicable a los productos relacionados con la energía; el *Real Decreto* 459/2011, de 1 de abril, por el que se fijan los objetivos obligatorios de biocarburantes para los años 2011, 2012 y 2013; el *Real Decreto* 1308/2011, de 26 de septiembre, sobre protección física de las instalaciones y los materiales nucleares, y de las fuentes radiactivas; y la *Orden ARM/1783/2011*, de 22 de junio, dictada al amparo de lo dispuesto en el artículo 149.1.23 CE, en materia de responsabilidad ambiental, de gran importancia para la implantación de la exigencia de la garantía financiera obligatoria de los riesgos medioambientales.

La Jurisprudencia Ambiental: Algunos Aspectos de Interés

A nivel jurisprudencial, lo más destacable en este período son tres sentencias dictadas por el Tribunal Constitucional en materia de aguas. Es éste un ámbito sobre el cual se está desatando en España una importante conflictividad competencial entre el Estado y las Comunidades Autónomas. Los procesos de reforma estatutaria acometidos en los últimos años han puesto de manifiesto un importante conflicto en torno al agua y su gestión territorial en España. Son varias las Comunidades Autónomas que han aprovechado la ocasión para introducir en los nuevos Estatutos algunas previsiones que incrementan sus cuotas de poder sobre este recurso, especialmente en el caso de las cuencas intercomunitarias. Algunos Estatutos habilitan a las Comunidades Autónomas respectivas para asumir competencias que

rompen con el principio tradicional de unidad de gestión de las cuencas hidrográficas y replantean el criterio hasta ahora establecido por la legislación de aguas española, según el cual el Estado es competente sobre las cuencas intercomunitarias y las Comunidades Autónomas sobre las intracomunitarias, si las tienen. Buen ejemplo de ello son los artículos 51 del Estatuto de Autonomía de Andalucía y 75 del Estatuto de Autonomía de Castilla y León, que otorgan competencias exclusivas a estas comunidades autónomas sobre las aguas de determinadas cuencas intercomunitarias que transcurren por su territorio.

Ello ha suscitado un interesante debate en España en torno a cómo articular la gestión del agua en el territorio y los procesos de territorialización de este recurso que están llevando a cabo algunas Comunidades Autónomas en sus Estatutos con el modelo de gestión establecido con anterioridad y con el principio de gestión unitaria por cuencas hidrográficas, así como con la solidaridad interregional. Sobre esta cuestión acaba de pronunciarse el Tribunal Constitucional en dos sentencias muy recientes: la 30/2011, de 16 de marzo, y la 32/2011, de 17 de marzo. Ambas han declarado la inconstitucionalidad y nulidad de los artículos 51 del Estatuto de Autonomía de Andalucía y 75 del Estatuto de Autonomía de Castilla y León, por considerar que estos preceptos acogían un modelo de gestión fragmentada de las aguas pertenecientes a una misma cuenca hidrográfica intercomunitaria que resulta inviable, ya que debe prevalecer el criterio de que las aguas de una misma cuenca forman un conjunto integrado que debe ser gestionado de forma homogénea y, en el caso de las cuencas intercomunitarias, la competencia es estatal.

Más recientemente, el Tribunal Constitucional ha dictado la Sentencia 110/2011, de 22 de junio, en relación con el nuevo Estatuto de Autonomía de Aragón, que incluía algunas previsiones controvertidas en materia de aguas. El Tribunal Constitucional declara la constitucionalidad de los artículos 19, que recoge derechos en relación con el agua y contiene un criterio de orientación de la actuación de los poderes públicos aragoneses dirigido a evitar transferencias no sostenibles de agua a otras cuencas; y 72, que incluye las competencias de esta Comunidad Autónoma en materia de aguas. Sobre la controvertida disposición adicional quinta, que establecía una reserva de agua para uso exclusivo para los aragoneses de 6.550 hm3, el Tribunal Constitucional considera que es constitucional, siempre que no se interprete como una imposición vinculante para el Estado, que en ejercicio de su competencia exclusiva ex art. 149.1.22 podrá determinar con plena libertad la fijación de los

caudales apropiados en cada momento.Por otra parte, en este mismo período el Tribunal Constitucional ha dictado la Sentencia 150/2011, de 29 de septiembre de 2011, en la que desestima la demanda de amparo presentada por un ciudadano respecto a una Sentencia del Tribunal Superior de Justicia de la Comunidad Valenciana que desestimó su demanda de indemnización contra el Ayuntamiento de Valencia por contaminación acústica de su vivienda. El particular alegaba la vulneración de los derechos a la integridad física y moral y a la intimidad y a la inviolabilidad del domicilio, recogidos en los artículos 15 y 18 CE. Sin embargo, el Tribunal Constitucional desestima la demanda por falta de prueba de los ruidos sufridos por el demandante en su salud y en su domicilio, aunque existe un voto particular disidente de tres magistrados. Paradójicamente, el Tribunal Europeo de Derechos Humanos sí ha reconocido que existe vulneración del artículo 8.1 del Convenio Europeo de Derechos Humanos (derecho al respeto de su vida privada y familiar, de su domicilio y de su correspondencia), en un supuesto de contaminación acústica en la Sentencia *Martínez Martínez contra España*, de 18 de octubre de 2011. En esta sentencia, se condena a España a indemnizar con 15.000 euros a un ciudadano que desde hacía diez años soportaba los ruidos emitidos por la terraza de una discoteca situada a escasos metros de su casa, a pesar de que el Tribunal Constitucional había rechazado previamente el recurso de amparo por carecer de contenido constitucional.

Consideraciones sobre la evolución reciente de la normativa ambiental

La normativa ambiental adoptada en el período examinado ha venido marcada, en primer lugar, por la situación de crisis económica que atraviesa España –unida a importantes recortes presupuestarios– y por la incorporación de patrones de sostenibilidad ambiental en el ámbito económico. Es esta situación la que ha justificado la adopción de una macronorma como la Ley de economía sostenible, tendente a crear las condiciones que favorezcan un desarrollo económico sostenible y a incentivar y acelerar el desarrollo de una economía más competitiva y más innovadora.

En segundo lugar, continúa apreciándose la influencia decisiva de la *Directiva* 2006/123/CE de servicios en el mercado interior, del Parlamento Europeo y del Consejo de 12 de diciembre de 2006, relativa a los servicios en el mercado interior, a través de la sustitución en diversos ámbitos del mecanismo de autorización o

licencia previa, por otros mecanismos de intervención más flexibles, como la comunicación y la declaración responsable. Las modificaciones de varias leyes sectoriales ambientales en los últimos meses van en esta línea y eliminan las tradicionales licencias locales, sin perjuicio de su sustitución por otras formas de verificación y control administrativo.

En tercer lugar, se aprecia la continuidad de tendencias ya señaladas en crónicas anteriores. Por una parte, muchas de las normas que han visto la luz en estos últimos meses tienen su origen en el Derecho comunitario, como se ha destacado en las páginas precedentes. Por ello, el Derecho ambiental español continúa, en buena medida, yendo a remolque del derecho comunitario, uno de los principales motores de innovación para la legislación ambiental española. Por otra, prosigue la tendencia bastante generalizada en España en materia ambiental de aprobación de normas básicas con carácter reglamentario, aun cuando en el sistema español, de acuerdo con la jurisprudencia constitucional, sólo excepcionalmente se admite la definición de lo básico en normas reglamentarias. Buena parte de los reglamentos aprobados se consideran legislación básica sobre protección del medio ambiente con arreglo al artículo 149.1.23 de la Constitución.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: THAILAND
Recent Developments of Forest-Related Law

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Introduction

Logging of natural forests is banned in Thailand. In order to satisfy the country's need for timber, the Thai government had enacted the *Forest Plantation Act* (1992) to encourage increased investment in plantation forests. However, this Act contained a number of constraints that made it ineffective in achieving its objectives.[1]

On 2 August 2002 the Thai Government ratified the *Kyoto Protocol*.[2] Under Article 12 of the *Protocol*, Thailand, through the Clean Development Mechanism (CDM), can implement emission-limitation projects to earn saleable certified emission reductions credits, which can be counted towards the country's obligations to meet the Kyoto targets. To enable CDM to operate, the *Forest Plantation Act* (1992) has been amended (25 October 2011).[3] The objectives of the amendment are to comply with the international agreement and to help further develop the national economy through timber production.

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[1] Regional Office for Asia and the Pacific of Food and Agriculture Organisation, *Thailand Forestry Outlook Study* (2009) Asia-Pacific Forestry Sector Outlook Study II, Working Paper Seires No. APFSOS II/WP/2009/22, 88.
[2] Office of Natural Resources and Envrionmental Policy and Planing of Thailand, *UNFCCC and Kyoto Protocol Implementation in Thailand* (2011) (avalable at http://www.onep.go.th/CDM/en/unfwork.html).
[3] Secretariat of Cabinet (Thailand), *Cabinet Resolution No. 23495/54 on 25 October 2011* (2011) (available at http://www.cabinet.soc.go.th).

This report discusses the amendments to the *Forest Plantation Act*. The report begins with a brief outline of the four main amendments to the Act. This is followed by a more detailed discussion of the benefits of the amendments and the issues that may arise as a result of the amendments. The conclusion to this report identifies research agendas for consideration by the IUCN Academy on Environmental Law.

Amendments to the *Forest Plantation Act*

As already noted, the 1992 Act did not succeed in encouraging increased investment in plantation forests in Thailand. A significant reason for the lack of success was the fact that only teak plantations were allowed. This restriction severely curtailed economic opportunities that might arise from investments in plantations. The 2011 amendments remove the restrictions on the type of tree that can be planted.[4]

Another amendment to the Act is a provision to allow licences to be obtained for timber production on land cleared under section 54 of the *Forest Act* that has been registered for plantation forests.[5] The Forest Chief Executive may grant a licence for the establishment of a lumber factory on such lands, subject to conditions set by the relevant Minister.[6]

Section 14 of the amended Act exempts plantation timbers from royalties and fees (this is intended to increase the incentives for investing in plantation forests). Section 14(1) also exempts non-timber forests products such as firewood and bamboo from royalties and fees. A fourth amendment enables the imposition of administrative penalties to suspend or revoke the registration of a plantation forest if there is a breach of conditions stated in a permit or under the Act.[7]

Discussion of Amendments

Incentives, especially for the private sector, for investment in plantation forests have been increased by the amendments to the *Forest Plantation Act.* The amendments increase the availability of land for plantation forests and provide opportunities for a greater range of investors to participate - including owners of cleared land who might

[4] Section 3.
[5] Section 4.
[6] Section 10 and section 11(2).
[7] Section 26(1).

otherwise be unable to invest in forest plantations. They further enable lumber yards to be conveniently established where timber is being harvested and exempt those who sell plantation timber from royalties and fees.

By increasing the land area under forest and better controlling harvesting activities (through enabling the imposition of penalties for breaches of the Act), Thailand appears to be making significant steps towards ensuring a sustainable forest industry that contributes to the economic wellbeing of the country as well as meeting its obligations under the *Kyoto Protocol*.[8] There are, however, a number of key issues that the amended Act does not address.

Excessive Discretionary Power

Excessive, legislated discretionary power can cause complexity[9] and enable corruption.[10] Section 11(1) of the Act grants the Forestry Chief Executive and the Forestry Minister significant discretion to create the conditions of approval for establishing a forest plantation and lumber factory on approved cleared land. These powers could be used to impose complex or unnecessary conditions that will allow eligibility to only a minority of 'preferred' parties.[11]

This potential (ab)use of discretionary power is evident when noting the operation of another Thai law, which aims to grant land to landless people and thereby provide them with the means to stop encroaching on and damaging natural forests. Thus far, the law has met with little success because government agents (often from several government authorities) have imposed complex conditions for the granting of land, which effectively precludes the landless from obtaining land.

[8] Thailand Greenhouse Gas Management Organization (Public Organization), *Clean Development Mechanism (CDM): CDM Development in Thailand* (2011) (available at http://www.tgo.or.th/english/).
[9] A. Contreras-Hermosilla and G. Witness, *Emerging Best Practices for Combating Illegal Activities in the Forest Sector* (2003) *DFID-World Bank-CIDA*, 8.
[10] Food and Agriculture Organization, *Reforming Forest Tenure: Issues, Principles and Process* (2011) FAO Forestry Paper 165, 13; and Food and Agriculture Organization and The International Tropical Timber Organization, *Forest Law Compliance and Governance in Tropical Countries: A Region-by-Region Assessment of the Status of Forest Law Compliance and Governance in the Tropics, and Recommendations for Improvement* (2010), 11.
[11] Food and Agriculture Organization and International Tropical Timber Organization, *Best Practices for Improving Law Compliance in the Forest Sector* (2005) Forestry Paper No. 145, 12.

The regulation of the forest industry in Indonesia provides a good illustration of how such discretionary power can be abused. Research suggests that some forestry officials exercise their discretionary power over licensing and permits for logging concessions in ways that benefit those operators who are prepared to provide the officials with financial returns.[12]

Conflicting Regulations

The amendments to the *Forest Plantation Act* do not consider and at times contradict the objectives of other Acts. Such conflict in objectives can cause administrative complexity,[13] high transactions costs and ineffective implementation of effected laws.[14]

For example, there are contradictions in the objectives of *Forest Plantation Act* and those of the *Forest Act* (1941). The *Forest Act* has a conservation focus. People may be granted land under the *Forest Act* but only for the conduct of agricultural activities.[15] The *Forest Plantation Act,* on the other hand, has a commercial focus and allows for the planting of any kind of tree (as a consequence of the 2011 amendments) on appropriately registered cleared land. Native forests could, therefore, be cleared to make way for plantation forests and for sites for lumber factories - both activities being counter the objectives of the *Forest Act*.

In addition, by allowing *any* type of tree to be planted, there is an increased danger that native forests will become invaded by weedy tree species. It is also possible that tree species are planted that significantly reduce available natural resources for other activities. For example, there is evidence that some kinds of Eucalyptus trees planted

[12] C. Palmer, *The Extent and Causes of Illegal Logging: An Analysis of a Major Cause of Tropical Deforestation in Indonesia* (2000) CSERGE Working Paper, Economics Department University College London and Centre for Social and Economic Research on the Global Environment University College London and University of East Anglia, 20.
[13] N. Gunningham, P. Grabosky and D. Sinclair, *Smart regulation: designing environmental policy* (1998) Clarendon Press, 46.
[14] P. Martin and J. Shortle, 'Transactions costs, Risks and Policy Failure (2009)' in C. Soares et al (eds), *Critical Issues in Environmental Taxation: International and Comparative Perspectives* (2010) 8 Oxford University Press, 717.
[15] Section 54.

for timber in Thailand consume vast quantities of water, reducing water availability for crops planted on adjacent lands.[16]

Other conflicts between administrative authorities under legislation may also arise. Usually, the power to grant a license for establishing a lumber factory is provided by the Department of Industrial Works (the *Forest Plantation* Act vests this power in the Chief Executive Officer and the Minister of the Department).[17] The Department of Pollution Control is charged with monitoring any pollutants that may arise from establishing the factory,[18] and the local government usually has the power to oversee the operation of factories established in their administrative territory.[19] Together these different authorities can create confusion and potential conflict between agency requirements.

Insufficient Monitoring of Implementation

Although the amendments to the *Forestry Plantation Act* allow for penalties to be imposed for breaches of the Act, there is no requirement to monitor whether permit conditions are, in fact, being implemented. This should be a basic requirement to ensure effective operation of the Act.[20] In addition, there should be a requirement to gather data and information that could guide the improvement and development of policies and laws regarding forestry practices.

There is, for example, no requirement to monitor the activities of third parties contracted to plant trees or harvest timber. The contractors might carry out their activities without regard to permit requirements for what and how land should be cleared. There are no impediments to contractors who can do long-term damage to the industry because they are concerned only with the amount of timber they can harvest in their allocated period for harvesting without regard to the maturity of the trees being harvested.[21]

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[16] P. Kuaycharoen, 'Plantations are not Forests Commercial Tree Plantations in the Mekong Region: Commercial Tree Plantations in Thailand: Flawed Science, Dubious Politics and Vested Interests' (2004) 9(3) *Towards Ecological Recovery and Regional Alliance*.
[17] Factory Act B.E. 2535 (1992) (Thailand), section 7.
[18] Pollution Control Department (Thailand), *Mission Statement of Pollution Control Department (Thailand)* (2004) (available at http://www.pcd.go.th/about/en_ab_mission.html).
[19] *Thailand Constitution* (2007), section 290.
[20] FAO et al (supra note 11), 73.
[21] Forest Watch Indonisea and Global Forest Watch, *The State of the Forest: Indonesia* (2002) Forest Watch Indonisea and Global Forest Watch, 29.

Lack of Costing of Implementation

There is a lack of evidence that the cost of implementing the Act was appropriately considered before the amendments to the Act were passed. For example, it is unlikely that resources would be available to deal with the administration of a proliferation of lumber factories that may arise as a result of the provisions in the amended Act.[22]

Other costs also appear to be overlooked. There is no requirement within the Act to ensure that trees planted in fact return the highest benefit. *Any* tree may be planted, under the Act but one of the objectives of the Act is to increase the economic welfare of the country. The Act should make clear the definition of how such welfare can best be achieved.

Stakeholder Needs

Stakeholders affected by the *Forest Plantation Act* are not effectively considered by the amendments to the Act. As already noted, decisions regarding the granting of permits are vested entirely in the Chief Executive Officer and the Minister. There is no provision to involve the community or other stakeholders who may be impacted by, for example, the establishment of factories.

In addition, there is no scope to enable groups of people to participate in forestry operations. The amendment provisions of the *Forest Plantation Act* theoretically allow for land granted to landless people under the *Forest Act* to be planted out with plantation forests. However, small-scale landholders are unlikely, individually, to be able to afford the expense and time for creating such forests. It may be possible for the landholders to engage in plantation forestry activities as a group, but this possibility is not addressed in the amendments to the Act.[23]

[22] P. Martin et al, *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers* (2007) Research Report, Australian Farm Institute and Land & Water Australia, x.
[23] A. Nawir and L. Santoso, 'Mutually beneficial company-community partnerships in plantation development: emerging lessons from Indonesia' (2005) 7(2) *International Forestry Review* 177.

Research Agenda for IUCNAEL

The above discussion raises a number of possible research agendas for consideration by the IUCN Academy of Environment Law (IUCNAEL).

How can land-use laws and institutions be reformed to achieve effective forest plantations that result in sustainable forest management in Thailand?

Land use systems and deforestation are interrelated: ineffective land-use governance can lead to significant deforestation. Current regulations attempt to protect native forests by providing landless people with land for cultivation to halt their encroachment on the forests, but regulations simultaneously provide for the means to destroy native forests to create timber plantations. There are no clear property rights and obligations for the use of land, and there is little coordination among authorities who approve land allocation.[24] The research agenda would be to develop proposals for better land-use governance systems that achieve effective forest plantations and sustainable forest management for Thailand.

Whether co-regulation is an effective method for reducing excessive discretionary power provided in Thailand's Forest Plantation Act[25]

Forms of co-regulation between industry and government could include mutual contracts or agreements related to plantation and timber management.[26] Co-regulation arrangements may also help to ensure that licensees produce timbers of a high standard.

Development of an assessment method to ensure that regulatory objectives are being met

[24] S. Lakanavichai, 'Trends in forest ownership, forest resources tenure and institutional arrangements: are they contributing to better forest management and poverty reduction?; Case study from Thailand' in Food and Agricultural Organisation, *Understanding Forest Tenure in South and Southeast Asia* (2007) Vol 14, 341.
[25] P. Martin and E. Le Gal, 'Concepts for Industry Co-Regulation of Bio-Fuel Weeds' (2010) (1) *IUCNAEL eJournal,* 7-9.
[26] L. Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9(1) *Electronic Journal of Comparative Law*,11-14; J. Gray, *Forest Concession Policies and Revenue Systems: Country Experience and Policy Changes for Sustainable Tropical Forestry* (2002) World Bank Publications, 11.

One approach to assessment that may be worth researching further is the Monitor, Evaluate, Report and Improve (MERI) Framework used by many government departments around Australia to assess the effectiveness of natural resource management policies and to promote their accountability.[27]

What assurance can be built into the logging industry to ensure that timber is legally planted and harvested?

Illegal logging continues to be a significant problem in Thailand. The viability of implementing the European Union's proposed Forest initiative (or other international counterparts such as the *US Lacey Act*, 2008) could be further investigated. This Initiative is a due diligence system that monitors the sourcing of timbers and encourages plantation licensees to go beyond mere compliance by continuously verifying the methods and practices by which timbers are produced.[28]

Methods to better involve the community

Better methods to involve the community in the forest plantation industry may provide opportunities for those living in poverty to economically gain from the forestry industry. Community-company partnerships may be a mechanism for achieving better involvement.[29] Greater community involvement may also encourage a sharper focus on the sustainable production and supply of timber, and on environmental conservation.

A significant component of such research must be how to manage flows of information to the community to enable good decision-making. Without access to accurate and timely information, stakeholders will not be able to effectively engage in achieving outcomes from the timber industry that will go towards meeting the objectives of the *Forest Plantation Act*. A viable model for increasing the flow of

[27] Australian Government, *NRM MERI Framework: Australian Government Natural Resource Management Monitoring, Evaluation, Reporting, and Improvement Framework* (2009) Commonwealth of Australia, 3.
[28] International Union for Conservation of Nature, *News and Events:Asia-Pacific Forest Week* (2011) (available at http://www.iucn.org/about/work/programmes/forest/fp_news_events/asia_pacific_forest_week__november_2011/?8575/Addressing-illegal-logging).
[29] World Bank, *Sustaining Economic Growth, Rural Livelihoods and Environmental Benefits: Strategic Options for Forest Assistance in Indonesia* (2006) Report No. 39245, 86.

information regarding forest practices to stakeholders may be the development of extension services.[30]

Conclusion

This report has discussed the recent amendments to Thailand's *Forest Plantation Act* (1992). The amendments address a number of failings of the *1992 Act,* but fail to address others. Significantly, the amendments do not adequately provide for increased participation of the community in the forestry industry, and amendments introduce measures that may cause: increases in complexity and corruption in the system; and decreases in environmental sustainability. Timely research and proposals into methods to overcome failings of the Act would provide useful input to Thailand's efforts to truly meet the Act's environmental, social and economic objectives, and to meet the country's international obligations.

[30] K. Singh, B. Sinha and S. Mukherji, *Exploring Option for Joint Forest Management in India* (2005) Forestry Policy and Institutions Working Paper: A World Bank/WWF Alliance Project, Food and Agriculture Organization, 4.

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COUNTRY REPORT: UGANDA
Environment within Planning Legislation

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Introduction

Physical planning is the spatial expression of the desired form of social and economic development. Its purpose is to establish and maintain a framework for a more balanced spatial development countrywide, through a rational arrangement of land uses in space, protection of the environment and their alignment with long-term government objectives for sustainable economic and social development. Physical planning offers several services including framework development planning and control, and development assessment. It specifically regulates development which is defined under section 1 of the *Physical Planning Act* (2010) to mean the 'making of any material change in the use or density of any buildings or land or the subdivision of any land and the erection of such buildings or works and the carrying out of such building operations'.

The *Physical Planning Act* (2010) repealed the *Town and Country Planning Act* (1964). It establishes the National Physical Board and the district, urban and local physical planning committees. Their role is to make and approve physical development plans and applications for development permission and related matters in Uganda. As a law that regulates physical developments, it has implications for environmental regulation. The purpose of this report is to examine the implications of this new law for environmental regulation in Uganda.

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The Scope of Application of the Act

Section 3 states that the *Physical Planning Act* applies to the entire country in all respects of planning. This implies that all activities related to physical planning development in Uganda must be authorized by the National Physical Planning Board, District Physical Planning Committee, Urban Physical Planning Committees or Local Physical Planning Committees. This is a very important development in the law because land use planning and development plan approvals, previously done only in urban areas, will now become a standard practice across the country.

Institutional Framework for Physical Planning

The Act establishes an institutional framework to govern planning in Uganda. At the national level, section 4 establishes the National Physical Planning Board. The Board has functions that relate to environmental regulation. The first is to provide advice to Government on all matters relating to physical planning, broad physical planning policies, planning standards and the viability of any proposed subdivision of urban or agricultural land. Secondly, to provide advice to the Minister responsible for local government on the declaration of town councils, town boards or upgrading of urban authorities; and on the declaration of special planning areas. Thirdly, to study and give guidance and recommendations on issues relating to physical planning which transcend more than one local government for purposes of coordination and integration of physical development. Fourthly, to approve regional, urban or district physical development plans and recommend to the Minister national plans for approval. Fifthly, to cause physical development plans be prepared at national, regional, district, urban and sub-county levels. Sixthly, to evaluate the implementation of physical development plans; and to formulate draft planning policies, standards, guidelines and manuals for consideration by the Minister. Seventhly, to ensure the integration of physical planning within social and economic planning at the national and local levels. Eighthly, to exercise general supervisory powers over all lower planning committees; to provide guidance, set standards and take control and to foster coordination of physical planning related or interdisciplinary activities in the country so as to promote orderly and sustainable development human settlements in rural and urban areas. Lastly, to hear and determine appeals lodged by persons or local governments aggrieved by the decision of any physical planning committees;

and to determine and resolve physical planning matters referred to it by physical planning committees.

The Act sets up planning committees at the district, urban and local levels. At the district level, section 9 of the Act establishes the District Physical Planning Committee with the following functions: to cause to be prepared local physical development plans through its officers, agents, or any qualified planners; to recommend to the Board development applications for change of land use; to recommend to district council subdivision of land which may have a significant impact on the contagious land or be in breach of any condition registered against a title deed in respect of such land; to approve development applications relating to housing estates, industrial location, schools, petrol stations, dumping sites or sewerage treatment, which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safeguard areas; to hear appeals by those aggrieved by decisions made by the district physical planner and lower local physical planning committees; to ensure the integration of physical planning into the three year integrated development plan of the district; and to exercise supervisory powers over all lower planning committees and to ensure integration of social, economic and environmental plans into the physical development plans.

At the urban planning level, section 11 of the Act establishes the Urban Physical Planning Committees which are mandated with the following functions: to cause to be prepared urban or local physical development plans and detailed plans; to recommend development applications to the Board for change of land use; to recommend to the urban council, subdivision of land which may have significant impact on contiguous land or in breach of any condition registered against a title deed in respect of such land; and to determine development applications relating to industrial location, dumping sites or sewerage treatment which may have injurious impact on the environment as well as applications in respect of land adjoining or within a reasonable vicinity of safe guarding areas and to hear and determine appeals made against decisions of the urban physical planner or subordinate local authorities.

At the local level, the Act recognizes that the sub-county councils shall constitute local physical planning committees with the following functions: initiate the

preparation of local physical development plans; recommend to the district physical planning committees the approval of local physical development plans; implement structure plans in close consultation with the district physical planner and implement in close consultation with the district physical planner, detailed plans and area actions plans which shall address the matters such as the treatment of a particular planning aspect like residential, transportation, water supply, sewerage, in part or as part of a long term plan; advisory or subdivision plans, indicating permitted subdivision, use and density development; and the assessment of immediate land requirements to accommodate specific population needs and detailed allocation of the land requirements to land uses taking into account compatibility of adjoining land uses and conforming to the existing physical development plan proposals for the area.

All three committees are specifically mandated to deal with environmentally-related issues such as dumping sites or sewerage treatment, which may have injurious impact on the environment. The inclusion of environmental issues within the mandate of the committees provides an opportunity for environmental regulation through physical planning.

Physical Development Planning and its Environmental Implications

The Act makes provisions that regulate physical development planning. Section 18 provides that physical development plans shall address the following: the national physical development plan; regional physical development plans; district development plans urban physical development plans; and local physical development plans. Section 19 requires that the national and regional physical development plans be prepared by the Board in respect of any area for the purpose of improving that area and providing for proper physical development. In the preparation of the national and regional physical development plan, the Board is required to take into account the securing of suitable provision for agricultural development, infrastructure, industrial development, environmental protection, natural resource management, urbanization, human settlements, conservation, tourism and matters such as population growth, distribution and movement, land potential including distribution of agricultural potential, the relative values, population and land imbalances, land tenure, land use and other natural resource endowments. The Board is also required to take into account employment and income distribution,

the labour force, potential of the informal sector and their locations, human settlements including distribution of existing services, growth, pattern of urbanization and cause of rural-urban migration and matters affecting more than one district which require central government coordination.

Section 24 empowers the Minister, on the recommendation of the Board and by statutory instrument, to declare an area with unique development potential or problems, a special planning area for the purposes of preparation of physical development plan.

Section 25 requires a district urban and sub-county physical committee to prepare a district urban physical development plan. Section 26 outlines what should be contained in the district, urban and local physical development plans. These plans have to contain the following: a topographical survey in respect of the area to which the plan relates, carried out in the prescribed manner; maps and descriptions as may be necessary to indicate the manner in which the land in the area may be used, a technical report on the conditions, resources and facilities in the area; a statement of policies and proposals with regard to the allocation of resources and the locations for development within the area; a description and analysis of the conditions of development in the area as may be necessary to explain and justify the statement of policies and proposals; relevant studies and reports concerning the physical development of the area; maps and plans showing the present and future land use and development in the area; and any other information as the Board and the Committee may deem necessary.

Section 28 provides that the district, urban and local physical development plans must be approved by the Board. Once they have been approved, they cannot be altered without the prior written authorization of the district physical planning committee.

Section 30 permits the modification of district and urban physical development plans by the district or urban physical planning committee with the approval of the relevant local government council. The proposals for modification are submitted to the board for alteration upon payment of the prescribed fee, where there are practical difficulties in the execution or enforcement of the approved plan or there has been a change of circumstances since the plan was approved. The section also permits a

local physical planning committee (with the approval of the local government council) to submit to the urban or district physical planning committee proposals for the amendment or modification of an approved local physical development plan.

Section 31 requires a land owner to use a qualified planner to prepare a local physical development plan to be submitted to the local physical planning committee for adoption with or without modification.

Section 32 provides that the local physical planning committees have the following powers: to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of the area; control or prohibit the consolidation or subdivision of land and existing plots; to ensure the proper execution and implementation of approved local physical development plans; to initiate formulation of by-laws to regulate physical development; and to ensure the preservation of all land planned for open spaces, parks, urban forests and green belts, environmental areas, social and physical infrastructure and other public facilities, in accordance with the approved physical development plan. The powers are crucial for physical development in Uganda because the committees can prepare physical development plans, recommend plans for change of land use and approve development applications relating to housing, estates, industrial locations, schools, petrol stations, dumping sites and sewerage works. These are common physical planning activities in Uganda and their regulation is very crucial.

Section 33 prohibits any person carrying out any development within a planning area without development permission from a physical planning committee. It creates penalties for non-compliance with the provisions of the Act. Any person who contravenes the provisions of the Act commits an offence and is liable to a fine not exceeding forty-eight currency points or imprisonment not exceeding two years or both. According to the First Schedule of the Act, a currency point is equivalent to twenty thousand shillings. Thus a person who commits an offence under the Act can a pay a maximum fine of nine hundred and sixty thousand Uganda Shillings.

Section 34 requires that an application for permit be made to the relevant local government, which shall forward it to the relevant physical planning committee. When the physical planning committee is considering a development application, it shall be bound by any approved relevant regional or local physical development plan, have

regard to the health, amenities and convenience of the community generally and proper planning and density of development and land use in the area, have regard to any comments received from the physical planner or authorities and in case of a leasehold, and consider any special conditions stipulated in the lease.

Section 37 provides that where a development application relates to matters that require an environmental impact assessment, the approving authority or physical committee may grant preliminary approval of the application subject to the applicant obtaining an environmental impact assessment certificate in accordance with the *National Environment Act*.

Section 40 provides that an application for development permission in areas where there is no approved plan shall be submitted to the local physical development committee for consideration. The committee may approve the application but where the application covers matters of a national character, the committee shall refer the application to the Board.

Section 46 provides for enforcement. A local physical planning committee is empowered to serve an enforcement notice on an owner, occupier or developer of land, where the committee is satisfied that the development of land has been or is being carried out without the required development permission; or that any of the conditions of development permission granted under the Act have not been complied with. Section 56 also empowers the Board (after consultation with the Commissioner in Charge of Antiquities) to serve on the owner or occupier of a building which in the opinion of the Board is of special architectural value or historic interest, an order prohibiting the demolition, alteration or extension of that building.

Conclusion

This new legislation has introduced environmentally-related regulation into physical planning which did not exist under the *Town and Country Planning Act* (1964). The Act requires authorities in the whole country to develop detailed plans for land use and enforce compliance according to physical planning development standards. Whilst the new law makes the whole country a planning area, it also recognises the special importance of urban areas that are very important for environmental regulation. The Act establishes appropriate institutional frameworks at the national,

urban and local levels. The establishment of physical planning committees at the local levels provides an opportunity to consider special physical planning development needs in rural areas. However, there are some challenges regarding the implementation of the new law because there are no guidelines for implementing the physical planning standards. The required approach to implementing the Act is therefore not known by the key stakeholders who are supposed to implement it. In addition, there are insufficient specialized and technical personnel to monitor implementation especially in relation to environmental standards. It is thus recommended that the content of the law be more widely communicated to the community and there be provision of funding and specialized training to ensure its effective implementation.

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eJournal
ISSUE 2012 (1)

COUNTRY REPORT: UNITED KINGDOM
Energy and Ecosystem Services

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Introduction

The United Kingdom (UK), like many other industrialised countries, faces a multitude of challenges balancing its consumptive needs, the management of its ecosystems and ecological footprint. This Country Report will focus on these challenges in the context of the *Energy Act* (2011), the Government's proposed ch*anges to Feed-in-Tariffs* (*FITS*) for renewable energy and the National Ecosystem Assessment. This Report will also provide a brief update on the Welsh badger cull discussed in issue 2(1) of the *eJournal*.

New Legislation: *Energy Act* (2011) and the Green Deal

The *Energy Act* (2011), which received Royal Assent on 18 October 2011, is designed to implement the key findings of the *Electricity Market Reform Programme* focused on energy efficiency, low carbon supplies and enhanced market competition.[1] Central to the new legislation is the creation of the 'Green Deal', an energy efficiency initiative aimed at decreasing the energy consumption of private homes and workplaces through the instillation of energy saving mechanisms and the undertaking of repairs. Works initiated under the *Energy Act* are to be funded through

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[1] Department of Energy and Climate Change, *Energy Act* (2011). The full text of the Act can be accessed at http://www.decc.gov.uk/en/content/cms/legislation/energy_act2011/energy_act2011.aspx.

a new financing mechanism designed to increase their affordability.[2] The Act contains five main parts which are linked closely to its main objectives, namely: (1) energy efficiency; (2) the security of energy supplies; (3) measures for reducing carbon emissions; (4) the expansion of the existing Coal Authority; and (5) miscellaneous provisions including the repeal of the *Home Energy Conservation Act* (1995) (*HECA*).[3]

Chapter 1 of the Act establishes the Green Deal. It is aimed at increasing the uptake and installation of energy saving measures in households and businesses by private sector suppliers. Measures covered by the Act are classified in four categories: heating ventilation and air conditioning, building fabric, lighting, water heating and micro generation. These range in cost and complexity from lighting controls and draft proofing, to solar thermal and biomass boilers.[4] The initiative aims to increase instillation rates of these measures through removing the requirement of upfront payment and staggering payments through energy bill installments. Importantly, the Act includes technologies capable of generating energy as well as those capable of decreasing consumption, encouraging households to be become net energy producers.[5] Specifically, in order for an energy saving instillation to be funded under the Green Deal, it must meet a number of criteria. Some of these criteria are set out in the Act.[6] The details of these requirements are, however, presently under consultation. Broadly, the measure will be required to meet these still to be determined eligibility requirements and be attached to, and suitable for, the property in question. Once these criteria have been established, the 'Green Deal provider' is then required to make a 'finance offer' based on the potential energy savings of the instillation. A Department of Energy and Climate Change Paper on Green Deal measures provides that annual savings derived from the instillation will be required to be equal or exceed the annual repayment costs.[7]

In 2000, the UK launched its *Climate Change Action Programme*, which set the objective to reduce greenhouse gas emissions by 12.5 percent below 1990 levels by

[2] Department of Energy and Climate Change, *What Measures Does the Green Deal Cover?* (July 2011) 3.
[3] *Energy Act*, 'Explanatory Notes' (http://www.legislation.gov.uk/ukpga/2011/16/notes/division/2).
[4] Department of Energy and Climate Change (supra note 2) 7.
[5] Ibid, 4.
[6] *Energy Act*, sections 4-11.
[7] Department of Energy and Climate Change (supra note 2) 8.

2012.[8] Compared to many countries, homes and workplaces across the UK are comparatively aged and present substantial challenges for energy efficiency. Approximately a quarter of the UK's carbon emissions are derived from energy consumption in private housing and another quarter from business.[9] Reducing energy consumption in these areas is essential for meeting the Government's overall emission target and more specifically those targets set by the *Energy Act* (2008).[10] It is also important to note that in the era of austerity and budget cuts that the Act engages and relies upon the private sector for achieving its desired outcomes. The Government has indicated that it will be adopting a co-regulatory approach, working with the United Kingdom Accreditation Service (UKAS) to define the standards. The details of these standards have not been finalised. The DECC has, however, already stated that the companies participating the in the Green Deal will require licensing and accreditation and that an industry code will be in place to protect consumers during the lifespan of Green Deal's plans.[11] However, it is not possible to make an assessment of their effectiveness at this stage.

Parts 2 and 3 of the *Energy Act* (2011) are also linked to energy supply. They focus on the security of supplies and further measures to decrease emissions. Specifically, Part 2 aims to enhance energy security in the UK with provisions aimed at gas supplies empowering Ofgem to modify the Uniform Network Code to ensure the availability of sufficient gas levels during a 'gas supply emergency'.[12] Section 103 allows for changes to be made with respect to the continental shelf boundaries.[13] These changes have been made to enable the signing of a maritime boundary agreement with Ireland which will allow for the alignment of Exclusive Economic Zones.[14] Linking back to the energy consumption focus of Part 1, Part 3 of the Act extends the powers granted to the Secretary of State under the *Energy Act* (2004) to amend and extend offshore energy transmission licences past the existing 2010 deadline,[15] allowing for the continuation of these projects. It also makes changes to

[8] S. Bell and D. McGilvray, *Environmental Law* (2008) 2nd edition, Oxford University Press, 527.
[9] Department of Energy and Climate Change, *Green Deal* (available at http://www.decc.gov.uk/ en/content/cms/tackling/green_deal/green_deal.asp).
[10] Ibid.
[11] Department of Energy and Climate Change, 'Consumer Protection and the Green Deal' (May 2011).
[12] *Energy Act*, section 81; and Department of Energy and Climate Change (supra note 9).
[13] *Energy Act*, section 103; Energy Act, 'Explanatory Notes' (supra note 3).
[14] Department of Energy and Climate Change (supra note 1).
[15] *Energy Act*, section 104.

the nuclear decommission programme under the *Energy Act* (2008) and permits these sites to be used as carbon capture and storage sites (CCS).[16]

If there is one theme currently running through environmental matters in the UK, it is the conflict between cost and conservation. In the current era of debt and austerity, there exists substantial concern regarding the Government's commitment to its environmental mission. Placing the private sector at the centre of the *Energy Act* (2011) aims to achieve emission reductions in the household and business sector at limited public cost. However, this raises concerns as to whether the private sector is the most appropriate vehicle through which to promote these objectives. Great attention should be paid in the coming months to the details of the consumer protection and co-regulatory regimes as they emerge. Moreover, consideration must be given to whether delayed payment is a sufficient incentive to engage households and businesses with energy saving technologies.

Solar Subsidy Litigation: Solar Firms and Friends of the Earth

In two separate and ongoing judicial review applications, a coalition of solar installation companies and the Friends of the Earth have challenged the decision of the Department of Environment and Climate Change (DECC) to reduce solar Feed-In-Tariffs (FITs).[17] These planned reductions have been widely criticised for reducing the viability and attractiveness of renewable energy at a time when the UK is under increasing pressure to control emissions and air pollution. The new rates were planned to come into force on 12 December 2011, prior to the conclusion of the current Feed-In-Tariffs review on 23 December 2011 initiated by the DECC in October this year.[18]

Under the current scheme, which was introduced in April 2010 under the *Energy Act* (2008), households, community groups and businesses are able to invest in small-scale (under 5MW) low carbon generating technology for which they would receive a guaranteed payment for the surplus electricity they sold back to the grid. The renewable technologies covered by the scheme include solar, wind, hydro and

[16] *Energy Act*, section 107.
[17] D. Clarke, 'UK Solar Companies Take Legal Action' *Guardian* (London, 10 November 2011).
[18] Department of Energy and Climate Change, *FITS Review* (available at http://www.decc.gov.uk/en/ content/cms/meeting_energy/renewable_ener/feedin_ tariff/fits_review/fits_review.aspx).

anaerobic digestion.[19] Under the review launched on 31 October 2011, the DECC will examine the efficiency of the FITs programme with the view of the scheme delivering £40 million saving by 2014/15. The review will be conducted in two phases, the first of which will consider small-scale solar photovoltaics (PV), its linkage to 'specified energy efficiency requirements from 1 April 2012' and the introduction of new multi-instillation tariff rates for solar schemes. The second phase of the review will consider these issues in the context of non-solar technologies.[20] Despite the ongoing nature of the review, the DECC announced that it would change the rates paid to consumers for proposals lodged on or after 12 December 2011. This change will involve the rates decreasing from 37.8 pence per kWh to 21 pence for new builds and 43.3 pence per kWh to 21 pence for retrofits.[21] These proposals were intended to take effect before the end of the review period.[22]

A coalition of solar companies, led by Solarcentury, applied to the High Court for an interim injunction to stop the Government implementing these proposed changes prior to the completion of the formal consultation period.[23] The Friends of the Earth also challenged the decision on the basis that the change in the feed-in-tariff payments prior to the conclusion of the consultation period was unlawful. The charity has also expressed its concerned that the change of tariff levels may lead to the abandonment of current solar projects.[24]

On 21 December, the Administrative Court handed down its ruling on the enjoined matter. The Court granted declaratory relief holding that the decision of the DECC was both unlawful and one that likely to have 'significant impact' in practice.[25] The DECC appealed the decision. On 25 January 2012, the Court of Appeal, in a unanimous judgment, held that there was no power in the *Energy Act* (2008) 'to introduce a modification which reduced a rate fixed by reference to an instillation becoming eligible prior to modification' and more broadly that the Secretary of State for Energy and Climate Change did not have the power to make the proposed

[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Clarke (supra note 17).
[24] Friends of the Earth, 'We Are Taking the Government to Court Over Solar Cuts' (14 November 2011) (available at http://www.foe.co.uk/news/final_demand_33279.html).
[25] *R (on the Application of Friends of the Earth) v Secretary of State for Energy and Climate Change; R (on the Application of Homesun Holdings Ltd v same; R (on the application of Solar Century Holdings Ltd) v same* [2011 EWHC 3575 (Admin) (21 December 2011).

changes.[26] Following the judgment, the DECC has again indicated its intention to appeal the matter, this time in the Supreme Court.[27]

These changes to the solar-based FITs and the continuing litigation highlight the tension again between expenditure and environmental initiatives. The timing of these changes also raises questions regarding the Government's commitment to the expansion of renewable energy initiatives under the *Energy Act* (2011).

Government Report: National Ecosystem Assessment

The management of ecosystems and consumption of ecosystem services is a vital issue. The recently released UK *National Ecosystem Assessment* (*NEA*)[28] considers the status of the UK's service producing ecosystems and proposes methods for their future management and conservation. The assessment was undertaken by the Department of Food, Environment and Rural Affairs in conjunction with the Governments of Scotland, Wales and Northern Ireland and the National Environmental Research Council. The *NEA* surveyed the country's natural environment and ecosystems dividing them into eight key habitats[29] and considered the ecological health, economic value, use and future pressures of these ecosystems.[30] The purpose of the *NEA* is to ensure the 'long-term sustainable delivery of ecosystem services for the benefit of current and future populations in the UK' and to support Britain's obligations under the *Convention on Biological Diversity*[31] and the *Water Framework Directive*.[32] Central to the NEA, was an

[26] *R (on the Application of Friends of the Earth) v Secretary of State for Energy and Climate Change; R (on the Application of Homesun Holdings Ltd v same; R (on the application of Solar Century Holdings Ltd) v same* [2012] EWCA 28 (25 January 2011); Per Lord Justice Moses.
[27] Department of Energy and Climate Change, 'Chris Huhne on Court of Appeal Decision on Feed-In-Tariffs' (10 February 2012) (available at http://www.decc.gov.uk/en/content/cms/news/huhne_fits/ huhne_fits.aspx).
[28] Countryside Council for Wales, Department of Environment, Food and Rural Affairs, Economic and Social Research Council, Natural Environment Research Council, Northern Ireland Environmental Agency, The Scottish Government and Welsh Assembly Government, *United Kingdom Ecosystem Assessment Report*: *Technical Report* (June 2011) available at http://uknea.unep-wcmc.org/ Resources/tabid/82/Default.aspx).
[29] Ibid. These habitats are: mountains; moorland and heath; semi-natural grasslands; woodlands; freshwater open-waters; wetplains and floodplains; urban; coastal margins; and marine.
[30] Ibid.
[31] *Convention on Biological Diversity* (1992) 31 *ILM* 822.
[32] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for community action in the field of water policy, OJ L327, 22 December 2000.

examination of the impact of urbanisation and current globalisation patterns on the environment and its capacity to deliver ecosystem services.

The UK, like many other industrialised nations, possesses very high levels of urban density, with approximately 80 percent of its 62 million inhabitants living in towns and cities. The *NEA* found that this high degree of urban living has effectively removed the environment from the daily lives of many residents and consequently that the natural source of ecosystem services are not appropriately valued and acknowledged.[33] It also noted that the production output from ecosystem services has dramatically increased over the past 60 years to meet growing consumption needs. The greatest output increases have occurred in the areas of livestock, crops and forestry resources through the intensification of farming and harvesting practices. However, the *NEA* provides that this intensification of 'primary' services has led to the contraction of 'supporting' ecosystem services such as nutrient cycling, insect pollination and 'cultural' services such as hedgerows.[34] The *NEA* also considers the relationship between ecosystem services and 'human well being' in the context of this increased productivity. It concludes that these increased yields have had both a positive and negative impact on society as enhanced production satisfies consumptive needs while placing greater pressure on supporting, regulating and cultural services.[35] The continuing pressures and disconnection between ecosystems and consumers are identified as a clear challenge. The Assessment however notes that that despite the past and present stress on ecosystems that improvements have been made over the past 20 years especially in the areas of fisheries management, farming, forests, air and water quality. In particular it credits the *Rural Development Programme* (as part of the UK implementation of the *Common Agricultural Programme*), *Water Framework Directive* and related legislative reforms as leading to significant improvements in ecological status.[36]

The *NEA* also highlights the importance of integrating the economic value of ecosystem services into decision-making processes. It argues that the 'economic, human health and social benefits' that we derive from ecosystem services are vital to both 'human well being and the UK economy' and that consequently 'each should be considered when evaluating the implications of changes in ecosystems and their

[33] *Ecosystem Assessment Report* (supra note 28).
[34] Ibid, 23-5.
[35] Ibid, 33.
[36] Ibid, 9 and 26.

services'.[37] At present, the values of most ecosystems services are not included within economic frameworks and decision-making. The *NEA* asserts that this exclusion is allowing for inefficient decision-making and the less effective allocation of resources. The economic valuation of these services, it argues, would allow for the tangible value of services to be assessed and given appropriate weight.[38]

Going forward, the *NEA* advocates the adoption of both a sustainability approach and effective regulatory measures. Importantly, the *NEA* views sustainability and sustainable management as the most appropriate mechanism to achieve a balance between the demands on ecosystem services and the needs of the ecosystem itself. The key findings assert:

> 'that a move towards sustainable development will require an appropriate mixture of regulations, technology, financial investment and education as a well as changes in individual and societal behaviour and adoption of more integrated…approach to ecosystem management.'[39]

In terms of achieving this goal, the *NEA* views broad based community and government participation as key. Integration in this sense is to involve a response on the 'local to global level' the development of linkages between the public, private, civil and voluntary societies to facilitate open dialogue and collaboration.[40] Despite the importance of this approach, the clear emphasis on anthropogenic factors must be acknowledged as it raises concerns as to whether this form of sustainability will place sufficient emphasis on the ecosystem rather than merely what it is able to produce for human consumption. The *NEA* pays particular attention to the success of previously mentioned European and domestic regulatory approaches which have put in place environmental protection measures, such as emissions limits and the removal of subsidies.[41] In terms of this integration, it proposes the linkage of this enabling level with foundation knowledge, instrumental market incentives and technology.[42] Potentially, it will be through this legislative element that environmental factors and ecosystem concerns will receive their equal footing.

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[37] Ibid, 42.
[38] Ibid, 42-3.
[39] Ibid, 5.
[40] Ibid, 53-6.
[41] Such as those adopted under the *Common Agricultural Policy*.
[42] *Ecosystem Assessment Report* (supra note 28) 54.

Country Report Update: Badger Cull Review and Badger Vaccination Trial

The previous UK Country Report[43] discussed the case *Badger Trust vs. The Welsh Minister*.[44] In this case, the Court of Appeal held a proposed badger cull under the *Tuberculosis Eradication (Wales) Order* (2009) to be invalid. Following the case and the halt of the proposed cull, the Welsh Government has undertaken a review to consider the most appropriate mechanisms to eradicate bovine tuberculosis (bovine TB) in Wales. The review, which is expected to report by the end of the year, will focus on the 'scientific evidence base' surrounding the eradication of bovine TB and in particular the validity and effectiveness of badger culling to tackle the problem. The Welsh Environment Minister, John Griffiths has refrained from introducing any further cull orders for the Intensive Action Area while the review is ongoing.[45]

In a related development, the Gloustershire Wildlife Trust has undertaken the first independent badger vaccination programme. The early results of the trial, which saw 35 badgers vaccinated against the bacteria that cause Bovine TB in cattle, found that vaccination could be carried out effectively at a cost of £51 per hectare. This is substantially higher that the culling cost of £20 per hectare. While the study did not specifically examine disease levels in badgers and cattle post vaccination (instead relying on previous research), it does highlight the potential for vaccination as a viable alternative to culling.[46] In light of the protected status of badgers and biodiversity value, the inclusion of non-cull such as vaccination, should be considered as part of any long-term and sustainable Bovine TB eradication programme.

[43] R. Bates, 'United Kingdom Country Report' (2011) 2(1) *IUCN Academy eJournal*.
[44] [2010] EWCA Civ 807.
[45] Welsh Government, *Review of the Scientific Evidence Base for the Eradication of Bovine TB in Wales* (21 June 2011). See further: http://wales.gov.uk/newsroom/environmentand countryside/ 2011/110621bovinetb/?lang=en.
[46] R. Black, 'Badger Cull Head for Further Consultation' BBC (12 October 2011) (available at http://www.bbc.co.uk/news/uk-14204236).

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

COUNTRY REPORT: USA
Climate Change in the Supreme Court

Melissa Powers*

Introduction

US climate law has witnessed important developments in the courts and at the regulatory level in the past year and a half. In the courts, the most significant recent decision came out in June 2011, when the US Supreme Court held that federal *Clean Air Act* displaced federal common law.[1] The case at issue, *American Electric Power Co., Inc. vs. Connecticut* (*AEP*), involved a lawsuit brought by several states and three private land trusts against several electric utilities that rely heavily on coal-fired power plants for electricity production.[2] Although the case foreclosed the use of federal tort law to mitigate climate change,[3] it left open several questions regarding state common law authority over major sources of greenhouse gases (GHGs) and citizen standing to sue regarding climate change. It also raised broader questions regarding the Environmental Protection Agency's (EPA) authority to regulate GHG emissions under the Clean Air Act. This report will discuss the Supreme Court's ruling in *AEP* and explore its implications for US climate law more generally.

American Electric Power Co., Inc. vs. Connecticut

The Supreme Court's decision in *AEP* arose from a public nuisance action filed in 2004. At that time, the EPA had consistently refused to regulate GHG emissions under the federal *Clean Air Act* or any other federal law. Indeed, the President at that

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[1] *Am. Elec. Power Co. Inc. vs Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*).
[2] Ibid, 2533-34.
[3] Ibid, 2537.

time had expressed doubts about the severity and causes of climate change and had made it clear that his administration would not make climate change mitigation a regulatory or legislative priority. By the time *AEP* had reached the Supreme Court in 2010, the regulatory landscape had changed. The Supreme Court had ruled in 2007, over EPA's objection, that the *Clean Air Act* gave the agency power to regulate GHG emissions and that EPA had a mandatory obligation to respond to a petition requesting regulation of emissions from motor vehicles.[4] When the Obama Administration took office in January 2009, it embarked on a number of regulatory actions to regulate GHGs under the *Clean Air Act*.[5] This regulatory context likely influenced the Supreme Court's decision in *AEP*. Accordingly, this part of the report begins with background discussions of the lower courts' rulings and the Obama Administration's efforts to regulate GHGs under the *Clean Air Act*. It then describes the Supreme Court's decision in *AEP* and its direct implications for US climate change law. Part 3 of the report will explore the questions *AEP* left unanswered and discuss the broader implications of the decision.

The Lower Courts' Decisions

In July 2004, several states, New York City and three private land trusts filed suit against five US electric utilities.[6] Their complaints alleged that the utilities were the five largest GHG emitters in the US, emitting an estimated 650 million tons of carbon dioxide annually, which amounted to 25 percent of the electric industry's emissions, 10 percent of US human-caused emissions, and 2.5 percent of global anthropogenic carbon dioxide emissions.[7] They further alleged that these emissions caused a public nuisance - 'a substantial and unreasonable interference with public rights' - and asked the federal district court to issue an injunction requiring the utilities to cap and then reduce their emissions from coal-fired power plants pursuant to a schedule created by the court.[8]

The district court never ruled on the merits of the plaintiffs' claims. Instead, acting in response to motions to dismiss, the court declared the plaintiffs' case non-justiciable

[4] *Massachusetts vs. EPA*, 549 U.S. 497 (2007).
[5] See, for example: M. Powers, 'United States Country Report: Developments in Climate Change Law', (2010) 1 *IUCNAEL eJournal*.
[6] *AEP* (supra note 1) 2533.
[7] Ibid, 2533-34.
[8] Ibid, 2534.

under the 'political question doctrine,'[9] a judge-made doctrine that allows federal courts to reject cases under a narrow set of circumstances that make it clear that elected officials, rather than appointed judges, should resolve particular disputes.[10] The Court of Appeals for the Second Circuit, however, reversed.[11] It held that federal courts had jurisdiction both because the case did not present non-justiciable political questions[12] and because the plaintiffs had demonstrated they had standing under Article III of the *US Constitution*.[13] The Second Circuit also addressed other arguments raised in the appeal; most importantly, the court ruled that plaintiffs had adequately alleged a cause of action under public nuisance and held that the federal *Clean Air Act* did not displace the federal public nuisance claims.[14]

The Regulatory Landscape Since Massachusetts v EPA

While *AEP* was making its way through the lower courts, the regulatory framework governing GHG emissions underwent remarkable changes. At the point the Supreme Court issued its decision in *Massachusetts*, the EPA had staunchly refused to regulate GHG emissions under the *Clean Air Act*. Even after the Supreme Court remanded the case directing EPA to respond to the petition seeking regulation, EPA did whatever it could to delay regulation of GHGs.

However, when the Obama Administration took office, the *Clean Air Act* regulatory framework rapidly changed.[15] First, EPA announced its plans to reconsider a decision that prohibited California from regulating GHG emissions from motor vehicles. A few months later, EPA granted California the authority to establish its own vehicle emissions standards.[16] Second, EPA took steps to establish federal vehicle standards, by issuing a finding that GHG emissions from motor vehicles cause or

[9] Ibid.
[10] See *Baker vs. Carr*, 369 U.S. 186 (1962) (listing six factors a court should consider when deciding whether a case presents non-justiciable political questions).
[11] *Connecticut vv Am. Elec. Power Co. Inc*., 582 F.3d 309 (2009).
[12] Ibid, 332.
[13] Ibid, 349.
[14] Ibid, 379-81.
[15] For a more detailed description of these actions, see: Powers (supra note 5).
[16] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32744 (July 8, 2009).

contribute to an endangerment of public health and welfare[17] and then by releasing its own vehicle emissions and fuel economy standards.[18] Third, EPA developed a rule requiring very large stationary sources - including coal-fired power plants and large industrial emitters - of GHGs to obtain permits and implement technology controls to limit GHG emissions whenever they undergo modification or are newly built.[19] Last, EPA embarked upon rulemakings that should, when finalized, establish national emissions standards for GHG emissions from many other new and modified stationary sources.[20] Although opponents of climate change regulation have challenged all of these decisions, most of which are still pending in the courts, the regulatory landscape has undergone a remarkable change since the plaintiffs in *AEP* first sought to use the common law to restrict electric utilities' emissions.

The Supreme Court's Decision

The Supreme Court had three primary issues before it when it agreed to review the Second Circuit's decision. It disposed of two of these - Article III standing and the political question doctrine - in a paragraph.[21] Under Supreme Court rules, where the judges evenly divide regarding an issue, the lower court's decision will stand and the Supreme Court's affirmation of the lower court's decision has no precedent.[22] Thus, while many observers hoped the Supreme Court would shine light on these hotly disputed issues, the Court only definitely resolved the third issue regarding the viability of federal common law claims to abate GHG emissions.

In a unanimous ruling, the Supreme Court held that the *Clean Air Act* completely displaces federal common law actions seeking to reduce GHG emissions.[23] Relying in part on sections of the statute that allow EPA to establish emissions limitations for categories of emitting sources, including coal-fired power plants, the Supreme Court declared that there was no room in the statutory structure to allow federal nuisance

[17] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
[18] *EPA and National Highway Transportation Safety Admin., Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards* (pre-publication final rule issued Apr. 1, 2010), (available at http://www.epa.gov/otaq/climate/regulations/ldv-ghg-final-rule.pdf) (to be codified at 40 C.F.R. Parts 85, 86, and 600 and 49 C.F.R. Parts 531, 533, 537 and 538) (Vehicle Emissions and Economy Standards).
[19] Environmental Protection Agency, P*revention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31514 (June 3, 2010).
[20] See 75 Fed.Reg. 82392.
[21] See *AEP*, 131 S. Ct. 2527, 2535.
[22] Ibid.
[23] Ibid, 2537.

actions, or other common law actions, to proceed.[24] Moreover, the Court declared that the *Clean Air Act* displaces federal common law whether or not EPA has in fact developed regulations to reduce GHG emissions.[25] If litigants are unhappy with any regulations EPA has developed or with EPA's refusal to regulate at all, their remedy is under the *Clean Air Act* and not through the common law.[26] The Court's ruling thus established a clear rule barring plaintiffs from relying on the federal common law as an alternative strategy to using the *Clean Air Act* to control GHG emissions.

One must wonder, though, whether the Court would have issued the same categorical holding absent EPA's regulatory efforts. In previous cases finding that a federal statute displaces federal common law, the Court considered the scope of regulatory power provided under the Act as well as the actual regulatory actions taken by the agency.[27] Likewise in *AEP*, the Supreme Court noted the actions EPA had already initiated to regulate GHG emissions from the very coal-fired power plants at issue in the public nuisance dispute.[28] Perhaps the Court would have reached a different conclusion if the Obama Administration had pursued the same strategy of non-regulation as its predecessor. Regardless, the Supreme Court issued a sweeping decision barring plaintiffs from using federal common law to regulate GHG emissions. Yet, as categorical as the Court's decision may appear, it leaves many unanswered questions.

The Implications of *AEP*

Notwithstanding the Supreme Court's decision in *AEP*, many questions remain unanswered following the case. The Supreme Court squarely faced some of these questions in *AEP*, but failed to resolve them. More broadly, the Court's decision raises interesting and important implications regarding the scope of EPA's authority to regulate GHGs and the regulatory actions it has taken to date.

As noted above, the Supreme Court failed to decide whether the plaintiffs in *AEP* had Article III standing to sue and whether the political question doctrine barred the action.[29] Lower courts have reached different conclusions regarding these issues,[30]

[24] Ibid, 2537-38.
[25] Ibid, 2538-40.
[26] Ibid, 2539-40.
[27] See, for example: *Milwaukee vs. Illinois,* 451 U.S. 304, 316–319 (1981).
[28] *AEP*, 131 S. Ct. 2527, 2533.
[29] Ibid, 2535.

and it seems likely that the Supreme Court will need to resolve these questions in an upcoming case. Until then, however, it will remain unclear whether private citizens have Article III standing to sue for injuries related to climate change and whether courts should declare climate change a political question exempt from judicial review.

The Supreme Court also did not address whether the *Clean Air Act* preempts state common law actions seeking to reduce GHG emissions. The plaintiffs in *AEP* also alleged that the electric utilities' emissions caused a public nuisance under state common law, but the lower court found the state common law claims preempted by federal nuisance law.[31] Once the Supreme Court found federal law displaced, the viability of state common law claims again arose.[32] The Court thus remanded the issue for the lower courts to consider.[33] If the lower courts find state common law claims viable, then courts will need to decide whether defendants have behaved unreasonably by emitting large amounts of GHGs into the atmosphere. Courts have demonstrated great resistance to getting involved in these issues, but the availability of state common law actions may force them to finally shed light on what a 'reasonable' GHG emitter must do.

Finally, the Supreme Court's decision, and its emphasis on EPA's regulatory authority under the Clean Air Act, makes the content of EPA's regulations particularly important. Industry groups have challenged every action EPA has taken under the Clean Air Act to reduce GHG emissions. In February 2012, the DC Circuit will hear oral arguments in several of these challenges and it will likely issue decisions in the upcoming year. Now that the Supreme Court has made it clear that the Clean Air Act will serve as the dominant federal climate change mitigation law,[34] the outcome of these regulatory challenges is more important than ever.

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[30] Compare *Connecticut vs. American Electric Power Co. Inc*., 582 F.3d 309 (2d Cir. 2009), with *Native Village of Kivalina vs. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009) and *Center for Biological Diversity vs. U.S. Dept. of the Interior*, 563 F.3d 466 (D.C. Cir. 2009).
[31] *AEP*, 131 S. Ct. 2527, 2540.
[32] Ibid.
[33] Ibid.
[34] Congress could presumably intervene and pass its own comprehensive climate change law, but most observers consider this possibility highly unlikely. See E. Rosenthal, 'Where Did Global Warming Go?' *NY Times* (New York, 16 October 2011) SR1.

IUCN Academy of Environmental Law
eJournal
ISSUE 2012 (1)

COUNTRY REPORT: VIETNAM
Payment for Environmental Services

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Introduction

Vietnam belongs to the Indo-Burma biodiversity hotspot. It benefits from a diversity of ecosystems and species of which 8 per cent are endemic.[1] Vietnam is also among the global centres for crops origination, with around 800 cultivated species.[2] Forests cover almost 39.5 percent of its territory[3] with an increasing growth rate of reforestation.

For the past ten years, Vietnam has been introducing and implementing a new environmental legal framework: the *Law on Forest Protection and Development* in 2004; the *Law on Environmental Protection* in 2005; and the *Law on Biodiversity* in 2008 (and associated decrees, decisions and circulars). The *Law on Water Resources* (1998) is currently under revision. The focus of this Country Report is on *Decree* No. 99/2010/ND-CP of 24 September 2010 on the *Policy for Payment for Forest Environmental Services*, adopted in 2010.

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[1] UN-REDD Programme, *Vietnam Forest Facts and Figures* (2009) (available at http://www.unredd. org/UNREDDProgramme/CountryActions/VietNam/tabid/1025/language/en-US/Default.aspx).
[2] P. Thi Sen and L. Ngoc Trinh, *Vietnam Second Country Report on the State of the Nation's Plant Genetic Resources for Food and Agriculture* (2008) FAO (available at http://www.fao.org/ docrep/013/i1500e/VietNam.pdf) 11.
[3] FOMIS, *Viet Nam Forest Sector Progress Report 2006-2010* (2010) (available at http://www.vietnamforestry.org.vn/FOMIS_Report_2010/EN_VN/Chuong_14_EN.pdf) 262.

Forests are classified in three categories: special-use forest, protection forests, and production forests. Special-use forests are mainly used for 'conservation of nature, specimens of the national forest ecosystems and forest biological gene sources; scientific research; protection of historical and cultural relics as well as landscapes; in service of recreation and tourism in combination with protection'.[4] Special-use forests encompass five sub-categories: national parks; nature reserves; species and habitat protected areas; landscape protected area; and scientific research and experiment forest area.[5] Until the *Law on Biodiversity* (2008), Vietnam did not have protected areas legislation. The *Law on Forest Protection and Development* was the major legal document to create protected areas, under the special-use forest category. Today, overlaps between the biodiversity legislation and forest legislation remain, along with competing competences between the Ministry of the Environment and Natural Resources, and the Ministry of Agriculture and Rural Development.[6] The new framework is an attempt to streamline the system for protected areas.

Protection forests are established 'to protect water sources and land, prevent erosion and desertification, restrict natural calamities and regulate climate, thus contributing to environmental protection'.[7] Production forests are mainly used 'for production and trading of timber and non-timber forest products in combination with protection, contributing to environmental protections' including natural and planted production forests and seeding forests.[8]

The Introduction of Payment for Environmental Services (PES)

Vietnam has been one of the first South-Asian countries to implement a national policy on PES through its *Decree* No. 99/2010/ND-CP which entered into force on 1 January 2011.

The context behind *Decree* 99/2010/ND-CP can be found in the pilot projects on Payment for Forest Environmental Services (PFES) - the first of their kind in

[4] *Law on Forest* (2004), Article 4(2).
[5] *Decree* No. 117/2010/ND-CP of 24 December 2010 on the *Organisation and Management of Special-Use Forests*, Article 5.
[6] Law and Policy of Sustainable Development Research Centre, *Project's Report, Review on Biodiversity Related Legislation and Responsibility of Ministries/Line ministries for Implementation* (2010) JICA.
[7] *Law on Forest* (2004), Article 4(1).
[8] *Law on Forest* (2004), Article 4(3).

Southeast Asia - that were established by *Decision* 380/QD-TTg of 10 April 2008.[9] Two pilot projects for PES were established in Lam Dong province in the south, and Son La province in the north in January 2009. Pursuant to *Decision* 380/QD-TTg, three types of forest environmental services were piloted, namely water regulation, soil conservation and landscape aesthetics. Service buyers were electric and water utilities, and tour operators. Local farmers, households and communities were the services providers and the main beneficiaries of the scheme. It is estimated that the scheme generated a total payment of 87,067,200,000 Vietnamese Dong (US $4.46 million), paid to 22 forest management boards, forest businesses and 9,879 households.[10] The Ministry of Agricultural and Rural Development led the implementation of these pilot projects, with support from Winrock International and the German Development Agency, GIZ (formerly GTZ). Despite only two years of implementation experience, the two pilot projects were deemed so successful that a nation-wide decree on PFES was adopted at the end of 2010, namely *Decree* 99/2010/ND-CP.

The legal basis for implementing PES can be found in the *Law on Biodiversity* (2008), which provides that 'organizations and individuals using environmental services related to biodiversity shall pay charges to services providers'.[11] This provision is much broader in scope than *Decree* 99/2010/ND-CP, which focuses exclusively on forests ecosystems whether they are protected areas (special-use forests) or not (protection and production forests).[12] However, even if the new PES policy is limited to forests, these account for around 40 percent of Vietnamese territory and provide a wide range of services.

Article 4 of the Decree defines the relevant environmental services provided by forests. They encompass: soil protection and reduction of erosion and sedimentation of reservoirs, rivers and streams; regulation and maintenance of water sources for production and living activities; forest carbon sequestration and retention, reduction of greenhouse emissions through measures for preventing forest degradation and loss of forest area, forest sustainable development; protection of natural landscape

[9] *Decision* No. 380/QD-TTg of 10 April 2008 on the *Pilot Policy for Payment for Forest Environmental Services.*
[10] N. Thi Bich Thuy et al, *Payment for Environmental Services: A Case Study on Pilot Implementation in Lam Dong Province, Vietnam 2006-2010* (2011) Winrock International (available at http://www.winrock.org/fnrm/files/PaymentForForestEnvironmentalServices ARBCPCaseStudy.pdf).
[11] *Law on Biodiversity* (2008), Article 74.
[12] *Decree* 99/2010/ND-CP, Article 4.

and conservation of biodiversity for tourism services; and provision of spawning grounds, sources of feeds, and natural seeds, use of water from forest for aquaculture.

A payment for forest environmental services is defined as 'a supply and payment relationship in which the users of forest environmental services pay the suppliers of forest environmental services'.[13] Therefore, an 'organisation or individuals benefiting from forest environmental services must pay for forest environmental services to forest owners of forest that create the supplied services'.[14] The PES mechanism is based on contract.

The new national policy opts for a 'user-led PES scheme' contrasting with a 'government-led PES scheme' in place in countries such as Costa Rica.[15] The Decree clearly specifies those who will pay, pursuant to a 'beneficiary's pays principle'. The Decree mentions four categories of users.[16] Thus, hydropower production facilities have to pay for services related to soil erosion, reduction of erosion and sedimentation of reservoirs, streams and rivers. Clean water production and supply facilities have to pay for services such as the regulation of water sources. Industrial production facilities using water directly have to pay for services such as the regulation and maintenance of water sources for production. Finally, 'organizations and individuals doing tourism services … have to pay for services for protection of natural landscape and conservation of biodiversity of forest ecosystems serving tourism purposes'.[17] Notably, the Decree does not mention the users benefiting from carbon sequestration or spawning grounds, but refers to subsequent regulation.[18] PES related to forest carbon sequestration are likely to be combined with the implementation of REDD and REDD+ as Vietnam has been chosen as a REDD pilot country by the UN-REDD.

Such a restricted list can limit the scope of PES, as other users could be excluded from payments despite benefiting from the forest environmental services. For

[13] Ibid, Article 3(3).
[14] Ibid, Article 5(1).
[15] S. Wertz-Kanounnikoff and H. Rankine H, *How Can Governments Promote Strategic Approaches to Payments for Environmental Services (PES). An Exploratory Analysis for the Case of Viet Nam* (2008) IDDRI, 31 (available at http://www.iddri.org/Publications/Collections/Analyses/An_0308_Rankine-Wertz_PES-Viet-Nam.pdf).
[16] *Decree* 99/2010/ND-CP, Article 7.
[17] Ibid, Article 7(4).
[18] Ibid, Articles 4(3) and 7(5).

example, agriculture producers or even bio-prospecting industries could benefit from the maintenance of water flows or biodiversity conservation and be exempted from paying. The targeted users of the national policy are nonetheless increasingly significant users of environmental services. Additionally, while PFES can be a way to make current users pay for the FES they use, caution is needed to ensure that such schemes are not used as a way to legitimise future infrastructure projects, such as hydropower developments, without paying sufficient attention to the long-term environmental costs.

The beneficiaries of payment are 'forest owners of forests that supply forest environmental services'.[19] 'Owner' relates mainly to those who are allocated or leased forests by the Government for long-term use. Forests are not owned by private entities in Vietnam, but since the 90's the forest policy has given more opportunities to individuals and communities to manage the forests by granting them rights of use. The Government can assign or lease forests to a range of 'forest owners' either on a long-term basis or on short-term contractual basis depending on the status of the forests. As a result, owners benefit from forest use rights in the form of rights to exploit the forests, to enjoy the benefits, and to lease their rights.[20] Conversely, individuals or households who are not allocated forests' use rights or not contracted by state organisation could be sidelined from the implementation of the PES scheme, as they will not fit into the supplier category.

A further aspect with respect to beneficiaries is the case of village communities and their capacity to enter into contracts. They are not 'forests owners' and have limited legal personality to enter into agreements according to the 2005 civil code even if they can be assigned forests.[21] However, the new scheme on PES would appear to open up opportunities with respect to communities, as the scheme can also benefit village communities that are contracted for long-term forest protection by state organizations[22] or who plant forest on forestry land allocated by the Government. According to the Decree, village communities can officially enter into contractual agreements with organisations or individuals, and be paid for forest environmental

[19] Ibid, Article 8.
[20] *Law on Forests* (2004), Article 3.
[21] V. Thu Hanh, P. Moore and L. Emerton, *Review of Laws and Policies Related to Payment for Ecosystem Services in Viet Nam* (2011) IUCN (available at http://cmsdata.iucn.org/downloads/080310_pes_vn_legal_review_only_legal_sections_final.pdf.)
[22] *Decree* 99/2010/ND-CP, Article 8(2).

services, but conflict between the civil code and the decree is likely to favour the former.

The Decree stipulates that payment is monetary, either directly or indirectly. Direct payments can be made from users to suppliers under agreements specifying the amount and methods. Users make indirect payments to an intermediary organisation such as a specific fund (either the Vietnam Forest Protection and Development Fund or the Provincial Forest Protection and Development Funds). The Decree fosters direct payment rather than indirect payments. Direct payments might raise equity issues due to power imbalance between the users, for example a company, and the providers, such as a community that may be ill-equipped to conclude contracts. In an attempt to prevent this imbalance, the Decree specified that direct payments are carried out based on voluntary negotiated agreements[23] and indirect payments are possible if no agreement is reached. In the case of indirect payments, the provincial forest protection and development funds act as a representative, of 'the suppliers of FES to sign contract [sic] with users of FES specifying responsibilities of each party'.[24] The introduction of the fund can be viewed as a means to address unfair agreements between suppliers and users. However, the involvement of intermediaries needs to be carefully organised to ensure impartiality and that such arrangements are indeed equitable.[25]

In the case of indirect payments, the national Vietnam forest protection and development fund allocates payments to provinces through provincial funds.[26] The latter allocates payments to suppliers according to their forest area multiplied by a coefficient 'K'. K is the payment coefficient used to define the amount of payment for a service. It is determined based on the forest owner, the type of forest, the origin of forest, the level difficulty or easiness in forest management.[27] The amount of the payment in Vietnamese Dong (VDN) is specified for hydropower plants and clean water production facilities, according to a fixed amount (respectively 20 VDN/kWH and 40 VDN/m^3) multiplied by a time period. Regarding tourism, the amount is a percentage (one-two percent) of the revenue generated by tourist activities.

[23] Ibid, Article 6(1)(b).
[24] Ibid, Article 16.
[25] P. Thu Thuy, B. Campbell, S. Garnett, H. Aslin and H. Minh Ha, 'Importance and Impacts of Intermediary Boundary Organizations in Facilitating Payment for Environmental Services in Vietnam' (2010) 37 *Environmental Conservation*.
[26] *Decree* 99/2010/ND-CP, Article 14.
[27] Ibid, Article 16.

Suppliers of forests environmental services can decide upon the use of their payment. The Decree does not state the purposes of payments, whether they should be reinvested in environmental conservation or used for livelihood purposes.

From an institutional standpoint, the Ministry of Agriculture and Rural Development is the national body supervising the implementation of PES. On the provincial and local level, the provincial people's committees, along with the district people's committees, are in charge of implementing PES.

The Conditionality and Voluntary Criteria

Payment for environmental services is commonly defined as 'a voluntary transaction where a well-defined environmental service (or a land-use likely to secure that service) is being "bought" by a (minimum one) environmental service buyer from a (minimum one) environmental service provider, if and only if the environmental service provider secures environmental service provision (conditionality)'.[28] To what extent, therefore, does the new PES policy comply with the conditionality and voluntary criteria?

Under the PES Decree, rights and obligations of both suppliers and users are specified. It specifies that users shall pay 'in a timely and sufficient manner'. They also have the rights to be informed about the quality and quantity of FES and about payments. Suppliers have the right to request payment for services, be informed of the value of the services, and be involved in checking and monitoring activities. The conditionality for payments is weak. The Decree simply stipulates that suppliers who fail to 'ensure the areas of forest supplying forest environmental services are protected and developed' according to their obligations face prosecution. In addition, terms related to the possible suspension of a contract are not mentioned, although the users of FES have the right to request that the competent authorities 'consider adjustment of payment … in case the suppliers … do not ensure forest area or cause degradation of forest quality that the users have paid for'.[29]

[28] S. Wunder, *Payments for Environmental Services: Some Nuts and Bolts* (2005) CIFOR Occasional Paper No 42, 3 (available at http://www.cifor.org/publications/pdf_files/OccPapers/OP-42.pdf).
[29] *Decree* 99/2010/ND-CP, Article 19(1)(d).

The implementation of PES follows a command-and-control approach. The people's committees shall ensure that FES providers comply with their obligations of protection or development of forests services. The formalisation of this approach nationwide confirms that '"payment is good" as an auxiliary instrument facilitating policy implementation, but 'control is better'.[30] This scheme seems to create the means to make the users of environmental services pay, without creating incentives for local communities to protect sustainably the forest or to go beyond mere compliance with forest or environmental regulations.

For Vietnam, one may wonder about the voluntary aspect of this scheme. The Provincial People's Committee (the main policy-decision body at the Province level) lists the suppliers and the users of forest environmental services pursuant to article 22, even though it can be difficult to clearly identify which community or individual is actively working to provide or secure environmental services. Moreover, there is an inherent factor that suggests the non-voluntary characteristic. Households, individuals and village communities do not own but are assigned or leased forests, and their competences to manage them can be restrained. This raises the question of whether the Vietnamese scheme is truly a 'PES' as one characteristic of PES should be voluntary transactions. This shortcoming has been previously identified by experts,[31] and the new national policy fails to overcome it.

Conclusion

Setting aside the question of its relevance in Vietnam, the new national policy on PFES will require subsequent specification to be implemented and effective. *Decision* No 2284/QD-TTg approving the scheme for implementing *Decree* No 99/2010/ND-CP has already been adopted in December 2010. This Decision mainly plans the activities and implementation schedule for the national policy. The legal framework will inevitably need to be complemented by circulars that provide more detailed guidance. Time will therefore tell to what extent PES and its associated legal and policy framework will support both livelihoods and biodiversity conservation in Vietnam.

[30] S. Wunder et al, *Payment is Good, Control is Better. Why Payment for Forest Environmental Services in Vietnam Have So Far Remain Incipient* (2005) CIFOR (available at http://www.cifor. org/publications/pdf_files/Books/BWunder0601.pdf).
[31] Ibid.

Clearly Vietnam has taken the lead in Southeast Asia, both in adopting pilot projects on PES, and now a nationwide PES scheme for forest services. Irrespective of the future challenges, the Vietnam case provides an important insight into the challenges for implementing PES schemes and the contribution that legal instruments might play. In terms of further research, Vietnam's experience within the context of forest ecosystem services might be an important test case for the value of a PFES scheme to other ecosystems in Vietnam, and Southeast Asia. Additionally, while Vietnam's legal system is certainly unique, important insights might be gained from the evaluation of experiences in implementing *Decree* 99/2010/ND-CP. Such experiences will no doubt help inform law and policy developments within other sectors, ecosystems, and jurisdictions.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

Derecho Internacional del Medio Ambiente: Una Visión desde Iberoamérica

Francesco Sindico, Rosa Fernández Egea & Susana Borràs Pentinat (Eds)

(2011, Cameron May, London)
ISBN: 978-1907174094

Review by Nicolás Boeglin*

Esta obra reúne contribuciones de especial interés en el campo ambiental, tanto por parte de autores confirmados de amplia trayectoria como también de jóvenes valores de la ciencia jurídica, y merece ser saludada por varias razones. En primer lugar, porque 'viene a cubrir el vacío doctrinal en lengua española' (en palabras de sus editores, p. XXVIII) en la literatura especializada en derecho internacional ambiental de carácter general: esta situación obliga a muchos autores hispanoparlantes referirse a obras generales (y también no tan generales) escritas en otros idiomas que la lengua castellana. Además, el libro pretende dar 'una visión desde Iberoamérica' de esta compleja materia (como bien lo señala su titulo) a partir de la profusa y variada experiencia vivida en el continente americano. Las características geológicas, hidrogeológicas, geográficas y culturales combinadas con los desafíos ambientales contemporáneos 'han hecho de América una región pionera en el desarrollo del derecho ambiental', como lo apuntan en su Prólogo Cletus. I. Springer y Claudia S. de Windt, Director y Jefe de la Sección de Derecho Ambiental del Departamento de Desarrollo Sostenible de la OEA respectivamente (p. XIX).

Todas las contribuciones tratan de manera general algún componente de esta variada materia. La primera parte (o '*Parte General*') permite situar al lector los

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problemas generales: un estudio sobre los orígenes y evolución del derecho ambiental internacional (José Juste Ruiz), sus fuentes (Zlata Drnas de Clément), la aplicación del mismo (Susana Borrás Pentinat), la responsabilidad internacional de los Estados por daño ambiental (Antoni Pigrau Solé), así como la llamada 'gobernanza internacional' en la materia (Mar Campins Erija). La segunda parte de la obra (denominada '*Parte Especial*') incluye: un estudio sobre la capa de ozono (Rosa Giles Carnero), el cambio climático (Michael Mehling y Arturo Brandt), la diversidad biológica (Susana Borràs Pentinat), los recursos marinos (Luisa Rodríguez Lucas), bosques y desertificación (Claudio Torres Nachón y Solange Teles de Silva). A penas llegamos a la página 303, pero a continuación inicia una tercera parte (titulada '*Parte trasversal*') la cual ofrece contribuciones sobre temas más álgidos como las negociaciones ambientales multilaterales (Rodolfo Godínez Rosales), la cooperación al desarrollo (Teresa Fajardo del Castillo), el comercio internacional y el ambiente (Francesco Sindico y Rosa M. Fernández Egea), la relación arbitraje de inversiones y ambiente (Marcos A. Orellana), la protección jurídica del derecho al ambiente (Claudia María Rojas Quiñonez), la protección del Ártico (Joaquín Alcaide Fernández y Claudia Cinelli), la zona antártica (Maria Teresa Infante Caffi), el acuífero Guaraní (Maria Querol), así como la relación ambiente y los pueblos indígenas (Soledad Torrecuadrada García Lozano). Estas magníficas 19 contribuciones de renombrados autores y de jóvenes juristas nos ofrecen de esta manera un estupendo abanico de análisis sobre un tema en constante evolución. Una '*bibliografía general, jurisprudencia e instrumentos de derecho internacional del medioambiente*' (pp. 548-554) confirma lo dicho con anterioridad: la gravísima laguna de obras generales (pero también específicas) en idioma castellano, la cual de igual manera se deja entrever en las breves bibliografías al final de cada una de las contribuciones (con excepción de la última sobre pueblos indígenas).

Debemos agradecer al templo del derecho internacional que constituye la Academia de Derecho Internacional de La Haya, puesto que sirvió de punto inicial de encuentro a estos jóvenes investigadores responsables de esta publicación. Nos atrevemos incluso a pensar que el sentimiento de frustración de varios de ellos (que participaron en agosto/septiembre del 2008 a la sesión del 'Centre de Recherches et d´Etudes' sobre los problemas del derecho internacional del ambiente) al tener que redactar sus 'papers' en inglés o en francés explica en parte la razón de ser de esta magnifica obra en idioma castellano. En este sentido hay que saludar a los autores

brasileños el detalle de haberse ceñido al idioma castizo en sus escritos, de manera a ofrecer al lector este estupendo esfuerzo colectivo.

Como bien lo indica el Maestro Antonio Remiro Brottons en su prólogo (el cual, lejos de ser '*una filigrana, un arabesco, un pálpito*', según su autor, amerita por si solo ser considerado como un insumo de lectura obligada al iniciar), '*para las /horas/ de la formación cívica y profesional, este libro satisface plenamente el canon de la excelencia*' (p. XXV). Con semejante valoración, no queda más que felicitar a los editores de esta publicación por ofrecer lo que posiblemente se convierta en una referencia obligatoria en nuestro ámbito, y recomendarles una difusión en todo el continente, incluyendo el uso de modernas técnicas de información para facilitar su acceso al texto completo.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

Bluebook on the Rule of Environmental Law in China (1979~2010)

Jing Wang *et al*

(2011, China Peking University Press, Beijing)
ISBN: 9787301193815

Review by Zhuang Chao*

The recently published *Bluebook on the Rule of Environmental Law in China (1979~2010)* (*the Bluebook*) was written by an environmental legal research group led by Professor Jing Wang. Prof. Wang is the Head of the Environmental and Resource Law Centre, Peking University. This fascinating book is the result of collaboration with numerous prestigious environmental law professors, and follows five-year's of nationwide fieldwork incorporating surveys and case studies.

The 30 years since China's first national environmental law - 'Environmental Protection Law 1979 (On Trial)' was promulgated has witnessed China's rapid economic development, improved environmental legislation, enhancement of environmental protection authorities and a growing number of participants in the environmental protection process. At the same time, environmental issues have aroused concern both within the government and the public. Although progress has been observed in terms of the application of environmental law and the construction of an environmental legal system, the concept of 'the rule of law' in environmental protection is not yet fully developed. The problems are obvious: in recent years there have been more frequent environmental pollution incidents; environmental quality is deteriorating; prevention mechanisms are not fully employed and there is limited application of environmental responsibility. These factors lead to questions: why for example, do these problems continue despite the fact that China has established a

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relatively advanced environmental law system? There are also questions as to why environmental remediation has not kept pace with environmental pollution. It may be assumed that either the legislation is defective or, that there are problems with the administrative process. One of the objectives behind *the Bluebook* is to illuminate the extent to which these assumptions are correct.

A Comprehensive Review of 30 years of Environmental Law in China

This book takes the principal legal institutions of China's environmental law as a starting point and analyses the implementation of each legal institution after reviewing its evolution. The analysis is based largely on empirical work. In this respect *the Bluebook* makes a very valuable contribution to the legal literature in China. There are a myriad of research products on environmental law in China, but few of them carry out such a thorough empirical analysis. *The Bluebook* will almost certainly promote innovation in Chinese environmental legal research more broadly as it highlights the benefits empirical analysis can bring through the provision of precise statistics and data.

The key feature of *the Bluebook* is then its inclusion of a large amount of empirical evidence. Specifically, it includes references to: significant international and domestic environmental conferences which have influenced the development of environmental law in China; plans and outlines for practical implementation in different periods and other important environmental incidents. This information is contained in a total of 104 highlighted diagrams and fact boxes. The benefits can be seen, for example, in the clarity of information provided by 55 cases on environmental pollution, compensation for environmental damages and other environmental disputes; 33 diagrams on various indicators and impact factors relevant to environmental law, such as air pollution, collective protests incited by environmental disputes and the government's measures designed to resolve known problems. These all help readers to gain broad insight into the implementation of environmental law in China. This information is complimented by the comprehensive fieldwork and questionnaires on the implementation of environmental law across China carried out in the five years of preparation that went in to the production of this book. Additional texture to the analysis is provided through the 38 surveys of public environmental awareness carried out in the streets and many universities located in Beijing. The thoroughness

of the research combined with the comprehensive literature review and the expert data analysis, lead to a meaningful discussion of Chinese environmental law.

The publication of this book thus marks an innovation in environmental law research in China, bringing as it does empirical analysis to the fore. It demonstrates that if environmental law research in China can adopt a more rigorous scientific approach, drawing on both scientific and social science research methods to ensure comprehensive analysis, it will be able to feed in to the development of environmental law more effectively, and environmental law in turn will then be able to play an effective role in settling environmental problems. In the following sections some key aspects of the discussion in *the Bluebook* are reviewed.

Effectiveness - 30 years of Environmental Legal Practice Focussed on the Control of Sources

It is generally accepted that robust environmental legislation includes the control of sources, and that sound environmental legislation provides for both implementation and enforcement. Even if legislation aiming at the control of sources of pollution is not in place, a strong environmental law ought to provide sufficient judicial and enforcement powers to result in their control in practice.

How the objective of environmental protection will be met depends on such things as one's political structure, legal tradition and socio-economic factors. Thus, when reviewing foreign laws, we are confronted with different legislative models and legal cultures. They do, however, have one commonality: in each, legal effectiveness relies on a good match between legal norms and social practices. Legislation alone is not a guarantee that the end objective of environmental protection will be achieved. The effectiveness of the legislation in prompting adjustment of social relationships and behaviour depends largely on how it is implemented and this ultimately rests on the degree to which the legislation can be effectively enforced. As some have said 'one should not worry about the lack of laws but about strict enforcement.' Weak enforcement is therefore more harmful than weak legislation. With weak enforcement the values being promulgated by the laws will not be realised.

The Bluebook explains the paradox in the reality of environmental law in China. On the one hand, environmental laws appeared to be developing rapidly in 'batch

production', while environmental agencies are continuously being upgraded. On the other hand, local environmental quality has not been fundamentally improved, but has instead partially deteriorated. This paradox, *the Bluebook* indicates, is a result of problems in the environmental legislation. There are numerous legislative gaps and loopholes and in addition many of the laws lack detailed formulation and are too abstract to be enforced. The overall result is that enforcement of environmental law is weak, and the sources of pollution are not effectively controlled. This prompts the conclusion that if Chinese environmental law is to become effective, new, more relevant, legislation is required.

Practicability - A Structured Analysis of 30 Years of Environmental Law

In addition to examining enforcement and implementation, *the Bluebook* considers the question of whether or not the 30 years of environmental law have been successful by analysing the legislation, the executive, justice and related subjects in further detail. The conclusion is that China's environmental legal system has failed to function as designed. The authors then undertake an analysis on the causes of this failure as follows:

First, legislative factors are considered. Here it is found that the environmental legislation contains no major mistakes, but equally has no far-reaching effects. This is explained by the fact that its contents look more like declarations than legislative provisions.

Second, government bodies are shown to have inadequate authority and power to safeguard the environment. For example, the administrative punishment measures they may use are not rigorous enough.

Third, judicial relief is minimal, victims have difficulty obtaining compensation for damages suffered and there are few provisions in the criminal law that can be applied in environmental lawsuits.

Fourth, the role of civic society is found to be lacking in a number of ways. Enterprises are shown to be inclined to ignore their social responsibility for environmental protection and to have failed to undertake socially and environmentally responsible action. The public are limited in their ability to engage by inadequate

legislative provision for public participation. In addition, it is shown that there is a lack of willingness by the public to play a monitoring role and report pollution incidents.

Response to the Future of Environmental Law

While it is clear that there is room for more analysis and improvement of environmental law in China, we must acknowledge that it has already made remarkable progress and that the continued existence of some problems is inevitable. Since environmental law is still developing and being updated, it is not yet appropriate to draw a conclusion on whether it is a success or not, but it is clear that the current environmental law is 'better than nothing'. This conclusion still leaves scope for a significant contribution to be made in terms of pointing to possible future improvements in China's environmental law and one might anticipate that *the Bluebook* would make a significant contribution here. The goal of reflection on environmental law is, after all, to enhance the environmental legal system, to ensure sustainable development and the purpose of analysing the environmental law is to contribute to its improvement. Besides pointing out the difficulties faced by environmental law in China and their causes, some relevant countermeasures and suggestions are proposed at the end of *the Bluebook*. This part is not, however, as well developed as one might hope for and the proposals are relatively vague. This reviewer suggests that identifying problems should not be the main purpose of research and that instead proposing methods and countermeasures to solve these problems should be the key point. Consequently, if a revised edition of *the Bluebook* contained an enriched responsive part it would gain even greater significance and academic value.

Ensuring the rule of law cannot be completed overnight and the problems found in environmental law are symptomatic of China's problems with the rule of law more generally. As *the Bluebook* demonstrates, research on environmental law can function as the engine and stimulation for legal research in China more generally. Through reflection on environmental law in the past 30 years, the course of the rule of law in China will undoubtedly be promoted.

IUCN Academy of Environmental Law eJournal
ISSUE 2012 (1)

Sustainable Development in World Investment Law

Marie-Claire Cordonier Segger, Markus Gehring & Andrew Newcombe (Eds)

(2011, Kluwer Law International, Alphen aan den Rijn, The Netherlands)
ISBN: 9789041131669

Review by Professor Anthony VanDuzer*

International investment flows and investment activity are necessary for sustainable development but whether they lead to sustainable development in fact depends on a number of variables, including effective domestic regulation in host states. Since international investment treaties constrain domestic government action in the interests of protecting foreign investors and, it is hoped, encourage foreign investment as a result, they affect these two key determinants of sustainable development. *Sustainable Development in World Investment Law*, a new book in the Kluwer Global Trade Law series, makes an important contribution to our understanding of the complex relationship between international investment law and sustainable development.[1] It provides both a useful stocktaking of current treaty practice and investment treaty arbitration decisions from a sustainable development point of view and a range of suggestions regarding how the existing regime may be adapted to contribute more effectively to sustainable development.

Sustainable Development in World Investment Law is very timely. The effect of international investment law on sustainable development has become a significant concern of academics, policy makers and governments. A few examples serve to illustrate this point. In August 2010, more than 50 academics from around the globe

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[1] These comments are based on a presentation made on the occasion of a launch for the book at the University of Ottawa, Faculty of Law on 26 September 2011.

signed a public statement of concern about the harm done to public welfare by international investment agreements. The statement asserts that international investment agreements hamper the ability of governments to act for their people in response to concerns regarding human development and environmental sustainability. Similarly, some states have questioned the content and even desirability of investment treaties. In 2008, Ecuador, Bolivia and El Salvador renounced 11 investment treaties. Australia announced in April 2011 that it would no longer seek to negotiate international agreements with investor-state dispute settlement – a process that allows private investors from one treaty party to claim financial compensation for the other party's breaches of the treaty in binding arbitration. This remarkable change in direction from a country highly integrated into the international economy breaks a strong consensus among developed countries on the need for investor-state procedures to enforce substantive standards for investor protection in treaties with developing countries.

In this context of concern and change, it is very useful to have an analysis of the standards in international investment agreements and the arbitral awards applying them from a sustainable development point of view. The editors of *Sustainable Development in World Investment Law* are to be commended for bringing together a wide range of different viewpoints on these issues. The papers in this book are contributed by some of the leading scholars around the globe and are typically strong on legal analysis of the problems with the current situation and on imagining technical reforms to the existing system that would be of assistance in helping to achieve sustainable development. The contributors provide an insightful account of the surprisingly expansive interpretations of investor protection provisions that have been adopted by investor-state arbitral tribunals. These decisions have caused concerns that the current standards for host states are too high and that they inappropriately limit state power to legislate in the public interest and the contributors debate a wide range of possible solutions to these concerns. The investor-state arbitration process itself is also criticized on various grounds, including inconsistency in the decisions that it has produced and its lack of transparency. The papers in *Sustainable Development in World Investment Law* not only critique the decisions, but also canvass a large number of approaches to achieving progressive change.

Overall, however, the papers are relatively weak on strategic thinking about how to address the considerable barriers that impede reform. One challenge is that the

existing system is highly fragmented, consisting of almost 3,000 bilateral investment treaties and more than 250 preferential trade agreements with investment provisions that together involve 170 countries. It is true that some reforms, especially to the investor-state arbitration process, could be made in a systemic way. For example, one could change the arbitration rules under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which are used for about two-thirds of investor-state arbitrations. Nevertheless, most changes require new or revised treaties. On that front some change is occurring. As discussed in *Sustainable Development in World Investment Law*, new treaty models are being developed by some states that provide more scope for host states to regulate to achieve sustainable development by, for example, circumscribing the protection given to investors. In some cases, these new models are forming the basis for new or renegotiated treaties, but change in this way is a slow and incremental process. More systematic change may result from the 2008 Lisbon Treaty under which the European Commission acquired the authority to negotiate investment treaties. Currently, the EU is considering what it will do with the 1,300 or so treaties that are in place between its Member states and non-member countries. The strategy that is ultimately adopted could lead to substantial changes in the agreements currently in place.

The fragmented nature of international investment law, however, is not the only challenge to reform. Despite signs of dissatisfaction with existing treaties and some incremental changes to some treaty models in response, many new agreements continue to be negotiated based on traditional models. Fifty-four new bilateral investment treaties were signed in 2010 and 23 in the first 6 months of 2011, most based on traditional models. For people concerned about re-engineering the system to better achieve sustainable development this raises an important strategic question: why do developing countries continue to sign treaties that do not do a good job of contributing to sustainable development? Power politics partly explain this phenomenon, but it is also driven by competition for investment. Many countries, especially developing countries, see international investment commitments that protect foreign investors as an important part of a strategy to attract investment. Countries are encouraged to seek an advantage in the competition with other countries for investment by signing treaties with stronger investor protection. This suggests that good legal analysis of the kind found in this book regarding helpful reforms will not lead to significant change on its own. Governments have to be

convinced that it is in their interests to seek new forms of treaties that better achieve sustainable development and, in particular, that they will not be putting themselves at a competitive disadvantage by seeking to negotiate treaties with the new sorts of provisions outlined in this book.

In particular, it will be necessary to convince governments of developing country host states that new sustainable development-based investment agreements will help them to attract investment at least as well as traditional agreements would. Investor protection provisions in any new form of agreement are likely to be weaker than in traditional treaties in the interests of ensuring that host states are not subject to restrictions that prevent them from regulating to achieve sustainable development. They may also involve obligations in some form on investors themselves to protect the environment and labour and human rights. Both these kinds of changes may be unappealing to investors and so may reduce the investment inducing impact of signing an investment treaty. Strategies could be developed to counter this effect, however. For example, treaties might include new obligations for investors' home states to promote investment in developing country host states directly and to provide technical assistance that will help host states to create robust and transparent schemes of domestic regulation. This kind of regulation would encourage domestic as well as foreign investment by providing a certain and predictable legal structure for investment and is more likely to be effective in achieving host state development goals. Whatever approaches are taken in the new treaty models designed to achieve sustainable development, technical assistance and capacity building programs will be needed to explain their merits to governments.[2]

Governments of investment exporting countries will also have to be convinced that new sustainable development-based treaty models will not put their investors at a disadvantage compared to investors from other states if the investor protection provisions in such treaties are weaker than those in traditional treaties or investors bear obligations. More thinking needs to be done about how to persuade investment exporting states and their investors regarding the benefits of sustainable development-based treaty models for them.

[2] Some of this work is already going on, such as the International Institute for Sustainable Development's Investment Forum for Developing Country Negotiators held for the 5th time in 2011.

Some of the ingredients of possible strategies to implement sustainable development reforms are already referred to in *Sustainable Development in World Investment Law*. Nevertheless, we need a next instalment to address strategic issues in a more comprehensive and thorough going way to complement the excellent legal analysis in this significant new work.