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A Word from the Editors: Ecosystem Services, Economic Valuation, and Environmental Equity: Complementary or Contradictory

In this issue of the IUCNAEL eJournal we invite readers to explore the problems inherent in the valuation of and provision of ecosystem services. Increasing numbers of scholars and governments have begun to embrace ecosystem services as a means to protect the environment and provide financial rewards to those involved in habitat protection and restoration. The term "ecosystem services" refers to the important functions ecosystems provide, such as water filtration and purification, soil protection and creation, and food production. For most of the 20th Century, people have viewed environmental protection as economically disadvantageous when compared to natural resource exploitation and other habitat uses that convert natural capital to economic goods. The recognition and economic valuation of ecosystem services may provide a means by which habitat protection and restoration can have direct economic value that exceeds other potential habitat uses. An ecosystem services framework may also provide new economic and employment opportunities for people who live in habitats that serve important functions. For these reasons, and many others, many environmental advocates have promoted the development of ecosystem services as a new model of conservation. At the same time many commentators are wary about the implications of this concept for fairness and environmental governance.

In this issue of the journal we therefore focus on the intersection of ecosystem services, economic valuation of environmental goods, and the equitable concerns involved in pricing environmental benefits. Some of the fundamental concepts in the valuation of services are explored in Platjouw's article which begins with a review of the methods used to value services and some common critiques of those methods. Platjouw develops the critique further by examining the impact that discretionary rules have on the use of valuation techniques as a mechanism to ensure the continued provision of ecosystem services. Some insightful lessons are drawn from experience in the Nordic countries and in the Netherlands which demonstrate both the potential absurdity of some methods for monetizing the value of ecosystem services and the potential pitfalls of using valuation methods within a regulatory

system which leaves discretionary power with officials.

Nsoh's article examines some of the problems with valuation reviewed in Platjouw's article in the context of expropriation of land and compensation for damage to land in Cameroon. As Nsoh demonstrates compensation for expropriated land tends, for example, to be calculated based on market value or taking account of 'worthy' buildings erected or other works done on the land, such as the planting of agricultural crops. This approach, however, ignores many of the ecosystem services provided by some expropriate land, services as vital as the provision of wild foods for, for example, the indigenous Pygmy population.

The article also explores the inequities that may arise where valuation techniques are used within a legal system which does not fully recognise all interests in the ecosystem in question. In Cameroon land is, in theory, divided into three broad categories, private property, public property and "national lands", but this last also encompasses lands held in customary title. Although customary title appeared to have been expunged by Ordinance No. 74/1, Nsoh demonstrates that it does still exist both in practice and in law. The Cameroonian legal provisions on compensation follow the formal legal position, however, and make no provision for compensation to those who hold land under customary title. This, as Nsoh highlights, is a key issue in respect of the equity of the Cameroonian compensation.

Following the above articles you will find two "insights articles". The first of these short articles examines the problem of regulating mining activities in Finland, pointing to the potential need for a centralized system to ensure effective control over the environmental impacts that mines can create. The second draws out some lessons from the experience of environmental NGOs in China.

The "insights articles" are followed by a diverse array of country reports from scholars situated in 22 different jurisdictions across the globe. These provide an overview of recent legal, policy and judicial developments in these countries. 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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THE VALUATION OF ECOSYSTEM SERVICES: ARE THE CHALLENGES TOO MANY TO ENSURE THE MAINTENANCE OF ECOSYSTEM INTEGRITY?

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One of the key challenges today in relation to the use of and preservation of the environment is how to resolve conflicts between the maintenance of ecosystem structure, functioning and integrity on the one hand, and the use of ecosystems through activities such as food production, aquaculture, transport, hunting, mining, energy production, recreation and building on the other hand.

One approach to address this challenge is to ascribe a value to ecosystem services which can be balanced against the value of other activities. While the potential of this approach has stimulated various national and international initiatives to explicate the value of ecosystem services,[1] this article reviews some major challenges that may lead one to question the degree to which ecosystem services valuation is an appropriate mechanism to ensure the maintenance of ecosystems and the services they provide.

Although the challenges stem from different disciplines, assessed in combination they reinforce one another. The challenges discussed in this paper are related to difficulties with regard to the monetization of the values of ecosystem services, and to the existence of discretionary provisions and principles in environmental law. The paper begins with a review of three key challenges to the use of ecosystem services valuations in environmental decision-making.

Technical Challenges Related To Valuation Methods

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[1] A global study, which is named "The Economics of Ecosystems and Biodiversity (TEEB)" was initiated in 2007 and a first interim report was presented in 2008. Available at http://ec.europa.eu/environment/nature/biodiversity/economics/pdf/teeb_report.pdf. Various TEEB country studies have been initiated, amongst others in Brazil, Germany, Japan, the Netherlands, the Nordic countries, the UK, and South Africa. See further http://www.teebweb.org/teeb-implementation/national-studies/.

Ecosystem services have generally been distinguished into four categories; provisioning, regulating, cultural, and supporting services.[2] These services have a variety of values, ranging from direct use values for provisioning services to non-use values attached to the satisfaction one enjoys from the pure knowledge that a natural resource exists. The method of valuation depends on the type of benefit attached to the ecosystem service, on the characteristics of the case and on data availability. This section will review the most common valuation methods and the difficulties embedded in these methods. It begins with a discussion of valuation of provisioning services.

Provisioning services may be ascribed direct use values. These are relatively straightforward to monetize as most of the products of provisioning services (such as food products, timber, medicinal products) are traded on markets. In this situation, the market price may indicate the value people place on the particular asset, however, this relatively simple method of valuation does contain some limitations. Most importantly, the true economic value of goods and services may not be fully reflected in market transactions.[3] When people purchase a marketed good, they compare the amount they would be willing to pay for that good with its market price. They will only purchase the good if their willingness to pay is equal to or greater than the price. This approach therefore only tells us the minimum amount that people who buy the good are willing to pay for it[4] and that may not appear to be a sufficiently high value to warrant protecting the ecosystem or its services from other uses or activities.

Regulating services, such as pest control, flood control, soil fertilizer, and water filtration are considerably more difficult to monetize than direct use values. These services often provide production inputs,[5] for example a wetland may contribute to the production of crabs, scallops, clams, birds, and waterfowl, through the regulating services it provides. This might

[2] Provisioning services includes food and fibre, fuel, genetic resources, biochemicals, natural medicines, and pharmaceuticals. Regulating services include air quality maintenance, climate regulation, and water regulation. Cultural services are the nonmaterial benefits people obtain from ecosystems through spiritual enrichment, cognitive development, reflection, recreation, and aesthetic experiences. Supporting services are those that are necessary for the production of all other ecosystem services, such as the production of oxygen, and soil formation. See further the Millennium Ecosystem Assessment, 2005. *Ecosystems and Human Well-being: Synthesis.* Island Press, Washington, DC.

[3] This is not a new problem, see for example, Adam Smith in the *Wealth of Nations,* (1776) book I, Chapter IV.

[4] More specifically, the standard economic assumption is that consumers will continue to purchase a good or service until the marginal value of it (or willingness to pay) is equal to the marginal sacrifice (or price). Under these circumstances, the market price is only an expression of the marginal willingness to pay, or the marginal value. The value of the total sales might however be less that the total value to consumers. See L.H. Goulder and D. Kennedy 'Valuing Ecosystem Services: Philosophical bases and empirical methods', in G. Daily *Nature's Services. Societal Dependence on Natural Ecosystems*, (Island Press 1997) 29.

[5] Ibid.

appear to point to the possibility of using market value techniques, however, a major problem with this approach is that it is often difficult to distinguish between the production inputs from ecosystem services and other production inputs. In addition, this method requires the links between a quality change in the ecosystem and changes in market prices to be properly specified. Such modelling requires sufficient scientific knowledge of how environmental goods and services support or protect economic activities and it has proven difficult in practice to satisfy this requirement.[6]

Regulating services could also be valued by estimating what people are willing to pay to avoid the adverse effects that would occur if these services were lost, or to replace the lost service. Assessing the replacement cost is not, however, a convincing way of valuing natural ecosystems and the services that they provide. Replacements rarely replace all of the services coming from the original system. A filtration plant for instance replaces only a small part of what a watershed does. So, with this approach we could only reach a partial, or a lower estimate of the value of the services of the ecosystem.[7]

Many ecosystem services, particularly cultural services, do not enter markets at all, so that their 'price' is difficult to establish. Valuation methods have, however, been developed to capture the values of these services too. For instance, the 'travel costs method', has been applied to ascertain some values provided by parks, rivers and lakes, or the costs that result from the loss of these elements of nature.[8] When applied to recreational sites, the travel cost method assumes that the value of the site or its recreational services is reflected in how much people are willing to pay for each visit to the site.[9] This method may, however, lead to over or under estimation of the value of the site. For example, when a trip serves multiple purposes, the value of the site may be overestimated, if instead of calculating the value of the trip as one unit a separate value is ascribed to each purpose. Equally, the value can be underestimated if, for example, those who value certain sites choose to live nearby. In that case they will have low travel costs, but high values for the site that are not captured by the method.[10]

[6] N. Hanley and E.B. Barbier, *Pricing Nature. Cost benefit analysis and environmental policy,* (Edward Elgar Publishing, 2009) 124.
[7] G. Heal, 'Valuing Ecosystem Services', 3 *Ecosystems* (2000) 27.
[8] Ibid, 33.
[9] J. P. Chavas, 'Ecosystem Valuation Under Uncertainty and Irreversibility' 3 *Ecosystems* (2000)11, 12.
[10] J. Asafu-Adjaye, *Environmental Economics for Non-economists. Techniques and policies for sustainable development,* (World Scientific Publishing, 2005) 124-125.

Another valuation method is the hedonic price method, by which the value of non-marketed services is estimated by looking at the change in the market price of property due to the existence of absence of the particular service.[11] Characteristics such as environmental quality, including air pollution, water pollution, and noise, or environmental amenities, such as aesthetic views or proximity to recreational sites, can increase land and house values if they are viewed as attractive or desirable, or reduce values where they are undesirable.[12] A simplified example of how the method may work is as follows: find two comparable houses, one with and one without views, and compare their prices. The difference reflects the value of the view in the market place. An important limitation of this method is that the value of services that can be measured is limited to attributes that are related to market goods.[13] The method is also relatively complex to implement and interpret, requiring a high degree of statistical expertise, large amounts of data and the time and expense to carry out an analysis.[14]

Many ecosystem services remain that are not easily evaluated by the methods discussed above. In these cases, surveys, based on a hypothetical scenario, can be used to assess individual values. These survey methods are the most widely used methods for estimating non-use values, existence values, option values, and bequest values.[15] The methods can, for instance, be used to measure the value of the basic life supporting services provided by ecosystems, the enjoyment of a scenic vista or a wilderness experience, the appreciation of the option to fish or bird watch in the future, or the right to bequest those options to your grandchildren. It also includes the value people place on simply knowing that, for example, giant pandas or whales exist.[16] A major advantage of these survey methods is their potential as general procedures for assessing the total economic value (use values plus non-use values) of any type of ecosystem. However, it remains the case that even the most sophisticated design of contingent valuation instruments cannot fully capture the total value of ecosystems.[17]

One valuation method which is used more and more frequently is the 'benefit transfer method'. Benefit transfer uses economic information captured at one place and time to make

[11] Ibid.
[12] A. Hussen, *Principles of Environmental Economics*, (Routledge, 2004) 150.
[13] G. Heal, *Nature and the Marketplace: Capturing the Value of Ecosystem Services*, (Island Press, 2009) 26. See also Hanley and Barbier (n.6), 98.
[14] D.M. King and M.J. Mazzotta, 'Ecosystem Valuation' (2000) (available at (www.ecosystemvaluation.org/contingent_valuation.htm).
[15] See Heal (n.13) 28 and Asafu-Adjaye (n.10) 113.
[16] See King and Mazzotta (n.14).
[17] See Hussen (n.12) 160.

inferences about the economic value of ecosystems at another place and time.[18] It is often used when it is too expensive and/or there is too little time available to conduct an original valuation study, yet some measure of benefits is needed.[19] While this method clearly has some advantages, it is controversial as it may lead to value estimates being used in ways that were not intended by the original researchers.[20] Other problems include that the benefit transfer may not be accurate, that it may be difficult to track down appropriate studies, since many are not published, and that the adequacy of existing studies may be difficult to assess.[21]

Discounting the values of future generations

Many decisions made now have consequences that persist well into the future. Exhaustible energy resources, once used, are gone. Biological renewable resources can be overharvested, leaving smaller and possibly weaker populations for future generations. Persistent pollutants can accumulate over time. How can we make choices when the benefits and costs may occur at different points in time?[22] The answer is that all cost and benefit flows are converted into present value, providing a way to compare net benefits received in different time periods. The conversion of future costs and benefits into present value is called discounting.

Discounting reflects the opportunity costs of not having access to money or any other benefits immediately. It suggests that people would value environmental amenities more highly now than if they were provided the same experience twenty years from now. Two

[18] M. A. Wilson and J.P. Hoehn, 'Valuing Environmental Goods and Services Using Benefit Transfer: The state-of-the art and science', 60 *Ecological Economics* (2006) 335.
[19] Demands for environmental valuation estimates are rising in the policy community in both Europe and the US. In Europe, this is partly being driven by the introduction of the Water Framework Directive (Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, of 22 October 2000, which requires benefit-cost analysis of water quality improvements throughout the European Union, and by greater emphasis on the application of cost-benefit principles in environmental policy design in the EU. Hanley and Barbier (n.6) 70.
[20] Wilson and Hoehn (n.18) 336.
[21] R. Iovanna and C. Griffiths, 'Clean Water, Ecological Benefits, and Benefit Transfer: A work in progress at the U.S. EPA', 60 Ecological Economics (2006) 476. See also B. P. Allen and J. B. Loomis, 'The Decision to use Benefit Transfer or Conduct Original Valuation Research for Benefit-Cost and Policy Analysis', 26 *Contemporary Economic Policy* (2008) 1, who argue for the use of original benefits estimation research in this context.
[22] T. Tietenberg and L. Lewis, *Environmental & Natural Resource Economics,* 8th ed. (Pearson 2009) 24.

explanations have been given for this behaviour: people tend to discount the future because they are myopic or impatient, and people are uncertain about the future.[23]

From an economic point of view, discounting future costs and benefits is the right way to approach the problem of time preference – at least where projects of reasonably short duration, say up to 30 years, are involved. But the method has troubling implications for projects yielding huge gains in the far distant future, because after discounting these gains are deemed to be virtually worthless.[24] Applying a discount rate of say 3-6 per cent, the economic income of the planet over 50-100 years would shrink it to the value of a car. For the purposes of intergenerational equity, this seems indefensible.[25] Yet these are the actual rates applied in practice in some countries. In the Nordic countries (Sweden, Denmark, Norway and Finland) the rates applied vary from 4 to 6 per cent.[26]

The desirability of discounting future costs and benefits has therefore been the subject of intense debate.[27] For our purposes the key point is that the discount rate chosen is critical in determining the direction of social policy, particularly with respect to environmental assets that are long lived. If we discount the future heavily enough, it is possible to justify policies that generate a short-term benefit at the expense of extensive long-term environmental damage[28] impacting on, for example, the provision of fresh water, or moderation of the effects of flooding or droughts. It is perhaps for these reasons that some believe that ecosystem services should not be discounted.[29]

Uncertainty

Another key challenge is that the limitations in scientific understanding are such that we may not fully understand the true value of the services ecosystems provide and yet decisions with regard to use and development must be made today, on the basis of this imperfect knowledge.

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[23] Hussen (n.12) 177. See also: 'Deep discount', *The Economist: Finance & Economics*, (June 24th 1999).
[24] 'Deep discount', The Economist: Finance & Economics, (June 24th 1999).
[25] G. Chichilnisky, 'The costs and benefits of benefit-cost analysis', [1997] 2 *Environment and Development Economics* 1997, 203
[26] Nordic Council of Ministers 2007, *Nordic Guidelines for Cost-Benefit Analysis,* TemaNord 2007:574, 17.
[27]. Hussen (n.12).183.
[28] D.A. Starret, 'Shadow Pricing in Economics', 3 *Ecosystems* (2000) 17.
[29] D. Ludwig, 'Limitations of Economic Valuation of Ecosystems' 3 *Ecosystems* 2003, 33. On the issue of 'zero discounting' Hussen (n.12) 186; D. Pearce, G. Atkinson and S. Mourato, *Cost-Benefit Analysis and the Environment: Recent Developments* (OECD, 2006) 185.

In part uncertainty is caused by the fact that ecosystem functions are quite often complex and poorly understood. As Chavas stated:

> "Ecosystems change over time in complex ways. First, ecosystems involve many ecological variables that interact with each other. Second, ecosystem dynamics can be highly nonlinear, meaning that knowing the path of a system in some particular situation may not tell us much about its behaviour under alternative scenarios. As a result, learning about an ecosystem is difficult, especially if one is interested in its long-term trajectory. Third, ecosystems are subject to unpredictable effects of variables that are not anticipated by decision-makers. These unpredictable effects generate uncertainty due to lack of knowledge and/or lack of information. The best available scientific information typically is incomplete and uncertain for most decision-makers."[30]

Although progress has been made in understanding ecosystem dynamics, uncertainties concerning their long-term evolution remain and likely always will. This uncertainty makes it sometimes problematic to rely on economic values and to decide the best way to manage ecosystems and the services they provide. Equally, controversy may arise because of this problem when projects or activities are carried out that will irreversibly change the ecosystem functioning, structure and services.

Conclusions on the Challenges of Valuation

It is clear that the economic valuation of ecosystem services is not a straightforward exercise. The monetization methods that have been developed contain various difficulties and controversial issues. Even though economists have suggested alternatives to address the technical difficulties embedded in valuation methods and the ethical issues related to discounting, it remains questionable whether valuation of ecosystem services is an appropriate tool to ensure their preservation. This is exacerbated by the fact that other challenges, outside of the field of ecosystem economics, may reinforce the problems of economic valuation: namely the use of discretionary rules and principles in environmental law.

Discretionary Rules and Principles in Environmental Law

[30] J.P. Chavas, 'Ecosystem Valuation under Uncertainty and Irreversibility', 3 *Ecosystem*s (2000) 11-12.

Discretionary rules and principles are problematic because they leave room for the values of ecosystem services to be outweighed by other values. They may, for example, be unclear as to the extent to which ecosystem services need to be valued. Similarly, even where a value is attached to the ecosystem service in question, discretionary powers may leave room for decision makers to place greater emphasis on other values in their decisions than on the value of ecosystem services. This means that when it comes to ensuring the maintenance of the ecosystem's integrity, the process of *weighing and balancing* the values of different potential uses and services is just as important as the valuation exercise itself. Despite this, clear and coherent rules and guidelines on weighing assessments are generally absent in environmental law. Instead it is left open to decision-makers to decide how to weigh and balance diverging values; to what extent the outcome of the weighing assessment is determinative of the final decision; and what consequences will follow from ignoring the results of the process of weighing different assessments.

A number of provisions from Norwegian legislation may serve to illustrate this problem. The first example is drawn from the Norwegian Pollution Control Act, which provides that, in deciding whether to grant a permit for activities that may cause pollution, the competent authorities are required to "pay particular attention to the nuisance arising from the pollution of the project, *as compared with any other advantages and disadvantages of the project".*[31] This wording must be interpreted in the light of the purpose of the Act and the guidelines in Article 2 of the Act. Article 2(3) of the Act states that efforts to prevent and limit pollution and waste problems: "shall be based on the technology that will give the best results in the light of an overall evaluation of current and future use of the environment and economic considerations".[32] This wording makes the Act a rather flexible tool. The main objective is, of course, to prevent pollution and protect the environment. But it will be implemented with due regard to other interests, economic interests in particular. It thus requires that a trade-off is made between environmental considerations and other social needs and objectives,[33] but no clear guidance is given as to how this trade-off should be arrived at.

Another example can be found in the Norwegian Nature Diversity Act of 2009, which states that: "[t]he objective is to maintain the diversity of habitat types within their natural range and the species diversity and ecological processes that are characteristic of each habitat type. The objective is also to maintain ecosystem structure, functioning and productivity to the

[31] Act of 13 March 1981 No.6 Concerning Protection Against Pollution and Concering Waste, Article 11.5.
[32] H.C. Bugge, *Environmental Law in Norway,* (Kluwer Law International, 2011) 72.
[33] Ibid, 71.

extent this is considered to be reasonable".[34] The management objectives of the Nature Diversity Act do not impose any direct obligations upon public or private authorities, but they are important for the interpretation of the provisions and the exercise of discretion under this and other acts.[35] Achieving these objectives will require trade-offs to be made between different alternative courses of action and competing interests. One way to decide where exactly the balance of interests should lie in the final decision is to attach values to the various courses of actions and benefits arising from them. For this to work a value would have to be attached to the relevant ecosystem services. The Act neither prescribes nor prohibits such an approach to decision making[36] and thus the decision as to whether to use this approach and if so, which methods to use to calculate the value of ecosystem services is left to the discretion of the regulators.

A further example from Norway is found in the Energy Act[37] the key provision of which simply states that production or transmission of energy requires a permit, and that the objective of the act is "to ensure that the generation,[…] and use of energy are conducted in a way that *efficiently promotes the interests of society*, which includes taking into consideration public and private interests that will be affected".[38] In a statement, the government underlined that not all of the effects can be priced in a widely accepted and meaningful way[39] yet complying with the Act requires companies and energy authorities to weigh the social benefits and costs. To arrive at a result then they must take into account both the costs and benefits that are valued in dollars and costs and benefits assessed in other ways. No real guidance is provided as to how that assessment is to be carried out and how to compare these different values with each other.

Besides the general problems with discretionary rules outlined above, a further problem is created by the fact that the legislation may be underpinned by environmental principles

[34] Act of 19 June 2009 No. 100 Relating to the Management of Biological, Geological and Landscape Diversity (Nature Diversity Act), section 4.
[35] Ministry of Environment. 'Guiding Document to Chapter II of the Nature Diversity Act – General Principles for Sustainable Use: A practical introduction' (Veileder til naturmangfoldloven Kap.II, - Alminnelige bestemmelser om bærekraftig bruk : en praktisk innføring), 9. Available in Norwegian at http://www.regjeringen.no/pages/36850877/Veileder_Naturmangfoldloven_endelig2.pdf.
[36] B. D. Bongard et al, 'Økosystemtjenester – fra begrep til praksis? Sammendrag av innlegg fra ØKOSIP-seminar 10. januar 2010, NINA Trondheim. – NINA Rapport 673.' P.15. ('Ecosystem services – from concept to practice'). Available in Norwegian at: http://www.nina.no/archive/nina/PppBasePdf/rapport/2011/673.pdf.
[37] Act of 29 June 1990 no. 50 Relating to the Generation, Conversion, Transmission, Trading, Distribution And Use Of Energy etc (Energy Act).
[38] Energy Act, section1-2.
[39] Offical Statement of the Ministry of Petroleum and Energy nr 14 2001-2012 (Meld. St. 14 (2011–2012), par.6.4.1. Available in Norwegian at: http://www.regjeringen.no/nb/dep/oed/dok/regpubl/stmeld/2011-2012/meld-st-14-20112012/6/4.html?id=673880.

which in themselves are open to different interpretations:[40] such as the principles of sustainable development, the precautionary principle and the 'polluter pays' principle. The problem that environmental principles bring is that even if individual legal provisions appear to be clear in requiring, for example, a valuation of ecosystem services to be carried out and the results to be used in decision making, the objectives of the principles may not be clear and so the precise weight to attach to the valuation may be difficult to ascertain. This problem remains even where more procedural principles, such as the principle that 'an environmental impact assessment, … shall be undertaken for proposed activities that are likely to have a significantly adverse impact on the environment and are subject to a decision of a competent national authority'[41] are used as they also leave considerable discretion to the implementing authorities. The decision-making procedure on gas exploitation in the Wadden Sea ecosystem may illustrate this problem.

In 1999, an economic valuation study was performed in order to disclose the costs and benefits of gas exploitation on the Wadden Sea ecosystem. Even though over a hundred services were identified, only 16 of the services were monetized. The study presented different scenarios, covering both the possible benefits and negative impacts. These latter could be considerable, particularly on services like seawater purification, breeding grounds, tourism and recreation and production.[42] Of particular concern was the possibility for subsidence of the sea floor, which would affect the area's tidal flats, sand flats, salt marshes, including its flora and fauna.[43]

The study concluded that if the maximum possible benefits were achieved, the revenue would be €14 billion. If, in the more likely case, benefits lower than the possible maximum were achieved, the revenue would be €2 billion. If the damages from gas exploitation were high through, for instance, the negative impacts of 'soil subsidence', or when the sea level rises faster than expected, societal loss could be up to between €11 and 22 billion. In the least harmful scenario, (no damage in years 1-5, 50% damage in years 6-10, 100% damage in years 11-50), societal loss could be between €3 to 15 billion.

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[40] J.M. Verschuuren, 'Sustainable Development and the Nature of Environmental Legal Principles', 9 *Potchefstroom Electronic Law Journal* (2006) 35-38.
[41] Principle 17 of the Declaration of the United Nations Conference on the Human Environment (UNEP 1972d); the 1992 Rio Declaration, (A/CONF.151/26 vol I).
[42] J. Van Wetten et al, *De Schaduwant van het Waddengas (The Shallow Side of the Wadden Gas),* (AidEnvironment, 1999) 41-49.
[43] Nederlandse Aardolie Maatschapij (Dutch natural gas organization), *Gas extraction under the Wadden Sea,* (NAM, 2006).

Based on this report, the government, applying the precautionary principle, rejected the exploitation plans of the companies. This rejection was made explicit in part 3 of the Third Key Planning Decision on the Wadden Sea in 2001.[44] The Council of Ministers stated that no new exploration activities were allowed in the Wadden Sea and no permission will be given for new gas exploitation activities. However, at the same time the government appointed an advisory board, Committee Meijer, to further investigate the actual consequences of exploitation. The Committee published their findings in a report: 'Space for Wadden'.[45] It emphasized the importance of Wadden Sea gas to supply future energy needs, but did not refer to the ecosystem valuation study that had been carried out. The report concluded that the negative effects on ecology were very limited and gas exploitation should be allowed under strict regulations in order to supply in future energy needs. As a result, based on this report, the government approved the plans of the oil and gas companies and gas exploitation started in 2007.[46] Thus both the Committee's conclusions and the government's final decision were diametrically opposite to the government's original decision, despite the fact that both decisions were made under the same legislation and with reference to the same environmental principle.

The Valuation of Ecosystem Services: Are the Challenges Too Many?

The valuation of ecosystem services in order to facilitate their integration into decision-making procedures has, particularly in the last decade, received much attention. Nevertheless, valuations raise a number of potential problems and questions particularly when applied in the context of broad discretionary powers and principles. The key issues identified in this paper - that discretionary provisions may indirectly refer to the use of cost-benefit analysis, without imposing a duty to use this mechanism; that due to the technical difficulties and uncertainties attached to calculating a valuation the results of ecosystem valuation studies are sometimes controversial; and that discretionary rules and principles allow regulators to give greater weight to other interests and values than to the value of ecosystem services;– point to a further issue. One of the motivations for developing ecosystem valuation methods is to ensure the maintenance of ecosystem integrity and the

[44] Ministry of Housing, Spatial Planning and the Environment, 'Third memorandum Wadden Sea – part 3: Cabinet positionto the Key Planning Decision', 2001. Available in Dutch at http://www.europa-nu.nl/id/vi3ak0pw8qzz/brief_minister_met_het_kabinetsstandpunt.
[45] W. Meijer et al, 'Space for Wadden', Final Report of the Advisory Board on Wadden Sea Policy, The Hague 2004. Availabe in Dutch at http://www.waddenacademie.nl/fileadmin/inhoud/pdf/01-Waddenacademie/Meijer_rapport.pdf.
[46] Part 4 of the Third Memorandum to the Key Planning Decision to the Wadden Sea, 2007. Available in Dutch at http://www.waddenzee.nl/fileadmin/wk/inhoud/Beleid_en_beheer/pdf/Derde_Nota_Waddenzee_deel_4.pdf at 15.

conservation of ecosystem structure and functioning. For these to be maintained, however, there is a need for a legal framework that sets conditions and procedures within which officials can exercise their discretionary powers. More specifically, the legal framework would have to contain rules to ensure the conservation of the basic life-supporting functions of ecosystems. These rules would have to include prohibitions on particular activities or impacts. If the goal is the maintenance of ecosystem integrity and the conservation of ecosystem structure and functioning then ecosystem values cannot simply be counted as one factor to be weighed against others in a decision making process.

ECOSYSTEM SERVICES: A POSSIBLE NEW APPROACH IN THE VALUATION OF COMPENSATION FOR LAND EXPROPRIATION IN CAMEROON

WALTERS NSOH*

Introduction

Ecosystems such as forests are recognised as an important part of cultural and natural heritage.[1] Different countries have different ways of preserving these ecosystem services and ensuring that they are managed in a way that is beneficial to the public. One approach that is increasingly being considered is Payment for Ecosystem Services (PES), a system that aims to recognise the contribution of landowners and managers in enhancing these ecosystem services around the world. In other words, PES is a mechanism whereby payment is provided to encourage landowners and managers to refrain from land management practices that have a negative impact on these services, thereby providing benefits for the public or specific beneficiaries.

In Cameroon, the current approach to preserving ecosystem services also entails the expropriation of land to secure its management in the public interest subject to the payment of some form of compensation for the work that has been done to the land over the years. Although the expropriation procedure was not initially designed specifically for land, it is increasingly being used to supplement the forestry laws and to place forested land that is valuable either as a commercial asset for timber or for other reasons, such as the protection of biodiversity, under the control of the State. One key feature of this process is the limitation on who can or cannot be compensated for the loss of their interests in the land. Although such expropriation is subject to the payment of compensation, the law does not recognise all those with a vital interest in the land as having legal rights entitling them to compensation. Even when there is a right to compensation, the valuation tests used do not take into

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[1] For more on the nature and extent of forest ecosystem services, see A Shvidenko, C V Barber and R Per, 'Chapter 21: Forest and Woodland Systems' in R Hassan, R Scholes and N Ash (eds), *Ecosystems and Human Well-Being: Current State and Trends: Findings of the Condition and Trends Working Group*, vol 1 (Island Press, Washington, D.C. 2005) 587-621.

account the different interests that contribute to the value of the land. Under the current law, compensation for expropriation is comprised of the value of crops, the value of 'worthy' buildings and other installations, the selling price of undeveloped land in urban areas and the cost of obtaining a land certificate for land that was held under customary tenure. This means that the "real" value of the land is ignored, with the law taking account of only a very narrow and artificially created set of "commercial" interests and market values attributed to only a few of the uses and interest affected by the expropriation. This system of valuation misses on occasion the value of land as providing livelihoods to others and benefits to the community as a whole.

This article aims to challenge this position both in terms of it being a misapplication of the current law and by arguing for a change in the law. Specifically, it is argued that although not recognised as legal rights under the expropriation regime, customary rights remain part of the land tenure system in Cameroon. The valuation tests used to calculate the different interests that contribute to the value of the land to the customary owners and others are also considered, and, using examples from the United States of America (USA) and South Africa, it is argued that the existing set of interests and values considered in the payment of compensation do not reflect the true value of the land expropriated. The notion of ecosystem services as a new interest in land is then considered as one approach to dealing with the inadequacies of the current law before drawing some conclusions. The paper begins, with an overview of the land tenure system in Cameroon and the nature of the customary interests in land under the existing law.

Background: the Nature of Land Rights in Cameroon

Land in Cameroon is governed by a set of laws collectively referred to as the Land Ordinances. These include:

- Ordinance No. 74/1 of 6 July 1974 to establish rules governing land tenure;
- Ordinance No. 74/2 of 6 July 1974 to establish rules governing State Lands; and
- Ordinance No. 74/3 of 6 July 1974 concerning the procedure governing expropriation for a public purpose and the terms and conditions of compensation.[2]

Since their enactment, the various shortcomings of the Land Ordinances have been highlighted in numerous articles.[3] The law illustrates the widespread inconsistencies in

[2] Hereinafter referred to as the Land Ordinances.

Government decision-making, and, coupled with other practical difficulties such as a dysfunctional judiciary it places serious limits on property rights. The common feature here is the division of land into three broad categories, private property, public property and "national lands". Private property now covers only land for which a land certificate has been issued[4] while public property consists of all personal and real property which, by their very nature (e.g. coastlands; waterways; sub-soil and air space) or intended purpose (e.g. easements), is set aside either for the direct use of the public or for public services.[5] Land that has not been registered as private or public property reverts to the common pool of "national lands" and this includes land still held by virtue of a customary tenure. For the purposes of this article, lands held by customary tenure are of particular importance.

Legality of the Customary Interest in Land

To define "national lands", Articles 14 and 15 of Ordinance No. 74/1 state that:

> 14(1) National lands shall as of right comprise lands which at the date on which the present Ordinance enters into force, are not classed into the private or public property of the State and other public bodies.
>
> 14(2) National lands shall not include lands covered by a private property right as defined in Article 2 above.
>
> 15 National lands shall be divided into two categories: (1) Lands occupied with houses, farms and plantations and grazing lands, manifesting human presence and development; (2) Lands free of any effective occupation.

This means that occupied and unoccupied lands that are not registered are included in the category of national lands. The effect of this all-embracing notion of "national lands" is that a vast majority of Cameroonians who held land under customary law without any State-recognised document of title found their lands absorbed into national lands. It has been argued that this is sufficient to divest all customary rights holders of their customary

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[3] See, for example, C Anyangwe, 'Land Tenure and Interest in Land in Cameroonian Indigenous Law'(1984) 27 CLR 29-41, 29; C N Ngwasiri and Y N Nje, *Advocacy for Separate Land Legislation for the Rural Areas of Cameroon* (A PVO-NGO/NRM Cameroon, Yaounde 1995) 3-15; C N Ngwasiri, 'The Impacts of the Present Land Tenure Reforms in Cameroon'(1984) Editions Clé CLR 73-85, 76; A J Njoh, 'The Political Economy of Urban Land Reforms in a Post-Colonial State'(1998) 22 Int J Urban Regional 408-24, 411. See also the case of *Amidu Lukong v Razel Road Construction Co. Ltd and MINAT* [2001] 1 CCLR Part 7 81.

[4] See Articles 2, 3 and 4 Ordinance No. 74/1 of 6 July 1974.

[5] Article 2 of Ordinance No. 74/2 of 6 July 1974.

ownership rights,[6] but not necessarily other rights (such as the rights to harvest timber products from such lands). However, a vast majority of the citizens have continued to occupy and use land as though customary ownership rights still exist and, as will been seen below, subsequent legislation is still drafted on the basis that such ownership does still exist.

Article 17 of Ordinance No. 74/1 gives customary communities and individuals the right to continuous occupation or use of lands that they had been peacefully occupying or using prior to the entry into force of the Ordinance. It also gives them the right to convert such interest into a land certificate. But a land certificate is not required to guarantee the right to peaceful occupation and use by customary communities and individuals. Nevertheless, in order to succeed with any application, the customary communities and individuals have to prove that they were in effective occupation or effectively exploiting the lands (including any forest lands) by 5th August 1974.[7] For some communities such as the indigenous Pygmy populations, even if they could afford the cost of applying for a land certificate, proving that they have been in effective occupation or effectively exploiting the forest (land) is very difficult due to their traditional hunter-gatherer lifestyles. The situation is even more complicated for individuals and customary communities on land classified as "unoccupied", where the only rights available to them are hunting and fruit picking rights which may also be limited if the land is assigned for different purposes.[8] For such lands, no land certificate can be issued even if occupation or use was claimed by these individuals or customary communities. It has, however, been held that where land is in possession of another, no land certificate can validly be issued in respect of that land without first revoking the right of the original occupier.[9] In the case where those lands are possessed by customary communities and individuals the only possible source of such rights would be customary title.

[6] C N Ngwasiri and Y N Nje, (n 3) 3-15; C N Ngwasiri, 'The Impacts of the Present Land Tenure Reforms in Cameroon'(1984) Editions Clé CLR 73-85, 75-76; and A J Njoh, 'The Political Economy of Urban Land Reforms in a Post-Colonial State' (1998) 22 Int J Urban Regional 408-24, 411.

[7] For a detailed analysis of the various procedures, see C F Fisiy, *Power and Privilege in the Administration of Law: Land Law Reforms and Social Differentiation in Cameroon* (African Studies Centre, Leiden 1992) 42-47.

[8] Article 17(3) of Ordinance No. 74/1.

[9] See the case of *Chief Molinge & 3 Others v Chief Musenja & 8 others* [2000] 2 CCLR 1. See also the case of *Adje Robert Acho v Rev. Ngwane Ediage Thomas* [1998] 4 CCLR 109, 112 where the Appeal Court upheld the decision of the Court of First Instance that Bernard Epie Ntungwe (a family member) who allegedly sold a piece of land to the Appellant 'was not the family head of the Kome-Mgome family'. He therefore, 'had no right of possession and could not dispose of any part thereof without the consent of other family members particularly the head of the family'.

The implication of the above argument is that customary owners are still holding land under the customary land tenure system.[10] This is significant because, although a land certificate is what now confers ownership, it has also been held that this is not the only possible proof of ownership.[11] In other words, even if it could be argued that a land certificate is the only objective proof of ownership, it is not the only basis of ownership since customary holding is one way of acquiring a certificate, implying that customary ownership rights are still recognised. The continuous occupation or use of land, which has been absorbed into the category of national land, grants customary communities and individuals a legal right to own the land. It is therefore fair to say that this right should be recognised in all legislation dealing with land ownership regardless of whether or not a land certificate exists. This is not, however the case, as for the purposes of expropriation and compensation, customary lands are treated as national lands and not as a distinct category of lands entitled to appropriate compensation.

The Notion of Compensation

The need for compensation may arise as a result of compulsory expropriation of land for logging operations or as a result of damage done in the course of logging operations (for example, as a result of breach of the specifications of the logging contract or of the management plan for a permanent or community forest).[12] Despite the legal status of customary ownership, however, the concept of expropriation on the grounds of public interest and the possibility of compensation that arises from that only apply to "national lands" or private lands.[13] In other words, they do not apply to customary ownership. The procedure for land expropriation is set out in Ordinance No. 74/3 and involves the extinguishment of existing titles and use rights over the land in question for overriding public interest[14] and in such cases subject to the payment of adequate compensation.[15]

[10] The conditions for obtaining a land title are set out in Decree No. 76-165 of 27 April 1976 to establish the conditions for obtaining land certificates and are general cumbersome and expensive for the customary land owner to fulfil. See further C Anyangwe, 'Land Tenure and Interest in Land in Cameroonian Indigenous Law' (1984) 27 CLR 29-41, 29-30.
[11] See *Mobit Jerry Docta v Alhadji Zakari Mana & 3 others* [2000] 1 CCLR 9.
[12] Section 65 of the 1994 Forestry Law.
[13] Article 18 of Ordinance No. 74/1, as amended by Ordinance No. 77/1 of 10 January 1977.
[14] Article 1(1) of Ordinance No. 74/3 of 6 July 1974. Questions have been raised over what the phrase 'public purpose' really means (see e.g. M Prouzet, 'L'Expropriation pour le Cause d'Utilisé Publique au Cameroun'(1972) 1 Cameroon Law Review 27-53, 27-33) and abuses of this notion have been widely documented (see e.g. C F Fisiy (n 7) 49-50; and *Fouda Mballa v Etat Fédéré du Cameroun Oriental* [1971] Arrêt No 160/A/CFS/CAY (Federal Supreme Court) of 8 June 1971).
[15] Article 7 of Ordinance No.74/2 of 6 July 1974.

Compensation is an important measure of fairness and justice. As a universal principle, it aims at making amends for any loss or damages suffered – in this case as a result of the action of the State or someone authorised by the State (e.g. a logging company). Given the spiritual attachment of forested communities to their lands and forests,[16] compensation for expropriation of land or damage to land is either not possible or, where it is possible, may never be sufficient. However, this does not mean that it is irrelevant. In fact, no amount of material support can remove the sense of loss of indigenous lands. But what is even worse is the prospect of losing one's land without any such financial compensation at all.[17] And it is significant to note that the loss may arise either as a result of expropriation or where such lands have been assigned for other purposes such as forestry.[18] If that happens, the right to occupy or use, that customary land holders may have, does not include the right to use or exploit the forests on such lands except for domestic subsistence.[19]

Although the harm due to logging activities is not expressly covered by the Forestry Law as a basis for compensation for damage suffered, for the sake of clarity, the following discussion on the tests used to value the different interests in land for compensatory purposes will be focused on the expropriation of land for forestry operations under that Act.

The Value of Expropriated Forest Land

Forest resources are important from different perspectives and for a variety of purposes. Although extremely difficult to gauge, the economic value of the ecosystem services of the world's forests is vast. The importance of forests in the provision of vital ecosystem services is evident from the percentage of the world's population directly or indirectly associated with

[16] For more on the spiritual connections between the Pygmies and their lands and forests, see Survival International, 'The Pygmies' (*Survival International*, 2011) <http://www.survivalinternational.org/tribes/pygmies> accessed 14 September 2011; M Kisliuk, 'Performance and Modernity among BaAka Pygmies: A Closer Look at the Egalitarian Foragers in The Rain Forest' in B Diamond and P Moisala (eds), *Music and Gender* (Univ. of Illinois Press, Urbana 2000) 25-46; N Ohenjo and others, 'Health of Indigenous People in Africa'(2006) 367 The Lancet 1937-46, 1939; S Chakma and M Jensen, *Racism Against Indigenous Peoples* (S Chakma and M Jensen eds, IWGIA, Copenhagen 2001) 312-326. See also, J Sheehan, 'Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia' (Paper presented at the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji 10-12 April 2002) <http://maya.usp.ac.fj/fileadmin/files/faculties/islands/landmgmt/symposium/PAPER53SHEEHAN.PDF>.

[17] See, for example, C O'Faircheallaigh, 'Resource Exploitation and Indigenous People: Towards a General Analytical Framework' in P Jull and S Roberts (eds), *The Challenge of Northern Regions* (North Australia Research Unit, Australian National University, Northern Territory 1991) 244.

[18] Article 17(3) of Ordinance No. 74/1.

[19] Section 8(1) of Law No. 94-1 of 20 January 1994 to lay down Forestry, Wildlife and Fisheries Regulations (hereinafter, the 1994 Forestry Law) defines logging or customary right as '…the right which is recognised as being that of the local population to harvest all forest, wildlife and fisheries products freely for their personal use, except the protected species'.

or dependent upon forests. According to World Bank estimates, more than half a billion people living in extreme poverty depend on forests for some part of their livelihoods.[20] While the forest product industry is a source of economic growth and employment, the international trade in global forest products is nonetheless estimated in the order of US$270 billion, of which products from developing countries account for 20%.[21]

Biologically, World Bank estimates show that forests are home to at least 80% of the world's remaining terrestrial biodiversity and are a major carbon sink that regulates the global climate.[22] Forests are also known to help in maintaining the fertility of the soil, protect watersheds and reduce the risk of natural disasters such as floods and landslides.

Socially, forests are even harder to classify. They may support isolated pockets of traditional life or absorb uprooted people with nowhere else to go. Forests may be refuges for indigenous cultures. They almost never represent the centres of wealth, power, or culture of the modern nation-state, yet people in those centres of power may see forests as having symbolic or moral values absent in the great cities. These are just some of the ecosystem services attached to the various uses of the forest.

Specifically within Cameroon, the more than 20 million hectares (ha) of tropical rainforest[23] acts as a huge carbon sink in the global fight against climate change. In economic terms, the Cameroonian forestry sector is the second largest export revenue source, with timber exports amounting to about 6.5% of the Gross Domestic Product (GDP).[24] The forest is also home to several heterogeneous groups of people including the Pygmy population, who have one of the oldest cultures on earth.[25] The importance of the services provided by the Cameroon forest to poverty reduction is reflected in various policy documents such as the

[20] World Bank, 'Forests and Forestry Sector' (*World Bank*, 2010) <http://go.worldbank.org/VIQE69YFZ0> accessed 22 August 2011.
[21] Ibid.
[22] Ibid.
[23] B Mertens and others, *Interactive Forestry Atlas of Cameroon (version 2.0): An Overview* (A World Resources Institute Report Prepared in Collaboration with the Cameroon Ministry of Forestry and Wildlife Washington, D.C. 2007) 1.
[24] Economist, *Economist Intelligence Unit Country Report Cameroon* (London 2008). Other sources estimate that the Cameroon's forest sector is the second largest export revenue source for the economy, contributing, for example, almost 10% of GDP in 2005, and representing 25% of all export earnings (see VERIFOR, 'Cameroon' (*VERIFOR*, 2007) <http://www.verifor.org/background/case-studies/cameroon.html> accessed 16 September 2011.
[25] See sources cited in P R Oyono, 'From Diversity to Exclusion for Forest Minorities in Cameroon' in C J P Colfer (ed), *The Equitable Forest: Diversity, Community, and Resource Management* (RFF Press, Washington, D.C. 2005) 114-115.

different versions of the Poverty Reduction Strategy Paper (PRSP)[26] under the headings of economic diversification and development of the private sector.

Over the years, the Pygmy population and other forested communities have, through their lifestyle choices and management practices, enhanced the value of these ecosystem services. However, the system of paying compensation is yet to recognise these vital interests in land when the expropriation procedure is triggered.

On the surface, under the 1974 Land Ordinances, compensation for land expropriated does not seem to raise any issue of equity, with regards to what is covered. According to the provisions of Ordinance No. 74/3 of 6 July 1974, expropriation for a public purpose shall confer the right to monetary compensation (Article 7) and such compensation shall be related to the direct, immediate and certain material damage caused by the eviction (Article 8). However, the provisions relating to how compensation is calculated do raise questions of equity. Article 9 of the Ordinance provides that:

> Subject to the provisions of Article 13(2)[27] of the Ordinance to establish rules governing land tenure [i.e. Ordinance No. 74/1], compensation for expropriation shall comprise the following:
>
> - The value of the crops destroyed calculated in accordance with the scale in force;
> - The value of the buildings and other installations calculated by the valuation commission…;
> - The value of the undeveloped land calculated as follows:
>
> a) In the case of urban lands officially allocated subject to payment, compensation may not exceed the official price of public lands in the particular town centre;
>
> b) In the case of lands held by virtue of a normal transaction under ordinary law, compensation shall be the purchase price to which shall be added the ancillary costs of the purchase and of obtaining title;
>
> c) In the case of lands held by virtue of customary tenure under which a land certificate has been issued, compensation may not exceed the amount of the expenses incurred by the issue of the said certificate.

[26] The latest of these reports was prepared by the government of Cameroon in 2009. See IMF, *Cameroon: Poverty Reduction Strategy Paper - Growth and Employment Strategy Paper 2010/2020* (IMF Country Report No 10/257, IMF, Washington, D.C. 2009). This was a follow-up document to a previous one in 2003 and builds on a Vision 2035 (MINEPAT, *Cameroon Vision 2035 - Working Paper* (Yaounde 2009)) policy document prepared earlier by the government. See also IMF, *Cameroon: Poverty Reduction Strategy Paper* (IMF Country Report No 03/249, IMF, Washington, D.C. 2003), esp. 34-54.

[27] Article 13(2) of Ordinance No. 74/1 states that, 'No compensation shall be payable for the destruction of dilapidated buildings liable to collapse, or buildings erected contrary to town planning regulations'.

From the above provisions, it is clear that expropriation of land provides for the payment of compensation for the land acquired itself. However, where there is no improvement on the acquired land, as defined under the Ordinance (i.e., no valued crops, no worthy buildings and other installations), no compensation is payable. For undeveloped land, compensation can only be paid to the value of the purchase price of the land if it has ever been bought or sold or for the cost of obtaining a land certificate for land that is held under customary law. As argued earlier, this provision excludes the vast majority of citizens without a land certificate, but with a legal right to compensation.

In addition, even when there is a right to compensation, the valuation test used does not take account of the real value of the land to the customary owners and others. Instead the law takes account of only a very narrow set of market values attributed to only a few of those affected, missing the value of land as providing livelihoods to others and benefits to the community as a whole. In most of the forested areas of Cameroon, the land is undeveloped and there are no structures on them, hence no compensation can be paid to the villagers if such land is acquired.[28] Yet expropriation may remove their rights to hunt, to gather fruits, farm or even practice their culture; things which they rely on for their livelihood.[29]

With regards to the 1994 Forestry Law, compensation for the expropriation of forested land is not expressly mentioned. This is due to, what appears to be, the unwritten objective of the law - to nationalise all forests except non-permanent forests.[30] Its effect is to place title to all forests and forest lands in the State. There is therefore, no need to initiate the expropriation procedure prior to designating the forests as permanent forest estates (State or council forests).[31] Although, in theory, they are categorised as 'non-State' forests, non-permanent forests can be expropriated and classified as State or council forests, which the State then controls and manages in the 'public interest'.[32] For example, if a forest that was initially classified under the non-permanent forest domain is later considered to fulfill most of the characteristics of a permanent forest, the expropriation process is triggered and the forest reclassified. Nevertheless, the procedure allows for the payment of compensation under the

[28] T Greiber and S Schiele (eds), *Governance of Ecosystem Services: Lessons Learned from Cameroon, China, Costa Rica, and Ecuador* (IUCN, Gland, Switzerland 2011), 27-28.
[29] Rights may be limited as a result of the forest being reclassified, but in extreme cases expropriation can lead to the complete loss of the land and all associated rights.
[30] With the exception of private forests, communal and community forests are still part of the national forests. However, community forests are allowed to be managed, preserved and exploited by the approved community in its own interest and subject to an approved management plan. See Sections 37 and 38 of the 1994 Forestry Law.
[31] Section 20(2) of the 1994 Forestry Law provides that, 'Permanent forest shall comprise lands that are used solely for forestry and/or as a wildlife habitat'.
[32] Article 19(2) of Decree No. 95-531-PM of 23 August 1995 to determine the conditions of implementation of the forestry regulations (hereinafter, the Degree of Implementation).

rules defined by the Ordinance No. 74/3 as explained above. Specifically, Section 26 of the 1994 Forestry Law provides that:

> (1) The instrument classifying State forest shall take into account the social environment of the local population, who shall maintain their *logging rights.*
> (2) However, such rights may be limited if they are contrary to the purpose of the forest. In such case, the local population shall be entitled to compensation according to the conditions laid down by decree.
> (3) Public access to State forests may be regulated or forbidden.

Section 27 further states that 'A forest may be classified only after compensating persons who had carried out investments therein before the start of the administrative classification procedure'.

The above provisions again reveal that any payment of compensation is not for the true value of the expropriated land, but only for the very narrow set of interests and values attributed to the local population and others, including their *logging rights*.

The focus of the current law on economic improvements as the basis for paying compensation could be traced to the time when the 1974 Land Ordinances were promulgated. At the time, the debate on land reform was driven mainly by economic objectives, especially in the agricultural sector, rather than environmental and social ones.[33] However, as environmental issues have increasingly become part of the national debate the same laws are still being used to justify the non-payment of compensation for the expropriation of land for economic and even environmental programmes. This is the case when land is set aside for forestry purposes as defined by the Forestry Law even though its main aim is to ensure the sustainable conservation and use of the forestry resources and of the various ecosystems within the framework of an integrated management approach.[34] In so doing the true value of the land in providing vital ecosystem services and the role of the local population in sustaining these services is being ignored.

But what does the real value of land involve? The next section considers the grounds on which ecosystem services add to the value of land. Obviously, there are difficulties on how to

[33] See, for example, S Melone, *La Parenté et la Terre dans la Stratégie du Développement, l'Expérience Camerounaise: etude critique* (Klincksieck Paris 1972) 184 and A D Tjouen, *Droits domaniaux et techniques foncières en droit camerounais: (étude d'une réforme législative)* (Economica, Paris 1982) 37.
[34] Section 1 of the 1994 Forestry Law.

value such services, and these difficulties have been well documented.[35] The subject of the analysis here is not to focus on these difficulties, but rather on the need to consider such an approach in calculating compensation for land expropriated, especially when it concerns customary landowners who have contributed in enhancing these ecosystem services, but who have not necessarily made improvements to the land that fit with the narrow set of "improvements" that the current law requires.

The Concept of Ecosystem Services and the Value of Land

The concept of ecosystem services has emerged in the literature and in practice elsewhere in the world as one way of valuing land,[36] whether that be for the purpose of compensating landowners and land managers, or for other reasons. The contribution that ecosystem services make to the overall value of land is now recognised to the extent that in the United States, for example, it has even been suggested that property owners with ecosystem services on their land should have the land purchased by the government.[37] At the moment though, the discussion is mainly focused on payment for ecosystem services as a mechanism whereby a source of income is provided to those who, by managing land in a particular way – for example, maintaining it in a "natural" state rather than felling forests, building houses or converting land to intensive agriculture – are providing benefits for the public or specific beneficiaries.[38] However, if the benefits are of such public interest that the State may decide to initiate the expropriation procedure in order to better protect them, then the valuation tests used must take into account the value of maintaining land in its "natural" state. This requires moving away from the very narrow and artificially created set of "commercial" interests and values used in the Cameroonian system to recognising the true value of land even in its "natural" state as providing livelihoods to others and benefits (economic, social, and ecological) to the community as a whole.

[35] See, for example, K H Redford and W M Adams, 'Payment for Ecosystem Services and the Challenge of Saving Nature'(2009) 23 Conservation Biology 785-87; C T Reid, 'Between Priceless and Worthless: Challenges in Using Market Mechanisms for Conserving Biodiversity' Transnational Environmental Law, available on CJO 2012 doi:10.1017/S2047102512000210 (hard copy in press); D Helm and C Hepburn, 'The Economic Analysis of Biodiversity: An Assessment'(2012) 28 Oxford Review of Economic Policy 1-21.

[36] See, for example, A I Davis, 'Ecosystem Services and the Value of Land'(2010) 20 Duke Envtl L & Pol'y F 339-84.

[37] J Salzman, 'Creating Markets for Ecosystem Services: Notes from the Field'(2005) 80 NYU L REV 870-961, 937.

[38] For an overview see, Forest Trends and Katoomba Group, *Payments for Ecosystem Services - Getting Started: A Primer* (Forest Trends, The Katoomba Group, & UNEP, Washington, D.C. 2008) <http://www.unep.org/pdf/PaymentsForEcosystemServices_en.pdf>.

Four broad categories of ecosystem services are recognised at the international level. These include: provisioning services such as food, timber, fresh water and plant-derived medicines; regulating services such as those that affect water quality through the filtration of pollutants by wetlands, climate regulation through carbon storage and water cycling, and protection from disasters and disease; cultural services that provide recreation, spiritual and aesthetic values, education; and supporting services such as soil formation, photosynthesis and nutrient cycling.[39] Studies[40] identify the great economic and spiritual value of the natural environment to society and the 'more holistic approach'[41] to the management of land that is now being encouraged through international law requires a shift in both the mind-set and practices of many of those who manage and use land. Besides the general acceptance of the need to shift our policy and practices to reflect the value of land in providing ecosystem services, a starting point is to calculate in economic terms the value of such services and to ensure that this is properly taken into account when decisions on land use are being taken.

There are challenges with valuing ecosystem services. While ecosystem services such as producing food, timber and energy have an explicit economic value reflected in the market price of the goods produced, other ecosystem services such as the protection or provision of biodiversity, valued by society cannot readily be priced.[42] The difficulty of valuing ecosystem services means that the rate of payments for the provision of ecosystem services under most Payment for Ecosystem Services (PES) schemes are not calculated based on the value of the services. They are valued in comparison to the land area or income forgone by adopting specified land management practices. Nonetheless, the approach adopted and the payment rates demonstrate the extent to which ecosystems services are seen as adding value to land.

Under the US Conservation Reserve Program (CRP), for example, payments are provided to farmers for planting long-term, resource-conserving covers on eligible farmland to improve

[39] The Economics of Ecosystems and Biodiversity (TEEB), *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A synthesis of the approach, conclusions and recommendations of TEEB* (2010) 7, and Annex 2 and the sources referred to there. See generally the website of the TEEB project <http://teebweb.org> and United Nations, 'Millennium Ecosystem Assessment' (2005) (available at http://www.unep.org/maweb/en/index.aspx).

[40] See, for example, Defra, *Securing a Healthy Natural Environment: An Action Plan for Embedding an Ecosystems Approach* (Defra, London 2007), 7; UK National Ecosystem Assessment, *The UK National Ecosystem Assessment: Synthesis of the Key Findings* (UNEP-WCMC, Cambridge 2011); and HM Government, *The Natural Choice: Securing the Value of Nature* (CM 8082, The Stationery Office, London June 2011).

[41] Convention on Biological Diversity, COP 5 (2000) Decision V/6 Ecosystem Approach, para 6, Principle 5.

[42] C T Reid, 'Between Priceless and Worthless: Challenges in Using Market Mechanisms for Conserving Biodiversity' Transnational Environmental Law, available on CJO 2012 doi:10.1017/S2047102512000210.

the quality of water, control soil erosion, and develop wildlife habitat.[43] Although payment rates are based on the relative productivity of the soils within each county and the average dry land cash rent or cash rent equivalent, determining the amount to pay is still largely dependent on the area of land to be placed under the scheme. Yet, lands that offer greater environmental benefits calculated according to the Environmental Benefits Index (EBI)[44] and for which landowners are willing to accept the maximum productivity adjusted payments, are automatically accepted into the scheme. The rates per acre paid for such lands are also significantly higher than those for land without such environmental benefits. Although the scheme has its weaknesses,[45] there has also been progress in creating habitat for different species of wildlife.[46] The higher rental rates for land with greater environmental benefits reflect the increased flow of ecosystem services and their value, as well as the opportunity cost to the producer of placing this land in the program.[47] Therefore, if land placed under the CRP, for example, is the subject of a market transaction, its market value is likely to reflect the potential of higher rental rates for the land as a result of the ecosystem services it produces.

If ecosystem valuation were included in the calculation of compensation for expropriation or land-damage in Cameroon it would have a significant benefit for those with a customary interest in undeveloped land. It would particularly benefit those where traditional market value approaches have failed to come up with any reasonable amount of compensation. And

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[43] See the website of the Conservation Reserve Program (CRP) <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp> accessed 14 February 2013. For an overview of the history and development of the CRP, see Chapter 9 of J B Ruhl, S E Kraft and C L Lant, *Law and Policy of Ecosystem Services* (Island Press, Washington, DC 2007) 186-192.

[44] For more in the index see, Farm Services Agency (FSA), 'Fact Sheet: Conservation Reserve Program Sign-Up 43 Environmental Benefits Index (EBI)' (2012) <http://www.fsa.usda.gov/Internet/FSA_File/gs43ebi.pdf> accessed 14 February 2013; Farm Services Agency (FSA), 'Conservation Reserve Program Sign-up 41 Environmental Benefits Index (EBI)' (2011) <http://www.fsa.usda.gov/Internet/FSA_File/crp_41_ebi.pdf> accessed 14 February 2013; and Farm Services Agency (FSA), 'Conservation Reserve Program General Sign-up 33 Environmental Benefi ts Index' (2006) <http://www.fsa.usda.gov/Internet/FSA_File/crp33ebi06.pdf> accessed 14 February 2013. See further Ruhl *et al* (n 43) 190-191.

[45] For example, issues have been identified with the design structure, land eligibility criteria, and the pressure to qualify for the program that all contribute to decrease the chances of significant ecosystem service provision. See J Salzman, 'Creating Markets for Ecosystem Services: Notes from the Field'(2005) 80 NYU L REV 870-961, 892-894.

[46] Farm Services Agency (FSA), 'News Release: Conservation Minded' <http://www.fsa.usda.gov/FSA/printapp?fileName=ss_ia_artid_617.html&newsType=crpsuccessstories> accessed 14 February 2013. For the reported State-by-State benefits of the CRP, see Farm Services Agency (FSA), 'Conservation Success Stories' <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp-20> accessed 14 February 2013.

[47] Ruhl *et al* (n 43) 190-191.

there are precedents for this approach being used in other countries. Specifically, the United States Court of Claims has held that, with regards to aboriginal interest:

> This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation - considering the ready market at that time and the potential market.[48]

Thus, in the determination of the "market value" of the land subject to "recognised" aboriginal interests, numerous factors need to be taken into account by the courts which go beyond a simple assessment of the economic value of the aboriginal activities carried out on the land. The fair value of the land is to be ascertained taking into account all pertinent factors including the timber, game, wildlife and agricultural potential of the land. Although, not expressly stated by the court, fair market valuations that consider these factors are actually ecosystem services valuations. The recognised aboriginal interests in the USA and the customary interests in Cameroon have much in common, and this decision points to the fact that the Cameroonian system of land valuation may need reform.

The suggestion that the Cameroonian system may need reform is further underlined by experience in South Africa where under the Constitution, specific factors must be taken into account when different interests are balanced, including what the market value is.[49] The interests of those affected are classified under the following heads:

(a) current use of the property;
(b) the history of the acquisition and use of the property;
(c) market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) purpose of expropriation.[50]

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[48] *Otoe and Missouria Tribe of Indians v United States*, 131 Ct.Cl. 593, 131 F. Supp. 265 (CT. CI., 1955) [290].
[49] Section 25(3) of the Constitution of the Republic of South Africa Act No. 108 of 1996.
[50] N S Terblanche, 'The Challenges to Valuers with Regard to Compensation for Expropriation and Restitution in South African Statutes' (PRRES Tenth Annual Conference, Bangkok, Thailand, Sunday 25th To Wednesday 28th January 2004), 19-21 (available at http://www.prres.net/Papers/Terblanche_Compensation_Expropriation_Restitution_South_African_Statutes.pdf).

Under these different heads, public interest is classified to include the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources.[51] Market value is thus one of the factors to be considered, rather than the prime factor. This approach to the calculation of compensation is in line with other jurisdictions, for example Germany, Sweden, the United Kingdom, Ireland, Australia, Japan[52] and Canada.[53] By this approach, the interests of the landowners may increase the compensation to above market value but this may be balanced by the fact that the public interest may reduce the compensation to an amount less than market value. Just and equitable compensation is therefore the sum total of the value of the interest of those affected by expropriation, minus the value of the public's interest. Although the list of interests given in the South African example, does not expressly include ecosystem services as interests that must be valued, it was not intended to be a closed list of interests and unconventional property interests (including those that require protection under international law) other than those listed in the Section 25(3) of the Constitution may also be considered.[54]

The South African approach suggests that "just and equitable" compensation involves a balancing of interests; a view supported by the European Court of Human Rights. Although the European Convention on Human Rights states that 'Article 1 of Protocol 1 to the European Convention on Human Rights does not expressly require compensation for expropriation,' the European Court of Human Rights has nonetheless held that:

> [T]he taking of property without payment of an amount 'reasonably related to its value' would normally constitute a disproportionate interference with property rights, which could not be considered justifiable under Article 1 [of the European Convention on Human Rights]. However, Article 1 'does not guarantee a right to full compensation in all circumstances.' Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full economic value.[55]

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[51] Section 25(4) of the Constitution of the Republic of South Africa.
[52] See, for example, D L C Miller and A Pope, *Land Title in South Africa* (Juta & Co., Cape Town 2000) 302.
[53] A F Hacault, 'A Primer on Expropriation: Are You Missing Elements of Compensation?' (Prepared for the Annual Conference of the Appraisal Institute of Canada, Mont-Tremblant, Quebec, May 27 - May 30, 2009) 5-14 < http://www.tdslaw.com/media/files/articleexpropriationafh2.pdf>.
[54] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 43-49. See further, D Kleyn, 'The Constitutional Protection of Property: A Comparison Between the German and the South African Approach'(1996) 11 SA Public Law 402-45.
[55] G Budlender, J Latsky J and T Roux, *Juta's New Land Law* (Juta & Co., Cape Town 1998) 1-57 & 1-65 cited in N S Terblanche (n 50) 21.

Again, this stresses the need for the compensation and the time and manner of payment to reflect an equitable balance between the public interest and the interests of those affected.

From the above examples, there appears to be greater recognition that the expropriation law "market value at the time of taking" approach is inappropriate to adequately compensate for the infringement of the customary interests in land. Even so, there seems to be a need to also consider the potential future value of the land. Therefore, an approach that takes into account the ecosystem services present and future value of the land is of particular importance. In Cameroon's case this is particularly relevant in cases where land subject to customary title or necessary for the exercise of customary rights is expropriated. As indicated earlier, by their very nature, many customary and indigenous rights to occupation or use, for example subsistence farming, logging and hunting require land sufficient to ensure their proper exercise. The expropriation of the land for other purposes or the limitation on the exercise of the right, in extreme cases, can lead to the demise of the customary activity that the right intends to protect. Such infringements affect in many cases, not only those local communities exercising the right at the time the infringements are first carried out, but also all future generations of the customary communities who could have benefited from the exercise of the right. The *sui generis* character of customary ownership rights generally, and particularly the collective, cultural and historic nature of these rights, strongly suggest that the loss of the exercise of the right and the lost land be compensated not only in present value terms but also in terms which take into account the loss of the future uses of the land and the consequential long term impacts on the affected local society. This is an idea that finds support in the concept of sustainable development: a concept from which the ecosystem approach has evolved.

Conclusion

An ecosystem services approach involves making sure that the benefits provided by the environment are recognised and sustained whilst delivering other economic and social goals.[56] There are different ways of achieving this objective.[57] Meeting this objective might be simplest if most lands providing ecosystem services were public property that could be set aside for forestry or other public use, but they are not. Although the existing land tenure system in Cameroon has sought to abolish customary ownership by "nationalising" all lands

[56] Convention on Biological Diversity, COP 5 (2000) Decision V/6 Ecosystem Approach.
[57] See, for example, The Scottish Government, *Applying an Ecosystems Approach to Land Use: Information Note* (The Scottish Government, Edinburgh 2011) 2 < http://www.scotland.gov.uk/Resource/Doc/345453/0114927.pdf>.

occupied or used customarily and for which a land certificate has not been issued, the reality is that customary ownership remains one of the main facets of the Cameroon land tenure system. Whether or not such customary ownership titles are recognised by the expropriation law, private lands (which will include lands held customarily in Cameroon) are vital for the provision of most services including biodiversity conservation.[58] The placement of certain forest land under a management agreement indicates recognition of this fact, but the expropriation law fails to recognise all these vital interests and values in the land. For example, without expropriation, where customary individuals or communities are able to control access to a region – as might be the case with sacred forests – it may be possible for them to successfully recoup conservation costs by charging tourists to visit the area and view the native flora and fauna as well as witness some cultural practices. It follows that whether the subject of a purchase or an expropriation proceeding, the value of the land should not be based only on the houses built and crops found on the land or the cost of obtaining a land certificate, as is currently the case, but should also take into account the benefits to the public and specific beneficiaries present and future of maintaining the land in its "natural" state. Although this can go a long way to resolving some of the fundamental issues of equity in the system of paying compensation as a result of the expropriation of land especially for conservation purposes in Cameroon, there are obvious problems with an ecosystem services approach.[59] The most important in this case would be how to value the present and future ecosystem services and any improvements to them made by the customary owners and occupiers over the years.

This article has drawn examples from the compensation valuation approaches in the United States, South Africa and other countries which generated some useful lessons on how compensation may be calculated taking account of ecosystem services. However, it is not in any way suggested that the approach is going to automatically work for Cameroon, particularly due to the differences in political and legal contexts. While further research is needed to find solutions to the problems with this approach, the core principle of the ecosystem services approach provides a significant way in which some of the equity issues in the payment of compensation for the expropriation of land in Cameroon could be addressed. For this to work, however, it will require both that the valuation system used to calculate compensation payable to owners take account of the value of ecosystem services and that customary ownership is recognised for the purposes of providing compensation.

[58] D Farrier, 'Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?'(1995) 19 Harvard Environmental Law Review 303-408, 310.
[59] K H Redford and W M Adams, 'Payment for Ecosystem Services and the Challenge of Saving Nature'(2009) 23 Conservation Biology 785-87.

These changes must be incorporated in tandem given the key role played by customary land owners in the provision and maintenance of ecosystem services in Cameroon.

THE PRECAUTIONARY CASE OF TALVIVAARA: A DEVELOPED LEGAL ORDER GONE ASTRAY

TIINA KORVELA*

Abstract

This short case study takes a look at the Talvivaara case in Finland. Talvivaara is a nickel and zinc mine in Eastern Finland. The mine has had environmental challenges through its history. The latest problem – a toxic water leak in November 2012 – brought into view a dysfunction between the Mining Act and the Environmental Protection Act, the main statutes regulating mining in Finland. The case highlights the need for reform of the bifurcated administrative procedure. In particular consideration should be given to where best to site supervision of mining activities: regional or national level.

Note

To some extent the story of Talvivaara is a story of how a regulatory system previously considered as solid can fail. The company in the limelight is Talvivaara Mining Comp. Plc, which exploits the largest known nickel sulfide resources in Europe. The Talvivaara mine has revealed some challenges in the legal and administrative system in Finland. The main problem is the dysfunctional relationship between the Mining Act and the Environmental Protection Act, especially in the choice of competent authorities under each statute.[1]

Talvivaara is a relatively new mine. It opened in 2007 after its feasibility study was accepted and it gained the environmental permits needed. It uses a novel technique called bioheapleaching to extract nickel and zinc. In bioheapleaching metal is leached from the ore with bacterial action.

When valuable ore has been found in the soil in Finland one part of the administrative proceedings is to gain permits and rights to the site under the Mining Act. These were

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[1] The Mining Act (kaivoslaki, 621/2011) is not officially translated into English. The Finnish version can be found at http://www.finlex.fi/fi/laki/ajantasa/2011/20110621 (accessed 14 February 2013). The Environmental Protection Act (ympäristönsuojelulaki, 86/2000) can be found in English at http://www.finlex.fi/en/laki/kaannokset/2000/en20000086.pdf (accessed 17 January 2013).

previously given by the Ministry of Employment and the Economy, but from July 2011 the authority to grant permits has been in the hands of the national Finnish Safety and Chemicals Agency (FSCA). In addition mining companies must apply for a permit under the Environmental Protection Act (and occasionally under other statutes such as the Water Act).[2] These permits are granted by Regional State Administrative Agencies (RSAAs) and supervised by regional Centres for Economic Development, Transport and the Environment (CEDTE). There are 15 CEDTEs in Finland. Since Finland has population of 5.4 million and land area of some 385 000 km^2, an individual CEDTE can have an extensive geographical area to supervise with rather limited resources regarding manpower.

The regulative aim in the Mining Act is to control the whole mining process from reservation and ore prospecting to mining itself – the focus is not directly on the environmental deterioration mining causes, but on the administration of mining as an economic activity causing certain harms. Environmental permits are not necessarily needed for the earlier phases of mining, but when it comes to the exploitation of the mining minerals a permit must be gained. There are, however, certain prohibitions – on soil contamination and groundwater pollution – that bind all operations, including the earliest stages of mining.[3]

The problems at the Talvivaara site started at an early stage. In 2010 waters in nearby lakes turned salty due to the runoff of waters rich in sulfates.[4] In November 2012 highly polluting water including uranium, nickel and other toxic metals leaked from the mine's gypsum waste pond to the surface waters around the mine and the soil below it. In March 2012 a worker died at the site, likely due to breathing hydrogen sulfide emissions. The danger posed by these emissions had been pointed out by employees, but no corrective measures had been taken.[5]

There have been various responses to these breaches from both government and civil society. In June 2012 Finnish MEP's Hassi and Pietikäinen initiated an EU Commission investigation into the mine, for non-compliance with the Mining Waste Directive

[2] The Water Act (vesilaki, 587/2011) can be found in Finnish at http://www.finlex.fi/fi/laki/ajantasa/2011/20110587. The statute has not been officially translated into English, but the translation of the previous Water Act (264/1961) can be found at http://www.finlex.fi/en/laki/kaannokset/1961/en19610264.pdf (accessed 17 January 2013).
[3] These full prohibitions are part of the Environmental Protection Act, 7 and 8 §.
[4] The mine has caused pollution to waters as far as 100 kilometers from the mine. See, for example, the Official Comment of Stop Talvivaara Movement on the handling of issue PSAVI/58/04.08/2011 at http://www.stoptalvivaara.org/fi/mielipide-psavi.html (accessed 14 February 2013).
[5] Investigation information and report abstract can be found at http://www.tukes.fi/en/Current-and-News/News/2Chemicals-and-gas/Accident-investigation-revealed-deficiencies-in-process-safety-management-of-Talvivaara-Sotkamo-Ltd/ (accessed 17 January 2013).

(2006/21/EC). The Finnish Nature Conservation Association also started administrative proceedings concerning the safety of the mine and its environmental impacts.[6] And after the gypsum waste pond leaked at November 2012 Talvivaara hit the national headlines for several weeks, causing petitions from the public to the Minister of the Environment and demonstrations in Helsinki.[7] Some of the problems arising from the mine operations have led the FSCA and the CEDTE and even the Radiation and Nuclear Safety Authority Finland to impose operation breaks.[8] These breaks usually lasted for a few days – the longest break, 17 days, took place after the gypsum waste pond leak at November 2012. On each occasion corrective measures required by the authority/authorities imposing the break had to be implemented and approved before the mine could reopen.

The case reveals the challenges inherent in the bifurcated administrative procedure. The right to proceed with the plans for a mine is granted at a national level, by a body with 16 officials in its mining unit which concentrates solely on mining, its permits and their surveillance. Given that there are in total only 52 mining operations in Finland, this body is relatively well resourced.[9] The FSCA has therefore been more able to respond to breaches of obligations by mining companies by imposing breaks in operation. The environmental permits by contrast are granted and supervised at regional level, in units consisting often of only a few civil servants responsible for the surveillance of all potentially polluting activities in their region. In Talvivaara's case, the regional CEDTE has only six officials in its supervision unit reponsible for all the various types of environmental permits that may be granted to industry of any kind. It has therefore proved more difficult for these officials to monitor and enforce the conditions of any permits they grant. The inadequacy of the CEDTE's response to the Talvivaara case has been highlighted by civil movements and NGO's. Having noted that the CEDTE has not used all the legal tools available under the Environmental Protection Act, they have called for the FSCA to take action instead.[10]

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[6] During 2012, the organization started proceedings at two instances, with the CEDTE and with the RSAA of Northern Finland, which was responsible for granting the environmental permits in the first place. Details of these latter proceedings can be found (in Finnish) at http://www.sll.fi/mita-me-teemme/kaivostoiminta/kainuun-piirin-vireillepano-pohjois-suomen-aluehallintovirastolle (accessed 17 January 2013).

[7] The public activity has been organized by a movement called Stop Talvivaara, http://www.stoptalvivaara.org/ (accessed 17 January 2013).

[8] The Radiation and Nuclear Safety Authority Finland is active in this case as the ore at the site includes uranium.

[9] Figure from the Ministry of Employment and Industry statistics for 2011, http://www.tem.fi/index.phtml?l=en&s=2110 (accessed 17 January 2013).

[10] Chapter 13 of the Environmental Protection Act includes sections on supervision and administrative compulsion. The limited use made of administrative compulsion in this instance has been criticized. See, for example, Suomen Luonto, magazine of Finnish Nature Conservation Association at http://suomenluonto.blogit.fi/kainuun-ely-keskuksen-ylijohtaja-on-lainamies-gtksta/ (accessed 14

The difference in resources available in the two permitting processes is notable. Not only does this mean that the environmental agency struggles to ensure compliance under its permitting system, but there is a difference in the political power of the two government agencies. Mining is seen as an escape from the looming recession and the decline of formerly strong branches of industry in Finland – the President of Finland has called the mining industry 'the new Nokia of Finland'. In his opinion the resources for permitting and supervision of mining operations are adequate and need not be strengthened.[11] In the face of this political pressure it may be difficult for officials of regional environmental agencies to take strong action to protect the environment against harm from mining operations. These problems may be exacerbated by the fact that the permitting process relies upon mining companies to produce their own impact assessments. Thus, while it is meant to embody a precautionary approach to mining, the ability of the permitting process to ensure this is constrained by the companies' ability and willingness to provide accurate forecasts of their likely impact. Even the most willing of companies will find it difficult to predict all eventualities given the nature of mining operations and their reliance on the natural environment.

All of this points to the need to revise some parts of the regulation. The need for greater regulation of larger or novel mining enterprises points to the need for more resources to be available to the regulator. Given the cost of investing in regional regulatory bodies, it may be more appropriate to relocate the supervisory authority for large and novel mining companies to a new national level agency similar to the FSCA. This would facilitate the compilation of regulatory knowledge gained from the environmental impacts of mining and the lessons learned from the supervision of it. Meanwhile the Talvivaara case acts as a precautionary example to others of what not to emulate.

February 2013) and at http://suomenluonto.blogit.fi/ylijohtaja-vahvistaa-kaivosviranomainen-tukes-voisi-lain-mukaan-keskeyttaa-talvivaaran-toiminnan/ (accessed 14 February 2013).

[11] News (in Finnish) in Kaleva, April 4th 2012, http://www.kaleva.fi/uutiset/pohjois-suomi/niinisto-kaivosten-valvonta-on-riittavaa/573070/ (accessed 17 January 2013).

THE LATEST DEVELOPMENT OF ENVIRONMENTAL NGOS IN CHINA

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Abstract

Environmental NGOs are growing quickly in China and playing an increasingly large part in environmental protection and the development of environmental law. In this short paper, the general development of environmental NGOs is reviewed, two powerful environmental NGOs are introduced and the barriers to the development are analyzed, with suggestions for improvement provided.

Introduction

In contrast with NGO formation in most States, most Chinese environmental NGOs are established from the top down. By 2008, there were 3,539 environmental NGOs in China, but they represent only a small fraction of the total number of NGOs in China: 310,000 NGOs with 3 million employees.[1] 1309 of the environmental NGOs were founded and sponsored by government; 1382 organized by college student environmental protection clubs;[2] 508 organized by citizens; and the remaining 90 were established by international environmental NGO. As most colleges are affiliated with central or local governments in China, these statistics indicate that 76% of Chinese environmental NGOs are in some way linked to government, only a small fraction are grassroots organizations. This is in part because few members of the ordinary public are aware of either environmental NGOs or indeed environmental problems. The future of grassroots NGOs in China is therefore in some doubt. At the same time, the government sponsored NGOs suffer from bureaucracy and so may not be as effective as more independent NGOs.

Two Most Influential Environmental NGOs

Despite these issues there have been some very successful environmental NGOs in China.

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[1] See the second chapter "The General Situation of Chinese Environmental NGOs" of the book *China's Environmental Non-governmental Organization Development Status (2008 Environment Blue Book),* which is investigated and edited by All-China Environment Federation in 2008.
[2] These environmental NGOs are affiliated to the colleges, their activity must be approved by the college, and their funding comes principally from the college.

The two most notable are the All-China Environment Federation (ACEF) and China Environmental and Resources Law Society (CERLS).

All-China Environment Federation (ACEF)

The ACEF formed in 2005. It was approved by the State Council of the Peoples Republic of China (PRC), registered in the Ministry of Civil affairs and administrated by the Ministry of Environmental Protection. Between 2009 and 2012, ACEF filed 6 environmental public interest litigation cases as plaintiff against polluters or governments. These cases covered both civil public interest litigation and administrative public interest litigation. Its actions opened the door to Chinese environmental public interest litigation, as ACEF was the first environmental NGO to successfully file environmental public interest litigation in China. It also prompted Guiyang People's Congress to pass legislation providing for public interest litigation in that province: *Guiyang Improving Ecology Civilization Construction Regulation* March, 2010. This has been followed by similar provisions being adopted by the Supreme People's Court and in, for example, Wuxi, Kunming, Yuxi and Hainan Provinces. These new rights to public interest litigation change the rules on standing in China.[3] Many of the new provisions not only allow the public prosecutor, administrative departments and nature reserve management institutions to bring actions, but also allow legal persons, NGOs and citizens who engaged in environmental protection and social public welfare to do so.

China Environmental and Resources Law Society (CERLS)

CERLS concentrates on environmental law research, education, advocacy and academic exchange with worldwide specialists, it was registered by the Ministry of Civil affairs of the PRC in June, 2012. Its predecessor, Environmental and Resources Law of China Law Society, was established in 1999.[4] CERLS has more than 700 members, of which 150 are environmental law associate professors and 80 are environmental law professors. One of its successes is in the promotion of environmental courts in China.

Due to the increasing number of environmental disputes and the complex nature of environmental cases, CERLS proposed the construction of an environmental court specialized in hearing environmental disputes (including resources and ecology disputes.) Their work first led to the establishment of two environmental courts in Guiyang (a city of

[3] Formerly only parties who had a direct-interest in a case could start legal proceedings in China.
[4] Environmental and Resources Law of China Law Society established formally in the conference of Sustainable Environmental and Resources Law held in Wuhan University in November 20 to 22, 1999, its moto was "Sustainable Development: Cross-century Reflection and Exploration of Environmental and Resources Law".

Guizhou province) on November 20, 2007. One was in a basic court of Qingzhen (a county-level city of Guiyang) People's Court, the other was in Guiyang Intermediate People's Court (a higher level above Qingzhen). These are the first environmental courts in China which specialize in environmental disputes. Four of the six environmental public interest litigation cases started by ACEF were heard in these two environmental courts. Subsequently more than one hundred environmental courts have been established in China. While practice has yet to fully develop, it is clear that the establishment of these courts is likely to provide both environmental and socio-economic benefits.[5]

Suggestions for Increasing the Number of Environmental NGOs

While ACEF and CERLS have had notable successes there is still a need to address the low number of environmental NGOs in China. This next section contains three suggestions for further improvement.

Reform the Registration System

A key barrier to their establishment is that to be formally recognized NGOs must comply with certain legal requirements. First, a corresponding authority of government must approve them in advance and, second, they must have more than 50 individual members or over 30 institutional members.[6] These requirements prove difficult to meet in practice, therefore, environmental NGOs have to search for other ways to obtain legal personality. One option is to attach to an existing NGO, for example, Friends of Nature[7] was attached to the Academy of Chinese Culture.[8] An alternative is to register as a company. Registering as a company, however, means that they are treated as for profit organizations and must pay tax unless they can apply for a tax reduction or exemption. A third option, which some environmental NGOs have used, is to practice without any legal status. This however, tends to result in a number of issues: the organizational structure tends to be unstable, there tends to be lower recognition from society, fund raising can be problematic and it can make involvement in environmental protection projects difficult.

It is suggested that the requirements for registration are now rather dated and that the

[5] Wang Shuyi, 'The Analysis of Necessity and Feasibility on Environmental Courts in China', First Symposium on Environmental Judiciary, June, 2011.
[6] See *Social Groups Register and Management Regulations* issued by the State Council in Oct, 1998 and *Non-government Institutions Management Provisional Regulations* issued by the State Council in Oct, 1998.
[7] It is the first environmental NGO in China, receiving government approval in 1994.
[8] A civilian organization of academic research and teaching initiated by some well-known Chinese scholars in 1984.

Chinese government should reform the law to safeguard the development of NGOs. Reforms should embody the following aspects: firstly, legislation should be enacted by the National People's Congress and it's standing committee which favours the development of NGOs. Secondly, registration requirements should be simplified, the requirement for government approval and for a minimum number of members should be removed. Thirdly, the government should offer financial support to environmental NGOs through both subsidies and tax relief. Finally, the collection and use of financial donations should be regulated in order to ensure NGOs are using donations reasonably and to ensure that they retain independence from contributors.

Remove the Link to Government

The second barrier to the development of environmental NGOs is that most environmental NGOs are dependent on government. This relationship has its roots in the era of the planned economy in China. At that point national power touched every aspect of society. In the 21st century the power structure is changing, as the famous jurist Mr. Jiang Ping said: the power of society should be liberated from the state.[9] The key reform is therefore to relocate the relationship between environmental NGOs and government, making environmental NGOs more independent. This requires both that government hand power to the NGOs and that environmental NGOs are active in fighting for self-governance.

NGO Self-improvement

As indicated earlier, one of the problems with some independent NGOs is that they lack a coherent structure. In addition there may be some questions raised about their financial probity. The final reform suggested is that environmental NGOs engage in self-improvement. That is, they should improve their internal structures, financial reporting systems, and the quality and professional skills of staff. More specifically, the environmental NGOs must ensure that their purpose, and development plan are clear; that they have sound human resources management policies and structures and that they have strong and transparent financial management to prevent corruption. By so doing the NGOs will improve their credibility and so attract more members and financial support.

[9] Jiang Ping, 'Social Power and Social Harmony', 2005(4) Chinese Academy of Social Sciences Graduate School Journal, 30.

COUNTRY REPORT: ARMENIA
Risk-Based Environmental Control and Locus Standi Jurisprudence

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Risk-Based Environmental Control System to be Enacted in 2013

This first part of the Country Report discusses the new environmental control system that will come into force in Armenia in 2013. This establishes a completely different system that considers the environmental risk of industrial installations as a guiding factor for designing the timetable for state environmental control. Public hearings on the draft Methodology of environmental control were held at the Environmental Law Research Centre (Yerevan State University), and the main ideas underpinning the draft Methodology are presented in this Report.

Current State of Environmental Control in Armenia

The system of state environmental control in the Republic of Armenia operates under the principles derived from the traditions of Soviet Union control system. It is commonly accepted that environmental control has two main goals: to uncover deviations from approved rules; and to improve the environmental performance of relevant entities. While the first goal is being addressed largely by State Environmental Inspectorate of the Ministry of Nature Protection, the country faces greater difficulties in seeking better environmental performance of companies (and also controlling unlawful intervention by public authorities).

Environmental control in Armenia is underpinned by the law *"On Environmental Control"*. The law came into force in 2005. The general framework for the environmental inspection system is established by the Law *"On State Environmental Inspection"*.

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In brief, the following remain on the agenda for the improvement of state environmental controls in Armenia:

- Developing an environmental governance system in more strategic and purposeful directions;
- Elaborating recommendations on improving environmental performance of the private organizations, based on information accumulated from the governance of natural resources;
- Gradually introducing best available technologies to improve the environmental performance of private organizations; and
- Improving the status of the environment system.

To pursue these outcomes, the Government of the Republic of Armenia has initiated a law-making process to make its environmental governance more systematic and strategic.

Main Features of the New System

The new legal framework to be enacted uses a range of new approaches to optimize the system of environmental controls. To this end, the environmental risk of an industrial installation is considered as the main decisive factor when establishing the inspection timetable for assessing whether the entities have respected their environmental legal requirements of the legislation. According to the current legislation, environmental performance of all installations is subject to annual inspection. The new system enables the authorities to differentiate the frequency of inspections based on the environmental risks posed by the installation. Under the present Methodology, industrial installations are classified into three categories: (1) high risk; (2) medium risk; and (3) law risk. The higher the risk level, the more frequent the business has to undergo environmental inspections.

The risk analysis Methodology is a specific requirement within the national environmental control system and therefore requires definition in national legislation, particularly for environmental risk. Generally risk is defined as a measureable likelihood for adverse effects to take place. The Methodology localizes the general definition of *risk* by underlining its relevance to adverse environmental effects that can arise by virtue of activities of the licensed entity.

The new system control is expected to ensure:

- improved efficiency of inspectorate revisions to the license conditions of industrial facilities;
- assessment of licensed installations based on environmental risk indicators;
- formation of a unified database and better classification of installations;
- the possibility to elaborate new risk-based models of environmental control in the future; and
- transparency of the control system.

How is the Risk Measured?

The Methodology establishes differentiated layers of risk assessment. This enables the public authority to distinguish between installations not only by their enterprise activities but also taking into consideration specific indicators such as their consumption of natural resources, emissions and other potential adverse impacts on the environment.

As in many other spheres, the environmental control system aims to assess the risk based on conventional units, which are calculated for each installation, and the final amount of which indicates the risk level possessed by the specific installation.

The risk for all installations arises from two major factors: sectoral risks and individual risks. While the sectoral risk units are automatically identified by virtue of the company acting in a certain activities, individual enterprise risks are based upon environmental characteristics of the specific activities it conducts. This implies that in specific cases, responsible behavior by the business may reduce the risk level of the installation (and vice versa for less responsible management). Individual enterprise risks are calculated based on two sources of information: (1) information provided by the entity; and (2) information collected by inspectors based on checklists. The checklists are to be elaborated for certain types of activities (i.e. mining, forestry, agriculture). These documents contain various questions as well as references to relevant legal instruments establishing mandatory and optional environmental protection measures.

Benefits for Environmental Protection?

During the public hearings discussion of the implications of a new Methodology raised many questions, among which is whether the new system will ensure improvement in the quality of the environment. The answer can be indicated by the main objective of new system, which is

to move the focus of license revisions from a fixed timetable to a flexible risk-based schedule and approach. The system does not aim to improve the state of environment directly. However, optimization of the inspection revisions and the elimination of corruption risks is expected to have an indirect positive impact on the state of environment through raising the responsibility of (particularly) more environmentally risky enterprises.

Conclusion

A risk-based environmental control system is based on good governance principles and, surely, is an improvement on the existing model. Moving to a more flexible approach demonstrates acknowledgement by the public authority of the specific needs and specialist tasks of environmental control. At the same time, the risk based control model will enable future links between the environmental governance system with such tools as EIA, IPPC and environmental insurance. However, this does not imply that the system has no shortcomings and drawbacks that will require further investigation and new solutions.

Access to Justice in Environmental Matters: Legal Standing of Non-Governmental Organizations

The Republic of Armenia became a party to the *Aarhus Convention* in 2001. Article 9 of the *Aarhus Convention* contains binding requirements for environmental law. By virtue of article 6 of the *Constitution of Armenia*, the provisions of the *Aarhus Convention* have a direct domestic application in Armenia. The national legislative framework that provides access to justice comprises of the following laws:

- *Constitution of the Republic of Armenia* (articles 18-19);
- *Law "On Human Rights Defender" of the Republic of Armenia*;
- *Law "On Prosecutor General's Office" of the Republic of Armenia*;
- *Law "On Administration and Administrative Procedure" of the Republic of Armenia*;
- *Law "On Non-Governmental Organizations" of the Republic of Armenia*;
- *Code of Administrative Procedure of the Republic of Armenia*;
- *Code of Civil Procedure of the Republic of Armenia*; and
- *Code of Criminal Procedure of the Republic of Armenia*.

The bulk of environmental cases in Armenia relate to administrative review of government decision-making in terms of the *Code of Administrative Procedure of the Republic of Armenia*.

The requirements of the *Aarhus Convention* mandate adequate and effective remedies, including injunctive relief as appropriate, and that these be fair, equitable, timely and not prohibitively expensive. Under article 9, decisions of courts and other bodies shall be in writing, and whenever possible, be publicly accessible. The provisions contained in the *Aarhus Convention* are codified in Armenia's procedural legislation listed above.

Despite the comprehensive legal framework, case law on environmental matters is underdeveloped in Armenia because of circumstantial reasons. Within the past 4-5 years, there has been a consistent growth in the number of cases initiated by citizens and non-governmental organizations aimed at protecting human environmental rights. Currently, the legal standing of non-governmental organizations (NGOs) before the courts in public interest environmental litigation is subject to judicial consideration. The national legislation of Armenia, particularly the *Code* of *Administrative Procedure*, does not grant standing to NGOs when there is no direct infringement of its own rights or that of its members. According to the article 3 of the *Code of Administrative Procedure*:

> 'Every natural or legal entity is entitled in accordance with this Code to apply to the administrative court, if he/she/it considers that the public authorities or local self-governance bodies or their officials, administrative acts, actions or omissions … (1) violated or may have directly violated the Constitution of the Republic of Armenia, international treaties, laws and other legal acts of the rights and freedoms set forth.'

In its judgment VD/3275/05/08 of 30 October 2009, the Cassation Court reversed the decision of the Administrative Court of the Republic of Armenia of 28 July 2009 that initially dismissed the Ecodar (NGO) cause of action.[1] The Cassation Court stated that:

> 'Ecodar NGO is an entity established in accordance with *RA Law "On Non-Governmental Organizations"*, meets the requirements of national law and promotes environmental protection based on charter mission and objectives. Considering the aforementioned the RA Cassation Court finds Ecodar NGO concerned organization

[1] VD/3275/05/09, of 28 July 2009. *Ecodar NGO & Assembly Vanadzor Office NGO vs. the Government of the Republic of Armenia, Ministry of Nature Protection of RA, Ministry of Energy and Nature Resources of RA and Armenia Copper Program CJSC* (available at www.datalex.am).

> in the meaning of the Aarhus Convention, hence it possesses the right to access to justice before the courts in environmental matters.'

The Cassation Court referred to the *Law "On Non-Governmental Organizations"*[2], the relevant provisions of the *Aarhus Convention* and the articles 3 and 79 of the *Code of Administrative Procedure*.[3]

When the case was considered admissible by the Cassation Court of Armenia and was returned to the lower instance court (Administrative Court of Armenia), according to the requirements of the *Code of Administrative Procedure* (Chapter III), it was only empowered to examine the case merits, namely the substantive issues of the case. Whereas, the RA Administrative Court ignoring the requirements of the legislation in its Decision of 24 March 2010, reflected once again procedural issues of the case, particularly the legal standing of NGOs. Considering superfluous any comments on the subject and the background of the appeal, we would like to argue that there is a violation of article 3 of the *Constitution of the Republic of Armenia* that states that:

> 'State and local self-government bodies and public officials are competent to perform only such acts for which they are vested in by Constitution or laws.'

Being dissatisfied by the judgment of the Administrative Court from 24 March 2010 the NGOs brought an appeal before the Cassation Court of Armenia against the Decision of the RA Administrative Court of 24 March 2010.[4] The Cassation Court's Decision was released on 1 April 2011, and in general, it has a lack of any grounding and contains only reference to:

- *Code of Administrative Procedure Code of RA*;
- Decision of the Cassation Court of RA of 30 March 2010; and
- Decision of the Constitutional Court of RA N 906.

Earlier than the Decision of the RA Cassation Court of 1 April 2011, the phrase "his/her" following the word "breach" of the *Code of Administrative Procedure* (article 3) had become a

[2] Adopted on 4 December 2001. Entered into force on 27 December 2001, *Official Bulletin of RA* 2001.12.27/42(174), art. 1034.
[3] Adopted on 28 November 2007. Entered into force on 1 June 2008, *Official Bulletin of RA* 2007.12.19/64(588), art. 1300.
[4] VD/3275/05/09, of 1 April 2011, *Ecodar NGO Case* (supra note 1).

subject of Constitutional justice. As a result of analysis of the RA Constitutional Court Decision N 906[5] we will emphasize the following two statements:

> 'Having in regard the role of NGOs in the state and civil society development and aiming to increase the efficiency of their activities RA Constitutional Court finds that the RA CAP may encompass the occasions of bringing cases before the court by concerned NGOs (on the basis of the Charter) for the purpose of public interests protection. For this reason the current developments of the institute of "action popularis" in Europe should be taken into consideration. This kind of regulation will both promote the protection of violated rights, lawful interests, and will increase the role of NGOs as a substantive part of civil society.'

> 'The actio popularis should be excluded without sufficient interest. The Constitutional Court concludes that for the purpose of increasing the effectiveness of social control over the state and local authorities, and for guarantying the implementation of the main functions of NGOs the further law-making developments should take into account the stated legal position of the Court.'

At the same time, the Constitutional Court concluded that article 3 of the *Code of Administrative Procedure* complied with the RA Constitution. For several reasons we share the position of the Constitutional Court. Recognizing the phrase "his/her" in the article 3 as unconstitutional would have led to the whole system establishing the right of access to justice in the Armenian Administrative Court as being unconstitutional.

Having in regard to the aforementioned developments, in particular the Decision of the Constitutional Court, the legal matter of NGO's standing is expected to be thoroughly resolved by the new *Code of Administrative Procedure* and *Law "On Environmental Impact Expertise"* drafted respectively by the Ministry of Justice and Ministry of nature protection having in regard the position of the Constitutional Court set in the Decision N 906.

[5] RA Constitutional Court Decision N 906, of 7 September 2009 (available at www.armlaw.am).

COUNTRY REPORT: AUSTRALIA
Environmental Developments Remain Highly Politicized in Australia

SOPHIE RILEY*

Introduction

In 2012, environmental developments in Australia have centered on the operation of the *Clean Energy Bill* (2011), with the Government deciding to scrap the floor price for carbon in Australia and link its markets with those in the European Union (EU). At the same time, it appears that the *Clean Energy Act* has already had a positive impact on reducing carbon emissions. Other developments include the controversy generated by the presence of the super-trawler, Abel Tasman, in Australian waters, and the consequential amendment of the *Environment Protection and Biodiversity Conservation Act* (1999) (Cth) to give the Minister additional powers to deal with the super-trawler. Finally, the Federal Government released the long-awaited draft *Biosecurity Bill* (2012) for public comment.

Policy Developments

The Carbon Floor Price

On 1 July 2012, Australia's Carbon Pricing Mechanism came into operation. At its inception, this mechanism was to have been based on a fixed price for each ton of carbon emitted, until 1 July 2015. After that date the regime would have converted to a cap and trade emissions scheme where the price was assumed to be market-based. Nevertheless, the scheme also provided that the Government would enact regulations to ensure a minimum, or 'floor price', for carbon of $15 per ton from 2015-2018. The Government reasoned that a floor price would ensure that polluters paid a minimum for the 'privilege of polluting' and at the same time would encourage industry to invest in cleaner and cheaper sources of energy.

The floor price, however, was unpopular with industry, environmental groups and some economists. Industry was concerned with the administrative and financial burdens it would place on them, while economists and environmental groups noted that when the floor price

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was phased out, industry could access inexpensive Clean Development Mechanism credits, perhaps as cheap as $3.60 per ton.[1] Were this to occur, the price of carbon would fall so low that it would not act as an incentive to find cleaner energy. The death knell for the floor price came when Rob Oakeshott, an independent MP in the Federal Parliament, indicated that he no longer supported the establishment of a floor price, leading to the Government abandoning the regulations.

As an alternative, the Government is introducing two initiatives: first a quantitative restriction on the amount of CDM credits that Australian industry can access; and second, the linking of Australia's carbon markets with the European Union Emissions Trading Scheme (ETS). With respect to the first initiative, Australian industry can now use CDM credits for up to 12.5% of their total emissions, reduced from 50% under the previous scheme. This will have the effect of stopping the price of carbon in Australia falling too low and otherwise providing a disincentive for investments in clean energy. The second initiative, the linking of Australian and European markets, will not only allow Australian industry to access European permits, but will also allow the Australian market to sell Australian permits in the largest carbon market established so far. This development potentially benefits those who can generate carbon credits, by for example, planting trees and creating carbon sinks. Another consequence of linking the two markets is that it also links the Australian price for carbon with the European price. At the moment, European permits are currently trading at approximately $9.80 per ton, but eighteen months ago the price was approximately $20 per ton. A price under $15 per ton makes acquiring carbon credits on the market cheaper for Australian industry than the floor price which would have applied until 2018. At the same time, the quantitative limitation on CDM credits means that Australian industry will pay a sufficiently high price for carbon to encourage investment in cleaner energy.

Drop in Emission Intensity

Media reports indicate that the *Clean Energy Act* has already had a positive impact on reducing the intensity of carbon emissions in the first few months of its operation. The Australian Energy Market Operator[2] has noted that in the first quarter of the operation of the new scheme, electricity sold to users on Australia's eastern seaboard generated approximately 7.6% fewer carbon emissions for each megawatt of power than had previously been gener-

[1] The Clean Development Mechanism allows emission reduction projects in developing countries to generate Emission Reduction Units that can then be traded. See *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Article 12.
[2] The Australian Energy Market Operator (AEMO) is charged with overarching responsibility for the functioning of the electricity and gas markets in Australia. See further http://www.aemo.com.au/.

ated for the same quarter in 2011. The Minister for climate change, Greg Combet, noted that while the carbon price is a 'key driver' of these changes, it is not the only factor at work. Other significant developments include: the fact that coal-fired power stations are being phased out; a reduced demand for electricity in some production sectors; and the fact that industry is on track to meet its renewable energy targets.

Super-Trawler Abel Tasman

On 30 August 2012 the super-trawler Margiris sailed into South Australian waters. It was intended that the Margiris would undergo maintenance and repairs in order to be licensed as an Australian-flagged boat in accordance with the *Shipping Registration Act* (1981) (Cth). The registration was finalized on the 5 September 2012 and at the same time the Margiris was renamed the 'Abel Tasman'. The owners of the Abel Tasman had expected that the Australian Fisheries Management Authority (AFMA) would give final approval for the super-trawler to take up to 18,000 tons of fish from Australia's southern oceans. In Australia, the allocation of fishing rights are regulated primarily by two pieces of legislation, the *Fisheries Administration Act* (1991) and the *Fisheries Management Act* (1991) (Cth). The former establishes the AFMA as a statutory authority to administer fish resources in the Australian Fishing Zone (AFZ), while the latter sets out operational provisions with respect to the management of fish stocks in the AFZ. Section 7 of the *Fisheries Administration Act*, and section 32 of *Fisheries Management Act*, charge the AFMA with the determination and allocation of fishing rights. In effect, this means that the AFMA sets the total allowable catch within the AFZ and grants licenses and fishing permits in that regard. Section 6(b) of the *Fisheries Administration Act* notes that in carrying out its functions, the AFM should ensure that:

> '…the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development (which include the exercise of the precautionary principle), in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.'

The owners of the Abel Tasman contend that they commenced negotiations with the AFMA in early 2012 and received assurances that their proposal to fish in Australian waters was approved.

However, from the moment the Abel Tasman arrived in Australia, it generated a storm of controversy. Environmentalists, recreational fishers and politicians questioned the decision

to allow the super-trawler access to Australian waters. Environmental groups, such as Greenpeace, contend that super-trawlers are not only larger than conventional trawlers, but that their operation has contributed to the collapse of fish-stocks in many parts of the world.[3] The AFMA on the other hand maintains that its determination of the allowable catch for the Abel Tasman at almost 18,000 tons is conservative and is based on the best available science. Notwithstanding the stance of the AFMA, Tony Burke, the Minister for Sustainability, Environment, Water, Population and Communities, sought legal advice on what powers he had to intervene. Although details of the advice have not been made public, Tony Burke openly acknowledged that he was cautioned he could not overturn the decision of the AFMA. At the same time, Jo Ludwig, the Minister for Agriculture Fisheries and Forestry, noted that from a fisheries perspective, he himself also did not have power to interfere with the decision of the AFMA.

In response, the government passed the *Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Act* (2012) (Cth) that introduced section 390SD into the *Environment Protection and Biodiversity Conservation Act* (1999) (Cth). The new legislation gives the Environment Minister, in conjunction with the Fisheries Minister, the power to make an interim declaration for 60 days with respect to certain commercial fishing activities. In accordance with these additional powers, on 20 September 2012, Tony Burke announced that he had made the *Interim (Small Pelagic Fishery) Declaration* (2012), precluding the Abel Tasman from fishing in Australian waters for up to two years.[4] The *Declaration* does not revoke the fishing permit issued by the AFMA. Rather it gives the Government time to undertake additional assessments of the environmental impact of the fishing activities. In accordance with s390SE of the *Environment Protection and Biodiversity Conservation Act*, the Minister undertook extensive consultation with those potentially affected by his decision and on 20 November 2012 made a final *Declaration* extending the ban for two years. In the meantime, the owners of the Abel Tasman are keen to resume fishing as soon as possible and have offered to reduce their fishing take.

[3] See Greenpeace, '10 Frightening Facts About Super Trawlers' (available at http://www.greenpeace.org/australia/en/news/oceans/top-10-facts-about-super-trawlers/).
[4] T. Burke, 'Interim (Small Pelagic Fishery) Declaration 2012' (available at http://www.environment.gov.au/coasts/fisheries/pubs/small-pelagic-interim-declaration.pdf).

Legislative Developments

New Biosecurity Bill for Australia

In July 2012, the Federal Government started releasing portions of the draft *Biosecurity Bill* (2012) for public comment. The *Bill* is designed to replace the *Quarantine Act* (1908) (Cth), that is now more than 100 years old. The release of the draft follows two recent reviews of Australia's quarantine regime, or biosecurity, as it is now known. The first review was conducted under the auspices of Professor Narin, and published in 1996 as *Australian Quarantine: A Shared Responsibility*.[5] The second review was conducted under the guidance of Roger Beale, and pubished in 2008, as *One Biosecurity, A Working Parthership* (*Beale Review*). The *Beale Review* stressed the importance of a seamless and cross-jurisdictional approach to biosecurity and acted as catalyst for the draft *Biosecurity Bill*.[6] Upon release of the *Bill*, the Government expressed the view that: 'The new legislation is intended to make Australia's biosecurity system more responsive and streamlined, enabling the Australian Government to better manage the risks of animal and plant pests and diseases entering, establishing, spreading and potentially causing harm to the Australian population, the environment and economy'.

The draft *Bill* reaffirms Australia's appropriate level of protection as very low, but not zero. It provides more flexible and up-to-date regulatory mechanisms including compliance and enforcement tools, such as enforceable undertakings. Importantly, the *Bill* will establish an Inspector General of Biosecurity as an independent statutory agency. This agency will review the functioning of the Director of Biosecurity, but not the merits of decisions made by the Director.

The *Bill* is anticipated to be tabled into Parliament before the end of 2012.

Recent Cases

A significant case decided by the Land and Environment Court of New South Wales in 2012 was *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and In-*

[5] M. Nairn *et al*, *Australian Quarantine, A Shared Responsibility* (1996) Department of Primary Industries and Energy, Canberra (available at http://www.daff.gov.au/__data/assets/pdf_file/0009/111969/nairn_report.pdf).
[6] R. Beale *et al*, *One Biosecurity, A Working Partnership* (2008) Commonwealth of Australia (available http://www.quarantinebiosecurityreview.gov.au/report_to_the_minister_for_agriculture_fisheries_and_forestry).

frastructure [2012] NSWLEC 197.[7] The case was brought by the Environmental Defenders Office of New South Wales on behalf of the plaintiffs and involved a legal challenge to the approval of the Gloucester Gas Project. The project is a large one that encompasses 110 coal seam gas wells along a 100 kilometer pipeline. The plaintiff's concerns largely centered on the risks of water contamination, especially with respect to groundwater, as the latter lacked comprehensive data.

One of the points of appeal was whether the Minister correctly formulated and properly considered the precautionary principle with respect to the project. The court noted, that although the precautionary principle is not specifically referred to in the part of the *Environmental Planning and Assessment Act* (1979) (NSW) that was relevant to the approval in question, if the Minister does not consider principles of ecologically sustainable development (ESD), including the precautionary principle, 'the failure may lead to an inference that he or she failed to consider the public interest…'.[8] However, the court also noted with approval statements in paragraph 241 of the earlier case, *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSLEC 33, that the need to consider principles of ESD does not mean that the court, on judicial review, can also conduct a merits review or 'hold decisions invalid merely because in the court's view insufficient weight was given to the principles, or because in the court's view incorrect results were reached in light of the principles'.

Accordingly, the court is only obliged to consider principles of ESD, including the precautionary principle, at a high level of generality.[9] In order for the decision-maker to be bound to consider ESD and its principles at a more specific level, the legislation must expressly or impliedly oblige this action.[10] In the case before the court, there was nothing that would derogate from this view, as it was up to the decision-maker to determine the extent of scientific uncertainty, and the proportionate response.[11] The reaction of the Environmental Defenders Office sums up the significance of the case and highlights gaps in the planning system operating in New South Wales:

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[7] *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 (available at http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2012/197.html). Points of claim made by the Environmental Defenders Office are available at http://www.edo.org.au/edonsw/site/pdf/casesum/110705bgspa_points_of_claim.pdf.

[8] *Barrington-Gloucester-Stroud Preservation Alliance Inc vs Minister for Planning and Infrastructure*, paragraph 160.

[9] Ibid, paragraph 171.

[10] Ibid, paragraph 173.

[11] Ibid, paragraph 177.

> 'The [Land and Environment Court] was satisfied that the precautionary principle was considered by the [decision-maker] and that an adaptive management approach has been taken through the conditions. However,…In our view, it is crucial that…a decision-maker should be required not to just to *consider* ESD but be required to protect the environment and act consistently with ESD principles in approving a development.'[12]

A Critical Consideration of Recent Domestic Developments

From this Report, it is clear that a number of environmental matters remain highly politicized in Australia. The prime example is the carbon debate that is still coloured by the acrimonious atmosphere in Federal politics.

The overturning of the floor price for carbon and concomitant linking of Australia's carbon markets with the EU have largely been seen as a positive development. Certainly, the business lobby has welcomed the move. However, Tony Abbot, the leader of the opposition, remains committed to repealing the Clean Energy Acts and overturning the entire carbon market mechanism. The stance of the Coalition is that should Australian industries purchase emission permits from the EU carbon market, they would be acquiring something which would be valueless once the Coalition repeals the Clean Energy legislation and dismantles Australia's carbon emissions trading scheme. Yet, political commentators have noted that linking Australia's scheme with the ETS might in fact make it more problematic for the Coalition to dismantle Australia's scheme due to strong international linkages and the difficulty of unravelling these connections.

Another action that has been criticised as broadening political interference was the decision of Tony Burke, the environment minister, to introduce legislation into Federal Parliament with respect to the Abel Tasman. While environmental groups hailed the legislation and the *Interim (Small Pelagic Fishery) Declaration* (2012) as a victory, political commentators noted that the passage of the legislation and the interim banning orders have the potential to destabilise Australia's fishing industry and the decision-making processes of the AFMA that are based on sound science. One element of debate focuses on why it was necessary for Parliament to pass additional legislation to prop up the Minister's existing powers. Section 6(b) of the *Fisheries Administration Act* (1991), for example, already provides that the AFMA should be guided by the precautionary principle. Yet, the Minister for the environment and

[12] Environmental Defenders Office, *Weekly Bulletin,* August 31, 2012, No. 775 (available at http://www.edo.org.au/edonsw/site/bulletin/bulletin775.php#01).

the Minister for fisheries were both advised that, under existing environmental and fisheries legislation, neither could stop the super-trawler on the basis of the precautionary principle.

As already noted, the advice given to the ministers was not publically released. However, it is likely to relate to the science-based foundations of the AFMA in setting catch limits. If the AFMA had set quotas for the Abel Tasman based on the best available science, there would be no need to invoke the precautionary principle; for the latter would only be triggered by uncertainty in scientific data. In this regard, the AFMA would undoubtedly argue that the science was not uncertain; hence, there was no need to invoke the precautionary principle. The Greens Party however, maintains that the science is incomplete, because research has not been carried out in small pelagic fisheries to evaluate the impact on fishing stocks of super- trawlers. This stance contrasts with the position of the Commonwealth Fisheries Association that has accused the government of ignoring the science and politicizing the matter.[13] The furore created by the Abel Tasman highlights that the boundaries between the best available science and the operation of the precautionary principle are still evolving and that governments may need to enact legislation and/or issue policy documents that set out a common understanding of how the principle is to operate in practice. The need for legislative elucidation was also noted by the court in *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure*, a case that has been discussed above.

The draft *Biosecurity Bill* (2012) is designed to operate as framework legislation with much of the detail being fleshed out by policy and regulations. Accordingly, interest groups have found it difficult to comment on the potential effectiveness of some of the *Bill*'s provisions. However, it appears that the important role that biosecurity plays in protecting Australia's natural environment from invasive alien species has not received the prominence it deserves. The *Beale Review*, for example, noted that the environment should be given equal consideration to agriculture, stressing that more effort is required that reflects 'the nature of the incursion risk'.[14] Yet, apart from one or two isolated examples, such as the regulation of ballast water, the *Bill* does not fully engage with the interlinkages that connect invasive alien species, biosecurity and the environment. In particular, the *Beale Review* recommended that an independent statutory authority called the National Biosecurity

[13] B Backham & L. Vasek, 'New Laws Will Curb Super-trawler from Fishing in Australian Waters for at Least Two Years', *The Australian,* 11 September 2012 (available at http://www.theaustralian.com.au/national-affairs/new-laws-will-curb-super-trawler-from-fishing-in-australian-waters-for-at-least-two-years/story-fn59niix-1226471776823).

[14] Beale *et al* (supra note 6), XXIII.

Authority be established to coordinate and manage biosecurity risks.[15] Yet, the Federal Government appears reluctant that the Department of Agriculture, Fisheries and Forestry (DAFF) relinquish its hold over biosecurity. Accordingly, the draft *Bill* continues to place Australia's biosecurity within DAFF instead of an independent statutory authority.[16]

[15] Ibid, X.
[16] Invasive Species Council, *Exposure Draft of the Biosecurity Bill 2012: A Submission from Environment NGOs* (2012) Unpublished – copy on file with author) 2012, at 8, 21 and 26.

COUNTRY REPORT: BELGIUM
Water Management and Maritime Spatial Planning

CATHY SUYKENS*

Introduction

This country Report aims to provide an overview of the legislative and policy related initiatives in Belgium, as well as pending initiatives, with regard to the governance of water issues. The topic "water" is increasingly being given priority by law and policy makers in Belgium. The legislative landscape governing the water sector is therefore going through a myriad of changes.

This contribution aims to set out the most important Acts implementing the recently issued European set of regulations related to water policy, both onshore as well as offshore. More specifically, this Report will give an overview of the implementation in Belgium of respectively the *Water Framework Directive*[1] (including the *Flood Directive*) and the *Marine Strategy Framework Directive*.[2]

The governance of water related issues in Belgium is divided between the three regions (the Flemish Region, the Walloon Region, and the Brussels Capital Region) and the federal level. For example, the protection of the environment (the aquatic environment) is a regional competence, whereas the governance of activities in the North Sea and the protection of the marine environment is a federal competence. Indeed, the low tide line marks the end of regional and the beginning of federal competence.

The Country Report is split into two main sections: recent legislative developments in general water management and the mitigation of floods, with a focus on the Flemish Region; and recent developments in the marine area under the jurisdiction of Belgium.

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[1] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy.
[2] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

Water Management and the Mitigation of Floods

In this section, the recent laws relating to the implementation of a European Directive of major importance in the water sector, namely the Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy (the *Water Framework Directive*), are discussed.

The *Water Framework Directive* (*WFD*) marks 2015 as the target year to achieve a good ecological and chemical status of the surface waters.

The main legislative instrument to govern water-related issues in the Flemish Region is the *Decree on Integrated Water Policy* of 18 July 2003.[3] This *Decree* provides for a general framework for the application and incorporation of specific water laws. Throughout the period 2010 to 2012, the *Decree on Integrated Water Policy* has been substantially altered.

One of the corner stones of the *WFD*, and of the *Decree on Integrated Water Policy*, is the adoption of River Basin Management Plans (or RBMPs). There are four river basin districts in Belgium, namely the Rhine, the Seine, the Scheldt and the Meuse, whereby the two latter cover the larger part of the territory. The Belgian coastal waters form part of the International River Basin District of the Scheldt.

In November 2012, the European Commission issued a report on the implementation of the *WFD* in Belgium.[4] The report provides a SWOT analysis of the RBMPs submitted by Belgium, whereby one of the main strengths relates to the fact that the ecological and chemical status assessment methods have been developed for all water categories, and one of the main weaknesses relates to the determination that most measures are defined in a general manner, without a specific timeline of implementation.

It should be noted that only the two RBMPs of the Flemish Region (namely of the Scheldt and the Meuse) and the Federal plan on the coastal waters have, at the time of writing of this Report, been submitted to the European Commission. The draft RBMPs for the Walloon Region are under consultation until 18 January 2013. The Brussels Region has submitted a notification to the European Commission of its adoption of the RBMPs in July 2012. The

[3] Belgian Official Journal 14 November 2003.
[4] *Commissions Staff Working Document* accompanying the *Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans*, COM (2012à), 670.

Commission has to date, not yet assessed these. In this regard, the Commission referred Belgium to the Court of Justice of the European Union for failure to adopt and report the RBMPs to the Commission. The Court of Justice issued its judgment on 24 May 2012, considering that neither the Brussels Capital Region nor the Walloon Region adopted their respective RBPMs in time, and therefore established the failure of Belgium to comply with the obligations included in the *WFD*.[5]

Article 4(4) provides for the possibility to apply for an extension of the deadline of 2015 to obtain good environmental status of the waters. Both the RBMP of the coastal waters and the Flemish RBMPs have applied for this extension.[6]

On the basis of article 4(5) of the *WFD*, member states may request to apply less stringent environmental objectives for specific bodies of water, provided certain conditions are met. Neither the federal RBMP nor the two RBMPs submitted by the Flemish Region have requested the application of article 4(5) of the *WFD*.

The competent authorities are currently preparing the second generation of RBMPs for Belgium. These should be submitted to the European Commission by 2015.

At the level of the Flemish Region, the run up to and the issuance of the first generation of RBMPs made clear that the applicable legislative and regulatory framework is needlessly complex.

Indeed, the Flemish Region distinguishes four different planning levels: the river basin management plans at the level of the river basin district; the water policy note at the level of the Flemish Region; the river catchment management plans at the level of the sub-basin; and the sub-river catchment management plans at the level of the sub-sub-basin. This myriad of plans results in sometimes cumbersome processes and organization. Therefore, initiatives were taken to substantially alter the *Decree Integrated Policy*, so as to simplify the planning process as to water management and better tune the activities on the different levels. The Flemish Government has principally approved an amendment to the Decree on 20 July 2012.

[5] Namely Articles 13(2), (3) and (6); Article 14(1c); and Article 15(1).
[6] See, for example, *River Basin Management Plan Coastal Waters*, 108. The natural circumstances do not allow these goals to be obtained those by 2015.

The bottom line of the draft Decree pertains to the integration of plans and planning levels. The river catchment management plans and the sub-river catchment management plans, for example, are absorbed by the RBMPs for the Scheldt and the Meuse. The relevant advisory bodies have submitted their advice on the amending Decree on 13 September 2012[7] but at the time of writing, the amending Decree has not yet entered into force.

The implementation of the *WFD* has been further enhanced by the Order of the Flemish Government of 21 May 2010 concerning special obligations of the river basin districts, which entered into force in January 2011.[8] The main merits of this Order relate to the mapping of ground water bodies.[9] The Order stipulates that any significant increase in the concentration of polluting substances in the ground water bodies should be reversed and set out in the river basin management plans.[10]

Other important recent legislative changes in the water framework in the Flemish Region, pertain to the implementation of the Directive 2007/60 of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (the *Floods Directive*). The *Decree Integrated Water Policy* was amended by the Decree of 16 July 2010 (the *Floods Decree*), to implement this Directive into Flemish legislation.[11]

The *Floods Directive* aims to enable member states to better calculate the risks of floods and to put measures in place to mitigate the damage caused by floods.[12]

The *Floods Decree* slightly amends the definition of "floods" as included in the *Floods Directive*. For example, the explicit exclusion of floods from sewerage systems is not adopted, as it is not always possible to distinguish whether floods result from sewerage systems or watercourses.[13]

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[7] The Flanders Social-Economic Council, the Environment and Nature Council of Flanders and the Strategic Advisory Council for Agriculture and Fisheries.
[8] *Belgian Official Journal*, 2 July 2010.
[9] In the Annex to the Order.
[10] Article 4 of the Order of 21 May 2010.
[11] *Belgian Official Journal*, 19 August 2010.
[12] In the Brussels Capital Region, the *Flood Directive* is implemented through the Order of the Brussels Capital Region of 24 September 2010 concerning the assessment and management of flood risks. In the Walloon Region, the *Flood Directive* is implemented through the Decree of 4 February 2010 modifying Book II of the *Water Code*.
[13] *Flemish Parliamentary Works*, 549 (2009-2010). Also, flood by mountain streams is not a reality in the Flemish Region, and is therefore not included in the definition.

In accordance with the *Floods Directive*, the member states should publish flood risk management plans by 22 December 2015.[14] The *Floods Directive* also stipulates that the efforts related to the drafting of flood risks management plans should be coordinated with those related to the drafting of river basin management plans. As, in the Flemish Region, the RBMPs already include provisions with regard to floods. The Decree does not retain the concept of flood risks management plans as self-standing document, but instead stipulates that flood risk management provisions should be included in the RBMPs by 22 December 2015.[15]

This initiative is in line with the recently implemented policy measures in the Flemish Region to reduce the amount of plans in the area of water management, as discussed above.

The *Floods Directive* provides for the possibility of member states to designate the same or different authorities as in light of the *WFD*. In the Flemish Region, the Coordination Committee on Integrated Water Policy (CIW), which is the commission responsible for the coordination of integrated water policy, was designated as competent body in the framework of the floods legislation.

Belgium was hit by heavy floods in November 2010, after which date a thorough evaluation of the legal regime governing floods issues was carried out. This review led to alteration of the instrument of the water test. The concept of the water test entails that the authority, which decides upon the granting of licenses (such as a building permit) or the approval of plans (such as zoning plans), should assess the impact of such licenses or plans on the water system. The result of this assessment is then included in the license or plan via a "water paragraph".

Since the entry into force of the *Decree on Integrated Water Policy*, the water test has been a valuable instrument in the water policy in the Flemish Region.[16] The Order of the Flemish Government of 14 October 2011, modifying the Order of 20 July 2006 determining the rules for the application of the water test, has substantially altered the application of the instrument.[17] The provisions of the new Order entered into force on 1 March 2012. The water test has been simplified, both as to content as well as the formal aspects. Indeed, the Order of 20 July 2006 provided for various "judgment schemes" included in the Annex of the

[14] *Floods Directive*, Article 7.5.
[15] *Floods Directive*, Article 7.
[16] *Decree on Integrated Water Policy*, Article 8.
[17] *Belgian Official Journal*, 14 November 2011.

Order, on the basis of which the water test should be carried out. These were considered to be overly complex, and are now replaced by a single provision, which also clearly sets out the thresholds to request advice from the designated advisory body.[18] Whereas the request for advice from the designated advisory body was merely recommended on the basis of the previous Order, the new Order marks the evolution towards obligatory advice sourcing. Finally, the new Order elaborates the list of licenses and plans submitted to the scrutiny of the water test.

Maritime Spatial Planning

As the number of marine activities in the Belgian part of the North Sea steeply increases over the years, amongst others, due to the continuing deployment of offshore technologies, smart and efficient usage of the marine space is becoming more and more of a pressing issue.

The evolution towards integrated maritime spatial planning is strongly promoted at the level of the European Union. Indeed, maritime spatial planning was identified as one of the pivotal instruments to support the implementation of the *EU Integrated Maritime Policy*.[19] In Belgium, the marine legislative framework has been revised in order to introduce into law the concept of marine spatial planning.

More specifically, the Act of 20 July 2012 modifying the Act of 20 January 1999 for the protection of the marine environment in the marine areas that come under the jurisdiction of Belgium (the *Marine Environment Act*)[20], provides the foundation of multi-dimensional planning in the Belgian part of the North Sea.

The newly included chapter in the *Marine Environment Act* effectively forms the basis of a future integrated and binding spatial plan, promulgated through a Royal Decree. The spatial plan is defined as a plan that organizes the desired three-dimensional and temporary structure of human activities, on the basis of a long-term vision and on the basis of clear economic, social and ecological goals.[21] Due to the fact that the spatial plan is characterized as being three-dimensional, the water and air column are included in the planning process.

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[18] Articles 3 and 5 of the Order of 20 July 2006, as modified by the Order of 14 October 2011.
[19] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Maritime Spatial Planning in the EU – Achievements and Future Development* (2010) COM, 771.
[20] *Belgian Official Journal*, 11 September 2012.
[21] Article 2, 30° of the Act of 20 January 1999 as modified by the Act of 20 July 2012.

The aim of the plan is to set out the framework on the basis of which future activities in the North Sea will be carried out. The plan will set out the conditions under which these activities may take place.[22] Once the draft plan is drawn, an environmental impact assessment shall be carried out, and broad public consultation will take place.

The procedure to be followed for the adoption of the spatial plan has been set out in the *Royal Decree* of 13 November 2012 concerning the creation of an advisory body and the procedure for the adoption of a maritime spatial plan in the Belgian marine areas.[23] The following steps should be taken before adopting the plan. The Minister firstly submits a preliminary draft of the spatial plan to the advisory body, composed of delegates from eleven relevant public entities. The latter should then provide a motivated advice within 30 days following receipt of the draft from the Minister. Once the advisory body has provided its input, the draft will be subject to public consultation, which will also extend to the socio-economic effects of the draft spatial plan. The *Royal Decree* not only provides that the spatial plan should be subject to national scrutiny, but that it should also be reviewed by relevant (non-) neighboring states. Indeed, the draft spatial plan should be submitted to the competent authorities of the Netherlands, France, the United Kingdom and any other state the Minister considers relevant. These transboundary consultations should, in principle, last for sixty days.

This Act should have a major impact on the development of renewable energy technologies in the Belgian part of the North Sea. For example, the plan will indicate whether and where a new zone for the development of offshore technologies should be placed. Indeed, the area in the North Sea reserved for the development of offshore energy production has recently become fully saturated. In this regard, the Governmental Agreement Di Rupo I of December 2011 stipulates that the Government should make a decision on the delineation of a new area for the development of wind energy in the North Sea.[24]

Indeed, the *Royal Decree* of 20 December 2000 concerning the conditions and procedure for the granting of domain concessions[25] (the *Decree on Concessions*), delineates a zone for the implantation of wind turbines in the Belgian part of the North Sea. On the basis of this Decree and the procedures included therein, seven domain concessions are to be granted

[22] *Report in the Belgian Senate on the draft Act modifying the Act of 20 January 1999*, 5-1685/2.
[23] *Belgian Official Journal*, 28 November 2012.
[24] *Draft Statement on the General Policy*, 1 December 2000.
[25] *Belgian Official Journal*, 30 December 2012.

to enterprises developing offshore wind technologies. The concessions are granted through Ministerial Decrees. In 2012, the last remaining available zones have been designated by means of Ministerial Decisions, resulting in a saturation of the delineated concessions zone for the development of offshore technologies for the time being.[26]

Another recent amendment to the existing legal framework is the *Royal Decree* of 11 April 2012 creating a safety zone around the artificial islands, installations and devices for the production of energy from water, tides and wind in the sea areas under the jurisdiction of Belgium.[27] This *Royal Decree* sets out the outer limits of respectively wind turbines, wind turbine parks and wind turbine park zones, and creates a safety zone of 500 meters around these outer limits. Within these 500 meters, intrusion by ships is prohibited. Several exemptions apply, for example to conduct scientific research or for war ships.[28]

At the time of writing, there are initiatives pending to amend the legal framework governing the support mechanisms applicable to renewable technologies deployed in the Belgian part of the North Sea.[29] On the basis of the existing *Royal Decree* of 16 July 2002, the support for wind energy amounts to 107 EUR/MWh for the first 216 MW installed capacity, and 90 EUR/MWh beyond this first 216 MW. The proposed amendment introduces a new category for installations producing electricity from water and tides (on the basis of the existing *Royal Decree*, these technologies are included in the "residual category), which will be granted 20 EUR/MWh. It is therefore likely that discrepancies in the amount of support applicable to wind on the one hand, and waves and tides on the other hand, will exist in the legal framework.

Another recent development in the legislative landscape governing the North Sea is the *Royal Decree* of 23 June 2010 concerning the marine strategy for the Belgian part of the North Sea, which puts forward a step-by-step approach in reaching its goals.[30] This *Royal Decree* aims to partially implement the Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (*Marine Strategy Framework Directive*). The *Royal Decree* aims to enable a good environmental status of the Belgian sea areas by 2020. This environmental status explicitly excludes the chemical and ecological

[26] *Ministerial Decision* of 1 June 2012 and *Ministerial Decision* of 2 July 2012.
[27] *Belgian Official Journal*, 1 June 2012.
[28] Article 5 of the *Royal Decree* of 11 April 2012.
[29] Introduced by the Commission for Electricity and Gas Regulation.
[30] *Belgian Official Journal*, 13 July 2010.

status of the surface waters.[31] Indeed, these aspects of environmental wellbeing are covered by other regulations, such as the *Water Framework Directive*, discussed above.

The *Royal Decree* sets out six phases throughout which the main goals of the *Marine Strategy Framework Directive* should be implemented.[32] The first phase pertains to the analysis of the current environmental status and an economic and social analysis of the use of the marine environment. The second phase sets out the characteristics of a good environmental status of the marine environment. The third phase is meant to set out a series of environmental goals. The deadline for completion of the three first phases expired on 15 July 2012.[33] These reports have been made publicly available by the competent authorities. In the fourth phase, monitoring programs are to be set out for the continuing analysis of the environmental status. This phase should be completed by 15 July 2014. In the fifth phase, a program of measures to reach or sustain the good environmental status should be developed by 15 July 2015. These first five phases mainly consist out of preparatory measures. In the sixth and final phase, which is the phase of implementation, the program should be applied, namely by 15 July 2016.

Reflections on Recent Legislative Developments

With regard to the implementation of the *Water Framework Directive*, the first generation of RBMPs in Belgium showed signs of growing pains, mainly due to an abundance of planning levels and administrative bodies involved. The recent initiatives to overhaul the applicable framework so as to simplify the operational processes in the run up to the adoption of the second generation RBMPs, should therefore be marked as a positive evolution.

The key words in the run up to the second generation of RBMPs should be “integration” and “coordination”. The former pertains to, for example, the integration of the governance of floods risks into the RBMP’s, whereas the latter pertains to, amongst other things, the coordination between the different authorities in Belgium, on a regional and federal level.

Considering the limited space available in the part of the North Sea under Belgian jurisdiction, a comprehensive legal framework that facilitates a maximization of efficient use of that space is paramount. The recent legislative initiatives embodied in the Act of 20 July

[31] Articles 2 and 3 of the *Royal Decree* of 23 June 2010.
[32] Article 3 of the *Royal Decree*.
[33] The draft reports within the first three phases have been reviewed by the Strategic Advisory Council for Agriculture and Fisheries, which submitted its advice on 29 May 2012.

2012 and the *Royal Decree* of 13 November 2012 lay the groundwork in this regard. It seems that wind energy, in the short and medium term, will remain the most attractive technology to be deployed in the Belgian part of the North Sea, considering the discrepancy in the level of support granted to the respective technologies.

COUNTRY REPORT: BOTSWANA
A New Environmental Impact Assessment Law for Botswana

BUGALO MARIPE*

Introduction

Since the 1972 United Nations Conference on Environment and Development (UNCED) held in Stockholm, environmental impact assessments (EIAs) have assumed an increasingly important status in domestic and international law. Their significance lies in them having utility for promoting the integration of environmental considerations into socio-economic development and decision-making processes.

As a measure of precaution, EIAs have assumed the status of binding legal rules faster than many other principles on environmental law, in particular the precautionary principle, on which, one would argue, EIAs are based. The reason for this is not difficult to find. Although there is a view that EIA is an emerging principle of international environmental law,[181] EIAs are often required as a matter of domestic law with many countries enacting dedicated EIA. This reflects the obligations enshrined in the 1992 UNCED in Rio de Janeiro. One of the instruments adopted was the *Rio Declaration* which provides:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[182]

Botswana is a signatory to the United Nations *Convention on Biological Diversity* that requires state parties, among other things, to adopt and implement EIA legislation. It provides in part:

> Each Contracting Party, as far as possible and as appropriate, shall:
>
> (a)Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse

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[181] *Experts Group on Environmental Law of the World Commission on Environment and Development* (1986).

[182] *Rio Declaration*, Principle 17.

> (b) on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures:
> (c) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have adverse impacts on biological diversity are duly taken into account.[183]

It was not until 2005 that Botswana enacted such a law, which did not come into force until it was replaced by another in 2011, becoming operational in June 2012.

Defining Environmental Impact Assessment

Definitions of EIA abound,[184] and it is not the purpose of this Report to reconcile definitions. The definitions do converge in respect of objectives. These require that any developer must ensure that environmental effects should be taken into account before decisions are taken to allow certain activities, and that procedures for the implementation of national impact assessment be spelt out. Most international instruments do not define what an EIA entails or the particular elements that have to be satisfied, nor set the threshold of harm that an activity may produce in order to require an EIA. They encourage reciprocal procedures for notification, information, exchange and consultation in respect of activities that are likely to have significant transboundary effects.[185] Exactly how the process operates in practice is described by Sands:

> 'An environmental impact assessment describes a process which produces a statement to be used in guiding decision-making, with several related functions. First, it should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives. Second, it requires decisions to be influenced by that information. And third, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.'[186]

Several ideas stem from this definition. The process must produce a statement. This is the statement that is going to be assessed for compliance. It is required that decisions (whether to permit development or not, or to permit it under restricted conditions) be

[183] Article 14 (a) and (b).
[184] For generally: R. Munn, *Environmental Impact Analysis* (1979); P. Wathern (ed), *Environmental Impact Assessment, Theory and Practice* (1988); P. Sands, *Principles of International Environmental Law - Frameworks, Standards and Implementation* (1995) Manchester University Press, Manchester; Glasson et al, *Introduction to Environmental Impact Assessment* (1999) UCL Press, London.
[185] UNEP, *Goals and Principles of Environmental Impact Assessment* (1987).
[186] Sands (supra note 4), 579.

influenced by information covered in the statement. It would seem that the decision maker must be allowed some measure of flexibility, to the extent of even deciding against the statement. Cogent considerations ought to prevail if it is intended not to follow the statement. The process should require the participation of the public, or at least those potentially affected, in the process leading to the production of the statement. This is frequently referred to as public participation. It is against the above expectations that the legislation in Botswana will be considered.

Environmental Impact Assessment Act (2005)

This Act was passed in 2005 with the objective of providing for environmental impact assessment "to assess the potential effects of planned developmental activities; to determine and to provide mitigation measures for effects of such activities as may have a significant adverse impact on the environment; to put in place a monitoring process and evaluation of the environmental impacts of implemented activities; and to provide for matters incidental to the foregoing".[187]

Its date of commencement was to be 27 May 2005. However, the Act provided that it applied to a list of activities prescribed by the Minister by way of regulations.[188] By the time of its repeal in 2011, these regulations had not yet been prescribed. Notwithstanding, developers routinely presented impact assessment reports to the Department of Environmental Affairs for evaluation. No legal challenge was ever brought as to the legality or otherwise of the demand for reports. Whatever uncertainties existed, they have now been laid to rest by a new law.

The previous Act was called the *Environmental Impact Assessment Act*. The new legislation is called *the Environmental Assessment Act*. The word impact has been omitted from the title, although no reasons therefore have been given. In some quarters it was felt that the word 'impact' was politically sensitive and negative, tending to presume blame.[189] In the situation of Botswana, it does not appear anything was achieved by the new terminology as the legislation has re-enacted the provisions of the previous Act.

[187] Long Title of the Act.
[188] Section 3.
[189] Glasson *et al* (supra note 4), 3.

The Main Provisions of the Act

The Act applies to "the activities in respect of which the Minister, may, after screening, prescribe by regulations".[190] In line with the position in many countries, the process of screening is a pre-condition for the application of the Act. The understanding is that not all activities require an EIA. It has been said that project screening narrows the application of the Act to those activities or projects that may involve a significant environmental impact.[191] On its own, this process has inherent problems, for it seeks to determine, *a priori,* that certain activities will or are likely to have a significant impact on the environment while others would not, before the EIA itself is done. It would be better to have the EIA itself discount the likelihood of harm. Further, the activities to which the Act applies must be prescribed by regulation. The regulations are thus a *sine qua non* for the coming into force of the Act. This was one of the shortcomings of the previous legislation because for about 6 years, the regulations were not promulgated.

Minister

The Minister is the central authority responsible for implementing the Act. He prescribes which activities are to be subject to an EIA. The Minister is therefore afforded a wide discretion. He prescribes the form of the statement to be submitted by a development proponent to the competent authority wherein an evaluation of the likely impacts is to be made.[192] He establishes an Appeal Committee which adjudicates on appeals lodged by persons aggrieved by decisions of the competent authority.[193] He has appointing powers over some members[194] of the Environmental Assessment Practitioners Board,[195] and may remove any member of the Board from office on the occurrence of certain events.[196] Where a proposed activity is likely to have significant adverse effects in another country, the Minister is the authority responsible for notifying, through the Minister responsible for foreign affairs, the concerned country's Minister responsible for foreign affiars. th. Certain activities have been exempted from the application of the Act. These are activities implemented by members of specific forces[197] or any other security organ of the state where national security

[190] Section 3.
[191] Glasson *et al* (supra note 4), 4.
[192] Section 9(4).
[193] Section 13.
[194] Section 22(b).
[195] Established under section 20 of the Act.
[196] Section 27.
[197] The Botswana Defence Force, the Directorate of Intelligence and Security, the Botswana Police Service and the Prison Service.

may be compromised.[198] The Minister may establish a special committee called the Environmental Impact Special Committee to determine the environmental impact of the activities carried out by these organs.

Although the intention was to leave assessment of environmental impacts to competent authorities, the Minister has retained a foothold on some important matters and can be said to have overall powers.

Competent Authority

The Department of Environmental Affairs is the authority responsible for implementing and ensuring compliance with the objectives of the Act. It is the Department that considers applications for proposed activities. It considers environmental assessment statements and decides on whether or not to grant authorization, and may conduct public hearings.[199] It can accept or reject a statement, and may impose conditions that it considers appropriate.[200] It may modify or revoke any authorization previously granted where there is an unanticipated irreversible adverse environmental impact, or where a developer fails to comply with any term or condition.[201] In view of these wide powers, the Legislature considered it necessary to provide a window of redress to aggrieved persons, in the form of an Appeals Committee. This is supplemented by the possibility of a review under common law, which applies to all decisions of public authorities.[202]

Environmental Assessment Practitioners Board

The Act requires that an Association of Environmental Assessment Practitioners be formed. It must be registered under the *Societies Act*,[203] and must demonstrate to the Minister that it is representative of practitioners practising in Botswana. There is no specific provision which establishes the Association. The act does however contain provisions governing the formation of the Board described above,[204] with a corporate status, and whose membership is composed of: members elected by the Association; members appointed by the Minister;

[198] Section 76.
[199] Section 11.
[200] Section 12.
[201] Section 15.
[202] See: *Tsogang Investments (Pty) Ltd* vs *Phoenix Investments (Pty) Ltd and Another* [1989] BLR 512; *National Development Bank* vs *Thothe* [1994] BLR 94; and *Attorney General and Another* vs *Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234.
[203] Cap 18:01.
[204] Section 20.

and a legal adviser nominated by the Association.[205] The main function of the Board is to: regulate the practice of environmental assessments by registering and certifying practitioners; provide quality assurance in the practice, prescription and enforcement of a code of conduct for practitioners; enforce discipline; and generally regulate of the practice.[206] It has very wide powers. In its make-up, it evidences a clear case of statutory self-regulation. The establishment of the Board with regulatory responsibilities over the profession is an innovation not contained in the original law enacted in 2005.

Assessment of the Act

The Act does satisfy international best practice for EIA. On the whole, the main elements recognized internationally as proper thresholds for an EIA regime seem to be in place. These are discussed below.

Production of a Statement

This refers to the report of an environmental assessment study.[207] This statement is mandatory for all activities that are likely to cause significant adverse effects on the environment,[208] included in a list of activities prescribed by the Minister.[209] The format of the statement is also prescribed by the Minister. The first requirement is therefore satisfied.

Impact of Statement on Decision-Making

The competent authority is under an obligation to assess the statement for compliance with the format prescribed by the Minister. There is a further obligation imposed on the competent authority to subject the statement to public review, a process facilitated in terms of logistics, by the competent authority itself. It is after all inputs have been received that the competent authority considers the adequacy of the statement.[210] To this extent, and to the extent that the decision to grant authority to develop, or to reject the statement, is based on the information contained in the statement and views stemming from a public review of the statement, the decision is indeed influenced by the statement. This requirement is also satisfied.

[205] Section 22.
[206] Section 24.
[207] Section 2.
[208] Section 3.
[209] These activities are listed at Schedule 1 of Regulation 3.
[210] Sections 10-12.

Public Participation

The Act requires an applicant for a proposed activity, to engage a practitioner to do a scoping exercise, before undertaking or implementing an activity.[211] During the scoping exercise, the applicant is under an obligation to publicize, in the mass media, in all official languages, the intended activity, its effects and benefits, and to hold meetings with the affected people or communities, at which meetings he shall explain the nature of the activity and its effects.[212] The significance attached to public participation is highlighted by numerous provisions of the Act. Even where the statement submitted by the developer complies with the requirements prescribed by the Minister, the competent authority is required to place a notification in the *Gazette* and in a weekly newspaper, in the official languages, for four consecutive weeks, inviting comments or objections from those most likely to be affected and other interested persons.[213] The invitation of comments or objections from *other interested persons* in addition to those most likely to be affected by the development/activity, has the effect of obviating the problems associated with restrictive *locus standi* rules.[214] In matters of the environment, where effects may not easily be localized, everybody is a potentially affected person. In its decision making, the competent authority must consider these comments and objections.[215] The authority is allowed to hold a public hearing if after examining the statement, he/she is of the opinion that the public should have the opportunity of making submissions and comments at a public hearing.[216] In considering applications for renewal of authorization, the competent authority is obliged to take into account the comments and objections of interested persons and the public.[217] These provisions seem to satisfy the general requirements for public participation,[218] and are in line with similar obligations in Europe.[219] The Act this complies with general international law.

Appeals

[211] Section 7.
[212] Ibid.
[213] Section 10.
[214] See in this regard B. Maripe, '*Locus Standi* and Access to Judicial Review: Statutory Interpretation and Judicial Practice in Botswana' 1999 (62) *THRHR* 390.
[215] Ibid.
[216] Section 11.
[217] Section 17.
[218] See B. Clark, 'Improving Public Participation in Environmental Impact Assessment' (1994) 20(4) *Built Environment* 294-308.
[219] See for example Article 6 of the EC Directive 85/337.

Under the Act, appeals lie to an Appeals Committee established by the Minister.[220] The Act does not prescribe the criteria for appointment to the Committee. It is hoped that the appointments will not be based on any consideration other than competence, expertise and general knowledge of the issues involved.

Conclusion

It has taken a long time for Botswana to discharge its international obligations by enacting and operationalizing environmental impact legislation. To do so is commendable. However, enactment of legislation is not enough. That legislation must meet the general purposes of impact legislation. Botswana's new EIA regime seems to meet these expectations. The implementation of the legislation must now achieve the purposes of impact legislation. Because the law has only recently come into force, one is not able to make an informed assessment as to whether or not the law will achieve its ends. It is hoped though that practice will reflect the lofty ideals that underpin the enactment of the law.

[220] Section 13.

COUNTRY REPORT: CANADA
The Law and Policy Governing Canada's Wetlands - Recent Developments

LAUREL PENTELOW BESCO*

Introduction to Wetlands

Wetlands are an ecosystem with many functions, services and abilities; and the fact that large quantities of these ecosystems have been destroyed or degraded as humanity has developed and industrialised is increasingly becoming a visible problem. In Canada, 70% of wetlands have been degraded or outright destroyed,[1] largely as a consequence of human activity such as industrial development, expansion of ports and the associated dredging required, and urban and agricultural expansion.[2] Before turning to look at the general status and recent developments in wetland law and policy in Canada, it is important to develop a basic understanding about what wetlands are, what they do and why they are so important. The wetland policy of the Government of Canada defines wetlands as:

> '...land where the water table is at, near, or above the surface or which is saturated for a long enough period to promote such features as wet-altered soils and water tolerant vegetation. Wetlands include organic wetlands or "peatlands", and mineral wetlands or mineral soil areas which are influenced by excess water but produce little or no peat.'[3]

While this definition is a good beginning, it is general in nature and covers a surprisingly broad array of ecosystems. While law and policy often treat wetlands as a broad classification, and it is true that they provide many similar services, there are many types of wetlands which exhibit drastically different characteristics. It is important for academics, policy makers and the general public to be able to recognize wetlands in their natural space in order to best provide recommendations for their use or protection. Therefore, brief descriptions of the main types which exist in Canada are provided below.

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[1] Ducks Unlimited Canada, *Learn About Wetlands* (available at www.ducks.ca/learn-about-wetlands/).
[2] C. Rubec & A.Hanson, 'Wetland Mitigation and Compensation: Canadian Experience' (2009) 17(3) *Wetlands Ecological Management,* 3.
[3] Environment Canada, *The Federal Policy on Wetland Conservation* (1991) Ottawa: Government of Canada, 9 (*Environment Canada Policy*).

The categories of wetlands found in Canada range from swamps to marshes, bogs, fens and shallow open water. Marshes, of which there can be salt water and fresh water types, are characterised as areas periodically submerged by either slow moving or standing water.[4] A main visually defining feature of marshes is their lack of woody vegetation,[5] which means that unlike many other wetland varieties, they are made up strictly of reeds, rushes or sedges.[6] Swamps, on the other hand, are dominated by trees and shrubs.[7] Water movement in swamps varies; these wetlands may flood on a seasonal basis or alternatively stay flooded for longer periods of time.[8] Bogs and fens are found more commonly in the northern parts of Canada and are often considered to be the least productive wetland ecosystems.[9] Bogs are peat-covered wetlands while fens have large amounts of sedge but also are known to contain trees and shrubs.[10] The final category of wetland commonly found in Canada is shallow open water. Often situated at the transition between lakes and marshes, this wetland system is made up of pot holes and sloughs.[11] While Canada has rich and varied wetland ecosystems it is in addition important to note that wetlands exist all over the world and their importance has long been recognized by the international community.[12] In fact, they are considered to be of such importance that the *Ramsar Convention,* the international agreement aimed at wetland protection, is the only global environmental treaty which deals solely with one ecosystem.[13]

Canada has an abundance of wetlands in a variety of forms, but why are they so important? The simple answer is because they provide services to both the natural and human world. We call these ecosystem services.[14] Wetlands, in their many iterations, provide services which filter water, prevent flooding, store groundwater, protect shorelines from erosion and storm surges and store carbon.[15] On top of this, wetlands are a hotbed of biodiversity, they

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[4] Supra note 1.
[5] Ibid.
[6] Ibid.
[7] Environment Canada, *Wetlands of Ontario-About Wetlands* (available at www.ec.gc.ca/tho-wlo).
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] *Convention on Wetlands of International Importance especially of Waterfowl Habitat,* 2 February 1971, 96 UNTS 245, Can TS 1981 No 9 (Amended by the Protocol of 3 December 1982 and the Amendments of 28 May 1987).
[13] Ramsar Secretariat, *The Ramsar Convention on Wetlands* (available at http://www.ramsar.org/ cda/en/ ramsar-home/main/ramsar/1_4000_0__).
[14] For Environment Canada's description of ecosystem services see Environment Canada, *Putting a Price on Canada's Ecological Goods and Services* (2010) Ottawa: Government of Canada (available at www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDQQFjAA&url =http://www.ec.gc.ca/envirozine/default.asp?lang=en&n=B31D9D941&ei=vnS2UKbXI8G8yAHf1YHgAQ&usg=AFQjCNFS54gvb42gNM2gOGojxKtDoxOAog>).
[15] Environment Canada (supra note 7).

provide irreplaceable habitat for many species, including migratory birds and species at risk, and allow for recreational experiences such as hiking and bird watching.[16] Unfortunately, over past decades many wetlands and their valuable services have been lost entirely or been extremely degraded. Clearly legal protection and public education is needed in order to help protect the remainder of these ecosystems.

The next two sections of this Country Report will describe the current state of wetlands law and policy in Canada and afterwards look at the most recent developments in some of the jurisdictions within Canada. This will focus in particular on areas of the country which are most proactive in their wetland protection as well as showing clear steps forward when providing recommendations for future wetland protection at any number of jurisdictional levels. It should be noted that in this same *IUCN eJournal* edition there is a complementary Canada Country Report written in French by Pierre Cloutier de Repentigny. While these two reports are not direct translations (Mr. Cloutier de Repentigny's piece focuses on developments in the Province of Quebec and this piece is a broader canvass of Canada as a whole) they are complimentary and both focused on the subject of wetlands law and policy in Canada.

Background on Wetland Law and Policy in Canada

In North America, the protection of wetlands through law and policy began with the United States in the early 1970s. In 1972, through Section 404 of the *Federal Water Pollution Control Act (Clean Water Act)*,[17] the US Federal Government established a priority to avoid wetland destruction (although the reality is that it was too often easy to bypass this requirement by stating that it was "too difficult" to avoid impacts).[18] More than 15 years later, the Government's wetland policy was strengthened to include the "no net loss" clause[19] which has now become a common phrase used when dealing with wetlands and many other ecosystem protection policies.

It was around the same time that the Canadian Federal Government began to consider wetland protection policies. The first step taken was by the Department of Fisheries and Oceans who, in 1986, included wetlands in their no net loss policy regarding fish-breeding

[16] Ibid.
[17] *Clean Water Act,* 33 USC §1251 (1972).
[18] S. Clare, N. Krogman, L. Foole & N Lemphers, 'Where is the Avoidance in the Implementation of Wetland Law and Policy' (2011) 19 *Wetlands Ecological Management*, 167.
[19] Ibid; *North American Wetlands Conservation Act,* 16 USC § 4401.

locations (of which some are wetlands).[20] Five years later, and in part to comply with obligations flowing from ratification of the *Ramsar Convention,*[21] the Canadian Federal Government released its first policy statement on wetlands.[22] This is still the current federal policy and in it the Government states as their goal no net loss of wetland function.[23] While this policy is not regulatory in nature, at the time of its release Cabinet directed it be applied to all programs, policies and plans released and approved by the Federal Government.[24] In part because of this broad application to federal programs, this policy is often touted as a global example. However, it only applies on federal lands, which means it only covers approximately 29% of wetlands in Canada (those which the Federal Government is directly responsible for).[25] In 1996, as a follow up to the policy, and to help government agencies and policy makers apply the content of the wetland policy to their actions, an implementation guide was released. This document reiterated the "no net loss" of wetland functions and provided guidelines to achieve this – namely the "mitigation sequence".[26] The mitigation sequence is a three tiered approach to wetland protection - avoidance first, minimization of damage if complete avoidance is not possible, and mitigation through actions such as protection or reestablishment of wetlands elsewhere as a last resort.[27] This sequence is an increasingly used directive for wetland law and policy in North America.[28] To date, along with the Federal Government, Alberta, New Brunswick, Prince Edward Island, Québec and Nova Scotia all have the mitigation strategy identified in their wetland protection strategies.[29]

The next several pages will detail the state of knowledge on wetlands law and policy in the different provinces and territories across Canada. Note that three provinces (Nova Scotia, New Brunswick and Québec), which have taken action on wetlands in the recent past are described, not in this section, but below in the current developments section. To begin, we turn to the eastern part of Canada and look at the province of Newfoundland and Labrador. The main wetlands policy statement in this jurisdiction was originally produced in 1997 and

[20] The Department for Fisheries and Oceans – Fish Habitat Management Branch, *Policy for the Management of Fish Habitat* (1986) Ottawa: Government of Canada, section 2.2.1.
[21] Canada became a Contracting Party to the *Ramsar Convention* in 1981.
[22] Environment Canada (supra note 3).
[23] Ibid, 5, 7 and 8.
[24] Lynch-Stewart *et al*, *Federal Policy on Wetland Conservation: Implementation Guide for Federal Land Managers* (1996) Ottawa: Wildlife Conservation Branch, Canadian Wildlife Service, Environment Canada, 6.
[25] Rubec et al (supra note 2), 3. It is also important to acknowledge that the Federal Government may have an impact on other wetland protection through other mechanisms such as their participation in environmental assessments or through the creation of new national protected areas.
[26] Lynch-Stewart *et al* (supra note 24), 10.
[27] Ibid, 17 (for details on this sequence).
[28] Clare et al (supra note 18).
[29] Scientific and Technical Review Panel Briefing, 'Avoiding, Mitigating and Compensating for Loss and Degradation of Wetlands in National Laws and Policies' (April 2012) *Ramsar Convention on Wetlands Briefing Note No.* 3 (available at http://www.ramsar.org/bn/bn3.pdf), 7.

was reissued in 2001 – it is called the *Policy Directive for Development in Wetlands.*[30] This policy deals with the issuance of permits under section 48 of the *Water Resources Act*[31] and specifically prohibits certain developments (such as infilling, dredging, etc. which may have adverse effects on water quality or quantity).[32] Interestingly, because municipalities in this province have control over watersheds (where many wetlands exist) through the *Urban and Rural Planning Act*[33] and because at the municipal level there is a lot of pressure for development,[34] the provincial government has encouraged municipalities to work with the Newfoundland and Labrador Municipal Wetland Stewardship Program which creates stewardships and conservation agreements.[35] In many cases these partnerships have led to protection agreements which ensure wetlands are not impacted by new development.[36]

Prince Edward Island, the smallest Canadian province, put forth their wetland policy document entitled *A Wetland Conservation Policy for Prince Edward Island* in 2003. This policy replaced a more development-centred one which previously stated that when developing, "avoidance" of wetlands was the policy, unless the development was "in the greater public interest."[37] The new policy goal is no net loss of wetlands or wetland function,[38] and to achieve this, Prince Edward Island has decided to adopt the mitigation framework of avoidance, minimization and compensation.[39]

Turning to Ontario's strategy, it is interesting that in some parts of this province there is more stringent protection of wetlands than in others. Specifically, the *Greenbelt Plan*[40] along

[30] Department for Environment and Conservation, *Policy for Development in Wetlands* (St. John's: Government of Newfoundland and Labrador (2001) available at http://www.env.gov.nl.ca/env/waterres/regulations/policies/wetlands.html).
[31] *Water Resources Act*, SNL 2002, c W-4.01.
[32] Department for Environment and Conservation (supra note 30), section 5.1.
[33] *Urban and Rural Planning Act*, SNL 2000, c U-8.
[34] J. Sharpe, *Newfoundland & Labrador Eastern Habitat Joint Venture Coastal and Inland Freshwater Wetlands Stewardship and Conservation Project # 1.1.1-09/10* (March 2010) (available at http://www.whc.org/en/downloads/final-project-reports/newfoundland-and-labrador/67-nl-coastal-and-inland-freshwater-wetlands-stewardship-and-conservation-final-project-report-0910) 5.
[35] Ibid. See further: Department of Environment and Conservation, Wetland *and Coastal Stewardship (St. John's: Government of Newfoundland and Labrador)* (available at http://www.env.gov.nl.ca/env/wildlife/stewardship/wetland/index.html).
[36] There are many municipalities who have signed Municipal Stewardship Agreements, such as: Tornbay; Labrador City; and Springdale. For a full list see: Department of Environment and Conservation (ibid).
[37] Energy, Environment and Forestry, *A Wetland Conservation Policy for Prince Edward Island* (2003) Charlottetown, Government of Prince Edward Island (available at http://www.gov.pe.ca/photos/original/2007wetlands-po.pdf), 1.
[38] Ibid, 5.
[39] Ibid, 6.
[40] Established under *Greenbelt Act*, 2005, SO 2005, chapter 1, section 3.

with the associated *Oak Ridges Moraine Conservation Plan*[41] and the *Niagara Escarpment Plan,*[42] improve wetland protection, but this stronger protection only applies to wetlands which fall within their jurisdiction.[43] The *Greenbelt Act* (which provides for the creation of the *Greenbelt Plan)* encompasses the land area for which the two other plans had already been created, plus additional land area. Although the total size of these specially protected areas are relatively small, approximately 7,200km^2,[44] as compared to the total province's size of over a million km^2,[45] the land protected is located within heavily populated South Ontario, where a significant proportion of wetlands have already been eliminated.[46] The increased protection provided means that "further identified" wetlands in the Greenbelt, the Oak Ridges Moraine and Niagara Escarpment areas are granted the same protection as provincially significant ones outside these boundaries.[47] It is somewhat unclear what the term "further identified" means and how the process of classifying these wetlands differs from distinguishing "provincially significant" ones, but a recent report on the wetlands in the Greenbelt indicated that the "further identified" language would mean that wetlands in these specific areas should have further protection than those elsewhere in the province.[48] The definition of the protection provided both to "further identified" wetlands in the designated areas and "provincially significant" ones in the rest of the province is laid out in Ontario's 2005 *Provincial Policy Statement* which states, in section 2.1.3, that

> 'Development and site alteration shall not be permitted in
> ...
> b. *significant wetlands* in Ecoregions 5E, 6E and 7E1; and
> c. *significant coastal wetlands…*'

and in section 2.1.4 states that

> 'Development and site alteration shall not be permitted in

[41] This plan is created by authority found in the *Oak Ridges Moraine Conservation Act, 2001*, SO 2001, chapter 31, section 3.
[42] Implemented by the *Niagara Escarpment Planning and Development Act*, RSO 1990, c N.2
[43] Ducks Unlimited Canada, Earthroots, Ecojustice and Ontario Nature, *Protecting Greenbelt Wetlands: How Effective in Policy* (2012), (available at http://www.ontarionature.org/discover/resources/PDFs/reports/protecting_greenbelt_wetlands_report.pdf).
[44] Ibid, 9.
[45] Ministry of the Environment, *Land*, Government of Ontario (available at http://www.ene.gov.on.ca/environment/en/category/land/index.htm).
[46] See Ducks Unlimited Canada, *Southern Ontario Wetland Conversion Analysis* (2010) Barrie: Ducks Unlimited Canada (availabel at http://www.ducks.ca/assets/2010/10/duc_ontariowca_optimized.pdf?9d7bd4).
[47] Ducks Unlimited Canada (supra note 43), 20.
[48] Ibid, 20.

> a. *significant wetlands* in the Canadian Shield north of Ecoregions 5E, 6E and 7E1 ...'

both with the caveat 'unless it has been demonstrated that there will be no *negative impacts* on the natural features or their *ecological functions'*.[49] While this does not indicate a "no net loss" policy, there are some who believe the lack of that phrase means the Ontario policy is stronger because it means no development which could destroy wetlands in any way, instead of allowing development to go forward so long as it is offset by protection or restoration of a wetland elsewhere.[50]

Manitoba, together with Ontario, possesses the largest portion of wetlands in Canada, and yet this province is still without a specific wetland policy statement, legislation or regulation.[51] Currently, wetlands are protected under *The Manitoba Water Strategy* which includes them with lakes, rivers and other water bodies and states that they 'shall, where possible, be conserved'[52] and that 'the protection of wetlands shall be a consideration in planning and developing drainage projects'.[53] Clearly such policies are not as extensive as those in some other provinces and, considering the large number of wetlands in Manitoba, it is not surprising there are calls for a more directed and comprehensive strategy. There does though seem to be movement. 2012 saw the Manitoba Water Council, at the urging of the Minster of Water Stewardship, produce a report based on information gathered at public meetings throughout the province in 2010.[54] Out of this report came information about what the public thinks and desires with regards to wetlands, including the suggestion that a wetland policy is needed.[55]

Saskatchewan is behind many other provinces in Canada with regards to wetland policy – it seems their first, and to date, only wetland policy was released in 1995. This policy did not

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[49] Ministry of Provincial Affairs, *Land Use Planning - Provincial Policy Statement* (2005) Toronto: Ontario Government.

[50] Ontario Nature - Federation of Ontario Naturalists for the Great Lakes Aquatic Habitat Network and Fund*, C.P.R. for Wetlands: Conserve, Protect and Restore - Breathing New Life into Our Sense of Place* (available at http://www.ontarionature.org/discover/resources/PDFs/misc/wetlands.pdf), 2.

[51] Ducks Unlimited, in 2012, released a document entitled *Now is the time for a wetland policy in Manitoba* indicating the lack of such a policy and the importance of the government creating one in a timely manner. Ducks Unlimited Canada, *Now Is the Time for a Wetland Policy in Manitoba* (2012) (available at http://www.ducks.ca/assets/2012/07/Now-is-the-Time-for-a-Wetland-Policy-in-Manitoba.pdf?9d7bd4).

[52] Manitoba Water Stewardship, *The Manitoba Water Strategy* (Document) (2003) Winnipeg: Government of Manitoba), Policy 2.1.

[53] Ibid, Policy 6.6.

[54] Manitoba Water Council, *Seeking Manitobans' Perspective on Wetlands: What We Heard* (January 2011) (available at http://gov.mb.ca/conservation/waterstewardship/questionnaires/surface_water_management/pdf/connected_docs/final_mwc_what_we_heard.pdf).

[55] Ibid,14-16.

make statements about absolute prohibition of destruction or even have a no net loss policy – instead it focused on items such as developing land use guidelines for managing wetlands and also encouraging the maintenance of wetlands by private landowners.[56] There has been some discussion of this policy being revised,[57] but as of yet no official statements have been made.

While the wetland policies, laws and regulations which exist across Canada are relatively new, Alberta is the one province which acted early. In fact, they released their first two government documents relating to wetland management in 1993 – *Wetland Management in the Settled Areas of Alberta – An Interim Policy*[58] and *Beyond Prairie Potholes –A Draft Policy for Managing Alberta's Peatlands and Non-settled Area Wetlands.*[59] The former deals with wetland management in areas where the majority of the Albertan population live (known as the 'white' area) and the latter with the less settled areas of the province (the 'green' area). The goal of the strategy for the white area of the province is to 'sustain the social, economic and environmental benefits that functioning wetlands provide, now and in the future'.[60] A new policy that will replace both of these previous documents (and will address wetlands across the province together) is expected to be released shortly. Some of the key directions that are likely to be included in the new policy are known – one of which is the adoption of the standard three step mitigation decision framework, as described above.[61]

Although the Government of British Columbia does not have a specific wetland policy in place, it is part of the Wetland Stewardship Partnership which has produced the *Wetland Action Plan*. The province also does regulate and consider wetlands through a number of different laws (for example, the *Forest and Range Practices Act*[62] and the *Wildlife Act*)[63] which directly or indirectly may protect wetlands. At the municipal level, there is protection afforded through the *Local Government Act*[64] which, together with the *Community Charter*, provides for the designation of environmentally sensitive areas (including wetlands) in

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[56] Saskatchewan Government, *Saskatchewan Wetland Policy in Water Management Framework - Appendix I* (1999) Regina: Saskatchewan Government, 18.
[57] Rubec et al (supra note 2), 8.
[58] Alberta Water Resources Commission, *Wetland Management in the Settled Area of Alberta* (1993) Edmonton, Government of Alberta (available at http://environment.gov.ab.ca/info/library/6169.pdf).
[59] Alberta Water Resources Commission, *Beyond Prairie Potholes: A Draft Policy for Managing Alberta's Peatlands and Non-Settled Area Wetlands* (1993) Edmonton, Government of Alberta (available at http://www.wetlandpolicy.ca/pdf/beyond_prairie_potholes_1993.pdf).
[60] Alberta Water Resources Commission (supra note 58), 1.
[61] Alberta's Wetland Policy, *Alberta's New Wetland Policy* (available at http://www.wetlandpolicy.ca/alberta-wetland-policy/wetland-policy.html).
[62] *Forest and Range Practices Act*, SBC 2002, chapter 69, section 150(5).
[63] *Wildlife Act*, RSBC 1996, chapter 488.
[64] *Local Government Act*, RSBC 1996, chapter 323.

planning documents. Furthermore, the 2008 publication of *Living Water Smart* (British Columbia's water plan) commits to protect and rehabilitate wetland and waterway function.[65]

The Yukon, one of Canada's three territories, has not experienced nearly the wetland destruction as most of the rest of the country,[66] but they are still concerned about protection. Their regular 'State of the Environment' reports provide an overview of progress made in wetland protection across the jurisdiction. The most recent report indicates that there are 54 identified wetland areas in the Yukon and nine of these are protected in some way.[67] The main type of wetland protection in the Yukon is through designation of a protected area; namely national parks, habitat protection areas, national wildlife areas and special management areas.[68] While national parks and national wildlife areas are designated under federal legislation,[69] habitat protection areas are created through the Yukon *Wildlife Act*.[70]

Wetland protection not only comes from the different levels of government in Canada but also from highly engaged non-governmental organizations.[71] Ducks Unlimited is a well known organization which operates in Canada and works to ensure wetland protection and restoration as well as focusing on working with governments, industry and landowners to educate and promote wetland policies.[72] The Nature Conservancy as well as many conservation authorities across the country are also actively involved in wetland conservation in Canada.

Recent Developments in Wetland Law and Policy in Canada

In the recent past, there have been several new developments in the law and policy area of wetland protection. Specifically, this section of the Country Report will look at the new wetland policies in Nova Scotia and New Brunswick along with the impact of a significant court case in Québec and the associated temporary legislation. The emphasis on the

[65] Government of British Columbia, *Living Water Smart: British Columbia's Water Plan* (available at http://www.livingwatersmart.ca/preparation/watersheds.html.
[66] Environment Yukon, Yukon State of the Environment Report (1999) Whitehorse, Yukon Government, 108.
[67] Environment Yukon, *Yukon State of the Environment Report* (2008) Whitehorse, Yukon Government, 22.
[68] Ibid, 24.
[69] *Canada National Parks Act*, SC 2000, chapter 32; *Wildlife Area Regulations*, CRC, chapter 1609.
[70] *Wildlife Act*, RSY 2002, chapter 229, section 181
.[71] L. Campbell & C. Rubec, *Interim Report: Synthesis of What You Said. Recommendations of the Conference on Canadian Wetlands Stewardship*. Report no. 03-1 (2003) Ottawa, North American Wetlands Conservation Council, 6.
[72] Ducks Unlimited Canada*, What We Do,* online: Ducks Unlimited Canada (available at *http://www.ducks.ca/what-we-do/).*

Maritime Provinces (of which Nova Scotia and New Brunswick are part) may result from the fact that to date they have seen such heavy destruction of some of their wetlands – specifically salt marshes – and that there is increasing awareness of the protection these provide from storm surges and sea level rise.

New Brunswick's previous *Wetland Policy* of 2002 was already stronger than many of the wetland policies in the rest of the country at the time – they committed to no loss of provincially significant wetlands and no net loss to other wetlands that do not carry this classification.[73] Nonetheless, in early 2012, a long-term wetland management strategy was released with some even stronger statements. Specifically, the policy indicated that not only would 'no loss' of provincially significant wetlands be the Government's policy, it was stated that amendments to the *Watercourse and Wetland Alteration Regulation*[74] would be made, if necessary, to ensure such a requirement was instilled in the law.[75] This amendment does not appear to have happened yet, but the Government may still intend to proceed. Over a similar time period, there was also some controversy around the mapping of wetlands in New Brunswick. There was a new map released which showed up to 18% of the province as wetland (which had many repercussions for developers and landowners). The new map was however rejected by the New Brunswick Government and has led to much debate over how proper wetland mapping in the province should progress.[76] While the stronger statement regarding no loss of provincially significant wetlands is promising, it may well be that the increased controversy over defining specific areas as wetland is a result of the stronger regulation of them. It seems this province is in need of a solution for mapping wetlands that both protect them but also satisfy landowners and citizens.

In late 2011, Nova Scotia also released a new wetland conservation policy and in it committed to a no net loss of wetland area and function, something which was required by the province's *Environmental Goals and Sustainable Prosperity Act*.[77] This new policy goes further than what was required by the legislation and has aligned itself with the New Brunswick policy of no loss of wetlands of special significance.[78] The new policy also sets

[73] Scientific and Technical Review Panel Briefing (supra note 29), 7.
[74] *Watercourse and Wetland Alteration Regulation,* NB Reg 90-80.
[75] Department of Environment, *Long-Term Wetland Strategy* (2012) Fredericton, Government of New Brunswick (available at http://www2.gnb.ca/content/dam/gnb/Departments/env/pdf/WetlandStrategy.pdf).
[76] CBCNews "Changes to N.B. Wetlands Strategy Announced" (18 March 2011) (available at http://www.cbc.ca/news/canada/new-brunswick/story/2011/03/18/nb-wetlands-policy.html).
[77] *Environmental Goals and Sustainable Prosperity Act,* SNS 2007, chapter 7, section 4(1)(n).
[78] Government of Nova Scotia, Nova Scotia Wetland Conservation Policy (2011) Halifax, Government of Nova Scotia (available at http://www.gov.ns.ca/nse/wetland/docs/Nova.Scotia.Wetland.Conservation.Policy.pdf), 9.

out the mitigation sequence (as was described in an earlier section) which many others before have made standard,[79] and more generally the policy is considered to be one which is based on best practices and lessons learned from other jurisdictions in Canada and around the world.[80] The Nova Scotia policy also has a regional connection - it is aligned with the policies in both New Brunswick and Prince Edward Island.[81]

In Québec, wetlands are protected by section 22(2) of the *Environment Quality Act* (*EQA*)[82] which forces citizens to obtain a certificate of authorization from the Minister of Sustainable Development, Environment and Parks before proceeding with any project that might affect a wetland. In 2006, the Minister adopted a directive to circumscribe its discretionary power regarding wetland. The directive adopts the no net loss principle and the mitigation sequence described above. However, the Superior Court of Québec declared the directive null and void as it was an encroachment on property rights not authorized by legislation.[83] This forced the Government to enact Bill 71, *An Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water* during the spring of 2012.[84] The *Act* specifically permits the Minister to require in emitting a certificate under section 22(2) of the *EQA* "compensation measures designed, in particular, to restore, create, protect or ecologically enhance a wetland, a body of water or a piece of land near a wetland or a body of water" which cannot be indemnified.[85] The *Act* is complimented with a ministerial guide on procedures to obtain a certificate of authorization for projects affecting wetlands.[86] Interestingly, this *Act* is of a temporary nature as its section 5 provides that the *Act* will become ineffective on 24 April 2015 or at the date of coming in force of an "Act providing for rules on the preservation and sustainable management of wetlands". The Province has thus a three-year deadline within which to adopt comprehensive legislation on wetlands.[87]

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[79] Ibid, 12.
[80] Wetland Stewardship Partnership, *A Wetland Action Plan for British Columbia* (March 2010) (available at http://bcwetlands.ca/wp-content/uploads/BCWetlandActionPlan_WSP_2010.pdf), 54.
[81] Ibid.
[82] *Environment Quality Act*, RSQ, chapter Q-2.
[83] *Atocas de l'érable inc. c Québec (Procureur général) (Ministère du Développement durable, de l'Environnement et des Parcs)*, 2012 QCCS 912.
[84] *An Act respecting compensation measures for the carrying out of projects affecting wetlands or bodies of water*, SQ 2012, chapter 14.
[85] *Ibid*, section 2.
[86] Ministry of Sustainable Development, Environment and Parks, *Les milieux humides et l'autorisation environnementale* (2012) Québec City: Government of Québec.
[87] For more information on Québec see : P. Cloutier de Repentigny, "Rapport national du Canada – Développement législatif récent au Québec concernant les milieux humides" (2013) *IUCNAEL eJournal*.

Future Possibilities & Continuing Challenges

Wetland protection in Canada has come a long way in the thirty years or so since this country became a signatory to the *Ramsar Convention,*[88] but it seems that there is much still remaining to be done. First of all, there are still a two provinces - Saskatchewan and Manitoba - which do not have significant wetland policy statements, very few who have their wetland protection commitments (i.e. no net loss) engrained in a legally binding way, and the Federal Government has not released updates to their policy in more than 20 years. That being said, there are certain provinces – namely Nova Scotia, New Brunswick and Québec – which are moving forward in their protection plans for these critical ecosystems. Perhaps part of the challenge to protecting wetlands has to do with a lack of education of the general public and therefore, as many provinces state in their policy plans, education is key in order to best protect these incredibly valuable parts of our natural heritage. This need for education provides an excellent opportunity for the Academy to become involved.[89] Much research has been done on the science of wetlands and it is clear to those in the academic world why wetlands are important, but this knowledge and understanding perhaps needs to be better transmitted beyond the borders of academics and into the government and policy arena and further still to general society.

Finally, increased coordination amongst the different levels of government is something which should be pursued. While “no net loss”/ “no loss” and the mitigation sequence are increasingly gaining traction amongst the different jurisdictions, there are still stumbling blocks with regards to integration of different policies.[90] Because wetland protection is not only a national and provincial challenge, but also a municipal one – due to the strong role local governments play with regards to land use planning – consistency in goals and streamlining processes and requirements may make it easier for landowners and governments alike to abide by goals and regulations designed for wetland protection. The Maritime Provinces have begun to move in this direction through policies which have clear connections and consistency and they should be seen as leaders in the efforts for coordination.

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[88] Supra note 12.
[89] See P. Cloutier de Repentigny, “Rapport national du Canada – Développement législatif récent au Québec concernant les milieux humides” for an additional discussion on the topic of the role of the Academy in wetlands education.
[90] See, for example, supra note 80, 1.

RAPPORT NATIONAL DU CANADA
Développement Législatif Récent au Québec Concernant les Milieux Humides

PIERRE CLOUTIER DE REPENTIGNY*

Abstract

Wetlands are fragile, diverse and productive ecosystems. The pressure of economic development has greatly reduced the surface area of wetlands. Governments have thus often stepped in to protect these ecosystems. In Canada, wetlands are partially protected by the federal government's *Wetland Policy* and by the *Ramsar Convention*. Nonetheless, most wetland protection and management is in the hands of the provincial governments. This Country Report explores Québec's legal framework for wetland protection and recent legislative development. It first summarizes the wetland protection under section 22(2) of the *Environment Quality Act* which requires citizens to obtain a certificate of authorization from the Minister of Sustainable Development, Environment and Parks before completely or partially altering or destroying a wetland. It then looks at the constraint created by the ministerial *Directive 06-01*, implementing the "no net loss" principle, on the Minister's discretionary power to grant a certificate. The *Directive* was however struck down by the Superior Court forcing the Government to quickly adopt Bill 71 which gives the authority to the Minister to the implement the principle. This Report summarizes the content of *Bill 71* and some of its shortcomings. It concludes by underling the opportunity for environmental law scholars to participate in the debate that will precede the adoption of future wetland protection legislation mandated by *Bill 71*.

Introduction : Le Cadre Juridique des Milieux Humides au Québec

Les milieux humides forment une partie importante des écosystèmes mondiaux. Ils fournissent de nombreux services écologiques et sont parmi les écosystèmes les plus productifs au monde.[1] Comme le dit si bien Canards Illimités Canada : « si les forêts sont les

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[1] Ministère du Développement durable, de l'Environnement et des Parcs, *Les milieux humides et l'autorisation environnementale*, Québec, Gouvernement du Québec, 2012 à la p 4 [MDDEP 2012]; et Secrétariat de la Convention de Ramsar, *The Ramsar Convention Manual: a guide to the Convention on Wetlands (Ramsar, Iran, 1971)*, 5e éd., Gland (Suisse), Secrétariat de la Convention de Ramsar, 2011 à la p 8 [*Ramsar Manual*].

poumons de notre planète, les milieux humides en sont les reins ».[2] Malheureusement, comme pour bien des écosystèmes, les milieux humides sont attaqués de toutes parts vu les besoins croissants en eau potable, le développement agricole et le développement économique.[3] Il en revient donc aux gouvernements, représentant l'intérêt public, de s'assurer de la protection de ces écosystèmes.[4] Au Canada, depuis l'adoption en 1971 de la *Convention relative aux zones humides d'importance internationale particulièrement comme habitats des oiseaux d'eau* (ci-après la *Convention de Ramsar*),[5] les différents paliers de gouvernement ont procédé à l'adoption de diverses mesures de protection des milieux humides. Le rapport national du Canada de Laurel Pentelow de cette même édition du *IUCNAEL eJournal* intitulé « The Law and Policy Governing Canada's Wetlands – Current State and Recent Developments » porte sur le droit et les politiques concernant les milieux humides au Canada. Ce rapport-ci se concentre plutôt sur les développements récents dans la province de Québec en la matière. La première partie du rapport établit brièvement le contexte juridique canadien et international. La seconde partie analyse l'évolution du droit québécois relativement aux milieux humides. Finalement, la dernière partie explore les pistes de solutions pour améliorer l'état actuel du droit.

Puisque le Canada est une fédération, il est important de comprendre les pouvoir de chaque palier de gouvernement en matière de protection de l'environnement. La *Loi Constitutionnelle de 1987*, dans laquelle on retrouve le partage des compétences gouvernementales entre le fédéral et les provinces, n'attribue la protection de l'environnement à aucun palier de gouvernement. La Cour suprême du Canada a donc statué qu'un gouvernement pouvait légiférer en matière d'environnement uniquement si celui-ci pouvait rattacher sa législation environnementale à une compétence lui étant déléguée par la *Loi Constitutionnelle de 1867*.[6] Les provinces, ayant compétence pour légiférer sur l'administration des terres publiques provinciales, sur l'exploitation et la conservation des ressources naturelles et sur les matières d'une nature purement locale ou

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[2] Canards Illimités Canada, « Milieux Humides » en ligne : www.canards.ca < http://www.canards.ca/province/qc/mh/index.html >, visité le 16 novembre 2012.
[3] *Ramsar Manual*, *supra* note 1 aux p 8-9. Selon Canards Illimités Canada, 70% des milieux humides du Canada furent dégradés ou détruits depuis l'arrivée des colons européens : voir Laurel Pentelow, « Canada Country Report: The Law and Policy Governing Canada's Wetlands – Current State and Recent Developments » (2013) IUCNAEL eJournal [Canada Country Report].
[4] Au Québec, cette tâche est déléguée au Ministre de du Développement durable, de l'Environnement et des Parcs et à son ministère : art. 10 à 15 de la *Loi sur le ministère du Développement durable, de l'Environnement et des Parcs*, LRQ, c M-30.001.
[5] *Convention relative aux zones humides d'importance internationale particulièrement comme habitats des oiseaux d'eau*, 2 février 1972, telle qu'amendée par le protocole du 3 décembre 1982 et les amendements de Regina du 28 mai 1987, RT Can 1981/9, 996 RTNU 245 [*Convention de Ramsar*].
[6] *Friends of the Oldman River Society c Canada (Ministre des Transports)*, [1992] 1 RCS 3.

privée, sont les principales responsables de la protection des milieux humides.[7] Le gouvernement fédéral a tout de même adopté en 1991, en partie pour satisfaire aux obligations de la *Convention de Ramsar*, une *Politique fédérale sur la conservation des terres humides* (ci-après la *Politique fédérale*).[8] Cette politique, bien que qualifiée d'exemple à suivre, ne s'applique cependant qu'aux terres fédérales vu les contraintes constitutionnelles.[9] Au Québec, à l'exception des terres fédérales,[10] la *Politique fédérale* n'a donc qu'une valeur morale et n'est pas contraignante. Néanmoins, la *Politique fédérale* reste un outil non-négligeable puisqu'elle encourage la coopération entre les gouvernements pour assurer la conservation des milieux humides et crée un « réseau national coordonné de terres humides protégées ». De plus, le gouvernement fédéral est responsable de l'application de la *Convention de Ramsar*. En vertu de cette Convention, le gouvernement fédéral doit, en plus d'établir une politique nationale telle que mentionnée ci-dessus, désigner des sites situés au Canada à inclure dans la Liste des zones humides d'importance internationale en se basant sur les caractéristiques écologiques, botaniques, zoologiques, limnologiques ou hydrologiques du site, et créer des réserves naturelles en milieux humides.[11] Le Canada a désigné à ce jour 37 sites Ramsar, dont 4 sont situés au Québec et 90% se trouvent dans une aire protégée par un gouvernement telle qu'un parc national.[12]

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[7] Art. 92(5) & (16) et 92A de la *Loi constitutionnelle de 1867*, 30 & 31 Victoria, c 3; voir aussi Jamie Benidickson, *Environmental Law*, 3e éd., Toronto, éditions Irwin Law, 2009 aux p 37-39.

[8] Article 3 de la *Convention de Ramsar*; et Environnement Canada, *Politique fédérale sur la conservation des terres humides*, Ottawa, Gouvernement du Canada, 1991 [*Politique fédérale*]. Voir aussi Pauline Lynch-Stewart et al., *Politique fédérale sur la conservation des terres humides – Guide de mise en œuvre à l'intention des gestionnaires des terres fédérales*, Ottawa, Gouvernement du Canada, 1996; et Robert Milko, *Directive pour les évaluations environnementales relatives aux milieux humides*, Ottawa, Gouvernement du Canada, 1998.

[9] Voir Canada Country Report, *supra* note 3 pour plus de détails sur l'implication du gouvernement fédéral dans la protection des milieux humides. 29% des milieux humides canadiens se retrouvent sur des terres fédérales, particulièrement dans le grand nord canadien : *Politique fédérale*, *ibid* à la p 5.

[10] Les terres fédérales sont des terres appartenant à la couronne fédérale ce qui comprend, entre autres, les bases militaires, les réserves indiennes et les parcs nationaux créés en vertu de la *Loi sur les parcs nationaux du Canada*, LC 2000, c 32 (à ne pas confondre avec un parc national du Québec créer en vertu de la *Loi sur les Parcs*, LRQ, c P-9).

[11] Articles 2 et 4 de la *Convention de Remsar*; Philippe Sands et Jacqueline Peel, *Principles of International Environmental Law*, 3e éd., Cambridge, Presses de l'Université de Cambridge, 2012 aux p 493-494 [Sands et Peel]; et *Ramsar Manual*, *supra* note 1 à la p 14.

[12] Environnement Canada, « Conventions et programmes internationaux » en ligne : www.ec.gc.ca < http://www.ec.gc.ca/habitat/default.asp?lang=Fr&n=7127734D-1 >, visité le 17 novembre 2012; et Wetlands International, « The Ramsar Sites Database » en ligne : ramsar.wetlands.org < http://ramsar.wetlands.org/Database/Searchforsites/tabid/765/Default.aspx >, visité le 17 novembre 2012. 78% des sites Ramsar canadiens sont situés sur des terres fédérales. Les sites Ramsar québécois sont le Cap Tourmente (site # 214), le Lac St-François (site # 316), la Baie de l'Isle-Verte (site # 362), et le Lac St-Pierre (site # 949).

La Protection des Milieux Humides au Québec : Consécration du Principe de Gain Net

Avant de procéder à l'analyse du régime québécois de protection des milieux humides, il est approprié d'établir les bases du concept de milieux humides. La *Convention de Ramsar* décrit les milieux humides comme :

> … des étendues de marais, de fagnes, de tourbières ou d'eaux naturelles ou artificielles, permanentes ou temporaires, où l'eau est stagnante ou courante, douce, saumâtre ou salée, y compris des étendues d'eau marine dont la profondeur à marée basse n'excède pas six mètres.[13]

L'Article 2(1) nous indique qu'un milieu humide peut aussi contenir des milieux riverains et côtiers. Toutefois, cette définition date de 1971 et certains commentateurs l'ont qualifiée de limitée.[14] Le Ministère du Développement durable, de l'Environnement et des Parcs (ci-après le MDDEP) offre une définition plus inclusive quoique plus technique:

> Les milieux humides regroupent l'ensemble des sites saturés d'eau ou inondés pendant une période suffisamment longue pour influencer les composantes sol ou végétation. Les sols se développant dans ces conditions sont des régosols, des gleysols (des sols minéraux) ou des sols organiques alors que la végétation se compose essentiellement d'espèces ayant hygrophiles ou, du moins, tolérant des inondations périodiques.[15]

Les milieux humides les plus courants sont les marais, les marécages, les tourbières, les étangs, les lagunes, les récifs de coraux, les côtes rocheuses et peu profondes, certains deltas et estuaires, ainsi que certains milieux associés à des lacs ou rivières.[16] Les milieux humides accomplissent plusieurs fonctions telles que régulariser les phénomènes naturels, filtrer l'eau, supporter la biodiversité (on y trouve plus de la moitié des espèces menacées ou vulnérables du Québec), produire des ressources (nourriture, fibre végétale, ressources génétiques, produits biochimiques, médecines naturelles, produits pharmaceutiques, etc.),

[13] Article 1(1) de la *Convention de Ramsar*.
[14] Sands et Peel, *supra* note 11 à la p 493; Clare Shine and Cyrille de Klemm, *Wetlands, Water and the Law - Using law to advance wetland conservation and wise use*, IUCN Environmental Policy and Law Paper No. 38, Gland (Suisse), IUCN, 1999 aux p 3-4 [Shine et de Klemm].
[15] MDDEP 2012, *supra* note 1 à la p 3.
[16] Ramsar Manual, *supra* note 1 à la p 7. Voir Canada Country Report, *supra* note 3 pour plus de détail sur les types de milieux humides.

et offrir des paysages de qualité.[17] Les milieux humides représentent environ 170 000 km² ou 10 % de l'ensemble du territoire québécois.[18]

Le droit Québécois adopte une approche holistique en ce qui concerne la protection de l'environnement en créant, à travers la *Loi sur la qualité de l'environnement* (ci-après *LQE*), des interdictions générales de polluer et d'endommager l'environnement.[19] Ces interdictions ne sont cependant pas absolues puisque le gouvernement peut permettre par règlements l'émission de certaines quantités de polluants ou la dégradation d'un écosystème par l'émission d'un certificat d'autorisation.[20] La *LQE* ne mentionne pas spécifiquement le concept de milieux humides, mais protège, depuis 1993,[21] ceux-ci directement en listant certains milieux humides au 2e alinéa de l'art. 22:

> Cependant, quiconque érige ou modifie une construction, exécute des travaux ou des ouvrages, entreprend l'exploitation d'une industrie quelconque, l'exercice d'une activité ou l'utilisation d'un procédé industriel ou augmente la production d'un bien ou d'un service dans un cours d'eau à débit régulier ou intermittent, dans un lac, un étang, un marais, un marécage ou une tourbière doit préalablement obtenir du ministre un certificat d'autorisation. [soulignement ajouté]

Les projets touchant un milieu humide doivent donc être approuvés par le MDDEP. Le non-respect de l'art. 22, alinéa 2 de la *LQE* peut entrainer des sanctions pénales en vertu de l'art. 106 de la *LQE,* ou une ordonnance de démolition et de remise en état en vertu de l'art. 114 de la *LQE*. Les milieux humides adjacents aux lacs et aux cours d'eau sont aussi protégés par la *Politique de protection des rives, du littoral et des plaines inondables* (ci-après la *Politique*).[22] Puisque ce rapport se concentre sur le droit provincial, principalement

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[17] MDDEP 2012, *supra* note 1 aux p 4-5; Shine et de Klemm, *supra* note 14 à la p 8. Voir Canada Country Report, *ibid* pour plus de détails sur les services rendus par les milieux humides.

[18] Ministère du Développement durable, de l'Environnement et des Parcs, « Milieux Humides » en ligne : www.mddep.gouv.qc.ca < http://www.mddep.gouv.qc.ca/eau/rives/milieuxhumides.htm > visité le 17 novembre 2012. Canards Illimités Canada a établi des cartes régionales des milieux humides du Québec disponible au http://www.canards.ca/province/qc/plansreg/index.html.

[19] Art. 20 et 22 de la *Loi sur la qualité de l'environnement*, LRQ, c Q-2.

[20] Le *Règlement relatif à l'application de la Loi sur la qualité de l'environnement*, RRQ, c Q-2, r 3, soustrait certains projets à l'application de l'art. 22 de la *LQE*.

[21] MDDEP 2012, *supra* note 1 à la p 9.

[22] La *Politique de protection des rives, du littoral et des plaines inondables*, c Q-2, r 35 possède un statut juridique en vertu de l'art. 2.1 de la *LQE*. Les municipalités doivent adopter une règlementation conforme à la politique : Daniel Bouchard, « Cours d'eau, plaines inondables, milieux humides, tourbières : un droit au milieu de la brume », dans Service de la formation continue du Barreau du Québec, *Développements récents en droit de l'environnement*, vol. 270, Cowansville (Qc), Éditions Yvons Blais, 2007 à la p 414 [Bouchard]; et Stéphane Sansfaçon, « Quelques difficultés rencontrées en matière de règlements municipaux portant sur la protection des rives, du littoral et des plaines inondables », dans Service de la formation continue du Barreau du Québec, *Développements récents en droit municipal*, vol. 265, Cowansville (Qc), Éditions Yvons Blais, 2007 à la p 44 [Sansfaçon].

l'application de l'art. 22, alinéa 2 de la *LQE*, l'application de la *Politique* relevant principalement du droit municipal est omise de l'analyse en cours.[23] Il suffit de noter qu'un projet autorisé par une municipalité en vertu de la *Politique* est exclu de l'application de l'art. 22 de la *LQE.*[24]

Le 30 novembre 2006, le MDDEP, conscient de l'importance des milieux humides, émit la *Directive 06-01* sur le traitement des demandes de certificat d'autorisation des projets dans les milieux humides.[25] La directive créait six types de milieux humides pour les fins d'obtention d'une autorisation. Les catégories étaient basées sur la taille et l'emplacement (soit les Basseterres du St-Laurent ou ailleurs au Québec) du milieu humide en question. La directive était basée sur le principe « éviter et minimiser », soit éviter autant que possible la destruction ou la perturbation des milieux humides et, lorsqu'impossible, minimiser les dommages en compensant la perte du milieu humide.[26] Les obligations reliées à l'obtention d'un certificat variaient selon le type de milieu humide. La *Directive 06-01* était censée être de nature temporaire en attendant l'adoption d'une politique complète sur les milieux humides à la l'image de la *Politique.*[27] Cependant, six ans plus tard, le gouvernement n'a toujours pas adopté une politique sur les milieux humides. L'approche discrétionnaire et administrative plutôt que législative du MDDEP, en ce qui a trait aux milieux humides, fut critiquée à plusieurs reprises avant d'être partiellement invalidée par la Cour supérieure.[28] Dans l'affaire *Atocas de l'érable inc.*, le Tribunal a déclaré la *Directive 06-01* nulle et sans

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[23] Pour plus d'information sur l'application de la *Politique* voir Ministère du Développement durable, de l'Environnement et des Parcs, *Politique Protection des rives, du littoral et des plaines inondables – Guide d'interprétation*, Québec, Gouvernement du Québec, 2007; Bouchard, *ibid*; Stéphane Sansfaçon, *ibid*; et Robert Daigneault, « Imprécision du concept de milieux humides », dans Service de la formation continue du Barreau du Québec, *Développements récents en droit de l'environnement*, vol. 300, Cowansville (Qc), Éditions Yvons Blais, 2009 [Daigneault].

[24] Art. 1, para 3 du *Règlement relatif à l'application de la Loi sur la qualité de l'environnement* : *Filion c Vallée-du-Richelieu (Municipalité régionale de comté de la)*, 2006 QCCA 385. Il faut néanmoins noter que les milieux humides, dans certaines circonstances, se trouvant sur le territoire identifié par la *Loi concernant la délimitation du domaine hydrique de l'État et la protection de milieux humides le long d'une partie de la rivière Richelieu*, LQ 2009, c 31, [*Loi 28*] sont automatiquement assujettis à l'art. 22, alinéa 2 de la *LQE* et ce nonobstant les dispositions législatives à l'effet contraire : voir les art. 17, 18 et 19 de cette *Loi 28*.

[25] La *Directive 06-01* est expliquée dans un fascicule : Ministère du Développement durable, de l'Environnement et des Parcs, *Une démarche équitable et transparente Traitement des demandes d'autorisation des projets dans les milieux humides*, Québec, Gouvernement du Québec, 2006. La Directive 06-01 est reproduite aux paras 97-98 du jugement de la Cour supérieure du Québec *Atocas de l'érable inc. c Québec (Procureur général) (Ministère du Développement durable, de l'Environnement et des Parcs)*, 2012 QCCS 912.

[26] Daniel Bouchard et Valérie Belle-Isle, « Les autorisations visant les lieux humides : la dissolution du droit », dans Service de la formation continue du Barreau du Québec, *Développements récents en droit de l'environnement*, vol. 352, Cowansville (Qc), Éditions Yvons Blais, 2012 aux p 279-282 [Bouchard et Belle-Isle]. « Les pertes inévitables de milieux humides doivent être compensées en respectant un ratio de compensation proportionnel à la valeur écologique des milieux humides détruits ou perturbés » : *Directive 06-01*.

[27] Bouchard, *supra* note 22 à la p 422.

[28] Voir Bouchard et Belle-Isle, *supra* note 26; et Daigneault, *supra* note 23.

effet puisque la directive, particulièrement en ce qui a trait à la compensation, n'avait aucune assise législative et contrevenait ainsi au droit de propriété.[29] Cette décision du juge Dallaire força le gouvernement québécois à adopter la *Loi concernant des mesures de compensation pour la réalisation de projets affectant un milieu humide ou hydrique* (ci-après *Loi 71*) au printemps 2012.[30]

La *Loi 71* ne fait que légitimer l'approche de la *Directive 06-01* en permettant au MDDEP d'exiger une compensation pour la dégradation d'un milieu humide comme condition d'obtention d'un certificat d'autorisation. La nouvelle loi codifie au Québec l'approche « gain net » en matière de milieux humides (« no net loss » en anglais), une approche utilisée par la *Politique fédérale* et par plusieurs États à travers le monde.[31] L'alinéa 2 de l'art. 2 de la *Loi 71* stipule qu'une « … mesure de compensation ne donne lieu à aucune indemnité. La mesure de compensation doit faire l'objet d'un engagement écrit du demandeur et elle est réputée faire partie des conditions de l'autorisation ou du certificat d'autorisation ». L'art. 3 donne un effet rétroactif à la loi en autorisant toutes mesures de compensations prévues pour la délivrance d'un certificat contractées avant son entrée en vigueur. La *Loi 71* ne prévoit aucune définition exhaustive de l'expression « milieux humides » et indique simplement qu'on entend par milieu humide un étang, un marais, un marécage ou une tourbière. [32] Il faut consulter le *Guide d'analyse des projets d'intervention dans les écosystèmes aquatiques, humides et riverains assujettis à l'article 22 de la Loi sur la qualité de l'environnement* du MDDEP pour obtenir plus de détails sur la composition et la délimitation des milieux humides.[33] Finalement, il faut lire la publication du MDDEP intitulée

[29] *Atocas de l'érable inc. c Québec (Procureur général) (Ministère du Développement durable, de l'Environnement et des Parcs)*, aux paras 137-150. Voir aussi les art. 947 et 952 du *Code civil du Québec*, LRQ, c C-1991;et l'art. 6 de la *Charte des droits et libertés de la personne*, LRQ, c C-12. Ce dernier stipule que « Toute personne a droit à la jouissance paisible et à la libre disposition de ses biens, sauf dans la mesure prévue par la loi » [soulignement ajouté].

[30] Voir les propos du Ministre du Développement durable, de l'Environnement et des Parcs de l'époque, M. Pierre Arcand, lors d'une audience de la Commission des transports et de l'environnement du 8 mai 2012 : http://www.assnat.qc.ca/fr/video-audio/AudioVideo-41691.html?support=video.

[31] Art. 2 et 3 de la *Loi concernant des mesures de compensation pour la réalisation de projets affectant un milieu humide ou hydrique*, LQ 2012, c 14 [*Loi 71*]. Voir Royal C. Gardner et al., *Avoiding, miti-gating, and compensating for loss and degradation of wetlands in national laws and policies*, Ramsar Scientific and Technical Briefing Note no. 3, Gland (Suisse), Secrétariat de la Convention de Ramsar, 2012. Voir Canada Country Report, *supra* note 3 pour plus de détails sur la *Politique fédérale*.

[32] Art. 1 de la *Loi 71*.

[33] Ministère du Développement durable, de l'Environnement et de Parcs, *Guide d'analyse des projets d'intervention dans les écosystèmes aquatiques, humides et riverains assujettis à l'article 22 de la Loi sur la qualité de l'environnement*, Québec, Gouvernement du Québec, 2011 aux sections 3 à 6 [MDDEP 2011]. Le guide offre une description de chaque type de milieux humides, ainsi que de l'information sur comment les identifier.

Les milieux humides et l'autorisation environnementale pour compléter le tableau.[34] Cette publication agit comme guide pour les demandes de certificat d'autorisation pour des projets touchant des milieux humides à l'intention des justiciables et des fonctionnaires du MDDEP.[35]

Un Regard vers le Futur : Améliorations Possibles du Régime de Protection des Milieux Humides

L'adoption de la *Loi 71* est venue colmater la brèche causée par la décision *Atocas de l'érable inc.* et a permis de sauvegarder le principe de gain net. Toutefois, cette législation de seulement six articles n'est pas l'idéal et fut critiquée sur plusieurs points durant son étude devant la Commission des transports et de l'environnement de l'Assemblée Nationale du Québec.[36] Ceci est dû au fait que la nouvelle loi est de nature transitoire. En fait, l'art. 2 de la *Loi 71* cessera d'avoir effet le 24 avril 2015, ce qui donne trois ans au gouvernement pour adopter une loi plus exhaustive sur le sujet.[37] Ceci crée l'opportunité pour les chercheurs et juristes s'intéressant aux milieux humides de participer au processus et d'influencer les politiques du gouvernement en la matière. Cette section du rapport se rapporte à deux des problèmes identifiés par les intervenants que le gouvernement devrait adresser dans sa future législation sur les milieux humides.

En premier lieu, il y a l'imprécision du concept de milieux humides. Il est clair, en lisant les critiques de certains auteurs, les Mémoires déposés devant la Commission et la jurisprudence, que le concept et ses sous-catégories d'étangs, marais, marécages et tourbières peuvent porter à confusion, qu'ils existent plusieurs définitions de ces termes et que la *Loi 71* n'ajoute aucune précision législative à ces termes.[38] Sans définition uniforme

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[34] MDDEP 2012, *supra* note 1. Voir aussi Ministère du Développement durable, de l'Environnement et des Parcs, *Guide d'élaboration d'un plan de conservation des milieux humides*, Québec, Gouvernement du Québec, 2008 [MDDEP 2008].

[35] Bouchard et Belle-Isle, *supra* note 26 aux p 285-290.

[36] Voir Assemblée Nationale du Québec, « Projet de loi n°71 : Loi concernant des mesures de compensation pour la réalisation de projets affectant un milieu humide ou hydrique » en ligne : www.assnat.qc.ca < http://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-71-39-2.html > visité le19 novembre 2012.

[37] Art. 5 de la *Loi 71*. Voir les propos du Ministre du Développement durable, de l'Environnement et des parcs, *supra* note 30.

[38] Bouchard et Belle-Isle, *supra* note 26; Daigneault, *supra* note 23; Mémoire du Centre québécois du droit de l'environnement; Mémoire de Nature Québec; Mémoire du Regroupement national des conseils régionaux de l'environnement du Québec; Mémoire de Réseau Environnement; lettre du Barreau du Québec; *9047-4784 Québec inc. c Béchard*, 2007 QCCS 710; *Québec (Procureur général) c Brais*, 2012 QCCS 1692; et *Financement et investissement des îles, société en commandite c Québec (Développement durable, Environnement et Parcs)*, 2009 QCTAQ 12462 confirmé par 2010 QCTAQ 10444. Les Mémoires sont disponibles sur Commission des transports et de l'environnement, « Mémoires déposés lors du mandat 'Consultations particulières sur le projet de

de ces termes, ou du moins sans précision législative sur la méthode à adopter pour identifier les différents milieux, il est difficile pour les citoyens de déterminer la présence ou l'étendu d'un milieu humide et pour le MDDEP de gérer efficacement les demandes d'autorisation. Les affaires *9047-4784 Québec inc. c Béchard* et *Québec (Procureur général) c Brais* exemplifient ce problème.[39] Dans *9047-4784 Québec inc. c Béchard*, la Cour avait à déterminer quels milieux sur un terrain particulier étaient des marécages au sens de l'art 22 de la *LQE* et donc assujettis à une ordonnance de restauration. Le juge, après avoir analysé plusieurs définitions, rejeta les définitions du MDDEP et de ses experts pour choisir une définition plus simple, soit celle retrouvée dans les dictionnaires. Dans *Québec (Procureur général) c Brais*, une affaire concernant une infraction à l'art. 22 de la *LQE*, alors que le Tribunal était appelé à déterminer la présence d'une tourbière, contrairement à l'affaire précédente, le juge adopta la définition trouvée dans les guides du MDDEP et proposée par les experts. Pourquoi est-ce que la Cour supérieure retient la définition du MDDEP dans une affaire et la rejette dans une autre? Essentiellement parce que la législation ne définit pas les milieux humides et il en revient donc aux parties, à chaque recours judiciaires, de démontrer au tribunal, preuve à l'appui, la présence d'un milieu humide.[40] Le gouvernement du Québec aurait donc intérêt à adopter une définition claire et informée englobant l'ensemble des milieux humides et ainsi éviter la situation de l'affaire *9047-4784 Québec inc. c Béchard* où un type de marécage, le marécage forestier sur tourbe, est exclu du champ d'application de l'art. 22, alinéa 2 de la *LQE* par la définition du mot marécage adoptée par la Cour.[41]

En deuxième lieu, il y a l'étendue du pouvoir discrétionnaire du MDDEP pour l'émission d'un certificat d'autorisation. L'art. 22 de la *LQE* ne prévoit aucun encadrement du pouvoir du Ministre du Développement durable, de l'Environnement et des Parcs. Ce pouvoir, en matière de milieux humides, n'est que limité par les exclusions du *Règlement relatif à*

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loi n° 71' » en ligne : www.assnat.qc.ca < http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CTE/mandats/Mandat-18403/memoires-deposes.html > visité le 19 novembre 2012. La lettre du Barreau du Québec est disponible sur Commission des transports et de l'environnement, « Documents déposés lors du mandat 'Étude détaillée du projet de loi n° 71, Loi concernant des mesures de compensation pour la réalisation de projets affectant un milieu humide ou hydrique' » en ligne : www.assnat.qc.ca < http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CTE/mandats/Mandat-18535/documents-deposes.html > visité le 19 novembre 2012. Par exemple, les guides MDDEP 2012, *supra* note 1; MDDEP 2011, *supra* note 33; MDDEP 2008, *supra* note 34 offrent tous des descriptions différentes. Pour ajouter à la confusion, la *Politique fédérale* et la *Convention de Ramsar* offrent des définitions supplémentaires.

[39] *9047-4784 Québec inc. c Béchard*, 2007 QCCS 710; et *Québec (Procureur général) c Brais*, 2012 QCCS 1692.

[40] *Financement et investissement des îles, société en commandite c Québec (Développement durable, Environnement et Parcs)*, 2010 QCTAQ 10444 au para 28.

[41] Mémoire du Centre québécois du droit de l'environnement aux p 13-14; Mémoire de Nature Québec aux p 6-7; et Mémoire du Regroupement national des conseils régionaux de l'environnement du Québec à la p 5.

l'application de la Loi sur la qualité de l'environnement. Tous les détails du régime de protection des milieux humides se retrouvent dans les différents guides du MDDEP.[42] La *Loi 71* ne vient pas encadrer davantage le pouvoir du Ministre et il est même possible d'affirmer qu'elle a un effet contraire en confirmant sa capacité d'exiger des mesures de compensation ne menant à aucune forme d'indemnité.[43] Ceci a amené les intervenants à s'inquiéter des dérives possibles du MDDEP, tant au niveau de l'imposition d'obligations trop lourdes aux citoyens qu'au niveau de la facilité d'obtention d'un certificat d'autorisation.[44] En fait, c'est justement cette propension à procéder à la gestion des milieux humides par voie de documents administratifs qui a engendré l'annulation de la *Directive 06-01* par le Tribunal et par la suite l'adoption en catastrophe de la *Loi 71.*[45] Le Ministre ne peut tout simplement pas légiférer par l'entremise de directives administratives.[46] Comme l'indiquent M[e] Bouchard et M[e] Belle-Isle:

> Nous reconnaissons que, dans l'exercice de son pouvoir discrétionnaire, le ministre peut adopter des politiques ou des guides qui ont pour objectif de mieux circonscrire l'usage de son pouvoir discrétionnaire. Cela permet à la fois d'assurer une certaine cohérence entre les décisions prises par le ministre et d'éclairer les justiciables afin qu'ils puissent appréhender l'orientation que prendra le ministre.
>
> Cela dit, il demeure douteux d'avoir recours à un guide pour définir des termes attributifs de compétence considérant les conséquences que le non-respect de l'article 22 alinéa 2 L.Q.E. pourraient avoir pour un administré.[47]

Le régime actuel de protection des milieux humides dépend trop du bon vouloir du Ministre d'émettre ou non une autorisation, sous réserve des règles du droit administratif. Il semble cependant évident que des écosystèmes aussi importants que les milieux humides méritent

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[42] Daniel Bouchard et Valérie Belle-Isle, *supra* note 26 à la p 273.
[43] Il faut cependant noter que ce genre d'obligation nécessaire à la protection de l'environnement ne constitue pas un pas une expropriation déguisée : *Abitibi (Municipalité régionale de comté d') c Ibitiba ltée*, [1993] RJQ 1061 (QCCA).
[44] Daniel Bouchard et Valérie Belle-Isle, *ibid*; Mémoire du Conseil patronal de l'environnement du Québec; Mémoire du Centre québécois du droit de l'environnement aux p 8-9; Mémoire du Regroupement des organismes de bassins versants du Québec à la p 6; et Mémoire de Nature Québec.
[45] *Atocas de l'érable inc.*; Bouchard et Belle-Isle, *ibid* aux p 302-303; et Mémoire de Nature Québec à la p 10.
[46] Voir Bouchard et Belle-Isle, *ibid* aux p 295-302; Jean Piette, « L'usage des politiques, des directives et des guides en droit de l'environnement », dans Service de la formation continue du Barreau du Québec, *Développements récents en droit de l'environnement*, vol. 270, Cowansville (QC), Éditions Yvon Blais, 2007; et Pierre Issalys et Denis Lemieux, *L'action gouvernementale – Précis de droit des institutions administratives*, 3[e] éd., Cowansville (QC), Éditions Yvon Blais, 2009 aux p 104-119 et 219-228.
[47] Bouchard et Belle-Isle, *ibid* aux p 309-310.

une protection à long terme robuste et basée sur la science.[48] Le Ministre aurait donc intérêt à adopter un cadre législatif compréhensif pour les milieux humides et ainsi éliminer toutes incertitudes quant à l'application du régime et éviter d'autres vides juridiques causés par l'invalidation d'une directive du MDDEP.

Malgré les promesses du MDDEP, une politique complète sur la protection et la gestion des milieux humides se fait toujours attendre. Cependant, la *Loi 71* prévoit un délai de trois ans pour forcer le Ministre à tenir sa promesse de longue date.[49] Il en résulte une opportunité pour le milieu académique de s'impliquer dans la création et l'adoption du nouveau régime. Outre les connaissances scientifiques nécessaires,[50] le gouvernement du Québec bénéficierait certainement de l'expertise des différents experts en droit pour établir quel régime juridique serait le plus efficace pour protéger et gérer les milieux humides de la province. Une piste de recherche supplémentaire serait d'examiner les bénéfices et les moyens pour harmoniser les différentes stratégies et politiques de protections des milieux humides au niveau national et international. L'Académie du droit de l'environnement de l'UICN et ses membres, vu le réseau créé par cette organisation, se trouvent dans la position idéale pour accomplir ces recherches et faire avancer le droit. Il ne reste qu'à espérer que le gouvernement de l'heure soit animé d'un réel désir de réforme.

[48] Mémoire de Nature Québec.
[49] Mémoire de Nature Québec à la p 8.
[50] Le Ministre du Développement durable, de l'Environnement et des Parcs a déjà commandé des études de groupes universitaires sur l'état des milieux humides au Québec. Voir les propos du Ministre *supra* note 30 vers 16h30.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA
Grain Law (Exposure Draft) and China's Regulation on Genetically Modified Food Supplies

JINGJING ZHAO*

Introduction

Genetically Modified Organisms (GMOs) are the results of modern biotechnology. GMOs impact on human society along a multidimensional scale and trigger health and safety concerns, economic consequences, and social and cultural concerns. GMOs have made contributions to agriculture, pharmaceuticals, energy and so on. However, on the other hand, they are claimed to represent significant risks to the environment, human and animal life and health, and food safety. Although there is no definitive scientific evidence that GMOs are harmful, there are widespread concerns that the transboundary movement of GMOs and their environmental release might have adverse effects on biological diversity, human health and the environment in the countries of import.[1]

China is a significant importer of soybean and maize, a large portion of which is GM products. According to the General Administration of Customs, the country imported 48,340,000 tons of soybeans[2] and 250,165 tons of maize[3] for the first ten months of 2012, respectively an increase of 16.6 per cent and 89.4 per cent over the counterpart figures in 2011. In order to meet the needs of more than 1.3 billion people, the Chinese Government has assigned a high priority to agriculture and crop biotechnology. It has made significant investment on the development of GM products. By the end of 2011, China has commercialized: Bt Coton, Bt Poplar, PRSV Papaya, VR Sweet Pepper, and DR, VR Tomato. In 2011, the total area under biotech crops increased by 11 per cent and reached 3.9 million hectares.[4]

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[1] *Cartagena Protocol on Biosafety*, Preamble.
[2] See http://www.customs.gov.cn/publish/portal0/tab400/module15677/info396980.htm.
[3] See http://www.customs.gov.cn/publish/portal0/tab400/module15677/info396979.htm.
[4] C. James, ISAAA Brief 43-2011, *Global Status of Commercialized Biotech/GM Crops: 2011* (2011, ISAAA), 93.

China's Regulation on Agricultural GMOs and GM Food Supplies

China has established a case-by-case domestic regulatory and administrative system for the regulation of GMOs.[5] In 1993, the Ministry of Science and Technology issued the first biosafety regulation in China: *Measures for Safety Administration of Genetic Engineering*. This regulation was replaced by the *Regulation on the Safety Administration of Agricultural GMOs* in 2001. According to its article 2, this Regulation applies to all activities relating to the research, experiment, production, process, operation, import, and export of agricultural GMOs in China. The 2001 Regulation contains general rules on biosafety and designated the Ministry of Agriculture (MOA) as the primary competent authority to oversee biosafety regulations on agricultural GMOs.

The Ministry of Agriculture has issued *Measures for the Administration of the Safety Assessment of Agricultural Genetically Modified Organisms* (2002), which require risk assessments to be undertaken for the research, experiment, production, process, operation, import, and export of agricultural GMOs. They set out the mechanism for the safety assessment of agricultural GMOs, including classification standards and assessment processes. The *Measures for the Administration of the Safe Import of Agricultural Genetically Modified Organisms* (2002) regulate the import administration of agricultural GMOs. The *Measures for the Administration of the Labelling of Agricultural Genetically Modified Organisms* (2002) implement a mandatory labelling scheme for agricultural and the *Measures for the Examination and Approval of the Processing of Agricultural GMOs* (2006) mandate that all domestic processing of agricultural GMOs requires a Processing Permit issued by MOA. In addition, the General Administration of Customs of the People's Republic of China promulgated the *Measures for the Administration of the Inspection and Quarantine of Genetically Modified Products Entering and Exiting the Territory* in 2006. The decree applies to the inspection and quarantine of GMOs in all forms of trade, exchange, donation, post, exhibition, and so on. It also establishes a system of permits for the movement of agricultural GMOs.[6]

[5] UNEP-GEF Biosafety Unit, *Guidance Towards Implementation of National Biosafety Frameworks: Lessons Learned from the UNEP Demonstration Projects* (April 2008), 6.
[6] *Measures for the Administration on the Inspection and Quarantine of the Genetically Modified Products Entering and Exiting the Territory*, article 5.

The New Grain Law (Exposure Draft) and China's Most Recent Concerns on GMOs at the International Arena

China is a member state of the *Cartagena Protocol on Biosafety* governing the transboundary movement of GMOs. The Protocol entered into force on 11 September 2003, and has 164 member parties. From 1 to 5 October 2012, the sixth meeting of the Conference of the Parties (COP) to the *Convention on Biological Diversity* (CBD) serving as the Meeting of the Parties to the *Cartagena Protocol on Biosafety* (COP-MOP 6) was held in Hyderabad, India. COP-MOP 6 addressed substantive issues, including: risk assessment and risk management; socio-economic considerations; capacity building; handling, transport, packaging and identification of GMOs; notification requirements; unintentional transboundary movements and emergency measures; monitoring and reporting; the second assessment and review of the Protocol's effectiveness; the Biosafety Clearing-House; financial resources and mechanism; cooperation with other organizations, conventions and initiatives; and the status of the *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress*.

Fifteen Chinese delegates participated from the Ministry of Environmental Protection, Ministry of Agriculture, State Council, State Forestry Administration, Chinese Academy of Inspection and Quarantine, China Academy of Science, Chinese Research Academy of Environmental Sciences, and Hong Kong Special Administration Region. The Chinese delegates were most concerned with risk assessment and risk management. The core of the *Cartagena Protocol* is the advance informed agreement procedure (the AIA procedure) that must precede the first intentional transboundary movement of GMOs intended for introduction into the environment. Under the AIA procedure, importing countries have the rights not to import GMOs intended for releasing into the environment without their prior consent; or to ban or restrict the import of GMOs based on a risk assessment which takes into account biodiversity and human health. The foundation of the AIA procedure is that importing countries should ensure that their informed decisions regarding GMOs intended for release into the environment are based on a risk assessment which is carried out in a scientifically sound manner. The Protocol sets out basic requirements on risk assessment and risk management in articles 15, 16 and Annex III. In addition, the parties to the Protocol are endeavouring to develop detailed guidance on risk assessment and risk management.

In COP-MOP 4, the parties to the Protocol established an Ad Hoc Technical Expert Group (AHTEG) on Risk Assessment and Risk Management, in order to develop further guidance

on specific aspects of risk assessment and risk management.[7] With the input from the Open-Ended Online Expert Forum, the fourth meeting of the AHTEG developed a revised version of the Guidance on Risk Assessment of Living Modified Organisms (the *Guidance*)[8] which was discussed by the parties during the COP-MOP 6 meeting. The Guidance was designed to assist Parties and other Governments in implementing relevant provisions on risk assessment.[9] Delegates in Working Group Two of the COP-MOP 6 considered risk assessment and risk management and the revised version of the *Guidance*.[10] Discussions focused on extending the mandate of the Ad hoc Technical Expert Group (AHTEG) on risk assessment and the open-ended online forum, and whether to endorse the *Guidance*. China, together with the EU, the African Group, CEE, Norway, and Colombia, supported the endorsement of the *Guidance* and continuation of the AHTEG and the open-ended online forum. Brazil, New Zealand, India, Ecuador, South Africa and the Philippines insisted that the *Guidance* ought not to be endorsed without further testing and refining. At the end of the meeting, the COP-MOP 6 decided not to endorse the *Guidance on Risk Assessment of LMOs*, but to 'commend' the progress made on developing the *Guidance*. The delegates recognized the *Guidance* as not imposing any obligations on parties. The parties decided that the *Guidance* will be tested nationally and regionally, the mandate of the open-ended online forum will be extended, and a new AHTEG will be established.[11]

At the domestic level, on 21 February 2012, the Legislative Affairs Office of the State Council published the *Grain Law (Exposure Draft*), and invited public comment on it before 31 March 2012. The drafting process of the *Grain Law* was led by the National Development and Reform Commission, executed by the State Administration of Grain, and supported by the Ministry of Agriculture and Ministry of Health. On 3 November 2012, officials from the Law Committee and the Agriculture and Rural Affairs Committee of the Standing Committee of National People's Congress visited the State Administration of Grain, to consult on the drafting of the *Grain Law*.[12] It is likely that the *Grain Law* will be included in the working plan on law reform of the National People's Congress in 2013. If adopted, the *Grain Law* will be the first Chinese legislation on food supplies and food safety endorsed by the National People's Congress in the format of law.

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[7] COP-MOP 4 Decision: BS-IV/11 Risk Assessment and Risk Management.
[8] COP-MOP6 Meeting Documents, Guidance on Risk Assessment of Living Modified Organisms, UNEP/CBD/BS/COP-MOP/6/13/Add.1 (available at: http://www.cbd.int/doc/meetings/bs/mop-06/official/mop-06-13-add1-en.pdf).
[9] Ibid, 8.
[10] UNEP/CBD/BS/COP-MOP/6/13/Rev.1 and 13/Add.1 (available at http://bch.cbd.int/protocol/meetings/documents.shtml?eventid=4715).
[11] COP-MOP6 Decisions, BS-VI/12. Risk assessment and risk management (articles 15 and 16) (available at http://www.cbd.int/doc/meetings/bs/mop-06/official/mop-06-18-en.pdf).
[12] See http://www.gov.cn/gzdt/2012-11/13/content_2264178.htm.

Article 12(2) and article 15 of the draft *Grain Law* are relevant to the domestic regulation on agricultural GMOs. Article 12(2) of the draft *Grain Law* states that: “The research, experiment, production, sales, import and export of genetically modified grain seeds must comply with relevant national regulations. No organisations or individuals are allowed to utilize GM technology for the main commercially produced types of grain without authorization”. This provision, together with other provisions of the draft, has caused significant discussion, debates, and critics. Article 12(2) provides general guidelines and indicators which are vague. It does not provide the detailed regulation of agricultural GMOs that was expected by some commentators.

Article 12(2) simply requires relevant processes to be based on existing national regulations. It does not add any new elements to the regulation. It is likely that “relevant national regulations” refers only to earlier government decrees, including the 2001 *Regulation on the Safety Administration of Agricultural GMOs*, and the implementation regulations issued by the Ministry of Agriculture and the General Administration of Customs. In China, laws issued by the National People’s Congress, such as the proposed *Grain Law*, are superior to regulations decreed by the State Council, such as the 2001 Regulation. Laws take precedence over regulations when they conflict. The wording of article 12(2) seems to reaffirm the authority of existing regulations governing agricultural GMOs. The second sentence of article 12(2) has also attracted debate as the public are concerned with the potential risk caused by GMOs. This provision forbids unauthorized utilization of GM technology on the main commercial grain breeds, and seems to leave non-mainstream grain breeds unregulated. There exists the potential that GM technology in non-mainstream grain breeds may also cause damage to the environment or to human health and safety.

Article 15 of the *Grain Law (Exposure Draft)* states that: “the country encourages and supports research, innovation, protection, and utilisation of new production methods of grains, in order to increase the per unit area yield level and quality of grains”. There is no doubt that GM technology is a significant agricultural innovation which can contribute to the increase of per unit area yield level and quality of grains. The Chinese Government has made significant investments in the development of GM technology. Article 15 seems to indicate that China will continue its investment in biotechnology and agricultural GMOs to meet the needs of its population.

On 30 December 2011, the Ministry of Agriculture announced the *Twelfth Five-Year-Plan on the Development of Agricultural Technology*,[13] and decided to carry on developing GM technology, whilst implementing risk assessment and monitoring of GMOs, and revising and improving the laws on GMOs. On 1 February 2012, the Chinese Communist Party Central Committee and the State Council published its 'Number One Central Document', *Suggestions on Accelerating Agricultural Science and Technology Innovation to Continuously Improve and Ensure Adequate Supplies of Agricultural Products*. The document announced that the country will continue its efforts on developing technology in the fostering new species of GMOs.[14]

Conclusion

China has established a case-by-case domestic regulatory and administrative system for regulating GMOs. The Chinese Government regulates agricultural GMOs through government decrees. China is yet to develop a sophisticated biosafety regulation framework to balance economic development and environmental, human health, and food safety protection. A sophisticated 'Transgenic Biosafety Law' has been drafted but has not been adopted. The proposed *Grain Law* will serve to regulate agricultural GMOs. The exposure draft of the *Grain Law* seems to be too simple and vague. It does not provide detailed new requirements on the regulation of agricultural GMOs. It leaves the utilization of GM technology on non-mainstream grain breeds unregulated. However, the *Grain Law (Exposure Draft)* does reaffirm the authority of existing regulations. Together with other evidence, the proposed *Grain Law* indicates that China will continue its efforts to develop GM biotechnology and agricultural GMOs.

[13] Available at http://www.moa.gov.cn/zwllm/zcfg/nybgz/201112/t20111231_2449779.htm.
[14] *Suggestions on Accelerating Agricultural Science and Technology Innovation to Continuously Improve and Ensure Adequate Supplies of Agricultural Products*, paragraph 9 (available at http://www.gov.cn/jrzg/2012-02/01/content_2056357.htm).

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA
The Introduction of Carbon Markets in China

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Abstract

In its *12th Five-year Plan of National Economical and Social Development*, the Chinese Government has explicitly adopted the use of market mechanisms in the field of climate change. The market mechanism is relatively new in China. This Country Report analyzes the initiative to develop a carbon emission trading market in China in the context of the *12th Five-year Plan*. The Report mainly focuses on the implementation of the pilot program called '6+1', proposed by the NDRC, which aims to establish the local carbon markets during the period of the *12th Five-year Plan*. Despite the progress at local level and the announcement by the Chinese Central Government regarding the establishment of a national carbon market by the beginning of 2016, there still exist uncertainties regarding the future of the carbon market in China.

Country Report

Dans son 12ème plan quinquennal de développement économique et social, adopté en octobre 2011, la Chine, comme le plus grand émetteur de gaz à effet de serre (GES) dans le monde, a pour la première fois inclus explicitement la question de la lutte contre le changement climatique en créant une section distincte sur « la réponse au changement climatique » et en indiquant clairement des objectifs de conservation de l'énergie et de réduction des émissions des GES.[1]

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[1] Le 12ème plan quinquennal a fixé des objectifs énergie-climat pour 2015 cohérents avec les objectifs 2020 auxquels s'est engagée la Chine au plan international à la suite du sommet de Copenhague en décembre 2009: i-Une diminution de 16% de la consommation d'énergie par unité du PIB d'ici 2015 par rapport à 2005, qui doit permettre de mettre le pays sur la voie de son engagement international de réduire l'intensité en CO_2 de l'économie de 40 à 45% en 2020 par rapport à 2005; ii-Une diminution de 17% des émissions de CO_2 par unité de PIB. L'objectif annoncé au plan

Dans le domaine environnementaél, la Chine n'est pas étrangère à l'utilisation d'instruments du marché pour la gestion de l'environnement. Dès 1999, la Chine a introduit un système d'échange des émissions de polluants atmosphériques (SO_2), qui s'est concrétisé en 2002 par l'instauration officielle de territoires pilotes[2]. Après près d'une décennie de tentatives, la Chine a annoncé dans son 12ème plan quinquennal l'application de cette démarche à des marchés réglementaires pour les émissions de gaz à effet de serre au plan local. L'objectif est la mise en place d'un marché du carbone au niveau national d'ici 2016. En novembre 2011, *NDRC(National Development and Reform Commision)* a ainsi officiellement annoncé le démarrage d'un projet pilote de marché du carbone dans 7 provinces et villes (projet pilote '6+1'). En parallèle, la Chine assure également la promotion du marché volontaire.

Innitiation De Marché Du Carbone en Chine

Le marché du carbone en Chine repose actuellement principalement sur deux volets: les projets de mécanismes de développement propre (MDP) et le marché de compensation volontaire.

Les Projets de Mécanismes de Développement Propre (MDP)

Le gouvernement chinois a approuvé le document « Mesures sur la gestion des projets de MDP » en 2005. Depuis lors, la Chine est rapidement devenue le plus grand fournisseur de crédits de carbone[3] du MDP dans le monde.[4]

Les projets de MDP servent de canal positif pour introduire le concept et la pratique de marché du carbone en Chine. Le MDP a permis de structurer une administration pour enregistrer les projets et mieux connaître les potentiels de réduction des émissions.

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international, corrélé mais non directement relié, est d'atteindre une part des combustibles non fossiles dans la consommation d'énergie primaire d'environ 15% d'ici 2020.

[2] En 2002, le Bureau national de protection de l'environnement (le prédécesseur du Ministère de l'environnement) a approuvé la participation de Shandong, Shanxi, Jiangsu, Shanghai, Tianjin et Liuzhou (province du Guangxi) comme provinces ou villes pilotes pour les échanges d'émissions de SO2. Voir Journal.

[3] Un crédit de carbone est une unité correspondant à une tonne d'équivalent CO_2 (dioxyde de carbone) sur les marchés du carbone. Il permet à son détenteur d'émettre davantage de gaz à effet de serre (par rapport au taux en vigueur fixé par le Protocole de Kyoto). Ils sont attribués aux Etats ou aux entreprises qui participent à la réduction des émissions de gaz à effet de serre.

[4] En juin 2012, NDRC avait approuvé 4 368 projets de MDP. Les projets sont principalement axés sur l'énergie renouvelable, l'économie d'énergie, etc. Un total de 2 162 projets ont été enregistrés par le Conseil exécutif du EB (Executive Board), ce qui représente 49 % de projets enregistrés du monde. (http;//cdm,ccchina,gov,cn/web/main,asp?Columnld=18).

Le Marché de Compensation Volontaire

Le développement du marché de compensation volontaire a permis au gouvernement et aux entreprises de se familiariser à l'utilisation d'un mécanisme de marché, notamment en matière du système de MRV (Mesure, reporting et vérification des émissions). Sont utilisées à la fois des normes internationales (VCS, Gold Standard, Social Carbon, etc.) et des normes nationales, développées par exemple par le China Beijing Environmental Exchange (CBEEX) ou le Shanghai Environment Exchange.

Le marché d'échange volontaire de réductions d'émissions est dorénavant réglementé par le document « Mesures pour la gestion des transactions volontaires de réduction des émissions de GES », publié le 21 juin 2012. Il inclut les six GES du protocole de Kyoto et propose une liste d'entreprises détenues par l'Etat central qui peuvent directement proposer des projets de réduction d'émissions à la NDRC.

Un point intéressant de ce document est le terme employé de « VER chinois » qui correspond à des crédits carbone volontaires issus de réductions d'émissions vérifiées et certifiées par un organisme national désigné par le gouvernement chinois au travers de la NDRC. Deux types de projets peuvent ainsi demander la certification:

- des projets développés selon une méthodologie du Mécanisme pour un développement propre (MDP) encadré par les Nations-Unies. Le gouvernement chinois cherche ainsi à maintenir les incitations au développement de projets de réduction d'émission de type MDP, alors que la demande internationale n'est plus suffisante, y compris en permettant la délivrance de crédits à des projets non enregistrés par la CCNUCC. Les crédits délivrés sont appelés « Chinese CER » (CCER).
- des projets développés selon une méthodologie proposée par la NDRC (mais aucune n'a encore été publiée).

Le marché volontaire du carbone en Chine se caractérise ainsi par un fort encadrement administratif avec une autorité chargée au niveau national de vérifier et certifier les réductions d'émissions de GES. Par ailleurs la NDRC est également habilitée à autoriser les plateformes d'échange qui souhaitent proposer des transactions de crédits volontaires. L'objectif avoué est d'assurer une harmonisation des normes de réduction d'émissions et

d'éviter la prolifération des plateformes d'échanges, de manière à favoriser la lisibilité de ce marché.

Deux questions se posent pour ce marché. D'abord celle de la demande : sans incitations appropriées, la demande du marché risque de rester relativement limitée. La deuxième concerne la réduction des émissions de GES et leur intégration dans les dispositifs juridiques et fiscaux existants : les entreprises qui réalisent des réductions volontaires de leurs émissions peuvent-elles profiter d'incitations fiscales ou de subventions ? Les VER peuvent-ils compenser les émissions de GES sur un marché réglementaire d'échange de quotas ? Les réponses à ces questions se font attendre.

Mise en Oeuvre Du Programme '6+1': Les Marchés Réglementaires D'échange de Quotas au Niveau Territorial

L'utilisation de dispositifs pilotes est fréquente dans le processus de formulation des politiques chinoises. Les programmes pilotes permettent aux gouvernements locaux d'explorer une variété de solutions pour un problème spécifique en les adaptant aux conditions locales, les retours d'expérience réussis étant ensuite intégrés dans la généralisation de la politique au niveau national. Cette méthode de travail est dite « du point au plan ». Néanmoins par l'ampleur du territoire chinois et des différences régionales qu'il implique, la réussite ultime d'une telle politique dépend en grande partie du bon choix des territoires pilotes. En pratique ce sont les ramifications locales de la NDRC qui sont chargées de mettre en place les systèmes pilotes, en étroite collaboration avec les instituts de recherches et les plateformes d'échange d'ores et déjà en place.

Le Choix des Territoires Pilotes: 6 Provinces ou Municipalités et Une Ville

Le choix des territoires pilotes pour la mise en œuvre d'un marché d'échange de quotas est le résultat d'une combinaison de plusieurs considérations, incluant le niveau de développement économique, la situation géographique, la politique énergétique, le statut des émissions de GES, les facteurs humains, etc.

Parmi les sept territoires pilotes retenus pour la mise en place de marchés du carbone pilotes, Beijing, Tianjin et Shanghai ont toujours été au premier rang des politiques climatiques. En 2008, les trois municipalités ont lancé successivement une plateforme d'échange en matière d'environnement, d'énergie et de climat, avec leurs propres caractéristiques. A ce jour toutes les trois ont soumis leurs projets de marché d'échange de

quotas à la NDRC. La première d'entre elles était Beijing, qui dispose de données relativement complètes concernant les émissions de GES des entreprises de son territoire. Par sa diversité industrielle, Shanghai a été confrontée à l'étude de nombreux dispositifs de mesure et de contrôle des émissions de GES, qui pourraient constituer une expérience précieuse pour l'ensemble du pays par la suite.

Guangdong est également une province à forte activité industrielle et dont les objectifs d'intensité énergétique et d'intensité du carbone sont parmi les plus ambitieux pour la période 2012-2015, et même supérieurs aux objectifs nationaux. En 2009, la plateforme d'échange Guangzhou Environment and Resources Exchange a été lancée. Guangdong a établit la première plateforme en Chine consacrée spécialement au marché d'échange de réduction volontaires des émissions de GES et au marché d'échange de quotas, sous le nom de Guangzhou Carbon Trading Exchange en Septembre 2012[5]. Au sein de la province de Guangdong, Shenzhen est une zone pilote spéciale qui profite de politiques préférentielles, avec davantage d'autonomie et de flexibilité pour son développement économique. Elle bénéficie par ailleurs de la proximité de Hongkong et Macao. Son intensité énergétique est déjà presque deux fois plus faible que la moyenne nationale, ses unités d'émissions ont une taille relativement faible et sont plus dispersées que pour les autres territoires.

Hubei et Chongqing sont les territoires pilotes qui représentent respectivement la région centrale et la région de l'ouest de la Chine6. Leur niveau de développement économique et d'activité de l'économie de marché étant relativement bas, leurs avancées en matière de marché d'échange de quotas sont plus lentes. Pour autant leur réussite sera cruciale pour favoriser l'intégration de la région de l'ouest dans le futur marché national unifié.

[5] Source: http://www.canfair.com/guangzhou-kicks-off-carbon-emission-rights-trading-exchange/
[6] Depuis le 7ème plan quinquennal, la Chine continentale est divisée en trois zones en fonction du niveau de développement économique et de la situation géographique. La région de l'est est économiquement la plus développée et la région de l'ouest est la moins développée. Parmi les sept territoires pilotes, seuls Hubei (région centrale) et Chongqing (région de l'ouest) n'appartiennent pas à la région de l'est.

Tableau 1- Objectifs énergie-climat et état de la législation pour la mise en place des marchés du carbone dans chaque territoire pilote

	Shanghai	Beijing	Tianjin	Guangdong	Hubei	Chongqing	Shenzhen (ville)
Objectifs de réduction 2015 par rapport à 2005 : Consommation d'énergie par unité de PIB	-18 %	-17 %	-18 %	-18 %	-16 %	-16 %	-19 %
Objectifs de réduction 2015 par rapport à 2005 : Emissions de CO_2 par unité de PIB	-19 %	-18 %	-19,5 %	-19,5 %	-17 %	-17 %	-18 %
Etape de législation	Proposition publiée le 3 juillet 2012, règlement prévu fin 2012	Règlement au approuvé par NDRC, adoption prévue en 2013	Projet de règlement au cours d'examen par *NDRC.*	Règlement publié en septembre 2012	Projet de règlement en cours d'examen par le gouvernement de la province	Plan de travail publié le 27 avril 2012	Projet de règlement au cours d'examen par l'assemblée locale de Shenzhen.

Source: Plans de travail détaillés du 12ème plan quinquennal en matière de conservation de l'énergie et de réduction d'émission et de contrôle des émissions de GES.

Les Choix Des Périmètre

La plupart des marchés du carbone pilotes devraient couvrir les émissions de CO2 directes, issues des secteurs de la production de l'énergie et des industries les plus émettrices, ainsi que les émissions de CO2 indirectes liées à la consommation d'électricité. Ce périmètre très élargi est une première pour un système d'échange de quotas (à l'exception de la Californie qui considère aussi les émissions de CO2 de l'électricité consommée lorsque celle-ci est importée dans l'Etat) et reflète le poids important de leurs objectifs en matière de conservation de l'énergie.

Les seuils d'inclusion des entreprises couvertes varient entre 10 000 et 20 000 tCO2 par an. La répartition sectorielle reflète l'importance des différents secteurs industriels selon les territoires considérés.

La deuxième caractéristique innovante des marchés du carbone pilotes est de placer le point de contrôle non pas sur des installations industrielles mais sur des entreprises ou personnes morales. Ce choix peut poser problème en pratique lorsque des gouvernements locaux doivent intégrer dans leurs marchés du carbone des entreprises « nationales » (i.e.

que l'Etat chinois détient pour tout ou partie) sur lesquelles leur contrôle pourrait être affaibli. Or les entreprises nationales occupent des positions monopolistiques dans des secteurs très émetteurs comme le pétrole, l'électricité, l'industrie chimique, la métallurgie, etc. Un manque de régulation des entreprises nationales pourrait ainsi réduire considérablement l'effet de la mise en œuvre du mécanisme du marché.

Tableau 2- Objectifs énergie-climat et état de législation pour la mise en place des marchés du carbone dans chaque territoire pilote en décembre 2012

		Shanghai	Beijing	Tianjin	Guangdong	Hubei	Chongqing	Shenzhen (ville)
Plafond		?	?	?	277 $MtCO_2$ en 2015 (42 % de l'objectif d'émission provincial)	153 $MtCO_2$ en 2015 (35 % de l'objectif d'émission provincial)	?	100 $MtCO_2$ par an
Période(s)		1 : 2013-2015	2013-2015	2013- ?	1 : S2 2013-2015 2 : 2016-2020. 3 : 2020- ?	2013-	2013-	1 : 2013-2015
Couverture	Gaz	CO_2 direct et indirect	CO_2 direct et indirect	CO_2	CO_2	CO_2	?	CO_2
	Secteurs et entreprises	• Secteurs industriels (acier, pétrochimie, chimie, métaux non ferreux, électricité, construction, textiles, papier, caoutchouc) : entreprises aux émissions 2010 ou 2011 supérieures à 20 000 tCO_2 • Secteurs non industriels (aviation, tertiaire, finances, etc.) : entreprises aux émissions 2010 ou 2011 supérieures à 10 000 tCO_2	• Secteurs industriels et tertiaires (non exhaustif : électricité, acier, chimie, bâtiment public). • Entreprises dont les émissions annuelles de 2009 à 2011 ont dépassé 10 000 tonnes par an.	• 5 secteurs (non détaillé). • Entreprises dont la consommation annuelle d'énergie dépasse 10 000 tce	• Secteurs industriels (production d'électricité, fer et acier, céramique, pétrochimie, production textile, métaux non ferreux, plastiques, papier). • Entreprises dont les émissions annuelles dépassent 20 000 tCO_2 (ou la consommation d'énergie dépasse 10 000 tce pendant une des années entre 2011 - 2014	• Secteurs industriels (possibles : papier, fer et acier, chimie, ciment, métaux non ferreux et verre). • Entreprises dont la consomma-tion annuelle d'énergie dépasse 80 000 tce	• Secteurs industriels (aluminium électrolytique, ferroalliage, hydrocarbures, ciment, soude caustique, fer acier). • Entreprises dont les émissions annuelles dépassent 20 000 tCO_2	26 secteurs, 800 entreprises incluses (non détaillé)
	Portée	200 entreprises de 16 secteurs. = environ 110 $MtCO_2$, = 50 % des émissions	400-500 entreprises incluses.	Plus de 100 entreprises incluses. = 60 % des émissions totales.	827 entreprises = 63 % de la consomma-tion d'énergie de l'industrie. = 42 % de la consomma-tion d'énergie	Env. 107 entreprises = 35 % des émissions	?	= 54 % des émissions de 2010.

Note: le CO_2 indirect correspond aux émissions liées à la production de l'électricité consommée. Tce = tonne de charbon équivalent.

Sources: Proposition de mise en place d'un marché d'échange d'émissions de carbone par le gouvernement de Shanghai, projets de règlement pour la mise en place d'un marché d'échange d'émissions de carbone du gouvernement de Beijing et du gouvernement de Tianjin, règlement du gouvernement local pour la mise en place d'un marché d'échange d'émissions de carbone dans la province du Guangdong, conférence de presse de la commission de développement et de réforme de Chongqing du 26 avril 2012 (http://news.steelcn.com/a/95/20120427/406328EAFB43EB.html), Li M.Y. (2012, projet de régulation du marché du carbone de la province du Hubei, Point Carbon du 11 septembre 2012.

Allocation et Conformité

Les caractéristiques des systèmes pilotes en matière d'allocation et de fonctionnement des marchés du carbone sont relativement proches. La plupart prévoient d'allouer gratuitement les quotas sur la base des émissions actuelles et des efforts à réaliser par leur territoire pour atteindre les objectifs du plan quinquennal. La plupart ont conscience de l'intérêt des mises aux enchères mais envisagent cette possibilité uniquement pour des périodes futures.

L'utilisation de mécanismes de projet est également un point de convergence. L'utilisation de CCER semble actée pour la plupart des systèmes, certains développant par ailleurs l'idée de standards provinciaux, notamment dans le Guangdong et le Chongqing pour des projets forestiers.

Tableau 3- Caractéristiques des projets de marchés du carbone pilotes en décembre 2012

		Shanghai	Beijing	Tianjin	Guangdong	Hubei	Chongqing	Shenzhen (ville)
Allocation des quotas		• Gratuite • En une fois pour 3 ans • Basée sur les émissions historiques 2009-2011 • Benchmark dans certains cas (sans précisions)	• 85 % gratuite • 15 % mise en enchère • Allocation annuelle basée en 2014 et 2015 sur les émissions de l'année précédente	?	• Gratuit + achat auprès du gouvernement Ex. pour le secteur cimentier, 90 % gratuit – 10 % achat. • En une fois pour trois ans.	• 100 % gratuite en 1ère période • Réserve de quotas inférieure à 15 % du total pour les nouveaux entrants	?	• Gratuite + mise en enchère • 100% mise en enchère dans l'avenir.
Crédit de compensation		• Réductions d'émissions certifiées par le gouvernement central ou celui de Shanghai • Utilisation probable : 5 à 15 %	• CCER • Utilisation limitée, possiblement à 5 %, la moitié devant provenir de projets développés à Beijing	?	• Crédits forestiers • CCER vérifiés par le gouvernement du Guangdong • Utilisation probable : 5 à 10 %	• CCER. • Limite d'utilisation de 15 % pour les entreprises inclues et de 10 % pour les nouveaux entrants.	• Utilisation probable : 5 à 15 % • Crédits forestiers autorisés	? • Utilisation probable : 5 à 15 %
Caractéristiques du marché	Contrôle du prix		Régime de contrôle du prix du quota en discussion.		Echanges inter-provinciaux dès 2015 (coopération en cours avec le Hubei).	Echanges inter-provinciaux dès 2015 (coopération en cours avec le Guangdong).		
	Flexibilité	• Epargne autorisée • Emprunt interdit			• Epargne autorisée.			
	Conformité	Pénalités de non-conformité en discussion	• Instruments financiers non autorisés. • Pénalité maximale de 200 000 RMB		• 1er achat par 4 cimentiers auprès du gouvernement de 1,3 millions de quotas le 12/09/2012 à 60 RMB/t (≈ 7,25 €/t).			Pénalité de 3 fois le prix du marché par quota manquant, potentiellement limitée à 100 000 RMB.
Autres mesure : reporting		Procédure de MRV annuelle avec vérification par un tiers. Reporting simple des émissions si supérieures à 10 000 tCO_2.			Entreprises aux émissions annuelles supérieures à 10 000 tCO_2 ou dont la consommation d'énergie dépasse 5 000 tce	Entreprises dont la consommation annuelle d'énergie dépasse 2 000 tce		Mise en place d'une plateforme dédiée pour le secteur du bâtiment.

Sources : Proposition de mise en place d'un marché d'échange d'émissions de carbone par le gouvernement de Shanghai, projets de règlement pour la mise en place d'un marché d'échange d'émissions de carbone du gouvernement de Beijing et du gouvernement de Tianjin, règlement du gouvernement local pour la mise en place d'un marché d'échange d'émissions de carbone dans la province du Guangdong, conférence de presse de la commission de développement et de réforme de Chongqing du 26 avril 2012 (http://news.steelcn.com/a/95/20120427/406328EAFB43EB.html), Université de Zhongshan (2012), Li Z.P. (2012).

Vers un Système D'échange de Quotas National?

Le 12ème guide quinquennal impose à la fois au gouvernement central et aux gouvernements territoriaux d'accorder davantage d'attention à la lutte contre le changement climatique en instaurant un cadre politique et juridique, qui reste à compléter et à préciser. Initialement annoncé pour 2015 puis 2016, l'instauration d'un système d'échange de quotas national qui tirerait partie des expériences des 7 marchés pilotes territoriaux semble dorénavant être prévue de manière progressive au cours de la période du 13ème plan quinquennal (2016-2020). Aucune réglementation n'a cependant été proposée pour l'instant. Ce renforcement de la réglementation est indispensable pour assurer davantage de stabilité aux outils de marché envisagés, d'autant plus que l'approche de marché n'en est qu'à ses débuts en Chine et que des changements politiques, liés aux négociations internationales ou encore à la priorisation du développement économique, sont encore possibles.

Les efforts actuels se concentrent pour l'instant davantage sur la préparation de lignes directrices communes. Ainsi la NDRC a lancé des travaux de recherche en matière de comptabilisation et de reporting des émissions pour les six secteurs qui devraient être inclus dans la première période du marché national : électricité (centrales thermiques), matériaux de construction (ciment et verre), produits chimiques, métaux non ferreux, aviation et fer et acier. La question se pose également de l'adaptation du cadre réglementaire financier, de manière à pouvoir autoriser et développer des instruments financiers pour faciliter la gestion de la contrainte carbone dans le futur. Ces réflexions sur l'approche réglementaire reflètent la tradition chinoise d'une forte intervention administrative. L'enjeu est donc également de renforcer les capacités de planification et de réglementation pour faciliter l'intervention du pouvoir public considérée comme « inévitable » et « nécessaire ».

La mise en œuvre de marchés d'échange de quotas en Chine, qui a éclipsé les discussions sur une taxe carbone, a attiré l'attention sur le développement des politiques climatiques

chinoises depuis 2011. Ces dispositifs constituent un exemple du rapprochement opéré dans le cadre du 12ème plan quinquennal entre les outils administratifs « classiques » et les outils de marché. Ces derniers voient leur utilisation accrue à la fois pour les politiques climatiques et pour les politiques énergétiques, de manière à servir les objectifs d'économie d'énergie et de réduction des émissions de gaz à effet de serre du pays.

L'expérimentation proposée par les marchés pilotes du carbone vise à mieux appréhender la diversité de développement des territoires chinois et à anticiper les difficultés qui pourraient se poser pour le système national. Cette méthode originale se développe avec une réglementation légère et incomplète, qui demande à être précisée. Le renforcement des capacités demeure donc un point essentiel, notamment en matière de comptabilisation des émissions, de système MRV et de système de registre. Une politique de formation et de normes de qualification des professionnels dans le domaine du carbone est en projet[7].

La Chine doit faire face au grand défi de la coordination d'instruments différents. Le foisonnement d'initiatives actuel en matière de politiques énergétiques et climatiques demandera à être coordonné et planifié à long terme. Un premier défi pour cette transition sera d'assurer l'intégration des marchés territoriaux dans le futur marché national.

[7] Source: www.chinanews.com/cj/2012/04-16/3821128_3.shtml.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA
Interim Measures for Voluntary Greenhouse Gas Emissions Trading

CHEN PING*

Introduction

Although China has historically accounted for only a relatively low percentage of globally cumulative GHG emissions (7.3 per cent from 1850 to 2000), it has increased its share to 14.8 per cent in 2003.[1] China is projected to surpass the United States as the world's largest emitter.[2] Recognizing the serious threat posed by global warming to public health, natural resources, and environment, China's Central Government has taken steps to reduce the country's GHGs emissions. It has pledged to lower China's carbon dioxide emissions per unit of GDP by 40–45 per cent by 2020 compared to the 2005 level;[3] this is the domestic voluntary emission reduction (VER) target.

China has signed the *Kyoto Protocol*, although it has not undertaken any mandatory emission reduction targets. Apart from the *Annual Progress Report of China's Policies and Actions for Addressing Climate Change* (*White Paper*), various documents concerning the emission reduction issues have been published. These are: (1) *12th Chinese Five-Year-Plan* (FYP, from 2011–2015) adopted by the National People's Congress; (2) *Resolution of the Standing Committee of the National People's Congress on Making Active Responses to Climate Change*; (3) *2012 Comprehensive Working Programme on Energy-Saving and Emission Reduction*; and (4) *Working Programme on Greenhouse Gas Emission Reduction During the 12th FYP Period*, adopted by the State Council.

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[1] M. Bo, 'Emissions Trading: A Fantasy for China to Combat Global Warming?' in M. Jeffery & K. Bubna-Litic (eds), *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide* (2008) Cambridge University Press, 400.
[2] K. Baumert & J. Pershing, *Climate Data: Insights and Observations*, Report prepared for the Pew Centre on Global Climate Change, 16.
[3] A. Kossoy & P. Ambrosi, *State and Trends of the Carbon Market* (2010) Report prepared for Environment Department of the World Bank, 30.

The above documents represent China's climate change policy and national actions. They are all political in nature, other than numbers (3) and (4), which are normative[4] (*guifanxing wenjian*). Document 4 mentions the aim of establishing a carbon trading system, without giving details. None of these documents stipulates the legal framework for China's carbon trading system.

On 13 June 2012, the National Development and Reform Commission (NDRC) adopted *The Interim Measures on Voluntary Greenhouse Gases Emissions Trading* (*2012 Interim Measures*), which has a higher legislative status as Ministry Rules (*bumen guizhang*)[5] than the normative documents. The Ministry Rules stipulate the legal framework for China's voluntary GHGs emissions trading system (ETS).

Contents

The *2012 Interim Measures*, contain six chapters with 31 clauses and one annex. It deals with: (1) general principles; (2) management of VER projects; (3) management of the emission reduction created by the projects; (4) trading emission reduction; (5) management of validation and certification; and (6) miscellaneous provisions.

Chapter 1 contains general provisions. The *2012 Interim Measures* aim to encourage project-based voluntary GHGs emissions trading, and ensure that the trading transactions comply with the law (article 1). CO_2, CH_4, N_2O, HFC_s, PFC_s and SF_6 are the targeted gases for China's voluntary emissions trading transactions (article 2). Voluntary emissions trading should comply with the principles of transparency, equitability, impartiality and credibility; and the emission reduction resulting from the concrete projects should be authentic, measurable and additional (article 3). The competent administrative authority at the national level is the NDRC (article 4). Institutions, enterprises, organizations and individuals from China and other countries can participate in the voluntary ETS (article 5). The official record system will administer the voluntary ETS. Projects and the emission reductions created from these projects will be registered by the NDRC (article 6).

The NDRC is responsible for establishing the national registry system (NRS). Authorised VER projects and their emission reductions should be registered in the NRS, including basic

[4] The normative document remains at the lowest legislative hierarchy of China's legal system. Its concrete definition and range can be found in the book: R. Peerenboom, *China's Long March Toward Rule of Law* (2002) Cambridge University Press, New York, 261 and 271.
[5] Ministry Rules (*bumen guizhang*) passed by central-level ministries, commissions, agencies, or entities directly under the State Council. See Peerenboom (supra note 4), 271.

information, the recording, transactions and annulments (article 7). Within 10 working days of the completion the official record procedure, the NDRC will publish the transaction information, provide an inquiry service based on NRS and support transactions of trading emission reduction with features of credibility and authenticity (article 8).

Chapter 2 deals with the management of VER projects, including provisions on methodology and applications for recording VER projects in official records. Methodologies provide guidance on how to set baselines, prove additionality,[6] calculate emissions reduction, and create a monitoring and measuring plan (article 10(1)). These methodologies should be authorised by the NDRC and verified by a validation institution approved by the NDRC (article 9). Methodologies approved by the clean development mechanism (CDM) Executive Board (EB) of the United Nations can be authorised in the NDRC if they are shown to be appropriate by experts appointed by the NDRC (article 10(2)). For a new methodology, based on an experts' opinion, the NDRC can authorise the methodology if it satisfies the requirements of rationality and feasibility.

Prior to the application for official recording of the VER projects,[7] a validation report on the projects must be prepared by a qualified validation institution authorised by the NDRC. The report must address validation procedures, the baseline and the accuracy of the emission reduction calculation, additionality, the monitoring and measurability, and the validation conclusion (article 12).

Enterprises domiciled within the Chinese jurisdiction can apply for approval of voluntary GHG emission reduction projects and for official registration of the emission reduction, based on the *2012 Interim Measures* (article 6). State-owned enterprises involved directly in GHG emission reduction projects can apply for the VER registration directly to the NDRC.[8] Other enterprises apply through the Development and Reform Commissions (DRC) at the

[6] Additionality is the 'requirement that the greenhouse gas emissions after implementation of a CDM project activity are lower than those that would have occurred in the most plausible alternative scenario to the implementation of the CDM project activity'. C. Streck, 'The Concept of Additionality under the UNFCCC and the Kyoto Protocol: Implications for Environmental Integrity and Equity' (available at http://www.ucl.ac.uk/laws/environment/docs/hong-kong/The%20Concept%20of%20Additionality%20(Charlotte%20Streck).pdf). This concept is also explained by the *Kyoto Protocol* as 'real, measurable, and long-term benefits related to the mitigation of climate change" and "reduction emissions that are additional to any that would occur in the absence of the certified project activity' (Article 6(1)(b)).

[7] This means the VER projects that are about to become recorded VER projects by the NDRC, after the application procedure. The type of the VER projects is stipulated in article 13.

[8] Article 14(1) lists state-owned enterprises managed by the State-owned Assets Supervision and Administration is attached to the Interim Measures.

provincial level.[9] The provincial DRC shall submit the applications to the NDRC after commenting on the authenticity and completeness of the applications documents.[10]

Chapter 3 focuses on management of emission reductions created through recorded VER projects. It outlines the procedures for the official recording of emission reductions.

Certification procedure: the emission reduction should be certified by a qualified certification institution approved by the NDRC. The certification institution should provide a report that includes the contents of "the certification procedures", "the implementation of the plan of monitoring and measuring", and a "conclusion" (article 18).

Application and decision procedure: Based on the experts' technical evaluation, the NDRC will make the decision on application for entry on the official record. The application shall include the "application form", the "monitoring and measuring report made by the project owner or consulting institution", and the "certification report".

Offsetting programme: Emission reductions are referred to as "China's certified emission reduction" (CCER) after official recording.[11] The CCER should be registered in the NRS and can be traded using the trading platform. CCER should be annulled in the NRS after trading or use (article 22).

Chapter 4, "Trading emission reduction", refers to the recording procedures within the trading platform. The trading platform is intended to document and support emission reduction transactions; the electronic trading system should be connected with the NRS, and update the transaction information (article 23). The NDRC will review all applications for registration and decide within six months whether to record applicants to use the trading platform. The requirements provided in article 25, include:

- Authorized share capital of the legal person domiciled in China and investing in Chinese capital of not less than 100 million RMB.
- The business outlets, trading system, calculation system, business information, reporting, and other systems are qualified.

[9] Article 14(2) defines "other enterprise" to mean those enterprises that are not in the attached list of state-owned enterprises. Here, the "DRC" means the provincial Development Reform Commission of the place where the projects are located, not where the enterprises are domiciled.
[10] Article 14(2). The Interim Measures stipulate the required documents for VER projects application in article 15.
[11] Article 21(2). One CCER means one tonne of CO_2 e(q).

- The employees have relevant professional information and experience.
- The applicant has a strict internal inspection and supervision system and risk control system.
- The rules on trading transactions should be integrated, explicit, and operational

Improper transactions should be rectified as the NDRC requires. If the impropriety is severe, the NDRC should publicise the traders default and cancel its record-keeping qualification (article 26).

Chapter 5 deals with the authorisation of validation and certification institutions. The independently qualified validation institution, mentioned in chapter 2, is responsible for validating the VER projects and creating a validation report. The qualified certification institution, mentioned in chapter 3, is responsible for certifying the emission reduction and forming a certification report.

Qualified verification institutions and certification institutions are required to be authorised by the NDRC (article 27). Application documents for the recording issue include the “business license”, “the identity documents of the representative of the legal person”, “documents that can prove the contributory performance of the verification work or certification work”, and “the auditors’ names and their responsibilities”.

The NDRC will make its decision if the following requirements are met:

- Establishment and operation of the enterprise is in compliance with Chinese law.
- The institution has its performance formally regulated.
- The institution has a good performance record in the verification or certification area.
- The institution has adequate expertise with experiences and non-illegal records.
- The institution is solvent (article 28).

If there is improper behaviour in the validation or certification process, the NDRC should order the institution to correct this. If the behaviour is severe, the NDRC will publicise the trading platform’s illegal performance and cancel its qualification (article 29).

Critical Comments and Expectations

The promulgation of the *2012 Interim Measures on Voluntary Greenhouse Gases Emissions Trading* is a remarkable improvement. It clarifies the legislative position for GHGs emission trading which ought to lead to stronger legal enforcement and compliance regime. It reflects the domestic concern for GHG emission trading and the Government's ambitions to reduce GHG emissions.

The law will provide substantial and procedural provisions on GHGs emission trading. The promulgation of the *2012 Interim Measure* will ensure that a voluntary emission trading system will be established by using the offsetting method. The *Measure's* 31 articles have set up the legal framework of voluntary emission trading in China. The official record of the project and its emission reduction, the trading platform, the validation institution and certification institution are all mandatory, indicating a strong administrative intervention from the NDRC regarding voluntary emission trading.

However, there is still room for improvement. The language of the *2012 Interim Measures* is ambiguous. Articles 26 and 29 are the two legal sanctions provisions but the term "severe illegal behaviour" is so broad and general that it allows too much flexibility in its implementation.

Specialist terminology should be made more specific. For instance, does the term "t CO_2 e" mean "t CO_2 eq"? What is the meaning of "additionality" in articles 3 and 12? What are the requirements for assessing whether a project is additional or not? Regarding the CCER mentioned in article 21, can a CCER be transferrable with a CER created from a CDM project? Essentially, one unit of CER and CCER both indicate the emission reduction of one tonne of GHG. Does this mean that they are equivalent by linking the CDM with the voluntary emission trading system?

The legal responsibilities of the validation institution and certification institution have not been adequately specified. It is not clearly stipulated whether these two types of institutions are independent institutions or may be affiliated to the administrative competent authority. The policy should better specify the qualification of these institutions, to ensure the transparency, equitability, impartiality, and credibility of trading transactions. Furthermore, it is not clear how to deal with the legal relationship between validation/certification institutions and the legal person who owns or develops the projects. The requirements in article 28 need to be more explicit, addressing how to assess the concept of "adequate expertise", "good

performance", and "adequate solvent capacity". We can expect that more explicit legal provisions will be developed, as lessons are learned from the implementation of the new trading practices.

COUNTRY REPORT: THE PEOPLE'S REPUBLIC OF CHINA
Criticism Levelled at China's Revised Environmental Protection Law

NENGYE LIU*

Introduction

China's economy has been booming since the Chinese Government adopted its open door policy in 1978. Pan Yue, the vice-Minister of China's Ministry of Environmental Protection (MEP), points out that many developing countries require a hundred years to achieve the level of industrialization that China has undergone in the last twenty years. But the miracle may end soon.[1]

China's focus on rapid economic development has led to widespread environmental degradation. The World Wildlife Fund (WWF) indicates that China is facing serious environmental problems. These include habitat and biodiversity loss, water pollution, air pollution, desertification and erosion. A quarter of all the species listed as critically endangered by the *Convention on International Trade in Endangered Species* (*CITES*), are found in China. Respiratory and heart diseases related to air pollution are the leading cause of death in China. About 40% of the water in the country's river systems has a quality index of 3 or worse, meaning that it is unfit for human consumption. Desertification has already swept over almost 30% of China's land area. Every year, this area increases by about 2,460 km^2.[2]

China adopted its first *Environmental Protection Law* (*EPL*) in 1979, just one year after the beginning of China's economic reform and open door policy. In 1989, the *EPL* was amended and has never subsequently been. Over the last two decades, a series of environmental laws have been enacted, including the *Marine Environment Protection Law*, *Water Law*, *Air*

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[1] SPIEGEL Interview with China's Deputy Minister of the Environment, 'The Chinese Miracle Will End Soon' (available at http://www.spiegel.de/international/spiegel/spiegel-interview-with-china-s-deputy-minister-of-the-environment-the-chinese-miracle-will-end-soon-a-345694.html).

[2] Environmental Problems in China (available at http://wwf.panda.org/who_we_are/wwf_offices/china/environmental_problems_china/).

Pollution Prevention and Control Law, *Water Pollution Prevention and Control Law*, *Noise Pollution Prevention and Control Law*, *Promotion of Recycling Economy Law* and the *Environment Impact Assessment Law*. It is fair to say that China has already established a legal regime for the protection of environment. However, 30 years after its last amendment, the *EPL* is now outdated. A proposal for amending the 1989 *EPL* was first submitted to China's National People's Congress in 1995. From 1995 to 2011, 78 proposals were submitted to the National People's Congress, calling for the amendments of the 1989 *EPL*. The Environment Protection and Resources Conservation Committee of the Standing Committee of the National People's Congress did an assessment of the implementation of 1989 *EPL* from 2008 and 2010. The Standing Committee of the National People's Congress decided to start the process of amending the 1989 *EPL* in 2011. On 31 August 2012, the National People's Congress published the draft of the revised *EPL* (proposed new *EPL*). After a month of public discussions, a final draft will be submitted for the hearing and approval of the General Assembly of the National People's Congress in 2013. This means a new Chinese *EPL* is likely to be adopted in the near future.

This Country Report focuses on this latest draft of the *EPL*. It provides details about the amendments and their legal implications.

The Proposed New *EPL*

The proposed new *EPL* consists of 7 chapters and 47 articles which deal with: (1) General Principles; (2) Environmental Management; (3) The Protection and Improvement of the Environment; (4) Prevention and Control of Pollution and other Hazards; (5) Supervision and Inspection; (6) Liabilities; and (7) Miscellaneous. Compared to the 1989 *EPL*, there is a new chapter 5 about "Supervision and Inspection", which intends to improve Government's power in respect of environmental protection.

Chapter 1 identifies the objectives of the new *EPL* (article 1), the definition of "environment" (article 2), applicable scope of the *EPL* (article 3) and the competent authority (the Ministry of Environmental Protection) to enforce the *EPL* (article 7). These articles are almost identical to corresponding provisions of the 1989 *EPL*. Article 4 of the 1989 *EPL* provided that the plans for environmental protection must be incorporated into the national economic and social development plans; and that the State must adopt economic and technological policies and measures favourable for environmental protection so as to coordinate the work of environmental protection with economic construction and social development. At the time

of the development of the 1989 *EPL*, the Chinese Government believed that economic development should be prioritized.

A shift in approach is reflected in the proposed new article 4 of the *EPL* where it is clearly stated that environmental protection shall rely on developments of science and technology, promote a circular economy and conservation culture. An enhanced monitoring regime is also provided for. In order to maintain a balance between socio-economic development and environmental protection, the State shall take economic and technological measures that recycle resources, protect the environment and improve the harmonization between humans and nature. It is also emphasized that the State shall establish an ecological restoration scheme.

The title of the new Chapter 2 has been changed from “Environmental Supervision and Management” (1989 *EPL*) to “Environmental Management”. There is also a new chapter 5 on “Supervision and Inspection”. Article 9 of the 1989 *EPL* only mentions that the Ministry of Environmental Protection under the State Council shall establish the national standards for environment quality. The proposed article 9 of the new *EPL* on the other hand, contains a requirement that the Ministry of Environmental Protection shall ensure that national standards for environmental quality coincide with the objectives of environmental protection. Moreover, prior to the adoption of environmental standards, the Ministry of Environmental Protection must consult with other relevant departments (article 10). It is provided by the 1989 *EPL* that the Ministry of Environmental Protection shall establish a national environmental monitoring system. Article 11 of the proposed new *EPL* further provides that an environmental monitoring network shall consist of the environmental quality monitoring network and a network that monitors the discharge of major pollutants. Data collected by the environmental monitoring network shall be entered into a database system to be used for the assessment of the quality of environment.

Article 12 of the proposed new *EPL* provides additional details about the adoption of a *National Plan for Environmental Protection*. The *National Plan for Environmental Protection* must be drafted by the Ministry of Environmental Protection according to the *Socio-Economic Development Plan*. The draft *Plan* must be reviewed by the National Development and Reform Commission and approved by the State Council. For the prevention and control of pollution and damage to the environment that involve various administrative areas, local governments must cooperate with each other to take action. Moreover, article 14 of the proposed new *EPL* provides that in river basins and key environmental protection areas that

involve various administrative areas, pollution prevention and control actions must be carried out based on prior environmental protection plans approved by the State Council.

Article 19 in Chapter 3 of the 1989 *EPL* only mentions that measures must be taken to protect the ecology and environment while natural resources are being developed or utilized. In the proposed new *EPL*, article 18 states that the development and utilization of natural resources must be appropriate in order to protect biodiversity and ecology. Measures such as the restoration of vegetation must be taken to protect the ecology and environment. Meanwhile, the introduction of invasive species must comply with relevant regulations issued by Government.

Article 19 of the proposed new *EPL* establishes the total amount control scheme of discharging pollutant for the whole country. It must be noted that the maximum amount of pollutant that can be discharged for each province will be first determined by the National Development and Reform Commission, and then approved by the State Council. The Ministry of Environmental Protection might have a say in the process but does not have the authority to set the quota of pollutants that can be discharged in each province. The Provincial Governments will be in charge of distributing the total amount of pollutants within its jurisdiction. If there is a violation of the maximum amount of pollutants that is allowed to be discharged in any administrative area, the environmental impact assessment for new construction project in that area will be suspended. The Central Government is hoping to make use of this scheme to better control and supervise local government's action for economic development and environmental protection. Chapter 3 of the proposed new *EPL* also pays much more attention to the environmental protection in rural areas through article 20. This was not addressed in the 1989 *EPL*. Under the new proposed amendments, heavy metals and other toxic wastes are prohibited from being deposited on farmlands. It is also stated that local government must provide funding for the protection of drinking water sources, treatment of sewage and garbage, prevention and control of pollution caused by livestock and poultry farming, soil pollution and industrial pollution in rural areas.

Chapter 4 of the proposed amendments strengthens polluters' obligations under the *EPL*. It requires that the board of directors shall report to its workers about environmental protection actions taken by the company (article 24 of the proposed new *EPL*). Article 24 also refers to the *Water Law*, *Water Pollution Prevention and Control Law, Air Pollution Prevention and Control Law, Solid Waste Pollution Prevention and Control Law, Noise Pollution Prevention and Control Law, Marine Environment Protection Law, Promoting Recycling Economy Law* and requires polluters to take effective measures to protect the environment. It is provided

that polluters must install environment monitoring equipment and record original information about the pollutants that are discharged. This information will be included into the national monitoring database and will be available to the public. Businesses and state-run institutions discharging pollutants must report to and register with the relevant authorities in accordance with the provisions of the competent department of environmental protection administration under the State Council (article 27). Article 27 of the proposed new *EPL* abolishes the fee for discharging pollutants that exceed the prescribed national or local discharge standards (established by the article 28 of 1989 *EPL*). Instead, businesses and state-run institutions must pay a fee for discharging pollutants. As provided by article 29 of the 1989 *EPL*, if an enterprise or institution has caused severe environmental pollution, it shall be required to eliminate and control the pollution within a certain period of time. Under article 28 of the proposed new *EPL*, businesses and state-run institutions must eliminate and control the pollution within a certain period of time in case discharging pollutants exceed national/local standards or the quota for total amount control of pollutants. A plan must be developed which includes: (1) a feasibility assessment of improved technology and pollution control; (2) funding; (3) procedures and deadlines; and (4) a relevant environmental impact assessment. The proposed new *EPL* also refers to the *Emergency Response Law*, which was adopted in 2007 for dealing with pollution incidents.

Chapter 5 is a new chapter in the new *EPL*. Article 14 of the 1989 *EPL* provides that the environmental protection administration of the governments at, or above, the county level or other departments invested by law with the power to conduct environmental supervision and management, shall be empowered to make on-site inspections of units under their jurisdiction that discharge pollutants. Article 33 of the proposed new *EPL* provides further details relating to the nature of these on-site inspections, which can include: (1) the construction and operation of pollution prevention equipment; (2) record of discharging pollutants; (3) responsible personnel for environmental protection; (4) enforcement of the plan for the elimination and control of pollution within a certain period of time; and (5) a contingency plan for the environmental pollution accidents.

Article 34 of the proposed new *EPL* concerns public access to environmental information. On the one hand, central and local government has the obligation to publish environment information such as the quality of environment, pollution accidents, paying the pollutants discharge fee and how the fee is used. On the other hand, any citizen, institution or other organization is entitled to access to environmental information from local government by way of application. Local government is obliged to reply to any application in due time.

Articles 35 and 36 of the proposed new *EPL* pay attention to the supervision of local government. Article 35 addresses the supervision of the various levels of government. Environmental protection will be used as one criterion for higher-level government to assess lower level government's performance. Article 36 establishes a reporting obligation for local government to the standing committee of the Local People's Congress.

Chapter 6 prescribes administrative, civil and criminal liabilities for polluters. Under article 43 of the 1989 *EPL*, if a violation of this Law causes a serious environmental pollution accident, leading to the grave consequences of heavy losses of public or private property or human injuries or deaths of persons, criminal responsibility shall be imposed on persons directly responsible for such an accident. The proposed new *EPL* only refers to the Criminal Law without mentioning damages caused (article 39). In the case where a party refuses to accept an administrative sanction, article 41 of the proposed new *EPL* changes the period within which to apply for reconsideration to the higher authority from 15 days to 60 days of receiving the notification. Article 45 of the 1989 *EPL* provides that any governmental official who abuses his power, neglects his duty or engages in malpractices for personal gains while conducting supervision and management for the purposes of environmental protection, shall be given administrative sanction by the unit to which he belongs or the competent higher authorities. If such an act constitutes a crime, the person involved shall be investigated for criminal responsibility. Article 45 of the proposed new *EPL* extends the ambit of the previous counterpart to include sanctions for government officials that: (1) forge or ask someone to forge monitoring information; (2) do not respond to the application from any citizen, enterprise or other organization for environment information; (3) do not act after receiving report from any citizen, enterprise or other organization about discharging pollutants that exceed standards, pollution incidents and abnormal operation of pollution prevention and control equipment; and (4) any other act in breach of other laws and regulations.

Chapter 7 deals with the relations between the *EPL* and international law. It is stated by both the 1989 *EPL* and the new *EPL* that: "If an international treaty regarding environmental protection is concluded or acceded to by the People's Republic of China contains provisions differing from those contained in the laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations".

Legal Implications

The Standing Committee of National People's Congress has declared that the intention of introducing the new *EPL* is not to comprehensively amend the 1989 *EPL*. Instead, only limited revisions are made.[3] The amendments focus on issues such as government responsibility, environmental standards, environmental protection planning, environmental impact assessment, pollution prevention and control across different administrative areas. The Ministry of Environmental Protection, environmental law scholars and NGOs have criticized the draft revisions.

The assessment by Chinese scholars on the amendments to the 1989 *EPL* generally fall into two camps. Some scholars argue there is no need to keep the 1989 *EPL* because a series of specific environmental protection laws has since been adopted. Other scholars believe that the 1989 *EPL* must be comprehensively revised in order to play the role of "umbrella" legislation for the Chinese legal regime on the protection of environment.[4] Nevertheless, the proposed new *EPL* only deals with a limited array of issues that the National People's Congress believes need to be amended.

The Ministry of Environmental Protection is also disappointed with the proposed new *EPL*. The Ministry of Environmental Protection submitted its comments to the Legal Committee of the Standing Committee of the National People's Congress on 29 Oct 2012. It strongly opposed the determination of the maximum amount of pollutant for each province by the National Development and Reform Commission. This is because the authority of the Ministry of Environmental Protection is weakened by the proposed new *EPL*.

NGOs are also unsatisfied with the proposed new *EPL*. Except for additional details on public access to environmental information, provisions about public participation are missing in the proposed new *EPL*. In 2011, the *Civil Procedure Law of China* was amended to include environmental public interest litigation. This has not even been mentioned in the proposed new *EPL*. As a result, public participation in environmental protection in China still lacks legal basis.

Conclusions

[3] *Explanations on the Draft of Revised Environmental Protection Law of People's Republic of China*, Standing Committee of National People's Congress, 31 Aug 2012.
[4] See: Nan Fang Zhou Mo (Southern Weekly), *Suggestions for the Revision of China's Environmental Protection Law*, 14 Sept 2012 (available in Chinese at http://www.infzm.com/content/80777).

The process of amending the 1989 *EPL* has taken more than 20 years. It is possible that the amendments will enter into force in 2013. Amendments to the 1989 *EPL* are undoubtedly essential so as to meet the environmental challenges that China is facing after 30 years of rapid economic development. However, almost every party working on environmental protection in China has criticized the current draft. Therefore, Chinese legislators might need to further work on the final draft of the proposed new *EPL* before it is submitted for approval of the General Assembly of the National People's Congress in 2013. One key area clearly needing further consideration in the final draft of the *EPL* is the issue of public participation.

COUNTRY REPORT: DENMARK
Landmark Energy Agreement and New Rules

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Introduction

The Energy Agreement 2012-2020

Based on the Government's energy strategy, *'Our Energy' - The New Government's Energy Strategy*, with the main objective to convert the country to 100% renewable energy use by 2050 (see further last year's Country Report in the IUCNAEL eJournal) the Government initiated negotiations with the opposition. A final agreement that reduced the costs but maintained the overall objectives was reached on 22 March 2012, laying down Denmark's energy policy road map for the period 2012-2020. While the Government's energy strategy was a 'unilateral' policy document, the energy agreement is based on a broad political consensus, which gives it much more political weight. To a wide extent the political agreement stipulates the content of the subsequent bills that have been and will be proposed to and adopted by Parliament.

The energy agreement gives wind energy a special position. It thus constitutes the basis for making sure that half of Denmark's electricity requirement will come from wind energy in 2020. In 2011 the share of wind energy in the Danish electricity use was 28.3%; the target is thus still far away. According to the agreement, two new offshore wind energy parks are to be built at Horns Rev in the North Sea and at Kriegers Flak in the Baltic Sea. Together they will provide a capacity of 1000 MW. The increase in onshore capacity (500 MW) will continue up to 2020, and there will also be a significant expansion of wind energy installations in coastal areas (500 MW). Subsequent to a screening procedure and strategic environmental assessment, six areas have been identified and agreed in November and will be made available for open tenders.

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The conversion to renewable energy in power and heat production is not only to be based on wind energy. It is recognized that biomass is an important replacement for coal; thus it is an aim of the agreement to facilitate an easier shift from coal to biomass in central CHP production. Likewise, solar panels will be supported financially although some adjustments were agreed in November because the previous regime was in fact too successful. The guaranteed price for energy sold to the common grid will be reduced every year. However, property owners that have already made investments are guaranteed a continued support for 20 years. The new principles are to be included in a new bill to be presented to Parliament.

Furthermore, the agreement emphasizes the need to increase energy-saving initiatives. This will include an increase in energy-saving initiatives by energy companies by 75% from 2013-2014 and by 100% from 2015-2020 compared to 2010-2012. Another target is focusing on energy renovations of existing buildings and businesses and initiatives to ensure that new buildings have high energy efficiency. However, specific obligations will also be imposed on ordinary property owners. Accordingly, it will be illegal to install oil-fired burners in existing buildings from 2016 unless they, due to their location, are unable to connect to more climate friendly sources of energy.

As a follow-up, the Minister for Climate, Energy and Building on 13 November 2012, entered into an agreement with the grid and distribution companies within the electricity, natural gas, district heating and oil sectors on the future energy saving obligations. It covers the period 2013-2020 and in practice, the initiatives by the companies will include consultancy, specialist assistance, and financial assistance to their customers to reduce energy consumption. The new agreement focuses in particular on making initiatives as cost-effective as possible. Therefore, it includes smoother administration for calculation, verification and documentation of savings.

Recent Statutory Developments

New Legislation on the CO_2 Emission Trading Scheme

On 20 November 2012, a new Act on CO_2 Quotas was passed by Parliament. The purpose is to implement the EU Directive 2009/29/EC that amends the *Emission Trading Directive* from 2003 in order to introduce a third emission trading period running from 2013-2020. New elements are the allocation of allowances by auctioning instead of giving it to enterprises for

free. Aviation was included as from 2012 but has recently been put on hold for a year with respect to international flights.

New Rules on Administrative Appeal to the Nature and Environment Appeals Board

The process and scope of review of the new Nature and Environmental Appeals Board (Natur- og Miljøklagenævnet), which has been effective since 1 January 2011, have been amended by the Parliament in June 2012.[4] There is generally a broad access to appeal administrative decisions to the Board according to environmental legislation and the Appeals Board has under the current legal framework in many cases conducted a full assessment of the case brought before it.

The purpose of the amendment was to make administrative appeal more effective by, for example, encouraging the first instance authority to reconsider the decision in view of the appeal. It has also been stipulated that the Appeals Board may limit its review to those issues that have been raised in the complaint and also to the most significant issues. This provision makes it clear that the Appeals Board is not obliged to make a full review of all aspects and conditions of, for example, an environmental permit. The Appeals Board is, however, obliged to review compliance with the requirements of EU law. On the other hand, it has been emphasised that the Appeals Board should only in specific circumstances remit a decision back to the first instance authority and if they do so, the Board should guide the first instance authority in order to avoid a second appeal to the Board. In addition, the amendment aims to increase the use of digital communication.

The amendment also included changes to the fee structure. The 3.000 DKK (400 EUR) fee for organisations and other legal entities that was introduced in January 2011 is now abolished. The 3.000 DKK fee was subject to a complaint to the Compliance Committee of the Aarhus Convention which in March 2012, found that the 3.000 DKK fee was in breach of Article 9(4) considering that: the intended purpose of the fee was to reduce the number of NGO appeals; and that the fee was considerably higher than fees for similar quasi-judicial appeal bodies in Denmark (Compliance Committee Communication ACCC/C/2011/57 concerning compliance by Denmark, 30 March 2012). The new fee is 500 DKK, which is the same as the previous standard fee. The new fee will, however, be subject to inflation indexation.

[4] Act No. 580 of 18 June 2012 amending the *Nature and Environment Appeals Board Act*.

The amendment was based on the recommendations of a so-called Expert Committee on the Administrative Appeal System in Environmental Matters which delivered a report in May 2011. The Expert Committee was established following increasing dissatisfaction with quite long delays in many appeal cases, in particular within specific areas such as environmental permits for livestock installations. The Expert Committee made a number of recommendations on changes to the existing system to make administrative appeals more effective – most of which were included in the above-mentioned amendment of the legislation in June 2012. The Expert Committee, however, also pointed at a need to reconsider the structure and function of the Nature and Environment Appeals Board to, for example, ensure a greater legitimacy in the expert composition of the Board; and to reconsider the limited possibilities of appeal regarding supervisory decisions. Furthermore, the Expert Committee pointed to the need to consider an environmental law reform as the increasing number of administrative appeal cases to some extent can be explained by the increasing complexity and incoherence in environmental legislation.

Statutory Requirements on Climate Reporting for Large Businesses

Since 2009, large businesses in Denmark have been required to account for their work on corporate social responsibility (CSR).[5] Businesses are free to choose whether or not they wish to work on CSR, but if they do they are obliged to account for their work in their annual financial reports. If they do not have CSR policies, they are required to state this in the annual report. Thus, the statutory requirement entails that large businesses in Denmark must take a position on CSR.

If a business covered by the statutory requirement has CSR policies it must report on:

- The business's social responsibility policies, including any standards, guidelines or principles for social responsibility the business employs.
- How the business translates its social responsibility policies into action, including any systems or procedures used.
- The business's evaluation of what has been achieved through social responsibility initiatives during the financial year, and any expectations it has regarding future initiatives.

[5] Para 99a in Act No. 1403 of 27. December 2008 amending the *Danish Financial Statements Act*. (Report on social responsibility for large businesses).

Under the 2009 Act, there have been no requirements regarding what policies businesses need to account for. However, from 2013, all businesses covered by the statutory requirement are required to report on policies to reduce climate change and policies concerning human rights.[6] The reporting is still voluntary, but if a company has no policy on these issues they must state information to that effect explicitly. The reporting so far has shown that most businesses already report on environmental and climate issues (89% in 2011). However, whether the current reporting on broader environmental issues fulfils the new requirements to report on climate change explicitly is not clear. According to the preparatory works, the aim of the mandatory reporting on climate initiatives is to promote investments in new technologies, reductions of CO_2-emissions and the implementation of management strategies on climate and environment in businesses.

New Act Establishing a CSR Mediation and Complaints Board

In June 2012, Parliament adopted a new Act establishing a Mediation and Complaints Board for Responsible Business Conduct.[7] The Board became effective on 1 November 2012. The background for establishing the new complaints board was the Government's CSR strategy 'Responsible Growth' from March 2011 and an aim to comply better with the 2011 revision of the *OECD Guidelines for Multinational Enterprises*. According to the revised *OECD Guidelines*, the role of the National Contact Points had to be strengthened by making more clear and reinforced procedural guidance for the handling of breaches of the *Guidelines*. The *OECD Guidelines for Multinational Enterprises* is one among several systems of guidelines that provide standards of corporate social and environmental responsibility. Currently, 42 countries adhere to the *OECD Guidelines* of which only eight countries are non-member countries. The *Guidelines* implementation mechanism – the National Contact Points – sets it apart from other developed governmental codes of conduct for CSR.

The Mediation and Complaints Board is organized as an independent expert body consisting of a five-member panel appointed by the Minister of Business Affairs. It is a requirement that the Chairman and the Expert Member of the Board have a background in law or social sciences. The three layman members are recommended by a trade union, an industry association and a NGO.

[6] Act No. 546 of 18 June 2012 amending the *Danish Financial Statements Act*, Act No. 323 of 11 April 2011.
[7] Act No. 546 of 18 June 2012 on the CSR Mediation and Complaints Board.

Anyone can bring matters to the Mediation and Complaints Board, but initial assessment should determine whether the issue is bona fide and relevant to the implementation of the *OECD Guidelines*. Under the Act, the Board is allowed to take on a matter on its own initiative, which is not a requirement under the *OECD Guidelines*. Complaints may be brought against all enterprises resident in Denmark or against a violation of the *OECD Guidelines* that has taken place in Denmark. There is no definition of when an enterprise is resident in Denmark, thus it is unclear whether it needs to be the head of the multinational enterprise that is placed in Denmark or whether it is enough that the enterprise has some activities in Denmark. Contrary to the *OECD Guidelines*, all companies are covered by the Act, including SMEs, and it gives access to complaints over public authorities and business partners. If a case brought before the Board is dismissed or an agreement is reached between the parties, only a short resume is published and the names of the parties is not mentioned. General rules on public access to information do not apply, which has given rise to some debate. However, if the Mediation and Complaints Board makes a final statement with recommendations this is disclosed, and the public will have the right to all information about the case. The recommendations of the Board are not enforceable.

COUNTRY REPORT: DEMOCRATIC REPUBLIC OF CONGO
Recent Developments in Environmental Protection

OLIVER RUPPEL[*] & DIGNITÉ BWIZA[§]

Introduction

Geographically, the Democratic Republic of Congo (DRC) is the second largest country in Africa with a total land area of 2 344 858 km^2 and 37 km coastline.[1] Its population is estimated at 67 757 577, with a crude birth rate of approximately 42 live births per 1 000 population for 2012 and the average life expectancy of approximately 49 years.[2] The DRC is classified by the World Bank as a low-income country with a GDP of USD 15.65 billion and a growth rate of 6.8 per cent.[3]

The DRC has vast potential and natural wealth but persistent armed conflicts since 1996 have dramatically reduced the national output, government revenue, and increased external debt. Major environmental concerns in the DRC include wildlife poaching, deforestation, mining and ecosystem degradation. The DRC has a large variety of mineral resources (cobalt, copper, niobium, tantalum, petroleum, industrial and gem diamonds, gold, silver, zinc, manganese, tin, uranium, etc.), a huge hydrography, and vast forests. The DRC alone accounts for one-fifth of Africa's total forest area. About 45 per cent of the DRC is covered by primary rain forest and since 2000, approximately two million hectares of this forest has been lost. Major threats in this regard are fuel wood collection, agriculture, and logging. The DRC is home to an enormous biodiversity, including rare animal species such as Okapi and mountain gorillas. Overall, the DRC is known to have more than 11 000 species of plants, 450 mammals, 1 150 birds, 300 reptiles and 200 amphibians.[4] The DRC counts more types

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[1] Maps of World (available at http://www.mapsofworld.com/africa/thematic/largest-countries.html).
[2] Figures taken from the World Bank (available at http://data.worldbank.org/indicator/SP.DYN.CBRT.IN?order=wbapi_data_value_2010+wbapi_data_value+wbapi_data_value-last&sort=desc and http://data.worldbank.org/country/congo-dem-rep).
[3] Figures taken from the World Bank (available at http://data.worldbank.org/country/congo-dem-rep).
[4] UNEP, *Africa Atlas of our Changing Environment* (2008) (available at http://www.unep.org/dewa/africa/africaAtlas/).

of great apes than any other country on earth, including the critically endangered lowland eastern gorilla and the bonobo.

Noteworthy legal developments in environmental protection in the DRC commenced with the adoption of a new *Constitution* on 18 February 2006, which clearly introduced environmental rights and obligations[5] and provided for the creation of other domestic laws concerning, *inter alia*, the protection of the environment and tourism.[6] Subsequently, around a dozen national laws in the DRC were introduced and/or amended to include environmental protection dispositions.

This Country Report is divided into three parts and aims to highlight noteworthy legal progress made in the field of environmental protection in the DRC in 2012. The first part includes an overview of national programmes of environmental protection implemented during the period under scrutiny, and highlights the major obstacles that hindered their implementation and sustainable development. The second part provides an overview of recently enacted environmental jurisprudence, which is then thirdly followed by a conclusion.

National Programmes on Environmental Protection

Forest Law Enforcement, Governance and Trade - FLEGT

In 2010, the DRC commenced negotiations with the European Union (EU) for a Voluntary Partnership Agreement in the EU's FLEGT action plan. The objective of the establishment of a national FLEGT programme in the DRC is the enhancement of forest management through upgraded respect of the legislation regulating forest exploitation both in the DRC and in the EU by forest exploitation companies.[7] The negotiations, which were suspended for a while, resumed on 31 August 2012 and were still on-going at the time of the drafting of this Report.

National Plan Combating Desertification (2012)

Developed to identify factors that aggravate desertification in the DRC, to propose concrete measures to address desertification and attenuate effects of draught; a *National Plan to*

[5] Articles 48 and 53-55.
[6] Article 123.
[7] Available at http://www.euflegt.efi.int/portal/home/vpa_countries/in_africa/democratic_republic_of_congo/).

Combat Desertification was finalised in 2012.[8] As Congolese forests are continuously declining, this plan is expected to address the various factors that continuously undermine forest protection in the DRC.[9]

Supporting Good Governance in Mineral Resources Exploitation (2009-2012)

Subsequent to the huge lack of transparency in the mining sector,[10] the DRC joined the Extractive Industries Transparency Initiative (EITI), and received funds from the German Gesellschaft für Internationale Zusammenarbeit (GIZ) to install the EITI national office (EITI-DRC).[11] Drafted for a four years period, the programme enables the establishment of a legal framework for the EITI-DRC, the appointment of a national Committee, and the publication - in 2012 of an *EITI-DRC Report* (2008-2009).[12] The drafting of EITI reports for the DRC faces two significant obstacles: (a) the lack of accuracy of information received from mining exploitation companies operating in the DRC; and (b) the lack of means to verify received information. The *EITI-DRC* Tri-annual Plan (2011-2013) creates an obligation to declare all mining corporations operating in the DRC as a solution to improve accuracy of information on mining activities, and a way to upgrade transparency in the mining sector in the DRC.

National Programme of Support to the Water Sector Reform (2006-2016)

The DRC is one of the water-richest countries in Africa. However, only one in four Congolese has access to sterile drinking water, and no more than one in five Congolese benefits from adequate sanitation facilities.[13]

To provide a remedy to these gaps, the German GIZ offered its support in the implementation of a *National Programme of Support to the Water Sector Reform*. The

[8] RIDDAC RDC: Finalisation du Plan National de Lutte Contre la Desertification (available at http://www.riddac.org).
[9] Exploitation Forestière en RDC, Les Irrégularités Persistent (2012).
[10] The lack of transparency in the mining sector, aggravated by the presence on rebel armed groups in the East, prompted the suspension of mining and trading activities by the Congolese Government. Exploitation and exportation of minerals in DRC was banned for 6 months under Decree No. 0705/CAB.MIN/MINES/01/2010 of 20 September 2010. The suspension was withdrawn by Decree 0034/CAB.MIN/MINES/01/2011 of 01 March 2011.
[11] Established by Decree No. 09/27 of 16 July 2009.
[12] EITI, *Rapport de l'administrateur in dependant de l'ITIE sur les revenus 2008-2009* (2012) Fair Links, Paris. The drafting of the *EITI Report* (2010-2011) is expected by April 2013, and the 2012 *EITI Report* is projected for December 2013. See EITI, *Trienal Plan 2011-2013 ITIE-RDC* (2012), 4.
[13] Conservation of Biodiversity and Sustainable Forest Management (available at http://www.giz.de/themen/en/16089.htm).

Programme has the ultimate objective to assist the Congolese Government in achieving the following goals:

- steering and implementing the reform of the water sector;
- establishing a clear legal and institutional framework for the water sector;
- promoting policy dialogue between institutions in the water sector; and
- strengthening individual and institutional skills, resources and efficiency.

So far, significant progress has been observed in the management of water resources since the opening of the Programme's activities. The key legal development is the drafting (in September 2010) of a comprehensive water management law, the so-called *Water Code*. The *Water Code* is yet to be promulgated but encompasses ground-breaking concepts for improved water and marine environmental resources management, specifically tailored to the needs and requirements of the DRC.[14] The Programme's perspectives include the lobbying for the promulgation of the *Water Code* and the establishment of effective mechanisms for its legal enforcement.

Programme of Reinforcement of Biodiversity (2009-2012)

To address the recurrent killing of protected species in the DRC, [15] the IUCN sponsored this programme with a central theme of 'Conservation of biodiversity and life'. This theme is apportioned into four major fields:

- climate change;
- the production and distribution of energy;
- the modern methods of management of ecosystems for the human wellbeing; and
- the economy of markets.

Nonetheless, damages to biodiversity in the DRC remain alarming.[16] Researchers contend that the real damage to biodiversity in the DRC remains largely unknown and might be much

[14] Among the significant innovations contained in the draft of the *Water Code* is the provision for technical capacity subsequent to decentralisation of the DRC. The *Constitution of the DRC* (2006) provides for decentralisation of governmental duties and the division of the country from 11 into 26 provinces. The decentralisation was effective within 36 months of the adoption of the *Constitution* but is yet to be implemented. The majority of national laws adopted in the DRC after 2006 do not take into account specificities peculiar to decentralisation.

[15] For instance, only 6 000 hippopotamus persisted in the DRC after the armed conflict, from the ± 22 000 hippopotamus counted before the conflict. Other species such as white rhinoceros, mountain gorillas and elephants were also killed at a large scale. A total of 190 species living in the DRC are mentioned on the IUCN's list of endangered species. IUCN, *Programme 2009-2012 in DRC* (2012), 5.

more extensive than reported. Wide regions of the DRC's national territory remain unexplored and might be the sanctuary of undiscovered animal and plant species. Some of these species might even have disappeared before their discovery. A timid development resulting from this Programme is however the development of ecotourism in selected protected areas of the DRC.

Conservation of Biodiversity and Sustainable Forest Management (2005–2013)

The Programme was created with GIZ funding to address the lack of adequate environmental institutions and the lack of suitable concepts to preserve forest and biodiversity in the DRC. Its main objective is to strengthen the performance of national institutions responsible for nature conservation in maintaining the integrity of protected areas and biodiversity [17] Furthermore, the Programme supports the introduction of forest concessions (areas where logging is permitted), based on sustainable forest management principles. The intended outcomes of this Programme are as follows:

- an improvement in the performance of institutions in charge of maintaining the integrity of protected areas and their biodiversity;[18]
- an institutional reform of the MECNT;[19]
- an increase in the number of specialised employees (more than 600 forest engineers were trained);
- the creation of a conversion process for the allotment of forest concessions; and
- the ratification of the *Central African Forest Commission Treaty* in 2009.[20]

[16] L. Debroux, T. Hart, D Kaimowitz, A Karsenty & G. Topa (Eds.), *Forests in Post-Conflict Democratic Republic of Congo - Analysis of a Priority Agenda (2007)* Joint Report by teams of the World Bank, Center for International Forestry Research (CIFOR), Jakarta.
[17] Available at http://www.giz.de/themen/en/16089.htm.
[18] Ibid.
[19] This reform involves a reduction of the number of MECNT Directorates from 23 to 12, the creation of a new Division of Community Forestry, mandatory retirement of over age staff, new recruitments, and improved synergy with ICCN. The reform has three main objectives: (1) institutional strengthening of MECNT, (2) community participation in forest management, and (3) management of protected areas and support to ICCN.
[20] For more information on the commission (Commission des forêts d'Afrique centrale COMIFAC) (available at http://www.cbf-fund.org/en/).

Obstacles to Environmental Protection in the DRC

Environmental protection in the DRC faces numerous obstacles including:

- *Lack of funds*: Funding constraints significantly limit the implementation of national programmes of environmental protection at a large scale. Less than 1 per cent of the national budget of the DRC is allocated to environmental protection,[21] and barely covers the minimum expenses of environmental protection programmes required. National programmes of environmental protection disappeared one after another due to a lack of funds or were simply never put into place.[22] National programmes currently under conception are likely to face the same obstacle as the DRC budget allocated to environmental protection is yet to be increased.
- *Inability of the Government to abide by national environmental laws*: Several duties assigned to the central Government and to the MECNT under national laws are not complied with by government institutions (such as the law which imposes a duty on the central and provincial Governments to effectively manage waste in a manner that preserves a good quality of environment and health).[23] Significant piles of waste are found in most of the DRC's towns, and very little is done by the Government to remove them. Local environmental NGOs engage in waste management by coordinating waste collection campaigns in selected towns, but their work remains dispersed and ineffective. A few numbers of private companies propose domestic waste collection services (in the example of POUBEL NET in Bukavu) but the price they charge (between US$5 and US$20) is not accessible to the majority of the population.
- *Gap between legislation and practice*: Many of the lawyers who draft environmental laws in the DRC ignore the realities prevailing on the ground. Subsequently, many environmental laws do not address problems they are meant to solve, as they are based on theories, speculations, and projections. It is thus difficult to understand the

[21] MECNT, *Rapport National synthèse sur le développement durable en République Démocratique du Congo* (2012) Kinshasa: UN DESA, RIO+20 &UNDP, at 9.
[22] *Democratic Republic of Congo Country Report* (2011) (available at www.congoforum.be/upldocs/eiu.pdf).
[23] Article 56, law No. 11/009 of 09 July 2011. Subsequently, a national directorate was created by Ministerial Order No. CAB.MIN/MBB/SGA/GPFP/JSK/035/2009 of 20 March 2009. Furthermore, although article 57(a) of Law No. 11/009 of 09 July 2011 prohibits the abandonment of domestic or industrial waste susceptible to cause damage to the environment, health and to produce uncomfortable odours; rarely are any offenders arrested for such offences. (A. Panda, *Obstacles à la Gestion efficiente de déchets solides en RDC: cas de la ville de Bukavu* (2011) (available at http://ircwsscc.wordpress.com/2011/03/09/obstacles-a-la-gestion-efficiente-de-dechets-solides-en-rdc-cas-de-la-ville-de-bukavu/)).

legislator's ideas, which generates further complications in implementation and enforcement.

- *Political instability*: The control and exploitation of mineral resources remain the main source of instability[24] and mining activity has caused water pollution, deforestation and soil erosion. Environmental protection is harder in regions of the eastern DRC under the control of rebel-armed groups, and environmental issues reported in these areas cannot be addressed.[25]
- *Lack of environmental pollution impact assessment*: The DRC does not undertake regular evaluation of environmental conditions and their impact on the health of nationals. Thus, the consequences of polluted environment on the health of local population in the DRC, remains unknown.[26]
- *Absence of mechanisms of coordination of the cooperation between various sectors*: National environmental, economic and social policies of the DRC were shaped in extremely arbitrary manner that does not enable cooperation between various sectors affecting environmental protection. This often generates conflict between various relevant environmental institutions. For instance, although the *Mining Code* calls for collaboration between the mining department and the MECNT, this is not done in practice. There is an apparent animosity between the two organisations, and the lack of a clear mechanism to regulate conflicts arising between these institutions results in serious difficulties.[27]
- *Overlapping institutional mandates*: There are several examples of overlapping institutional mandates in environmental protection in the DRC. Take for example the MECNT's Direction of Human Establishments and Environmental Protection and the Ministry of Mines' Department in Charge of the Protection of the Mining Environment.

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[24] See generally Global Witness, 'Congo's Mineral Trade in the Balance: Opportunities and Obstacles to Demilitarisation' (2011). Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* states that 'the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterised by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein'.

[25] Beyers et al, *Resource Wars and Conflict Ivory: The Impact of Civil Conflict on Elephants in the Democratic Republic of Congo - The Case of the Okapi Reserve* (2011) PLoS ONE; UNESCO 'Emergency appeal for Okapi Wildlife reserve (DRC) following murderous raid by poachers' (available at http://www.unesco.org/new/en/media-services/singleview/news/emergency_appeal_for_okapi_wildlife_reserve_drc_following_murderous_raid_by_poachers/).

[26] This includes air pollution (resulting from metallurgy; petrol and cement exploitation; wood combustion in the production of charcoal; slash-and-burn agriculture and fuel wood collection; manufacturing activities and transport), marine and water pollution, and so forth. See further: IUCN, *Strengthening Voices for Better Choices in the Democratic Republic of Congo: When All Voices are Heard, Forest Stakeholders Work Together* (2009), 1.

[27] For instance, there is no arbitration institution to address issues that arise in a conflict of competence between the mining, agriculture and forest sectors regarding the process of allocation of lands. This is aggravated by the lack of a clear national and regional development plan.

The mandate of the first includes environmental rehabilitation in mining areas and the conduct of environmental assessments in mining areas, which is basically the same mandate as the later.[28] This overlap of mandates causes serious problems in cooperation between the two Departments.

Environmental Case Law

The judicial system of the DRC was significantly undermined by the armed conflicts of 1996 and 2003, from which it is still recovering. To date, there is neither a central database of cases examined by local courts and tribunals, nor an official journal (national or provincial) in which legal decisions and case law can be published. At most Universities environmental law is not offered at all, or at best as an elective course. This needs improvement in order to enable future lawyers to appreciate the enormity of environmental problems at the global, regional and national level and the role of law in the sustainable utilisation of natural resources and environmental management. This is also necessary to facilitate the coming into being of a more critical mass of lawyers who are conversant with environmental law. It would also increase the number of judges, magistrates, prosecutors, legal practitioners and councillors able to understand environmental law and sustainable development.

The judicial system in the DRC thus still faces numerous obstacles that specifically hinder the legal implementation of national environmental law including the following:

- lack of special courts to examine environmental disputes and offences;
- limited knowledge of environmental legislation by Congolese magistrates;
- lack of an updated compilation of national laws regulating environmental protection; and
- the absence of environmental personnel, programmes and structures provided for by national environmental laws.

An illustrative example of the latter is the proposed establishment of sworn agents of environmental protection.[29] No information has transpired to date on efforts undertaken to appoint these agents, who would play a significant role in the enforcement of national environmental laws by identifying and referring environmental offences form prosecution.

[28] Other tasks of the Direction include: evaluation of the effects of the human activities on the environment; development of spaces; and prevention of activities that causes air, water and soil pollution.
[29] Article 71, Law No. 11/009 of 09 July 2011.

The same law[30] provided for the creation of national and provincial emergency plans to address environmental catastrophes. No information is available on whether these plans have been successfully drafted and are ready to be implemented if such incidents occur.

As a result, no environmental case law examined by local judicial institutions could be found. Yet, this does of course not imply that there are no violations of the environment, environmental laws or the prevalence of environmental conflicts in the DRC.

Conclusion

Despite the significant number of laws and regulations adopted and/or amended to meet international standards of international environmental law, the financial support of international donors for the implementation of national programmes aimed at the consolidation of environmental protection and the enforcement of sustainable development in the DRC; environmental protection in the DRC is yet to generate significant positive impacts and the quest toward sustainable development remains trivial.

While some of the aforementioned laws no doubt contribute to the protection of the environment, the Government of the DRC, with its respective Ministries, must continue to endeavour to improve, perfect and adjust existing laws and where necessary enact new laws. Without any doubt, this process will be time consuming, is ongoing and will require financial support.

To address the continuous decline of the environment and improve the quest of sustainable development in the DRC, there is a need to undertake more interdisciplinary research that navigates the legal and socio-economic particularities that affect the environmental sector in the DRC and to establish a suitable system of environmental protection.

Lastly, the future success of the DRC's efforts to sustainably use, control, manage and safeguard its natural resources will depend to quite some extent on the different legal instruments that are available in order to develop a target-oriented environmental legislative framework. In the aforementioned context, and in line with the recent *United Nations Security Council Resolution* 2078 (2012), the 'linkage between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as one of the major factors fuelling and exacerbating conflicts in the Great Lakes region of

[30] Articles 64 & 65.

Africa' cannot be overemphasized and 'the regional efforts of the International Conference on the Great Lakes Region (ICGLR) against the illegal exploitation of natural resources' must be encouraged.[31]

[31] Adopted by the Security Council at its 6873rd meeting, on 28 November 2012.

COUNTRY REPORT: GERMANY
New Renewable Energy and Waste Management Legislation

ECKARD REHBINDER*

Introduction

After the turbulences in the wake of the Fukushima nuclear disaster that led to the German "energy turn", that is, the rapid switch from nuclear energy to renewable sources of energy, German environmental and energy policy has managed to sail again into calmer and more predictable waters. The primary task for the near future is the smooth implementation of the energy turn. This is not an easy task and the insight that there are various implementation problems has already given rise to some legislative amendments of the statutory framework. Apart from energy policy, waste management has come into focus. Both fields of environmental policy are characterised by the central feature that governmental intervention has created "artificial" markets in which factors such as market power, access to the market, investment incentives, investment security and equitable distribution of costs and risks play a major role.

Statutory Developments

In the field of climate protection and renewable energy, two new laws respond to implementation problems of the energy turn. The German *Renewable Energy Act*[1] is based on a fixed-tariff system for the promotion of renewable energy. 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 remuneration for fed-in photovoltaic electricity is particularly high. This has led to an unexpected increase of the photovoltaic energy capacity and the associated cost burden of end electricity consumers that has caused a considerable imbalance in the whole system.

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[1] Law of 25 October 2008, *Federal Gazette* 2008 (Part 1), p.2074, as amended.

Therefore, an amendment of the Renewable Energy Act, the *Act for Amending the Legal Framework for Electricity from Solar Sources* of 17 August 2012,[2] reduces the remuneration of fed-in photovoltaic energy (new Sections 20a and 20b of the *Renewable Energy Act*). The Act provides for a degressive percentage of reduction (1 percent per month in relation to the remuneration for the respective previous month) and in addition a further fixed percentage of reduction insofar as the permissible corridor of overall capacity increase (2,500 to 3,500 MW per year) is exceeded (0.4 to 1.8 percent). These changes are also applicable to existing facilities although the *Renewable Energy Act* sets a fixed 20 years time frame for financial promotion.

The *Third Act for Amending Energy-Related Provisions* adopted by the Bundestag (House of Representatives) on 29 November 2012[3] addresses the distribution of financial responsibility for economic losses associated with the inability of transmission grid operators to accept electricity from offshore wind energy parks. The legislative process was complex because in the field of renewable energy, the Government is fully dependent on investment by private business. The operators of offshore wind energy parks were not willing to bear the economic risk caused by an overburdening or delayed construction of the grid and threatened to stall all new investments. Against this backdrop, the new Act provides that the transmission grid operators shall bear the primary responsibility in the amount of 90 percent of the remuneration foregone by the offshore generators of wind electricity but can in principle shift the losses onto the end consumers. However, such passing of financial risk is limited where the transmission grid operator failed to use due diligence in the operation and construction of the grid insofar as the loss does not exceed relatively high, differentiated retention sums; moreover, there is a presumption of negligence and even gross negligence.

Germany has a new waste management law, the *Circular Economy Act* of 24 February 2012.[4] The Act mainly transposes the *EU Directive on Waste 2008/98* into German law but also contains elements of autonomous German waste management policy. However, the changes of existing law that in an international comparison has already been quite progressive, are not of a fundamental nature. The *Circular Economy Act* introduces – instead of the previous three-tier system – a five-tier waste management hierarchy (prevention, preparation for re-use, recycling, recovery and disposal), which is not absolute but qualified by the prerequisites of technical feasibility, economic reasonableness and

[2] *Federal Gazette* 2012 (Part 1), p. 1754.
[3] Deutscher Bundestag, Die Beschlüsse des Bundestags am 29. November (available at www.bundestag.de; see also *Federal Parliamentary Documents* 17/11705 (Recommendations and Report of the Commission of Economic Affairs and Technology) and 17/10754 (Draft Act).
[4] *Federal Gazette* 2012 (Part 1), p. 212 (as corrected p. 1474).

compatibility with the protection of the environment. The Act retains the German “dual system” of waste management. Apart from waste originating from production processes for which producers are responsible, the dual system entails direct responsibilities of producers and distributors for a major part of product-related waste and responsibilities of the municipalities for the remaining household waste. The Act extends the responsibility of producers for product-related waste. Furthermore, it stiffens the existing recycling quotas although not significantly beyond the high recycling rates that have already been achieved in practice, and it provides for an extension of the separate collection of particular categories of waste. Disposal of waste on land is only permitted after thermal or biological treatment. This means that waste that cannot be recycled must in most cases be incinerated, either in the form of recovery for the generation of energy or in that of thermal treatment for reducing its volume and making it inert.

The most controversial issue has been the relationship between the municipalities and private business in the field of managing domestic waste for recycling or recovery. The backdrop of this controversy is the fact that recycling and recovery of waste for generating or processing secondary raw materials have become an important business as to which the municipalities and private enterprises compete. Under previous law there was a kind of monopoly of municipalities in the shape of an obligation of waste possessors to leave the wastes to the municipality although exceptions were permissible and in practice widely used. The Government and the conservative/liberal majority of the Bundestag (House of Representatives) wanted to introduce a liberalisation of existing law to the extent that private collection and recycling or recovery shall be permissible unless there are paramount interests that militate for the contrary; this requirement was then to be specified by reference to the functioning of municipal waste management and mandatory take-back systems on the one hand, the higher performance of private collection and recycling or recovery on the other. By contrast, the Bundesrat (representation of the States) and the municipalities insisted on retaining and even expanding the monopoly of the municipalities for domestic waste management, arguing that ‘cherry picking’ by private business should not be allowed. The Conciliation Commission of Parliament then reached a compromise solution whereby the relevant requirements are further specified by lengthy provisions that favour the municipalities. In particular, section 17(2) no 4, and (3) of the Act provides that an endangerment of planning security and organisational responsibility of municipalities for waste management that would justify the municipal monopoly is deemed to exist when the municipalities themselves or through private enterprises charged by them to carry out a separate collection and recycling or recovery of waste that is close to households and has a high quality, the stability of municipal waste management fees is endangered or the non-

discriminatory and transparent procurement of waste management services in competition is significantly impaired or frustrated. Moreover, the prerequisite of higher performance of private collection and recycling or recovery is qualified by elements that make it extremely difficult for private business to remain in or enter into the market. The ultimate effect of the compromise solution will be that private collection and recycling of household waste will in the future only be an exception.

Moreover, the Federal Government, in late summer 2012, has proposed an amendment to the *Environmental Remedies Act* (*ERA*).[5] This is a response to the landmark holding of the European Court of Justice of 12 May 2011 in the "Trianel" case,[6] as analysed in the German Country Report for 2011. This judgement had declared the German limitation of association standing to the vindication of individual rights of any affected person to be inconsistent with EU law. The proposal would now introduce a full-fledged association suit in environmental matters. It even goes beyond the Trianel holding in that it also includes decisions relating to the environment taken under non-harmonized national law. To this extent the proposal would directly transpose Article 9(3) of the *Aarhus Convention* into German law. In the "Slovak Brown Bear" case,[7] the European Court of Justice had derived from Article 9(3) of the Convention that this provision required an interpretation of national standing rules in conformity with the Convention also with respect to official action or inaction not subject to mandatory participation under the *Aarhus Convention.* Due to the limited competence of the Court, this was qualified by the proviso that the subject matter needed to be at least partly covered by EU law. The draft amendment of the *ERA* draws the consequences from the core message of this holding as far as German law is concerned. However, the draft would retain the controversial German concept of limited relevance of procedural errors for the legality of official action, introduce new substantiation requirements for instituting environmental suits, specify the depth of judicial review of the merits of administrative decisions challenged by such suits and reduce the traditional balancing concept of interim judicial protection. The Bundesrat, the representation of the States (which is dominated by the opposition), has immediately submitted critical comments on the draft.[8] It remains to be seen how the draft will fare in the legislative process.

[5] *Federal Parliamentary Document* 17/10957.
[6] Case 115/08, Bund für Umwelt- und Naturschutz/Bezirksregierung Arnsberg (available at www.curia.europa.eu).
[7] Judgement of 8 March 2011, Case C-240/09, Lesoochranárske zoskupenie VLK/Ministerstvo životného prostredia Slovenskej republiky (available at www.curia.europa.eu).
[8] *Federal Parliamentary Document* 469/12 (Resolution of the Bundesrat).

Finally, a rebellion of the local population against a major railway station and track extension project in Stuttgart in the State of Baden-Württemberg ("Stuttgart 21"), has directed public attention to deficiencies of the highly complex German system of public participation in the planning of major infrastructure projects. As a means for promoting better public acceptance of such projects, the Federal Government has proposed a new law[9] that would oblige the competent authority to see to it that the author of the project voluntarily informs the affected public before submitting an application about the expected impacts of the project Law and discuss these impacts with the public. This proposal is generally considered as rather weak. An alternative that has found much support is to enrich the EIA scoping process by comprehensive participation and make better use of the internet.

Recent Case Law

The most interesting developments in case law relate to the repercussions of the Trianel decision of the European Court of Justice.[10] It is evident that this decision has set in motion a process of reassessing fundamental bases of German administrative court procedure law in environmental matters. Pending the adoption of the *ERA* Amendments, the German administrative courts now accept the direct effect of Article 10a of the *EIA Directive* (Article 11 of the new consolidated *EIA Directive*)[11] and Article 15a of the *Directive on Integrated Pollution Prevention and Control*[12] (identical: Article 25 of the new *Industrial Emissions Directive*)[13] that were introduced by the *Aarhus Directive* of the EU.[14] Thus, the Federal Administrative Court[15] held that by virtue of the direct effect of the *EIA Directive*, the limitation of association standing to the vindication of subjective rights under the *ERA* has to be ignored. Moreover, the Federal Administrative Court, in a decision rendered in early 2012,[16] referred the question as to whether the limited relevance of procedural errors under the *ERA* and general law is in conformity with the *EIA Directive*, to the European Court of Justice for a preliminary ruling under Article 267 of the *Treaty on the Functioning of the European Union*. The *ERA* only provides that the lack of an environmental impact assessment and that of a preliminary environmental assessment (which determines case by case whether an environmental impact assessment is required for projects not listed in the

[9] Law for the Improvement of Public Participation and Harmonisation of Planning Procedures, *Federal Parliamentary Document* 17/9666.
[10] Supra note 6.
[11] Directive 85/337/EEC, consolidated as Directive 2011/92/EU.
[12] Directive 96/61/EEC, consolidated as Directive 2008/1/EC.
[13] Directive 2010/75/EU.
[14] Directive 2003/35/EC.
[15] Judgement of 20 December 2011, 9 A 31/10, Neue Zeitschrift für Verwaltungsrecht 2012, p. 575.
[16] Decision of 10 January 2012, 7 C 20/11, Neue Zeitschrift für Verwaltungsrecht 2012, p. 448.

German EIA Act) constitute grounds for quashing the relevant administrative decision. All other procedural errors, including incomplete or insufficient impact assessments, are subject to general law. They are only relevant if they may have had an impact on the substantive legality of the administrative decision and they can be remedied during the administrative and even court proceedings. The European Court of Justice will have to decide whether Article 10a(1) (new Article 11(1) of the *EIA Directive*) which accords the plaintiff also a right to the review of the procedural legality of administrative decisions but grants member states some margin of shaping the relevant remedies, requires a broader scrutiny of procedural errors.

By contrast, the German administrative judicature has not been prepared to deviate from its traditional stance that the institution of "preclusion" is a legitimate element of administrative and administrative court procedure. Under the relevant environmental and planning laws belated and unsubstantiated comments and objections do not need to be considered. Moreover, the *ERA* (Section 2(1) no. 3)) explicitly states that environmental NGOs which have not participated in the preceding administrative proceedings or have not raised objections on particular issues although they were given an opportunity to do so, do not have standing at all or are precluded with all arguments and assertions they could have already brought forward in the administrative proceeding. Although, in the light of the holding of the European Court of Justice in the case "Djurgården-Lilla Värtans Miljöskyddsvorening",[17] preclusion appears problematic. The German administrative courts consider it to be covered by the empowerment of member states to shape the details of environmental remedies.[18]

Outside the field of procedural law, the growing body of case law dealing with wind power facilities under the perspectives of spatial planning, nature conservation (especially bird and bat protection) and protection of neighbours against noise should be noted. Whilst administrative courts emphasize the interest in extending wind power under planning law by barring municipalities from declaring their territory as "wind energy-free", there is a judicial tendency to establish legal barriers to the operation of wind energy facilities based on species protection and protection against noise nuisances.[19]

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[17] Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsvorening/Stockholms kommun genoom dess marknämd, [2009] European Court Reports I-9967.
[18] Federal Administrative Court, Judgement of 20 December 2011, 9 A 31/10, Neue Zeitschrift für Verwaltungsrecht 2012, p. 575; Judgement of 3 March 2011, 9 A 8/10, Entscheidungen des Bundesverwaltungsgerichts vol. 134, p. 150.
[19] See, for example, Federal Administrative Court, Judgement of 20 May 2010, 4 C 7/09, Entscheidungen des Bundesverwaltungsgerichts vol. 137, p. 74; Judgement of 1 July 2011, 4 C 6/09, Entscheidungen des Bundesverwaltungsgerichts vol. 137, p. 259 (spatial planning law); Administrative Court of Appeal Magdeburg, Judgement of 26 October 2011, 2 L 6/09, Natur und

Critical Consideration of Recent Developments

In autumn 2012, the share of electricity from renewable sources in the whole electricity supply mounted to 26 percent. While this can be seen as an immediate success of the German policy on renewable energy, it remains equally true that the most urgent implementation problems of the energy turn such as the extension of the grid, the connection of off-shore wind energy parks to the grid and the technical improvement of the grid so as to cope with fluctuations and geographical imbalances on the supply and demand side have not yet been solved. Moreover, there is an inflation of electricity prices which is due to the generous remuneration of fed-in renewable electricity, the exemption of electricity-intensive industrial end users from redistribution and perverse impacts of the market premium that is paid to cover the difference between the price of directly marketed renewable electricity and the price noted on the German Energy Exchange. The associated financial burdens imposed on all other consumers have to an ever increasing extent become grounds for concern of the public. The reduction of the fixed tariff for photovoltaic electricity is just a first step to make the whole system of renewable electricity promotion a little more efficient. In any case, the intervention of the Legislature into the fixed periods of guaranteed remuneration of renewable energy is not without problems. Although technically speaking, the reduction is not retroactive since only the future remuneration is affected, investors had legitimate expectations that the remuneration would remain stable throughout the fixed period and had oriented their investment decision on these expectations. Therefore, the reduction of the remuneration is subject to constitutional concerns.[20] However, this does not relate to the adjustment of the remuneration to the development of installed total capacity, which was already laid down in previous versions of the *Renewable Energy Act*. Money is also at issue in the conflict between operators of offshore wind energy parks, transmission grid operators and end users of electricity on bearing the risk of overburdening and belated extension of the grid. Caught between several fronts, it was not easy for the Legislature to devise a solution that considers the interest in expanding offshore wind energy, promoting the extension of the grid and ensuring an equitable distribution of financial burdens.

As regards the new *Circular Economy Act*, the maintenance and even strengthening of the municipal monopoly for household wastes for recycling or recovery has become the source

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Recht 2012, p. 196; Administrative Court of Appeal Koblenz, Judgement of 28 October 2009, 1 A 10200/09, Natur und Recht 2010, p. 348 (bird and other species protection); Administrative Court of Appeal Kassel, Judgement of 27 July 2011, 9 A 103/11, Natur und Recht 2012, p. 485 (noise).

[20] See Federal Constitutional Court, Decision of 15 March 2000, 1 BvL 16/96, Entscheidungen des Bundesverfassungsgerichts vol. 102, p. 68, 97-98.

of legal and economic controversy. It is an open question whether the new Act is inconsistent with the market freedoms or justified by the exception for public enterprises charged with services of general economic interest laid down in the *Treaty on the Functioning of the European Union* (Articles 34 and 106). A number of German business associations have made complaints to the European Commission and asked for its intervention. Apart from legal arguments, the value of competition on the recycling market for price formation and for the assurance of the quality of secondary raw materials has convincingly been emphasized by the complainants. On the other hand, it does not appear illegitimate to put limits to 'cherry picking' by private business and leaving the bad fruit of household waste management to public corporations.

The draft amendment of the *ERA* is satisfactory if one only considers association standing. However, the draft must be criticized for its attempt to deteriorate substantive judicial review in environmental matters – the more so since the relevant proposals do not only concern association suits but also suits brought by individuals. The extension to individual suits is explained by the Government with the seemingly innocent argument that the amendments are necessary for off-setting the undesirable results of the extension of association standing but, by virtue of the prohibition of discrimination of association suits, unfortunately had also to be imposed on individuals. Arguably, these curtailments of judicial review constitute a violation of the requirement of effective judicial protection set out in the *Aarhus Directive* and the *Aarhus Convention.* Thus, Germany may face another judicial defeat before the European Court of Justice.

COUNTRY REPORT: INDIA
A Busy Year of India's Courts and Law Makers

KAVITHA CHALAKKAL*

Introduction

2012 will go in to the environmental history of India mostly for the legal interventions of the National Green Tribunal (NGT), which is starting to establish new benches for the faster settlement of environmental cases. The issue of the lack of scientific and proper Environmental Impact Assessments (EIA) dominated the court cases. While governments, corporations and media could be seen as still hesitant to consider EIA's as the most critical part of any project implementation, the NGT did emphasize its importance. The country did not see any considerable statutory reform this year. Many Bills with environmental implications, such as the *Biotechnology Bill* and the *Nuclear Safety Bill*, are still pending approval from the Indian Parliament. The debates and discussions on these are still continuing at various levels. It was a seemingly bad year for Indian wildlife, with cases of poaching, human-animal conflicts, train-hits and new linear and other infrastructural projects further pushing the limits. India did not move much ahead in its previous stances on matters such as climate change, emission reduction and related international commitments. It continued to emphasize on the need for "equitable burden sharing" with regard to commitments towards sustainable development.

Case Laws

National Green Tribunal

The Indian Government established[1] the National Green Tribunal (NGT) in October 2010, under the landmark legislation, the *National Green Tribunal Act* (2010). It is a specialized body for handling environmental disputes. As a specialized body with expertise to handle multidisciplinary issues, the NGT was expected to provide:[2]

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[1] *Special Order* (S.O.) 2570(E); the *Gazette of India*, 18 October 2010, New Delhi.
[2] *National Green Tribunal Act* (19 of 2010), the *Gazette of India*, 2 June 2010, New Delhi.

- Effective and expeditious disposal of cases relating to environment, including conservation of forests and natural resources;
- Enforcement of any legal right relating to environment; and
- Relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

The NGT has started functioning, and its 2012 judgments prove that this specialized body is dealing with environmental cases at fast rates. In 2012, the NGT gave its verdict on many cases. The cases were mostly regarding industrial and infrastructural development and their environmental impact assessments (EIA). The NGT has shown keenness to ensure that proper EIA's[3] are being done before the implementation of projects. In one verdict,[4] the NGT looked into multiple appeals against the establishment of a coal-based thermal power plant at Villages Golagandi and Baruva of Sompeta Mandal, Srikakulam District of Andhra Pradesh. The appeals raised issues such as: (a) the project site was a wetland and would cause environment hazards apart from ecological imbalance; (b) the Environment Assessment Committee (EAC) Report was incorrect, and was based on false data submitted by the project proponent; and (c) and that the public hearing was not conducted properly. The NGT found that the EIA Report had ignored "vital aspects," which gave an impression that "the matter was dealt with in a very casual manner without realising its importance." It emphasized that an "EIA Report is the key on which the EIA process revolves, it is important that EIA report prepared should be scientific and trustworthy and without any mistakes or ambiguity". In many other cases, the NGT clearly emphasized the need for development proponents to strictly follow EIA rules.

The case of *Prafulla Samantray and Biranchi Samantray vs Union of India and Others* resulted in a major decision by the NGT. The appeal was against the Environmental Clearances and EIA for a steel cum captive power plant project and a captive minor port project of POSCO India. The NGT asked the MOEF to "make a fresh review of the Project" and suspended the Ministry's final order on Environmental Clearances to the project. The NGT also suggested that it was "desirable that MOEF shall take a policy decision that in large projects like POSCO where MOUs are signed for large capacities and upscaling is to be done within a few years, the EIA right from the beginning, should be assessed for the full capacity and EC granted on this basis".

[3] As stipulated by the *EIA Notification* dated 14 September 2006.
[4] Judgement on Appeal No. 23, 24, 25, 26/2011 (available at http://www.greentribunal.in/orderinpdf/23-2012(T)_23May2012_final_order.pdf).

In another case, *Rohit Choudhury* vs *Union of India and Others* (Application No. 38/2011), the NGT ordered the removal of 11 stone-crushing units, 33 brick kilns and some other establishments functioning within the No-Development Zone of the Kaziranga National Park. It also ordered 23 units working outside the zone to cease their operations. The NGT directed the MoEF and the Assam State Government to prepare a Comprehensive Action Plan and Monitoring Mechanism for implementation of the conditions stipulated in the 1996 Notification creating the "No Development Zone".

In many cases, the NGT took strong decisions, setting aside the Environmental Clearances by various state environmental clearance agencies.

Supreme Court of India

Although the NGT has been delegated the duty to deal with environmental cases, the Forest Bench of the Supreme Court,[5] which deals with forest and mining-related cases, is still active.

Conservation of Asiatic Wild Buffalo

On 13 February 2012, the Court decided[6] a case involving the conservation of the endangered Asiatic Wild Buffalo (*Bubalis bubalis*) in Central India. The State of Chhattisgarh, which hosts a critically important population of the animal,[7] was heard in the case. The Apex Court asked the State to give effect to centrally sponsored wildlife schemes to save the wild buffalo from extinction, and to take immediate steps to stop interbreeding of wild and domestic buffaloes in order to maintain the genetic purity of the animal.

Transfer of Cases to NGT

In the case of *Bhopal Gas Peedith Mahila Udith Sanghathan vs Union of India*, the Supreme Court directed that all environmental cases, which are covered under the schedule of the *National Green Tribunal Act* (2010), must be transferred from various courts, including High Courts, to the NGT. The court emphasized that:

[5] Constituted in 2010.
[6] T.*N Godavarman Thirumulpad vs Union of India & Others;* Civil Original Jurisdiction, I.A. Nos 1433 and 1477 of 2005 in Writ Petition (C) No. 202 of 1995.
[7] Chhattisgarh has declared the wild buffalo as its State Animal.

> "We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice."

Statutes

New Bills and Acts

Many National Bills are pending decisions by the Indian Parliament, as mentioned in last year's Country Report. The *Agriculture Bio-security Bill* (2011) was cleared by the Union Cabinet in May 2012, and is yet to get the Parliament's nod to make it a law. While the *National Food Security Bill* (2011) is also pending, the State of Chhattisgarh came up with the *State Food Security Act*, the first such effort in the country. The controversial *Biotechnology Regulatory Authority of India Bill* (2011), *Draft Animal Welfare Bill* (2011) the *Mines and Minerals (Development and Regulation) Bill* (2011) are also pending approval from Parliament.

The *Land Acquisition, Rehabilitation and Resettlement Bill* (2011) has attracted controversy. In 2012, the Bill faced opposition in the Union Cabinet, and was referred to a Group of Ministers for review. The Bill aimed to replace the *Land Acquisition Act* (1894) and was later renamed the *Right to Fair Compensation, Resettlement, Rehabilitation and Transparency in Land Acquisition Bill* (2012). This was approved by the Union Cabinet in December 2012, and is all set to be tabled at the Parliament for approval.

Another Bill with environmental implications, the *Plachimada Coca-Cola Victims Relief and Compensation Claims Special Tribunal Bill* (2011), was passed by the Kerala State Assembly in 2011. It is similarly still awaiting the nod from the President of India to become a law. The Bill aims "to provide for the establishment of a Special Tribunal for the expeditious adjudication of disputes and recovery of compensation for the victims from the Hindustan Coca-Cola Beverages Private Limited and matters connected therewith or incidental there to".[8]

[8] See further: http://www.niyamasabha.org/bills/12kla/plachimada%20victims.pdf.

Notifications

Reconstitution of the Coastal Zone Management Authorities

In 2012, various Coastal Zone Management Authorities (CZMAs) were reconstituted under the new *Coastal Regulation Zone (CRZ) Notification* (2011), which was promulgated to replace the *CRZ Notification* (1991). The notification, promulgated under the *Environmental Protection Act* (1986), reconstitutes these CZMAs that are entrusted with many vital functions for conservation of coastal ecosystems. The CZMAs will play a critical role in the issuing of clearances for activities in the regulated zone and they are also vested with the task of formulating Coastal Zone Management Plans for each coastal state. The objectives of *CRZ Notification* (2011) are: (1) to ensure livelihood security to the fishing communities and other local communities living in the coastal area; (2) to conserve and protect coastal stretches with its unique environment; and (3) to promote development through sustainable manner based on scientific principles taking into account the dangers of natural hazards in the coastal areas, sea level rise due to global warming. The Central and State Governments were slow to respond to the *CRZ Notification* (2011) and it was only by late 2011, and in 2012, that they started reconstituting the CZMAs, which were originally formed in 1998, following the orders of the Supreme Court of India. Almost a year after the *CRZ Notification* (2011), on 19 April 2012, the Central Government reconstituted the National CZMA, the nodal agency for coordinating the functions of the state CZMAs. The CZMA of the State of Kerala was reconstituted in December 2011; and those of Gujarat, West Bengal, Odisha, Maharashtra, Tamil Nadu and of the Union Territories of Andaman-Nicobar and Puducherry in 2012.

Eco-Sensitive Zones

Through its notifications, the Ministry of Environment and Forests (MoEF) declared five Protected Areas as Eco-Sensitive Zones: Bandipur National Park; Girnar Reserve Forest; Purna Wildlife Sanctuary; Vansda National Park; and the Narayan Sarovar Wildlife Sanctuary. The orders regulate or restrict human activities within the zones, and the state governments are mandated to prepare Zonal Master Plans, as specified under the *Wildlife (Protection) Act* (1972).

Environmental Clearance

The Ministry also came out with four General Statutory Rules, under the name of the *Environment (Protection) Amendment Rules* (2012), amending the environmental standards set for Petrochemicals (Basic and Intermediates), Integrated Iron and Steel Plants, Electroplating and Anodizing Industry, and Grain Processing, Flour Mills, Pulse Making or Grinding Mills.

International Agreements

Convention on Biological Diversity

India hosted the 11th Conference of Parties (COP-11) to the *Convention on Biological Diversity* (*CBD*) and the sixth Meeting of Parties to the *Cartagena Protocol on Bio-safety* in October 2012. About 15,000 participants, including representatives of 170 nations, attended the biggest multilateral meeting held in India. India took over the presidency of the *Convention* for the next two years and during the Conference, India's Prime Minister, Manmohan Singh, declared the country's ratification of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD*. He also declared the *Hyderabad Pledge*, according to which India will spend $50 million in the two years of its *CBD* Presidency for strengthening the country's institutional mechanism and technical and human capabilities for biodiversity conservation in order to attain *CBD* objectives. The country will also promote capacity building in developing countries.

World Heritage Convention

The World Heritage Committee, in July 2012, listed the Western Ghats of India as a World Heritage (Natural) Site. Western Ghats is one of the world's recognized Biodiversity Hotspots, and it supports tremendous species and ecosystem diversity, along with dense human settlements.

MOU with Egypt

In March 2012, the Government of India signed a Memorandum of Understanding (MOU)[9] with the Government of Egypt, in Cairo. The countries, wishing to strengthen cooperation regarding specific international conventions and in conformity with the World Summit on Sustainable Development, agreed to develop and promote co-operation in environmental protection, including transfer of technology and exchange of expertise. The countries will cooperate on waste-management, climate change, bio fuels, marine and coastal management, air and water quality, protection of biological diversity and wetlands, water conservation and afforestation. A joint Working Group on Environment has been set up to promote this cooperation.

Equitable Burden Sharing and Climate Change Mitigation

India's 12th *Five-year Plan (2012-2017)* has a low-carbon growth strategy, "as one of its key pillars".[10] However, in 2012 the country did not realize its stance of adopting internationally binding commitments on the reduction of emissions and on mitigation actions. Emphasizing the unsustainable lifestyles of the industrial world, the Indian Prime Minister pitched for "equitable burden sharing" among nations at the UN Conference on Sustainable Development (Rio+20) held in Rio de Janeiro in June 2012. In a February-2012 Submission to the *UN Framework Convention on Climate Change* (*UNFCC*), India emphasized that with regard to climate change mitigation efforts, the question of "the highest possible mitigation efforts by all parties" has to be addressed based on the COP-16 decision on "Enhanced action on mitigation". It informed the Convention that India has already put forward and is implementing its domestic mitigation goal in accordance with the *UNFCC* principles and provisions, and that this could be achieved only through the provision of support and enablement in terms of finance and technology. In a joint declaration of BASIC countries in February 2012, India welcomed the agreement on the 2nd commitment period of the *Kyoto Protocol*. In the statement, it firmly opposed the inclusion of international aviation in the European Union Emissions Trading Scheme (EU-ETS), stating that it violates international law and multilateralism. In 2012, India reiterated its commitment to addressing climate change through enhanced international cooperation under the *Durban Platform on Enhanced Action*.

[9] See further: http://envfor.nic.in/downloads/public-information/MoU-Egypt.pdf.
[10] MoEF, *Executive Summary, India: Second National Communication to the United Nations Framework Convention on Climate Change* (2012) New Delhi: Ministry of Environment & Forests, Government of India.

Conclusion

2012 has not been a particularly good year for India's environment. In 2012, death numbers of the country's national animal, the endangered Bengal tiger (*Panthera tigris*), reached an all-time high of 88.[11] National and provincial governments are still on an industrialization spree with the natural environment suffering, arguably, the worst impacts. Forested areas and even protected areas are threatened by infrastructural projects. A proposed North-South Transportation Corridor could cause serious damage to the country's wildlife, including cutting off scattered protected areas by destroying forest corridors, which maintain genetic connectivity of animal populations. Indian environment law should grow beyond pollution control,[12] in favour of landscape-level management and ignored biodiversity aspects such as scattered ecosystems, forest-corridors and non-charismatic endangered species such as amphibians, fresh-water fishes and insects. However, 2012 did not see any effort from the Indian lawmakers in strengthening the law for environmental protection and ensuring improved compliance and monitoring of the existing law.

Issues of coastal zone violations surfaced in many parts of the country in 2012. The country's new policies envisage the construction of a staggering number of new ports (some estimates find the number to be at least one port every 30 kilometres),[13] which could mean the end of the delicate coastal ecosystems, including mangroves, sand dunes, mudflats and coral reefs. The country still lacks a comprehensive law for the coastline. The current *CRZ Notification* (2011), which lacks proper institutional support, is proving to be inadequate.

Indian wildlife had a torrid time with increasing human-wildlife conflicts. Despite many organizations working on the issue, human-animal conflict has grown as one of the serious issues demanding specific legal intervention. Poaching continues to increase, mainly targeting tigers (the endangered national animal of the country) and other endangered animals such as asian elephant and the great one-horned rhino. Apart from these, poaching and trading is continuing in threatened species of ungulates, insects, reptiles and birds. Elephants, the devastating crop-raiders, continue to cause damage to both human property and life. Carnivores, mostly leopards and sometimes tigers, venture into human settlements, lifting cattle and occasionally mauling or killing human beings. Retaliatory killings, including

[11] See further: http://www.asianage.com/india/tiger-deaths-reach-all-time-high-88-165
[12] Pollution Control Boards are the main custodians of Indian environment.
[13] See further: http://www.downtoearth.org.in/content/fisher-people-pushed-edge.

poisoning and putting pressure on governments to kill carnivores,[14] have been reported from many parts of the country. Train-hits and road-hits have caused the death of a number of wild elephants and smaller wildlife species. Strong legal intervention governing the unscientific and uncontrolled increase in road and rail networks through forested areas, the increase in number of vehicles, speeding and non-compliance, is needed.

The establishment of NGT has clearly been a positive move for environmental protection in the country. Probably the most notable step in 2012 towards better environmental protection could be said to be the Supreme Court of India's decision to move all pending environment-related cases in various courts to the NGT. This will however need to be accompanied by the faster establishment of regional benches of the Tribunal. The NGT panels have a balanced structure with a judicial member and a subject-matter expert. In many cases, the NGT has strongly emphasized the importance of precautionary principles, mainly EIA. In a country where corruption and malfunction of governmental systems are prevalent, it is generally considered normal to overlook environmental laws. In some cases, the NGT noted the callousness and carelessness in preparing EIAs, and rejected such reports. It has also directed the MoEF to make sure that EIAs are fool proof. The NGT has also asked the MoEF to proclaim the important wetlands and similar ecologically sensitive areas, so that they can be excluded when planning projects. At a time when fast-paced industrial development is causing a serious threat to the ecosystems of the country, such moves come as a relief. The declaration of another World Heritage Site (Western Ghats) in the country was also a welcome happening, bolstering legal protection for the declining biological wealth of the country.

[14] See further: http://www.dailypioneer.com/nation/113100-rules-shot-down-to-kill-wayanad-tiger-experts.html.

COUNTRY REPORT: ITALY
Italian Environmental Law Developments in 2012

CARMINE PETTERUTI*

Economic Policies and Environmental Law

The recent shift of Italy towards a green economy over the last three years has been confirmed in 2012. In a period of economic recession, the *2012 GreenItaly Report*[1] shows that increasing investments are being made by Italian companies in the green economy and to improve the environmental efficiency of production systems. This is occurring in a context of the pursuit of a more environmentally sustainable conversion of mainstream industries (from chemistry to pharmaceutical, from wood and furniture to high tech, from tanning to boating, the food industry, the paper industry, textiles, construction, and electronics and services).

About 23 per cent of the companies in the industrial and tertiary sector invested in green technologies, reflecting a greater inclination to innovation and exports. Thus, the green economy is recognized as an important opportunity for growth in the economic system. Given this perspective, renewable energies have an important role to play. According to the Ministry of Economic Development, energy consumption using renewable energies is expected to exceed the target of 17 per cent set in 2020. This trend should ensure renewable energies account for 38 per cent of energy consumption in 2020. Photovoltaic power represents the main renewable energy used in Italy and this is promoted by State incentives.[2] The *2012 GreenItaly Report* shows that the increase in renewable energy

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[1] This is a joint report by the Unioncamere (the public body which represents all the Italian Chambers of Commerce) and Symbola Foundation for Italian Quality, under the patronage of the Ministry of the Economic Development and the Ministry of the Environment. The report has been presented in Rome on the 5th November 2012.

[2] The new installations of renewable energy for the year 2011 were: wind 1 GW; bioenergy 500 MW; water energy 200 MW. According to the Independent Energy Authority, at the end of 2011, the cumulative power of renewable sources was 41.4 GW. Comparing to the previous year, this value is equivalent to an increase of 36.7 per cent of the renewable energy.

production is due, in a large part, to the generous incentives granted to the 'green' electricity producers.[3]

Despite the green economy's opportunities, there was a decrease in investment by companies in 2011. This reduction can be mainly ascribed to the economic crisis that influenced companies' investments in new technologies.

Recently, two ministerial decrees have been adopted concerning photovoltaic incentives. The *Ministerial Decree* of 5 July 2012 (the Ministry of Economic Development) has introduced the Fifth Energy Grant,[4] providing incentives for photovoltaic power. The new elements of the Fifth Energy Grant can be summarized as follows:

- a change from system feed in premium to a system feed in tariff (FIT) for energy plants lower than 1MW;
- a different tariff allocation for energy plants higher than 1MW; and
- the provision of different access mechanisms to incentives based on the technical features of the plants and the inscription in special registers.

At the same time, the Ministry of Economic Development adopted the *Ministerial Decree* of 6 July 2012, implementing the *Legislative Decree* No. 28/2011 of 3 March 2011 concerning the promotion of renewable energies.[5] The Decree provides incentives to promote electric energy produced by renewable sources other than photovoltaic. The Decree provides a different tariff system: the feed in tariff (for power plants less than 1MW) and the premium tariff (for power plants higher than 1 MW). The Decree provides different access mechanisms for incentives: (i) direct access for certain types of plants identified by the legislator; (ii) inscription in special registers; and (iii) participation in competitive bidding within a reverse auction.

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[3] In Italy the promotion of renewable energies has taken place through the Green Certificates and the administered price mechanism. Referring to the last one, in Italy there is an incentive tariff applied to the energy produced *(feed-in premium)*. Furthermore, Law No. 244/07 of 24 December 2008 (the *Finance Law*) has introduced the all-inclusive tariff *(feed-in tariff)* for small power plants (less the 1MW) that has represented an alternative to the Green Certificates.

[4] The Energy Account is the incentive mechanism introduced to promote photovoltaic power in Italy. The *First Energy Account* was introduced by the *Legislative Decree* No. 387/03 of 29 December and implemented by a *Ministerial Decree* of 28 July 2005 by the Ministry of Economic Development. The Energy Account introduces the principle according to which the incentive is an income statement contribution and not an installation plant funding.

[5] The Italian Independent Energy Authority (AEEG) has criticized the choice of not subsidizing the biomass energy preferring other renewable energies. The Authority observed that in Italy the biomass energy is more sustainable than wind and photovoltaic. Indeed, the wind energy and the photovoltaic power need a supply chain to import the plant components.

A report by the Italian Court of Auditors *(Corte dei Conti)* has confirmed the growth of the renewable energy sector in Italy. The Court has underlined the close connection between energy policy and the environment, especially the impact on natural resources. At the same time, the Court of Auditors has emphasized the great benefits of renewable energies in addressing political and economic problems.[6]

The analysis of incentive regulations shows that Italian environmental law in 2012 is characterized by an economic approach to environmental regulation[7]. Many laws adopted to deal with the economic situation by supporting the Italian economy contain environmental provisions. An example is the *Law Decree* No. 5 of 9 February 2012 (then transformed into Law No. 5 of 4 April 2012) which introduces the Unified Environmental Authorization (UEA) concerning administrative simplification for small and middle enterprises.[8]

The UEA sits alongside other instruments for environmental protection like Environmental Impact Assessment (EIA), Strategic Impact Assessment (SIA) and Integrated Environmental Authorization (IEA). The UEA replaces various environmental communication, notification and authorization acts, simplifying the relationship with public administration. The UEA can be considered as an application of a 'right to administrative simplification'. It means that public bodies must adapt their procedures to the needs of the enterprise, as well as safeguarding the protection of the public and environmental interests.[9]

Italy will have to incorporate the new *European Directive* 2010/75/EU, concerning integrated pollution prevention and control, by 7 November 2013. This will involve modifying the *Legislative Decree* No. 152/06 of 3 April 2006 (commonly referred as the *Environmental Code*) on integrated pollution prevention and control. The transposition of the *Directive*

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[6] Court of Auditors, *Energie rinnovabili, risparmio ed efficienza energetica nell'ambito della politica di coesione socio-economica dell'Unione Europea*, Special Report, 20th January 2012, www.corteconti.it.

[7] See generally on Italian environmental law: J. Bermejo, Latre*, Italia: In Trienio de Renuncias en la Protección Ambiental'*, in F. Ramón (ed), *Observatorio de Políticas Ambientales* (2012) Pamplona, Editorial Aranzadi, 143; and D. Amirante & C. Petteruti, 'Droit et Politique de l'environnement en Italie', (2009) 2 *Revue Européenne de Droit de l'Environnement*, 185.

[8] The *Ministerial Decree* of 18 April 2005 (referring to directive 2003/361/EC about the definition of small and middle companies) identifies the small and middle companies with those having no more of 250 workers and an annual turnover not higher than 50 million of euros (or an annual budget not higher than 43 million of euros). The Unified Environmental Authorization is applied to all the plants that are not subjected to the Integrated Environmental Authorization.

[9] This right to administrative simplification in environmental procedures can be gathered from the *Law Decree* No. 5 of 9 February 2012. Section IV of the *Law Decree* refers to the administrative simplification about the environmental regulation. A. Muratori, 'Decreto Semplificazioni: In Arrivo l'Autorizzazione Ambientale Unica' (2012) 3 *Ambiente & Sviluppo*, 205.

represents a good chance to improve IEA[10] and to solve some problems of regulatory coordination.

The Economic Approach to Waste Management in Government Regulations

Italian environmental law in 2012 also reflects an economic approach with regard to waste management. The Government adopted the *Law Decree* No. 2 of 25 January 2012 (transformed into the Law No. 28 of 24 March 2012) at the beginning of 2012. It introduces extraordinary environmental measures. These measures relate to the emergency of waste management, including the prohibition on non-biodegradable bags and the extension of the provisions concerning by-products to material likely to end up as landfill. Referring to the extension of the notion of 'by-product', article 3 of the Decree justifies the provision with "the need … to encourage the resumption of the infrastructure of the country". Once again the legislator refers to economic growth problems to justify laws concerning the environment. Indeed, article 3 of the Decree extends the notion of by-product to filling material, according to the provision of articles 184 *bis* and 185 of the *Legislative Decree* No. 152/06 of 3 April 2006.[11] In addition, the notion of by-product includes the excavated earth and rocks. In this regard, according to the qualitative standards of *Ministerial Decree* No. 161 of 10 August 2012 (adopted by Ministry of Environment), the excavated earth and rocks can be considered as by-product and not as waste.[12]

It is interesting to note that this Decree has been considered as being among measures for economic recovery. The adoption of the *Ministerial Decree* No. 161 was requested by the *Law Decree* No. 1 of 24 January 2012 (passed into Law No. 27 of 24 March 2012) concerning "Urgent provisions for competition, infrastructure development and

[10] The Integrated Environmental Authorization (introduced by the *Directive* 96/61/EC on the integrated pollution prevention and control) is an authorization given after an impact assessment on the environment of a certain activity. This authorization replaces the other environmental authorizations, simplifying the administrative procedures.

[11] Article 184 bis of the *Legislative Decree* No. 152/06 of 3 April 2006 outlines the characteristics of the by-product. Article 185 of the same Decree refers to the cases of exclusion of the waste discipline. Therefore, if the conditions of articles 185 and 184 *bis* are met, the filling material can be considered as by-product. However, *Law Decree* No. 2 of 25 January 2012 provides for the issuing of a ministerial decree which will clarify the characteristics of the filling material to be considered as by-product.

[12] The *Ministerial Decree* No. 161 of 10 August 2012 qualifies the excavated earth and rocks as by-product under the following conditions: i) the excavated earth is indirectly produced during the realization of a work; ii) it can be reused in the work or in a different work without other treatment; and iii) it respects the quality standards fixed by the Decree.

competitiveness". At the same time, the Ministry of Environment considered the law concerning excavated earth and rocks as one of the measures for a sustainable growth.[13]

At the same time, the application of the monitoring system for dangerous waste (commonly referred to as SISTRI) has been suspended. Despite the law requiring the monitoring system to be introduced in 2009, it is not yet operational. The *Law Decree* No. 83 of 22 August 2012 (transformed into the Law No. 134 of 7 August 2012), commonly referred to as "Growth Decree",[14] provided for the suspension of the system until 30 June 2012.

Economy and Environment: A Difficult Balance

The troubled economic situation raises a series of problems for the country's environmental choices. The danger is that economic needs prevail systematically over environmental needs. The role of the courts in this context is very important. In fact, the contribution of judges to the enforcement and interpretation of Italian environmental law has always been very important.

The criminal judges have recently ordered the closure of a major Italian plant, the steelwork ILVA Ltd. of Taranto. ILVA's managers and owners have been accused of environmental damage and environmental law violations, relating to air pollution and exhaust standards. The steelwork plant provides employment for local citizens and is important to the Italian economy as a whole. Notwithstanding, the judges decided that it was necessary to close the plant to protect the health and the environment against pollution. The court order has potential to create serious problems for the employees as the owners of the steelwork plant have threatened to close the plant permanently.

For this reason, the Italian Government adopted a law decree, commonly referred to as "Save-ILVA Decree", ratifying the appointment of a supervisor to manage the plant. The Decree provides that the supervisor must address measures for stopping pollution.

The Decree introduces the notion of *"plants of national strategic interest"* by a decree of the President of the Council of the Ministers. The Decree provides that the Minister of Environment, in its review of the integrated environmental authorization, can authorize the

[13] Ministry of Environment, *The Measures for a Sustainable Growth*, 21 September 2012. On the sustainable growth see: V. Pepe, *Fare ambiente.Teorie e Modelli Giuridici di Sviluppo Sostenibile* (2008) Milano, Franco Angeli.

[14] The Decree provides different economic and financial measures to restart the growth of the country.

continuation of production for a period not exceeding 36 months. This authorization is subject to the condition that the requirements contained in the review provision of the integrated environmental authorization are fulfilled. The Decree provides that the most adequate protection of the environment and health, according to the best available technology, must be applied.

COUNTRY REPORT: KENYA
The New Environmental and Land Court

COLLINS ODOTE*

Introduction

By including the right to a clean and healthy environment in its *Constitution*,[1] Kenya joined the growing list of countries that recognize the importance of giving constitutional protection to the environment.[2] That recognition also underscored the key environmental challenges facing the country requiring legal solutions.

Effective environmental governance requires the existence of sound laws and policies containing substantive provisions and a supportive institutional framework. These however, only represent half the equation. The other half requires procedural rules to give meaning to the substantive constitutional and legal provisions. Although discussions on environmental rights commonly focus on substantive rights, with the right to a clean and healthy environment occupying pride of place, environmental procedural rights (to information, participation and access to justice) have been increasingly recognized in international legal instruments.[3] Article 10 of the *Rio Declaration* provides the launching pad for discussions on procedural rights. It provides that:

> 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunities to participate in decision-making processes. States shall participate and encourage public

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[1] *Constitution of Kenya* (Government Printer, 27 August 2010, Nairobi), article 42.
[2] For discussions of countries with constitutional provisions relevant to environmental management, see: D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (2012) UBC Press, Toronto. For countries within the African context having environmental rights contained in their Constitutions, see: C. Bruch, W. Coker & C. Vanarsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2007) Environmental Law Institute, Washington DC.
[3] S. Kravchenko, 'Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted?' (2012) 7(2) *Florida A. M. University Law* Review, 164.

> awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'[4]

This Country Report seeks to review the provisions on access to environmental justice in Kenya with special reference to the recent establishment of the Environment and Land Court. It discusses the importance of this court in providing a framework for resolving environmental disputes. Through the introduction of this court, Kenya breaks a path and joins a select number of jurisdictions, like New South Wales,[5] that have created specialized courts to resolve environmental disputes.

The Resolution of Environmental Disputes before the Constitution of Kenya (2010)

Before Kenya adopted its current *Constitution* through a referendum in August 2010, the right to a clean and healthy environment was not captured in the country's *Constitution*. The substantive laws for environmental management were consequently found in statute law. In 1999, the Kenyan Parliament passed the *Environmental Management and Coordination Act*[6] (EMCA) as its framework environmental law. EMCA was intended to provide the overall legislative framework for environmental matters and consequently it prescribed that: 'any written law, in force immediately before the coming into force of (the) Act, relating to the management of the environment shall have effect subject to the modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this Act shall prevail'.[7] Despite challenges in interpretation regarding whether ordinary legislation such as EMCA could be superior to another simply on the basis of its more contemporary promulgation,[8] the Act remains the principal legislation governing environmental matters in Kenya.

When EMCA was adopted, the issue of dispute resolution received attention too. While ordinary courts existed even then, there was appreciation that such courts were not fully suited for dealing with environmental issues. As Albert Mumma correctly quips:

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[4] United Nations Conference on Environment and Development, Rio De Janeiro, Brazil, 3-14 June 1992, *Rio Declaration on Environment and Development*, Principle 10 (U.N, Doc. A/CONF.151/26/ REV.1/(Vol 1) Annex 1(12 August 1992).
[5] See the website of the court at http://www.lawlink.nsw.gov.au/lec.
[6] Act 8 of 1999.
[7] EMCA, section 148.
[8] See M. Akech, 'Governing Water and Sanitation in Kenya' in C. Okidi et al *Environmental Governance in Kenya: Implementing the Framework Law* (2008) East African Educational Publishers, Nairobi, 305-334. Here Akech discusses the relationship between the *Water Act* (2002) and the *Environmental Management and Coordination Act* (1999), critiquing the validity of the assertion that EMCA is a framework law and of superior status to other environmental laws.

> '(t)he development of laws relating to sustainable environmental management is relatively recent. Consequently, the courts, as the principal avenues for resolving disputes are not quite prepared to deal with issues arising from them. Additionally, the court processes tend, typically, to be slow, costly, and complex.'[9]

Consequently, EMCA provided two avenues for resolving environmental disputes to complement the ordinary courts of law. These were the establishment of the Public Complaints Committee and the National Environmental Tribunal.

The Public Complaints Committee was established under EMCA to carry out investigations either on the request of any person or on its own initiative, relating to cases of suspected environmental degradation. [10] The ideology behind the establishment of the Public Complaints Committee is to have a body that receives complaints directly from members of the public, much like an ombudsman.[11] Its aim is to determine the scope of facts on an environmental issue and recommend public action to redress the complaint.[12] The Public Complaints Committee has continued to provide an easy mechanism for dealing with environmental disputes due to the informal nature of its operations. It is not hamstrung by technical rules of procedure and an inquisitorial approach to dispute resolution. Its main shortcomings relate to the structure of its operations, being established as a Committee of the National Environmental Management Authority (NEMA), the statutory body responsible for coordinating environmental management in the country. This limits the Committee's operational and legal autonomy, since part of its mandate relates to investigating the actions of NEMA.

The second dispute resolution body is the National Environment Tribunal (NET). NET was established to hear technical disputes relating to the administration of the Act. It is chaired by a person qualified to be appointed Judge of the High Court of Kenya. It hears appeals relating to decisions of the NEMA.[13] The establishment of NET, despite its limited mandate,

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[9] 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, New York, 253.
[10] EMCA, sections 31-32.
[11] A. Angwenyi, 'An Overview of the Environmental Management and Coordination Act' in Okidi (supra note 8), 154.
[12] C. Okidi & P. Kameri-Mbote (eds) *The Making of a Framework Environmental Law in Kenya* (2001) Acts Press, Nairobi, 126.
[13] EMCA, section 126.

provided avenues for expeditious and cost-effective resolution of environmental disputes. Decisions from NET are still, however, subject to appeals to the High Court.

The courts, however, have had challenges in addressing environmental issues such as: the technical nature of most environmental cases; the fact that many current longstanding members of the judiciary have no training in environmental law; and locus standi limitations. These challenges have meant that Kenya's regular courts are not suited to deal with environmental litigation.[14]

The Land and Environment Court: Law and Practice

The need to reform the Judiciary was one of the major drivers for reforming Kenya's constitutional dispensation. The country's Judiciary had hitherto been seen as opaque, executive leaning, slow, corrupt and an ineffective arbiter of disputes. Kenya's contemporary *Constitution* makes fundamental reforms to the Judiciary and its practical impact has been phenomenal. At the end of 2012, the Judiciary was the most respected public institution in Kenya, from a body that was not long ago despised and revered in equal measure. The Judiciary is constitutionally obliged to be independent and accountable. Several constitutional provisions seeks to ensure this, including those providing: that judicial authority derives from the people and must be exercised for their benefit; for the dispersal of judicial authority; for the establishment of a Judicial Service Commission with representation from the public; for clarity and objectivity in the process of disciplining and removing judges; and for judicial vetting.[15]

The *Constitution* provides for the establishment of a specialized court by Parliament to hear and determine disputes 'relating to the environment and use and occupation of, and title to, land'.[16] On 30 August 2011, the *Environment and Land Court Act*[17] came into effect and it provides for the jurisdiction, structure and operations of the Environment and Land Court (ELC). The ELC is established as a specialized court with the same status as the High Court. This means that the decisions of the LAC are of equivalent value to that of a High

[14] For a discussion of courts and environmental management, see generally: *Kenya Law Reports (Environment and Land),* 'Land, Environment and Courts in Kenya' (2006) National Council for Law Reporting, xiv-xxxiv; M. Makoloo, *Public Interest Environmental Litigation in Kenya: Prospects and Challenges* (2007) ILEG, Nairobi; and P. Kameri-Mbote and C. Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009) 10(1) Sustainable Development Law and Policy Law, 31.
[15] M. Akech et al *Judicial Reforms and Access to Justice in Kenya*: *Realizing the Promise of the New Constitution* (2011) ACT, Nairobi, 28-33.
[16] *Constitution of Kenya*, article 162(2)(b).
[17] Act 19 of 2011.

Court and consequently can only be appealed to the Court of Appeal. Kenya's *Constitution* provides for a devolved system of government based on forty-seven counties. This is a departure from the previous centralized system. Despite this, judicial functions still remain a function of the National Government. The *Constitution*, however, requires that state organs, their functions and services be decentralized from the capital of Kenya.[18] The *Environment and Land Court Act* has consequently provided for the ELC to be based at the county level. In 2012, the President, on the recommendation of the Judicial Service Commission, appointed sixteen judges to the ELC. This still leaves a balance of thirty-one judges, if all the counties are to have one judge to deal with environment and land matters.

One of the most problematic issues at the induction of the members of the ELC was the issue of jurisdiction. While the *Constitution* stipulates broadly that the ELC will listen and determine matters relating to the environment and use, occupation and title to land, unless properly delineated, this may result in these courts taking up the majority of matters brought before the High Court. For a developing country like Kenya, where land forms the basis of livelihoods,[19] the majority of cases that go to the courts relate to land. Yet, the number of judges in the ELC is such that if the jurisdictional issue is not properly determined, these courts will become clogged. This would defeat the purpose for establishing these courts. The *Environment and Land Court Act* elaborates on the jurisdictional issue by defining the areas of the courts' intervention to include:

- Disputes relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
- Compulsory acquisition of land.
- Land administration and management.
- Public, private and community land and contracts.

In addition, the ELC is given the power to hear and determine matters relating to: the right to a clean and healthy environment;[20] obligations in respect of the environment;[21] and the enforcement of environmental rights.[22] While this ensures that constitutional issues relating to the environment are dealt with by the ELC, the High Court also has the constitutional authority to deal with all matters relating to the interpretation and enforcement of

[18] *Constitution of Kenya*, article 174(h).
[19] See National Land Policy, Sessional Paper Number 3 of 2009 (Government Printer, Nairobi, 2009).
[20] *Constitution of Kenya*, article 2.
[21] *Constitution of Kenya*, article 69.
[22] *Constitution of Kenya*, article 70.

constitutional rights. Towards this end, the Chief Justice has established a Constitutional and Human Rights Division. There is therefore some overlap between the constitutional jurisdiction of the ELC and the High Court, which will require resolution so as to avoid forum shopping. A third jurisdictional issue relates to criminal cases. EMCA creates environmental offences, implying that the ELC has jurisdiction to deal with criminal aspects too. This requires clarity to determine whether the court's jurisdiction extends to criminal cases or is limited to civil matters only. This is particularly important since the remedies under the *Environment and Land Court Act* seem only to contemplate civil remedies such as: injunctions; prerogative orders; damages; compensation; specific performance; restitution; declaration; and cost orders.[23]

On establishment, the Chief Justice, relying on the powers bestowed upon him by section 24 of the Act, developed *Practice Rules* to regulate the procedure of the ELC. These *Practice Rules*, promulgated on 9 November 2012, provide for matters that can continue to be heard by several other courts and tribunals (such as Magistrates Courts, business premises tribunals and rent tribunals) where appropriate, with appeals to the ELC. The *Practice Rules* also confirm that issues to do with succession (although occasionally dealing with land) fall outside the jurisdiction of the *Environment and Land Court Act* and will be heard by the High Court or Resident Magistrates Court. The spirit underpinning these *Practice Rules* appears to be to properly delineate which matters will be heard and determined by the ELC. They do not however address the confusion relating to the criminal jurisdiction of the ELC.

Furthermore, the fate of the NET remains unresolved. When it was established, NET was supposed to be a specialized tribunal. In light of the establishment of the ELC, questions remain regarding the utility of having both a specialized court and the NET since both are specialized.[24] Appeals from the NET lie to the High Court in accordance with EMCA; while under the *Environment and Land Court Act*, the High Court has supervisory jurisdiction over tribunals,[25] which would include NET.

All courts in Kenya are required to be guided by the general principles of environmental management including: sustainable development; public participation; international cooperation; intergenerational equity; intra-generational equity; polluter pays principle;

[23] *Environment and Land Court Act*, section 13.
[24] On the benefits and disadvantages of specialized environmental courts, see: G. Mcleod, 'Do We Need an Environmental Court in Britain' and P. Stein, 'A Specialist Environmental Court: An Australian Experience' in D. Robinson & J. Dunkley, *Public Interest Perspectives in Environmental Law* (1997) Wiley Chancery, London, at 275-292 and 255-274 respectively.
[25] *Environment and Land Court Act*, section 13.

precautionary principle; and the social and cultural principles traditionally applied by communities to manage the environment in Kenya. In addition, the courts must apply the constitutional principles governing land policy, [26] national values and principles of governance, values and principles of public service and principles of judicial authority. The courts are also required, in accordance with the *Constitution*, to promote the use of alternative dispute resolution (ADR) mechanisms.[27] This is important due to the reliance of ADR by many communities to resolve environmental matters.

Expectations and Challenges

At the end of 2012, the ELC was fully operational. Many expect that the court will be able to develop a sound jurisprudence on environment and land matters and address the many challenges facing the country. There will be need for the Chief Justice to clarify in practice notes, or for the courts to determine through their judgments, the exact purview of their jurisdiction. How the courts handle matters before them will determine whether Kenya's ELC joins the league of progressive specialized ones like that of New South Wales and eventually deliver effective justice by avoiding the pitfalls of non-specialized courts in the manner they handle environmental and land issues affecting development and future sustainability.[28] In the Kenyan context, it is still too early to judge. However, the introduction of the ELC marks an important development for the country in 2012.

[26] Constitution of Kenya, article 60(1).
[27] *Environment and Land Court Act*, section 20.
[28] G. Pring & C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) TAI.

COUNTRY REPORT: NETHERLANDS
Big Changes in Environmental Planning Law On The Way

KATINKA JESSE*

Introduction

In the Netherlands, dozens of Acts, some 150 Orders in Council and hundreds of Ministerial Orders regulate environmental and/or planning issues regarding, water, soil, nature protection and so forth. As a consequence of this fragmentation, the current Dutch system is particularly complex, decision-making is (regarded to be) slow, and research expenses are (regarded to be) high. The Ministry of Infrastructure and Environment therefore intends to draft one *Environmental Planning Act* (*EPA*) (Omgevingswet) in which all (or most) environmental and planning regulatory systems will be integrated, to make future environmental planning decision-making more transparent, simpler, faster and cheaper. The aim of this future *EPA* is to integrate consents in one procedure, for which one application suffices, that will be handled by a 'one-stop-shop' government body.

Preparatory operations are in full swing to ensure that the *Bill* will be sent to Parliament in 2013. Meanwhile, and in anticipation of the future *EPA*, the Government tabled the 'Bill to change the *Crisis and Recovery Act* (*CRA*) as well as some other acts in order to extend the operation of the CRA indefinitely and also to make some improvements in the area of the human environment' (hereafter referred to as '*Bill CRA'*). As some of these (so-called) improvements extend over virtual all environmental and/or planning decision-making procedures and even administrative law in general, they have been extracted from the *Bill* following the advice of the Council of State (in the Netherlands, the Council of State advises on all bills before they are sent to Parliament). In the (nearby) future, the Government will probably propose to include them either in the future *EPA* or in the *General Administrative Law Act* (*GALA*). Despite these extracted provisions, the remaining provisions of the *Bill CRA* are still worth discussing.

In this Country Report I will therefore first address the *Bill CRA*, followed by an outline of the future *EPA*. Next, attention will be paid to the provisions of the *Bill CRA* that probably will be

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enacted either in the future *EPA* or in the *GALA*. In the concluding section, I will discuss whether or not the environment will benefit from the changes foreseen.

The Bill to Change the Crisis and Recovery Act

In response to the financial and economic crisis, in 2010 the Netherlands drafted a special Act to reduce delays in both decision-making procedures and court procedures in order to boost economic developments. Various projects fall under the scope of this *CRA*, most notably regarding infrastructure and large-scale construction, as well as projects in the area of sustainability, energy and innovation. The *CRA* waives many norms of existing legislation and creates new opportunities for an accelerated onset and implementation of these projects.[1] As a result, public participation and access to justice have been reduced, international and European law are possibly being infringed, and environmental protection may have been lowered. These consequences have been justified by the exceptional and urgent economic situation as well as the temporarily duration of the *CRA* (only five years).

As the financial and economic crisis still lasts, and the *CRA* would expire on 1 January 2014, the Government tabled the *Bill CRA*.[2] One of the two pillars of this *Bill* was to make the *CRA* permanent. The Council of State responded critically to this proposal.[3] Not only because at that time, the legally obliged evaluation of the *CRA* had not yet been taken place, but also because an extension of the five years period could prevent transitional problems as well. The Government then combined the 'best' of both worlds: it extended the duration of the *CRA* for an unlimited period of time, and it expressed its intention to include the *CRA* in the future *EPA* (or the *GALA*); hence making it permanent after all.[4]

The other pillar of the *bill CRA* is called 'quick wins'. These quick wins are grouped along three lines: (a) less costs; (b) rapid, flexible and careful decision-making; and (c) elimination of problems in practice. The proposed changes include (but are not limited to) the following:

Reducing Costs

Authorities shall rely on data and research that is not older than two years. The aim of this provision is to prevent ongoing preparation procedures due to new data and recalculation.

[1] See critically, J. Verschuuren, 'The Dutch Crisis and Recovery Act: Economic Recovery and Legal Crisis?' (2010) 13 *Potchefstroom Electronic Law Journal*, 5.
[2] Tweede Kamer der Staten Generaal (TK) 2012, 33 135, 2-3.
[3] TK 2012, 33 135, 4.
[4] Ibid.

According to the Government, the continuous updating of research data or research methods is a major course of delay and extra costs in the decision-making procedure regarding infrastructural projects. A similar provision is already enacted in the *CRA*, but its scope will now be extended to environmental and planning law in general. Such a provision is contrary to general administrative law that obliges authorities to collect the necessary knowledge of relevant facts and to weigh interests when preparing a decision. In environmental law in particularly, this general administrative law rule is important as environmental data is subject to rapid changes.

Rapid, Flexible and Careful Decision-Making

A less onerous decision-making regime will be applicable to temporary deviations from development plans. The regular preparation procedure of 8 weeks will apply, instead of an extended preparation procedure of 26 weeks. The maximum duration of such a deviation will be increased from 5 to 10 years.

Elimination of Problems in Practice

Government bodies responsible for the decision-making on an application to change an environmental permit will no longer be bound by the basis of the original application. According to settled Dutch case law, an authority will be bound by the basis of the application. The industrial sector supports this approach wholeheartedly because, as they put it aggrievedly, otherwise one might end up with a permit for a bakery instead of the desired permit for a butcher's shop. The reason to enact this 'quick win' is to remove barriers to update environmental permits with regard to best available techniques and/or if its deemed necessary for the quality of the environment. This (environment protective!) provision has not been plucked out of thin air: the 2010 European *Industrial Emission Directive* contains a similar duty. This *Directive* has to be implemented in national law by 7 January 2013.

Environmental Planning Act

The agreement of the former coalition stated that the Government would propose to integrate and simplify the legal and regulatory system of environmental and planning law. According to this Government, one integrated Environmental Planning Act would not only lead to faster and better decisions, but would also create better conditions for the sustainable development of the human environment. In its notice to Parliament of March

2012, the Government traced the outlines of this future *EPA*.[5] As this future *EPA* remained on the agenda of the new Government (installed last October), I will briefly consider this government notice, as well as the information the Council of State produced in response of this notice.[6]

All parties involved (including the central Government, decentralized government bodies, business and/or citizens) acknowledge the lack of coherence in the field of environmental planning law due to the various legal frameworks that have been developed for specific environmental and/or planning issues. These legal frameworks – consisting of numerous Acts, Orders in Council and Ministerial Orders – are constantly changing and may also interfere with one another. Besides, they have their own distribution of competences, procedures, and deadlines. The resulting complexity not only leads to lengthy lead times but also to high (research) costs partly due to multiple research duties. Furthermore, it blocks innovation. By making environmental planning law more coherent, providing scope for regional and local initiatives, and creating a basis for flexible instruments, the EPA is meant to contribute to the strengthening of the economy and to the quality of the human environment, according to the Government.

One of the many aims is to integrate around 15 current Acts in the *EPA*, such as the *CRA*, *Water Act*, *Noise Abatement Act*, *Environmental Management Act* and the *Planning Act*. Around 25 other Acts will partly, later or possibly be integrated in the *EPA*. Many of these Acts contain environmental and/or planning elements as well as provisions regarding other issues, such as the organization of the market. They include the *Gas Act*, *Housing Act*, *Railway Act* and the *Nature Conservation Act*.

The list of both categories of Acts being published does not mean all questions regarding integration have yet been answered. For example, it is not yet clear whether or not the *EPA* will only provide for procedural integration or whether it will extend to include substantive integration. The aim of procedural integration is to combine different procedures in order to come up with one procedure for decision-making based on the various relevant legal frameworks. In order to achieve this objective, one opportunity for public participation and one opportunity for access to justice are provided. Procedural integration is already partly provided for by the *Environmental Licensing (General Provisions) Act* (ELA) (Wet Algemene bepalingen omgevingsrecht) (2010). This Act replaced some 25 systems for issuing permits, licenses and exemptions by a single 'environmental planning permit'

[5] See www.rijksoverheid.nl.
[6] Ibid.

(omgevingsvergunning). The aim of material integration on the other hand, is to create a single normative framework for the protection of all environmental and planning interests. Either rigid norms or open (so-called vague) norms would be the result. As flexibility is one of the aims of the *EPA*, and vague norms may conflict with European Directives, it is not very likely that the *Government* will strive for material integration.

Procedural integration will probably also be achieved by introducing six legal instruments as the successors to dozens of current environmental and planning law instruments. These new instruments intend to give shape and structure to norms, standards, development of planning, and decision-making in the area of environmental planning. These are:

Environmental Planning Vision

The *Environmental Planning Vision* is meant to be a strategic plan. Based on integrated choices for the human environment, central Governments and provincial government bodies will have to develop an integrated policy on the human environment. This policy will provide the basis for the consistent use of the other five instruments. Local government bodies will have an option to develop such a vision.

Programs

Programs are intended for parts of the human environment that need active government commitment to meet (environmental and planning) standards. A program will contain policy statements and legal measures. As a minimum, programs will be obligatory where European standards are (likely to be) exceeded, or if European Directives require a plan or program. Only the government body that produced a program will be bound by it; hence, programs will not contain normative statements that are legally binding on other administrative bodies, business or citizens. The duty to produce a program may stem from a specific environmental or planning interest, or due to specific environmental or planning norms, such as enacted in Dutch law and European Directives. Integrating programs will therefore not always be feasible. As a minimum, programs will need to be aligned and coordinated.

Integration of Orders in Council for Activities

Nowadays, some 150 permit-replacing Orders in Council are in force in the area of environment and planning. The Government intends consolidating these into several dozens of Orders. This should make it easier for business and citizens to have access to these

Orders, and for authorities to keep them up to date. The Government tends to be ambiguous whether or not it also intends to replace permit regimes with Orders in Council. Although business and relevant government bodies may benefit from Orders in Council (due to less preparatory time and therefore costs), monitoring and enforcement needs to be intensified. Legal security may also be affected as instead of relying on a focused permit, one would need to look at the Order(s) in Council and the corresponding Act(s) to trace rights and duties.

Area-Wide Environmental Planning Regulation

The Government also intends to oblige decentralized government bodies to prescribe single area-wide environmental planning regulations. At the local level, such regulations should replace a large amount of current development plans (in some cities there are more than 100) and regulations. An area-wide environmental planning regulation will contain the decentralized rules for the area and each location, region or district within that area, as well as decentralized permit conditions.

Environmental Planning Permit

For those projects that need an environmental planning permit, the *EPA* will ensure a single procedure that leads to a single permit (or its rejection). In addition to the procedural integration of the *ELA*, the Government intends to add more Acts to the *EPA* (see above). As a result of procedural integration, the execution of Government's responsibilities with respect to specific environmental interests may be jeopardized. The *ELA* therefore already makes sure a permit can only be granted if other relevant government bodies provide a 'statement of no objection'. According to the Cabinet Notice, the procedure regarding this statement of no objection turned out to be complicated and will require a considerable workforce to administer. Another way of dealing with these responsibilities will therefore be considered.

Project Decision

A project decision provides a general set of rules for decision-making regarding public projects, such as the construction of infrastructure and water works; as well as for private projects that serves a public interest, such as projects for the supply of energy and raw materials. Currently, many decision-making procedures are triggered to construct or install such projects. In contrast, project planning would benefit from one instrument. The emphasis in the procedure for project decisions would be at the early stage: to gain support, including

through consultation of stakeholders. Experience with the *Route Act* (Tracéwet) shows this investment in the initial stage can be recovered in the subsequent stages of the preparation of the project.

Postponed Provisions (Possibly Foreseen in Either the EPA or the GALA)

If all these changes have not made your head spin by now, I will continue by highlighting the provisions that did not make it to the final *Bill CRA*, but instead are foreseen to be (possibly) implemented in either the future *EPA* or the *GALA*. I will only focus on three of over ten "omitted" provisions below.

a) Decentralized government bodies cannot appeal against specified central government decisions that are not directed to them (for example, a local community has no legal standing if the central government has taken a decision to construct a high way that crosses the boundary of that community). Contrary to existing administrative law, an Order of Council based on the *CRA* already designates the projects for which such a limitation of legal standing applies. In the *Bill CRA*, the Government intended expanding the projects for which this limitation applies. An Order of Council based on the *GALA* would have provided for this. Disapproved by the Council of State, the Government has now passed this topic on.

b) Courts have to reach their decision rule within six months of the start of the appeal term. Such an exemption to the existing administrative law provision ('reasonable term') is already enacted in the *CRA*. In the *Bill CRA*, the Government intended expanding the scope of this exemption to environmental and planning appeal procedures in general. Instead of an exemption it would therefore become a rule, the Council of State responded critically. This topic was therefore also postponed.

c) Following the annulment of a decision by a court ruling, a new decision may be based on the facts on which the annulled decision was based, if these facts were not the reason for the annulment. Contrary to existing administrative law, the *CRA* already contains such a provision. In the *Bill CRA*, the Government intended to make it permanent and to extend its scope to all administrative decisions. Following criticism of the Council of State, this topic will be dealt with during the preparation of the future *EPA* or the intended change of the *GALA*.

Concluding Remarks

The explanatory memorandums to the *CRA* and the *Bill CRA* do not deny the fact that in this time of financial crisis, economic development is the Government's priority. One can be for or against this priority, but at least it is clearly stated. The *Cabinet Notice* regarding the *EPA*, on the other hand, gets a bit carried away. Although both the strengthening of the economy and the quality of the human environment (or even the creation of better conditions for a sustainable development) are formulated as the main aims of the *EPA*, it seems the emphasis is on the economy. Indeed, Dutch environmental and planning law is particularly complex. Initiatives to make it easily accessible should therefore be welcomed. But to state the environment will be better off due to the future the *EPA*, in my opinion is a bridge too far.

This is even more so as the *Cabinet Notice* regarding the future *EPA* introduces the term 'human environment' (gezond en veilig milieu – literally: 'a health and safe environment'). This would appear to be a step backwards from both anthropocentric and ecocentric environmental protection to anthropocentric environmental protection alone. Fortunately, Dutch law is bound by international and European law, and this will hopefully prevent such a backward step.

COUNTRY REPORT: NEW ZEALAND
Recent Developments in Resource Management Law and Climate Jurisprudence

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Introduction

This Country Report focuses on further proposals for reform of the *Resource Management Act* (1991) (RMA), and the ongoing debate about the legitimacy of climate change litigation in New Zealand.

Further Proposals for RMA Reform

Since the RMA came into force on 1 October 1991, it has been the subject of ongoing debate about streamlining and simplifying processes to avoid costs and delays, and has been amended on seventeen occasions. The debate remains ongoing and shows no real sign of abatement, with the most recent *Resource Management Reform Bill* being introduced into Parliament on 5 December 2012.[1] The Bill passed its first reading on 11 December 2012 following preliminary debate in the House of Representatives, and has been referred to the Local Government and Environment Select Committee for report back to the House after considering submissions on the Bill. Submissions close on 28 February 2013, and the Bill is due to be reported back to the House on 11 June 2013.

The current reform agenda has been dominated by freshwater allocation, and the aftermath of local government amalgamation in Auckland. The underlying theme of these twin debates is that a streamlined and simplified plan preparation process is required to deliver more agile policy development. Both strands of the debate have concluded that merits appeals to the Environment Court should be repealed and replaced with appeals on questions of law only to the High Court.

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[1] Bill No 93-1.

Land and Water Forum

The reform agenda for freshwater has been driven by a non-governmental stakeholder group, the Land and Water Forum, that has produced three reports on freshwater allocation and quality.[2]

Under the RMA, prior authorisation is required from the relevant regional council or unitary authority to take and use water,[3] and to discharge contaminants into the environment.[4] Absent regional plans, these activities require discretionary activity resource consent,[5] and both freshwater resources and the assimilative capacity of the environment to absorb contaminant loads are allocated on a first come first served basis.[6] The preparation of regional plans, with the sole exception of regional coastal plans, is optional and there has been a time lag between issues regarding freshwater allocation and quality being identified, and the preparation of regional plans to address these issues. As a result, complete regional plan coverage has not yet been achieved by all relevant local authorities, and the default rules under the RMA continue to influence resource consent decision-making.

These problems have been exacerbated by the failure, until recently, to prepare national policy statements or national environmental standards under the RMA to provide guidance on the preparation of regional freshwater plans. The *National Policy Statement on Freshwater*, gazetted in May 2011, is unlikely to resolve issues quickly as it requires full compliance by local authorities by 31 December 2030. In the interim, local authorities in Canterbury, Otago and Waikato continue to grapple with competing demands for freshwater allocation from hydro-electricity generation, dairy and other uses.

To provide for a streamlined process, the Land and Water Forum recommended in its second and third reports that proposed regional plans should be prepared by stakeholder groups following a collaborative process. Putting aside problematic questions about qualification for membership of the stakeholder group,[7] the process does not avoid the need for public notification of the proposed plan or the need for local authority hearings to make decisions on submissions about the plan. As a result, the streamlining effect of the Forum's

[2] Land and Water Forum: *A Fresh Start for Freshwater* (August 2010), *Second Report of the Land and Water Forum* (May 2012), and *Third Report of the Land and Water Forum* (November 2012).
[3] RMA, section 14.
[4] RMA, section 15.
[5] RMA, section 87B.
[6] *Fleetwing Farms Ltd vs Marlborough District Council* [1997] 3 NZLR 257 (CA).
[7] See: D. Nolan et al, 'Faster, Higher, Stronger … Or Just Wrong? – Flaws in the Framework Recommended by the Land and Water Forum's Second Report' (2012) August *RMJ*, 6.

recommended process would be dependent on the quality of the stakeholder process, and considerable investment would be required to enable the collaborative process to produce publicly acceptable mediated outcomes.[8] Ultimately, there is no guarantee that the collaborative process would actually streamline the process by reducing the time required for plan preparation compared with the current system under Schedule 1 of the RMA.

More importantly, the Forum has also recommended that the hearing process following public notification of the proposed plan should merely make recommendations to the local authority about how submissions should be decided, and provides the local authority with the ability to depart from the hearing panel recommendations where reasons for the departure are given by the local authority. Effectively, this provides the local authority with a power of veto that would not be subject to any statutory appeal rights, apart from appeals to the High Court on questions of law only.

Similar recommendations have been made by Local Government New Zealand,[9] and by Dormer and Payne in a report prepared for Waikato Regional Council.[10] But these recommendations differ from the Forum's reports in a number of important respects. For example, they do not recommend that a collaborative stakeholder process should be used to prepare the proposed plan. They rather recommended that the local authority hearing should be chaired by an independent person appointed by the Minister for the Environment. Furthermore, they did not recommend that the local authority should be given greater latitude to depart from hearing panel recommendations about decisions on submissions.

Dormer and Payne based their recommendations on an analysis of three proposed variations to the Waikato Regional Plan, and the time taken for them to be progressed under the Schedule 1 of the RMA from public notification until they became operative. For example, in the case of Variation 6 dealing with water allocation, they noted that the proposed variation was notified in October 2006 and was finally made operative in April 2012. In particular, they focused on the time taken to resolve merits appeals to the Environment Court. Appeals were filed in February 2009 and the Court hearing took place between February-August 2011. However, the raw data masks the fact that resolution of the appeals was delayed by the attempt made by the regional council to negotiate with some appellants, and to engage in mediation facilitated by a council appointed mediator.

[8] Ibid, 7.
[9] Local Government New Zealand Regional Sector Group, *Enhanced Policy Agility - Proposed reforms of the Resource Management Act*, December 2011.
[10] See: www.rmla.org.nz.

Subsequent analysis by the Court has identified that local authority attempts at negotiation are one of the primary sources of delay in the appeal process,[11] and other commentators have noted that mediation is unlikely to succeed unless facilitated by an independently appointed mediator.[12]

Auckland Governance

The Royal Commission on Auckland Governance (2008) recommended that seven territorial authorities and the regional council should be amalgamated to create a single unitary authority. In particular it proposed that the opportunity to streamline and simplify RMA planning for the new unitary authority by replacing all statutory planning instruments with a single unitary plan provided a strong catalyst for this recommendation.

Auckland Council prepared a briefing paper for the Government following the 2011 General Election that suggested that: the council was in a unique position; that it needed to implement the unitary plan quickly; and that the preparation the plan under the Schedule 1 process could be protracted and take up to 10 years to be made operative after any appeals had been resolved.[13] However, local government amalgamation is not unique. In 1989 the number of local authorities was reduced from over 700 to 86 as part of the reform agenda of the Lange Government, with the corresponding need to prepare new RMA plans.

Despite considerable debate, the *Reform Bill* proposes that the unitary plan preparation process should be streamlined by providing for a single council hearing,[14] with appeals being limited to appeals on questions of law only to the High Court (where the council adopts the recommendations of the hearing panel) and for merits appeals to the Environment Court (where the council decides to depart from the hearing panel's recommendations). Auckland Council suggested that the single hearing process could embody the "essential elements" of the council and Environment Court hearings under Schedule 1 of the RMA, as it proposed that the single hearing sould be chaired by a retired judge and that the hearing panel should include a mix of independent commissioners and elected councillors.

[11] L. Newhook, 'Current and Recent-Past Practice of the Environment Court Concerning Appeals on Proposed Plans and Policy Statements' (2013) *RM Theory & Practice*, 241-251.
[12] M. Oliver, 'Implementing Sustainability – New Zealand's Environment Court-annexed Mediation' (2012) *RM Theory & Practice*, 220-248.
[13] Auckland Council, *Briefing Paper to the Incoming Government* (November 2011).
[14] See: T. Daya-Winterbottom 'Blue Horizons' (2011) August *RMJ*, 21-24; D. Nolan et al 'A Better Approach to Improving the RMA Plan Process' (2012) *RM Theory & Practice*, 63-96; Nolan et al (supra note 7), 4-12; T. Daya-Winterbottom 'Blue Horizons 2' (2012) August *RMJ*, 18-23; D Nolan et al 'An Experiment in Expediency' (2012) November *RMJ*, 11-13; Newhook (supra note 11), 241-251.

Fundamental Rights and Natural Justice

Natural justice is provided for by a series of procedural safeguards in the RMA that require cost benefit analysis of objectives, policies and rules to ensure that proposed plans are soundly based on evidence of probative value;[15] and that guarantee access to justice by requiring public notification of proposed plans, and by providing for submission, hearing and appeal rights on merits and law. These safeguards reflect the fact that compensation is not available for adverse planning decisions that affect the reasonable use of property,[16] and the fact that there is no right to judicial review unless RMA appeal rights are exhausted.[17]

Leading authors have underscored the constitutional character of property rights,[18] the constitutional importance of compensation rights,[19] and constitutional guarantees designed to safeguard natural justice.[20] As a result, it is not surprising that previous attempts to limit appeal rights under the RMA to appeals to the High Court on questions of law only have not met with success.[21]

While it is clear that provision for natural justice is flexible in times of emergency (e.g. war time regulations),[22] the case for limiting appeal rights based on arguments about "unique" situations pertaining after local government amalgamation or the crisis arising from competing demands for freshwater allocation in the absence of regional plans, does not appear to be clear-cut or fully justified.

The arguments for limiting plan appeal rights are less clear-cut when the safeguards identified by the proponents for legislative amendment (e.g. the appointment of a retired judge to chair the council hearing panel) do not feature in the *Reform Bill*;[23] or where key aspects of Court process designed to streamline the hearing in a collaborative way (e.g. expert witness conferencing and mediation) are adopted in a hybrid way that departs from

[15] RMA, section 32.
[16] RMA, section 85.
[17] RMA, section 296.
[18] P. Joseph, 'Property Rights and Environmental Regulation' in T. Daya-Winterbottom (ed) *Frontiers of Resource Management Law* (2012), 124-143.
[19] S. Ratnapala, 'Environmentalism Versus Constitutionalism: A Contest Without Winners' (2007) *RM Theory & Practice*, 110-164.
[20] B. Barton, 'The Legitimacy of Regulation' in T. Daya-Winterbottom (ed) *Frontiers of Resource Management Law* (2012), 144-190.
[21] See: *Resource Management (Streamlining and Simplifying) Amendment Act* (2009).
[22] See: *Ridge vs Baldwin* [1964] AC 40 per Lord Reid.
[23] Resource Management Reform Bill, s 155 and s 156. There is no requirement in the Bill for the chair of the hearing panel to be a retired judge.

the integrity and independence of Court process;[24] or where the local authority is provided with the ability to depart from the recommendations of the hearing panel and afforded the privileged status of being able to re-litigate the merits of the departure via a separate hearing process.[25]

Most recently, extra judicial commentary and writing suggests that a rights-based approach to resource management decision-making may provide a more just way of balancing human rights to natural justice and property rights against other conflicting considerations.[26]

The Legitimacy of Climate Change Litigation

The debate in New Zealand regarding the use of consent conditions to mitigate greenhouse gas emissions was concluded in *Environmental Defence Society vs Taranaki Regional Council*,[27] and *Environmental Defence Society vs Auckland Regional Council*,[28] concerning proposed power stations. The Environment Court held that a national approach was required to address climate change. The Court deferred to the preferred policy package selected by Government to implement the *Kyoto Protocol*. It considered that mitigating greenhouse gas emissions had national and international implications, and required assessment of the social and economic consequences of imposing "offset" conditions. The Court considered that such matters were "quintessential policy decisions" that were best made in the political arena following an informed research led debate.

Subsequently, the opportunity for climate change litigation in New Zealand has been reduced under the *Resource Management Act* (1991) (RMA) as a result of the *Resource Management (Energy and Climate Change) Amendment Act* (2004), which inserted into the RMA section 70A and section 104E that preclude local authorities from considering the adverse effects of climate change when preparing regional rules pertaining to air discharges or when deciding air discharge permit applications.

[24] *Resource Management Reform Bill*, section 127, section 129, and section 130. For example, no provision is made for matters agreed via pre-hearing meetings or mediation to be resolved by consent order; and the facilitator is responsible for preparing reports from conferences of experts rather than reports being prepared by the experts themselves in the form of joint statements of evidence.
[25] *Resource Management Reform Bill*, section 143 and section 150.
[26] C. Whata, 'Environmental Rights in Times of Crisis: The Canterbury Experience' (2013) *RM Theory & Practice*, 42-72.
[27] (A184/2002).
[28] [2002] NZRMA 492.

The Court of Appeal and Supreme Court decisions in *Genesis Power Ltd vs Greenpeace New Zealand Inc,*[29] confirmed that regulation of greenhouse gas emissions is not possible under the RMA.

Most recently, the debate regarding climate change considerations was revisited in *Royal Forest and Bird Protection Society of New Zealand Inc vs Buller Coal Ltd*,[30] where the High Court held that such considerations were not relevant when deciding resource consent applications under the RMA. The Society had previously applied to the Environment Court for decalarations that the climate change effects of two South Island coal mining projects from CO2 emitted when coal was burnt by overseas exporters, should be considered when the land use consent applications were decided by the relevant local authority.

Based on the *2004 Amendment Act*, the Supreme Court had found in *Genesis Power* that adverse effects on climate change could not be considered by the relevant regional council when deciding air discharge permit applications for non-renewable energy generation projects. But that decision had not expressly addressed the issue in the context of the functions, powers and duties of territorial authorities when deciding land use consent applications.

The Society argued that the legal effect of the *2004 Amendment Act* was ambiguous and that it did not preclude the relevant territorial authority from considering the "down stream" effects on climate change of burning the coal when deciding land use consent applications. This argument was not accepted by the Environment Court, which found that the *2004 Amendment Act* left no room for "ambiguity, uncertainty, or … discretion" in relation to this issue. The High Court on appeal reached a similalr conclusion but like the Environment Court in the 2002 *Environmental Defence Society* litigation, the Court found it difficult to contemplate that local authorities were legally competent under the RMA to exercise jurisdiction outside their administrative areas. Justice Whata stated:

> One leviathan of environmental law (i.e. the RMA) is more than enough for lawyers, experts, environmental managers, planners, the local authorities and the courts of this country. The prospect of a district council assessing whether and end use of coal … is subject to sustainable environmental policy … in … foreign jurisdictions is palpably unattractive. [31]

[29] [2007] NZCA 469 and [2008] NZSC 112.
[30] [2012] NZHC 2156.
[31] [2012] NZHC 2156.

Subsequently, the Society has filed a further appeal and leave has been granted by the Supreme Court for the appeal to be heard direct by the Supreme Court, leap-frogging the Court of Appeal. The appeal has been set down for hearing by the Court on 12 and 13 March 2013.

It is for note that New Zealand's commitment to implement the *Kyoto Protocol* provided a powerful catalyst for the Environment Court to find that a national approach should be preferred to deal with the adverse effects of climate. Most recently, Tim Grosser, the Minister for Climate Change, announced that New Zealand has decided to pull out of the next phase of the *Kyoto Protocol* because it will have "disasterous consequences" and is "toxic".[32] Whether this change of heart will have an effect on the Supreme Court decision is a matter for speculation.

Conclusion

As a result, 2013 is likely to be an active year as the debates about further RMA reform and the legitimacy of local authority controls on the effects of climate change are litigated before the Parliamentary Select Committee and the Supreme Court. The decision to repeal merits appeals to the Environment Court in relation to plan decisions would be a strange way to celebrate the 60th anniversary of enactment of the *Town and Country Planning Act* (1953) that established the statutory predecessor of the Court. Similarly, the consequences for New Zealand's clean and green image of pulling out of the next phase of the *Kyoto Protocol* may not have been fully considered.

[32] TV 3 News, 10 November 2012.

COUNTRY REPORT: PERU
EIA Legal Reform in Peru: The Birth of SENACE

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Introduction

The Environmental Impact Assessment System has twenty plus years of history in Peru. Back in 1990, the first *Peruvian Environmental Code*, DL 613, introduced for the first time the concept and regulation for EIAs. According to the *Environment Code*, an EIA was required prior to obtaining a license or permit for environmental risky activities in the country. The *Environmental Code* also listed some of the activities that would necessarily require an EIA, and made an ambiguous reference to the responsible body as "the competent authority". The idea was to maintain sectorial environmental competences and EIA preparation and evaluations, but incorporate a coordinating entity to make the EIA system operational and articulated under a single public environmental entity.

The *Environmental Code* included a provision regarding a coordinating body for the national environmental system, which would be determined by future regulation, be responsible for guiding all competent authorities and lead the implementation of a national environmental policy. This provision was soon derogated, as it was thought that a new environmental authority or coordinating body would be bureaucratic, expensive and most of all, it could mean a threat for the much needed promotion of private investment in the country.

Over the next few years, a hybrid model was consolidated and EIA became regulated by individual sectoral authorities, which fictionally consolidated themselves as the environmental "competent authorities" with no coordinating body to articulate and provide a sense of unity. At the time, these "competent authorities" already regulated, granted permits and supervised potential environmental risky activities. With the *Environmental Code* they were also granted the role of evaluating and approving EIAs. Acting as a "judge and party" has been questioned over the years, but has more or less remained the same in spite of important milestones in the country, such as the creation of a National Council for the Environment (CONAM) in 1994, later to be replaced by the creation of the Ministry of

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Environment (MINAM) in 2008. Both CONAM and later MINAM were legally mandated to act as the coordinating body for the National System of Environmental Impact Assessment. However, apart from regulating some limits and approved guidelines, their role in regard to EIAs has been very modest and limited over the years. EIAs basically remained in the kingdom of each one of the sectoral "competent authorities".

Against this background comes the breaking news that the Peruvian Congress recently approved (in November 2012) the *Law for the Creation of the National Service of Environmental Certification for Sustainable Investments – SENACE*. SENACE is an independent entity, falling under the Ministry of Environment, which is granted supervisory and regulatory competence over all major EIAs. "SENACE", if broken down into two separate words in Spanish, means "being born" (se-nace). There was never a more appropriate acronym for a new institution.

The Environmental Impact Assessment System.

In 2001, the *Law for the National System of Environmental Impact Assessment – SEIA* (Law 27466) was approved. Under the SEIA framework, an environmental certification is required prior to execution of investment projects, whether private or public, that imply activities that may cause significant negative environmental impacts. The certification is a resolution given by the competent authority, which approves the environmental impact assessment study.

This Law also determined three different levels of classification for projects that require an EIA:[1]

- *Category 1.* Environmental Impact Declaration, or DIA.[2] This is meant for projects of very low risk, and which presumably do not cause significant negative environmental impacts.
- *Category 2.* Semi-detailed Environmental Impact Study, EIA-sd[3]. This is for projects that may cause moderate environmental impacts, but negative effects can be avoided or reduced through the adoption of simple mitigation measures.
- *Category 3.* Detailed Environmental Impact Study, EIA-d[4]. This is meant for projects that may produce relevant and significant negative environmental impacts, due to

[1] To prevent confusion, later it was decided to call all levels of EIA generally as "IGA". IGA stands for *Instrumento de Gestión Ambiental* or *Environmental Management Instrument.* In some cases, as we will see, an IGA means a Declaration and in other cases a more complex document.
[2] Stands for *Declaración de Impacto Ambiental*.
[3] *Estudio de Impacto Ambiental semidetallado*.

their nature, size or location. They therefore require a more detailed and in-depth analysis to anticipate, prevent, reduce or mitigate the impacts and develop a management strategy to deal with risks.

Prior and after this Law was passed, different "competent authorities" for different sectors (such as fisheries, mining, forestry, oil and industry) started to develop their own regulations and organizational structures to exercise and inform their EIA competences. As a result, for more than a decade, different types of criteria and principles were applied by different sectoral authorities, even where the nature of the activities they were regulating were similar. Among the more active and leading sectors, energy, mines and hydrocarbons certainly stand out. There was also interesting regulations developed for the following sectors: fisheries; railroad infrastructure; and some industrial activities. On the other hand, EIA structures and rules for agriculture and housing activities were very poorly developed.

To complicate matters further, a decentralization process oriented to empowering Regional Governments was initiated in the early part of the last decade. As a result of this process, several faculties were transferred to the regions, including some related to investment and infrastructure developments that required EIAS. In these cases, the role of the Regional Governments to approve or monitor compliance of EIAs was very unclear or badly defined in the best of cases.

The Good and the Bad of 20 Plus Years of EIA as a System, with Different "Competent Authorities"

Implementing EIAs in Peru has been a constant learning process. Below are some thoughts regarding good ideas and decisions that unfortunately had perverse effects:

- *Public hearings*. From the start, it was decided that all major EIA required also the presentation of information and management plans to all interested stakeholders. This was a seemingly good idea both posed certain challenges. Firstly, how to present large volumes of information based on sophisticated analysis to common people. Secondly, how to validate that information or propose alternative options, which additionally, often had budgetary and technical implications.

[4] *Estudio de Impacto Ambiental detallado*.

- *Environmental consulting firms*. According to Peruvian Law, only registered firms can produce an EIA and the holder of the project is responsible for hiring and paying for this service. The good part is that only qualified and accountable firms are permitted to undertake this role. The perverse effect of course is that companies deciding who undertakes the study influence in some way the results; and at the end, a poorly produced document is often generated. Quite often the firms preparing these documents adopted a “copy and paste” approach, filling thousands of pages in the hope of producing the image of a “detailed” EIA.

- *Environmental system*. It is very good news to have every productive sector taking environmental responsibilities and producing their own environmental regulations. The perverse effect is the application of different criteria in each sector, which produces unfair differences for investment projects, the rights of stakeholders and the conditions that should be relatively common and similar.

- *Decentralization process*. Over the last 10 years Peru has moved from a centralized model of government to a model that seeks to strengthen capacities and roles of Regional Governments to issue permits for the use of natural resources and to regulate landscape planning. It seems unfair then, that these same Regional Governments are not afforded a role in the approval process for EIAs in respect of projects falling within their jurisdiction.

It is worth mentioning that between 2011 and 2012, several cases dealing mostly with mining projects questioned the extent to which approved EIAs were effectively promoting environmental risk prevention and how they contributed to facilitating an “environmental and social license” for the execution of big development projects where, in most cases, you have rural populations living in poverty and sensitive ecosystems.

The most noticeable case was the Conga project, a big mining operation located in Cajamarca, where an EIA approved by the national government was challenged by local authorities and inhabitants of the area. The EIA had complied with all legal requirements including public hearings and adjustments to the project required by competent authorities. Regardless of this compliance, when the company was about to start its operations, the local community strongly resisted and compelled to mining company to stop its operations. The community raised several social and environmental concerns which apparently had been covered in the approved EIA. These included the use of two lagoons for the disposal of

waste. To cut a long story short, the Government decided to establish a panel of experts to make new recommendations regarding the management of waste water emanating from the proposed project. The mining company accepted these new requirements in spite of having their initial EIA approved. Notwithstanding the amended approval, the population continue resisting and frustrating the commencement of the mining operations.

Why have the community not accepted these new legal arrangements? The basic answer would appear to be that they do not trust the mining company and the Central Government. The EIA process means nothing to them, as it is basically perceived as an agreement between the company and the Central government.

SENACE. The Creation of the National Service of Environmental Certification for Sustainable Investments

After the social conflicts of 2011-2012, it was clear that the EIA legislation and the institutional framework needed to be re-built in order to make it a more efficient and inclusive instrument; and most of all to restore credibility in the EIA regime.

One of the key challenges to the EIA regime has related to the same authority being tasked with both promoting and regulating projects requiring EIA approval. One alternative which was proposed was having an independent institution for approving the EIA. With strong and direct political support of the President, SENACE was created to act as this institution.[5]

What is SENACE?

SENACE is a public body falling within the Portfolio of the Ministry of Environment. It has technical independence and its own legal status and budget. SENACE is part of the National System for Environmental Impact Assessment, whose coordinating body is the Ministry of Environment.

What is SENACE Responsible For?

[5] *SENACE Bill* proposal was an initiative of the executive power, by the request of President Ollanta Humala to deal with solutions for social conflicts in the country linked to high investments projects. In August 2012, the Council of Ministers approved a proposal for the creation of SENACE that was sent to Parliament. On 22 November 2012, the Bill was approved by Congress and sent back to President Humala who finally signed and promulgated the Bill on 19 December 2012, by Law 29968.

From the start of the discussions, it was obvious to most people that not all levels of EIA needed to be regulated by the new institution, as that would be overwhelming and not very practical. So it was decided that SENACE would be responsible only for detailed Environmental Impact Studies (EIA-d). In a controversial political move, it was decided in the law that in some cases the Council of Ministers may decide that a major project that requires an EIA-d, could be revised and approved by the sector in charge of the activity instead of SENACE. This means going back to the traditional sectoral "competent authority" system, albeit, in very exceptional cases.

Apart from this exception, general activities of SENACE will be: approving the EIA-d; implementing both the National Register of Environmental Agencies qualified to develop the EIA and the Register of Environmental Licenses; asking relevant authorities for their opinion about an EIA prior to making their decision; developing draft proposals for improving the EIA framework; coordinating mechanisms for the public participation processes; and implementing an "only window" system in all procedures related to EIA-d.

Organizational Facts

SENACE has a Board of Directors, consisting of six ministers: Environment (president); Finance; Agriculture; Energy and Mines; Production; and Health. The Board will approve the designation of a Chief for the executive operations of SENACE. This head will be the legal representative of SENACE, with all the administrative faculties needed for fulfilling SENACE's duties. Finally, SENACE has a Technical Counselor Council comprising of five individual specialists.

Implementation Process

It is not a usual legislative practice for Peruvian laws to include a section about an "implementation process". However, this time the legislator opted to include such a section, which dictates four phases in the implementation process:

- *Phase 1.* Install the board of Directors and design the Chief of SENACE.

- *Phase 2.* Design and implement the legal and administrative tools, such as a new set of procedures and regulations; hire the personnel of SENACE and implement capacity building and training processes; coordinate and follow up with each one of the current "competent authorities" to work with them until the transfer of

faculties has been completed; and design and regulate both registers in charge of SENACE. Once the completion of these tasks has been validated by the Board, SENACE can move onto the next phase.

- *Phase 3.* Transfer of faculties from the "competent authorities" to SENACE. A new Supreme Decree[6] will be needed to approve the schedule for all individual transfers. Then a Ministerial Resolution will also be required to accept each one of the transfers. Pending the adoption of these resolutions, individual projects will continue to be regulated by the sectorial "competent authorities".

- *Phase 4.* Follow up to the transfer of faculties. The Ministry of Environment will follow up the processes of transfer of faculties to SENACE.

As the above illustrates, the idea is to implement SENACE in a progressive way, starting with the institutional design and framework, hiring personnel, working on capacity building and training, promoting regulations and guidelines, and finally working with the current "competent authorities" to conclude the transfer of faculties to SENACE. It may be a long process, but it is certainly a big next step in Peru's path towards improving the country's Environmental Impact Assessment System.

In parallel to SENACE's creation, the Government has been working on improving the environmental prosecution regulations and some environmental compensation schemes. All these regulations and processes are the result of a set of recommendations provided by a Multisectorial Commission Report (October 2012) which identified several strategic issues requiring attention to address escalating environmental and social conflicts: environmental justice; governance; the right for a healthy environment; sustainable investments; social inclusion and natural heritage.

It is expected that the environmental policy and law agenda for 2013, and subsequent actions and measures, will be informed by this Report. The fact that Congress approved SENACE is a very good indicator that Peru has rapidly started taking note of this Report and commenced implementing its recommendations. However, the reality of implementing these recommendations may prove very challenging as many of them are still resisted by traditional extractive, industrial and productive sectors, and require considerable capacity building, budget allocations and political will. The situation at present looks promising and

[6] The highest legal norm the Executive Power can approve.

positive, but the mid- and long-term future may still present challenges. The most important of these challenges will be to present and internalize these instruments not only as part of a legal or technical debate, but as viable tools for building trust, governance and justice; and ultimately, striving towards true sustainable development.

COUNTRY REPORT: PHILIPPINES
Defending the Coasts: A Continuing Challenge

GLORIA ESTENZO RAMOS*

Introduction

Coastal areas have crucial ecological, social, cultural and economic significance for the people and species inhabiting the planet. They host diverse natural habitats that nurture various life forms and activities, protect communities from hazards, aside from offering immense historical, aesthetic and recreational value to the broader community. Increasing population growth, [1] unplanned and unregulated economic pursuits (such as land reclamation) and pollution, have proven detrimental in ensuring the ecological integrity of many coastal areas.

The coastal and marine areas in the Philippines deserve special concern. Due to its rich biodiversity, the Philippines is recognized as one of the world's 18-megadiversity countries which cumulatively contain 75 per cent of its biodiversity.[2] The Philippines, together with five other countries,[3] form the globally recognized coral triangle.

A study published in 2001 provides a glimpse of the problems besetting the country's coastline, which include: rapid population growth; widespread poverty; declining fisheries productivity; increasing environmental damage; increasing pollution from land-based activities; and the impacts of climate change on coral reef ecosystems and the fisheries they support.[4]

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[1] The *Philippine Development Plan* (2011-2016) acknowledges that '60 percent of the total Philippine population live in the coastal zones and depend on these coastal resources for livelihoods'.
[2] Coral Triangle Initiative On Coral Reefs, Fisheries And Food Security, Republic of the Philippines *National Plan Of Action* (CIT RNOP) (available at http://www.coraltriangleinitiative.org/sites/default/files/ resources/Philippines%20NPOA_Final.pdf).
[3] The six Coral Triangle countries are the Philippines, Indonesia, Malaysia, Papua New Guinea, the Solomon Islands and Timor-Leste.
[4] *Managing Philippine Coasts and Seas, Understanding the Challenge*, *Philippine Coastal Management Guidebook Series No. 1: Coastal Management Orientation and Overview* (2001) (available at http://www.oneocean.org/flash/the_philippine_seas.html).

The former President Gloria Arroyo issued *Executive Order* No. 533, which adopts integrated coastal management (ICM) as the national management policy framework to promote the sustainable development of the country's coastal and marine environments and resources. It seeks to bolster the already abundant national policies aimed at protecting the environment. Unfortunately, ICM has not been integrated into the policies, programs and projects of Government, except for a few produced by local government units[5] (LGU).

President Aquino's current administration has adopted the *Philippine Development Plan 2011-2016* (the Plan), [6] which devotes a chapter to Conservation, Protection and Rehabilitation of the Environment and Natural Resources. A portion of the Plan states as follows:

> 'The Philippines has one of the world's longest coastlines, a total of 36,289 kilometers… Located within the Coral Triangle, at the center of high marine diversity, the country's vast, rich and diverse coastal and marine resources are composed of coral reefs, sea grass beds, mangrove and beach forests, fisheries, invertebrates, seaweeds, marine mammals and many others. About 60 percent of the total Philippine population live in the coastal zones and depend on these coastal resources for livelihoods.
>
> Some unsustainable human activities, however, cause great stress to coastal and marine resources. Coastal development and climate change impacts such as sea-level rise and increasing sea-surface temperature add to the stress on these resources. Sedimentation in coastal areas due to unsustainable land use in upland areas continues to threaten coastal ecosystems. The productivity of the country's coral reefs, mangrove forests, sea grass, and algal beds and fisheries is declining at an alarming rate. Of the 27,000 sq. km. of coral reef, over 70 percent are of poor or fair quality and only five percent are in excellent condition. The Philippine reefs may already be in a steady state of decline from 5 percent to 3 percent to less than 1 percent (Nanola et. al., 2004). The country's coral reefs are considered to be one of the highly threatened reef areas in the world.'

In this era of growing climatic challenges, certain constituents in the country, especially the fisher folk and their families, stand to be most affected by storm surges, extreme weather disturbances and sea level rise. The Philippines is considered the third most disaster prone

[5] These are political and geographical units in the Philippines. As of 30 June 2010, local government units consist of 80 provinces, 122 cities, 1512 municipalities and 42,025 barangays. See further: http://www.dilg.gov.ph.
[6] Available at http://devplan.neda.gov.ph/.

in the world,[7] and according to the *Global Climate Risk Index* (2013), the fourth most vulnerable to the impacts of climate change.

Climate change has serious repercussions for Philippines' biodiversity. Aside from providing essential goods and services, mangroves, corals and sea grass absorb and thus sequester carbon, filter polluting substances and serve as natural barriers to storm surges. The *World Disaster Report* (2012) expressed the view that 'the Philippines could spare up to 20 million of its people - about a fifth of its total population - from natural disasters by improving the protection of its coral reefs, a primary line of defense against coastal hazards, including tsunamis'.[8]

If the Philippines' coast is openly acknowledged as essential in protecting the life, livelihood and environmental rights of the citizens, why is defending it a constant challenge? What reforms have its institutions and President Aquino administration initiated to mainstream ICM and marine protection? What steps have stakeholders taken to slow down or stop its alarming decline?

This Country Report discusses and evaluates the latest developments taken by the National Government in addressing the various coastal challenges and the response of key institutions, such as the courts and the dynamic civil society movement, in parrying the continuing attacks on the coast. It recommends courses of action for stakeholders from all sectors to take ownership of the grave responsibility to protect the country's threatened coastal and marine ecosystems.

Legal Framework for Coastal Protection

The Philippines adhere to the Regalian Doctrine where the State is vested the ownership and control of natural resources.[9] The exercise of its powers is however limited by the rights granted to the citizens and stakeholders, and the State's unequivocal responsibility to protect them. The *Constitution* (1987) provides a very strong framework for protecting the environment and its people, including its highly vulnerable sectors such as the fisher folk who are most dependent on the Earth's life support system for the quality of their lives and livelihoods. It contains provisions guaranteeing their right to life, health and a 'healthful and

[7] Philippine Daily Inquirer, 'Philippines is 3rd Most Disaster-Prone Country, New Study Shows' (available at http://globalnation.inquirer.net/52858/philippines-is-3rd-most-disaster-prone-country-new-study-shows).
[8] Ibid.
[9] *Constitution*, article XII, section 2.

balanced ecology in accord with the rhythm and harmony of nature'.[10] These rights are coupled with the crucial right for the constituents to effectively participate in decision-making processes and access information, backed up by the state policy of full disclosure of information. A social justice provision accords the subsistence fisher folk preferential rights to access traditional fishing grounds, as reiterated by the *Fisheries Code*.[11] Other national laws and policies of relevance to the coast include: *National Integrated Protected Areas System (NIPAS) Act*;[12] *Wildlife Resources Conservation and Protection Act*;[13] *Executive Order* No. 797 (which adopts the *Coral Triangle Initiative (CT) National Plan of Action*); and *Executive Order* No. 533. The Philippines has also ratified various multi-lateral environmental agreements.[14]

The legislative and judicial branches of government have, respectively, crafted laws and handed down rulings giving life to the new environmental rights paradigm. The Supreme Court has generally upheld environmental rights in numerous cases. In the exercise of its rule-making power, it issued the *Rules of Procedure for Environmental Cases* in 2010, the first of their kind in the world. The Rules have given rise to the filing of numerous citizen suits to protect the environment, including the case of *Boracay Foundation v. Province of Aklan*[15] where the Supreme Court stopped a 40-hectare reclamation project of the Province of Aklan, which could have defaced the popular Boracay Island.

The Legislature has enacted laws to protect ecosystems, and for the people and institutions to respond effectively to the dangers of climate change, disasters and continuing environmental degradation. It has also exercised its oversight functions and conducted investigations with a view to introducing legislation to improve implementation of the environmental laws by government agencies.[16]

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[10] *Constitution*, article II, section 16.
[11] Republic Act No. 8550.
[12] Republic Act No. 7586.
[13] Republic Act No. 9147.
[14] These include: *Rio Declaration on Environment and Development*; *Convention for Biological Diversity*; *Convention on the Conservation of Migratory Species of Wildlife Animals*; *Ramsar Convention*; *United Nations Convention on the Law of the Sea*; *Convention on International Trade in Endangered Species of Wild Fauna and Flora*; *ASEAN Agreement for the Protection of Biodiversity*; *Coral Triangle Initiative Declaration*; and the *United Nations Framework Convention on Climate Change*.
[15] G.R. No. 196870, 26 June 2012.
[16] Among recent initiatives is the on-going investigation by the House of Representatives' Natural Resources Committee on the reclamation projects and the implementation of the *Solid Waste Management Law*.

However, government agencies tasked with administering these laws have difficulty in performing their functions, specifically in implementing laws and harmonizing state policies on ecological integrity and sustainable development. The implementation of well-crafted environmental laws is weak and a grave cause of concern. Budgetary allocations for the environment sector are miniscule. The establishment of environmental and natural offices (ENRO) within LGUs is not mandatory. Environmental compliance certificates (ECC) are perceived to be to easily issued by the Department of Environment and Natural Resources[17] (DENR) even without participation by the affected stakeholders or based on ancient environmental impact statement submitted by development proponents. Worse still, unsustainable, largely unplanned but erstwhile 'favorite' coastal development projects such as reclamation, given presidential blessings by the previous administration, are allowed to continue to wreck havoc on the marine ecosystems, despite the clear constitutional and statutory edict of responsibility for the environment and the people. However, significant gains have been achieved in the arena of accountable and transparent governance and diminution of patronage politics, which previously contribute significantly to the lackadaisical enforcement of environmental laws.

Recent Policy Developments Impacting on the Management and Protection of Coastal and Marine Resources

A New Form of Governance

In seeking to adhere to the principles behind President Aquino's *Social Contract with the Filipino People*,[18] significant strides had been made by the new President to make National Government more transparent, accountable and participatory. Agency websites now contain public documents that were previously deemed confidential. The DENR has implemented anti-corruption measures to stamp out incidents such as delivering confiscated logs to the Department of Education to be made into school desks. Moreover, the employment of environmental officials and employees involved in illegal logging has been discontinued.[19] Windows of opportunity for genuine engagement between the public sector and civil society have never been opened wider, with agencies entering into memorandum of agreement with non-government organizations for partnership on government projects.

[17] See further: http://www.denr.gov.ph.
[18] See further: http://www.gov.ph/about/gov/exec/bsaiii/platform-of-government/.
[19] See further: http://www.abscbnnews.com/nation/regions/ 06/30/12/31-denr-officials-sacked-over-illegal-logging.

Environment Protection Policies

Recent administrative notices include Executive Order (EO) No. 79, [20] the Aquino administration's *Responsible Mining Policy*. Under EO 79, the Government committed not to allow mining in certain areas [21] including the prohibited sites under the *Mining Law*, [22] protected areas covered by the *National Integrated Protected Areas System* (NIPAS) under Republic Act No. 7586, and other laws which expressly excluded certain areas from mining applications.[23] The Government likewise committed to ensure that environmental standards for mining 'shall be fully and strictly enforced, and appropriate sanctions meted out against violators'. [24] Acting on studies which showed that revenues from mining were not as substantial as expected, a moratorium on new mining agreements was undertaken pending the passage of a law that rationalizes 'existing revenue sharing schemes and mechanisms'.[25]

EO 79 is doubly significant as, for the first time, a ban is imposed on the use of mercury in small-scale mining,[26] a recognition that mercury is toxic and harmful to the health of citizens and ecosystems. The International POPs Elimination Network (IPEN) views mercury as:

> 'a toxic substance of global concern that causes significant harm to human health, wildlife and ecosystems. When mercury is released into the environment, it travels with air currents and then falls back to earth, sometimes nearby the original source and sometimes far away. Mercury can drain from soils to streams, rivers, lakes and oceans and it can also be transported by ocean currents and migratory species.'[27]

[20] Available at: http://www.gov.ph/2012/07/06/executive-order-no-79-s-2012/.
[21] E.O. No. 79, section 1.
[22] Republic Act No. 7942, section 19.
[23] These include: 'c) Prime agricultural lands, in addition to lands covered by RA No. 6657, or the *Comprehensive Agrarian Reform Law* of 1988, as amended, including plantations and areas devoted to valuable crops, and strategic agriculture and fisheries development zones and fish refuge and sanctuaries declared as such by the Secretary of the Department of Agriculture; d) Tourism development areas, as identified in the *National Tourism Development Plan*; and e) Other critical areas, island ecosystems, and impact areas of mining as determined by current and existing mapping technologies, that the DENR may hereafter identify pursuant to existing laws, rules, and regulations, such as, but not limited to, the NIPAS Act.'
[24] E.O. No. 79, section 2.
[25] E.O. No. 79, section 4.
[26] E.O. 79, section 11 (e).
[27] IPEN *Views on a Global Mercury Treaty* (available at http://www.ipen.org/ipenweb/work/mercury/mercury_treaty_report_r5.pdf).

New Laws

Responsible Parenthood and Reproductive Health Act (2012)[28]

The President signed the Act into law in December 2012, after over a decade of procrastination, division and bitter conflict that pitted the influential Catholic Church against the President and supporters of the Bill. The country is said to have the highest birth rate in Asia 'with the United Nations estimating that half of the country's 3.4 million pregnancies each year are unplanned'.[29] The Act is recognition of the need to minimize the impacts of a fast growing population on the vanishing and threatened resources in a disaster-prone country, through education and mainstreaming rights to health care services.

Amendments to the Climate Change Act[30]

In August 2012, the President signed these amendments to the *Climate Change Act* into law. The amendments harmonize laws and policies related to climate change and disaster risk reduction and management. It gives broader powers to the Philippine Climate Change Commission (Commission). To prioritize the allocation and availability of funds for the implementation of climate-related plans and programs, the amendments create mechanisms governing the use of the People's Survival Fund. This is a special fund in the National Treasury with an annual appropriation of one Billion Pesos. These funds are to be used for the financing of adaptation programs and projects based on the *National Strategic Framework*, and in compliance with the country's undertaking under the *ASEAN Agreement on Disaster Management and Emergency Response*.[31]

Sin Tax Law[32]

This law came into effect in January 2013 and introduces higher taxes for tobacco products and alcoholic beverages. The country has 'the highest incidence of smoking in the region, with tobacco-related diseases costing the country P177 billion ($4.3 billion) last year'.[33] The

[28] Republic Act No. 10354.
[29] See further: http://newsinfo.inquirer.net/331669/philippines-seeks-unity-after-birth-control-law-signed.
[30] Republic Act No. 10174, which amended Republic Act No. 7924.
[31] Available at: http://www.asean.org/news/item/asean-agreement-on-disaster-management-and-emergency-response-vientiane-26-july-2005-2.
[32] Republic Act No.10351.
[33] See further: http://www.rappler.com/business/18928-higher-booze,-cigarette-prices-as-sin-tax-law-takes-effect.

proceeds are set aside for health care programs. This law is noteworthy as cigarettes stubs, aside from health impairment issues, cause danger to marine resources, being mistaken as food by marine mammals; and are highly toxic.[34]

Policy and Legislative Setbacks

Despite claiming inclusive and sustainable growth as a strategy in its *Philippine Development Plan*, the Aquino administration continues down the former administration's unsustainable path to development in two areas.

Fossil Fuel Dependency

Despite the introduction of the *Renewable Energy Act*,[35] the Department of Energy plans to build twenty-three coal-fired power plants, the biggest energy build in the country's history. These power plants are to be built near the coast, even in protected seascapes. Von Hernandez, Executive Director of Greenpeace Southeast Asia, has stated that:

> 'Solutions are available to reduce our dependence on polluting, dirty and deadly coal energy. The government must prioritize and support green investments which will help put the country on a low-carbon growth pathway, instead of pursuing investments which are harmful to society, peace and order, and the environment. This way, further human and societal damage, as well as ecological degradation and devastating climate change impacts, can be avoided.'[36]

Nationwide Land Reclamation Projects

The Philippine Reclamation Authority has approved the *National Reclamation Plan*[37] for projects that will further destroy 38,000 hectares of critical coastal habitat and heavily impact the subsistence fisher folk. This event triggered the mobilization of the fisher folk sector, scientists, professionals, churches and other groups to vigorously oppose the Plan.

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[34] K. Register, *Cigarette Butts as Litter-Toxic as Well as Ugly* (2013) (available at http://www.longwood. edu/cleanva/ciglitterarticle.htm).
[35] Republic Act No. 9513.
[36] See further: http://www.greenpeace.org/seasia/ph/press/releases/Nationwide-opposition-launched-against-coal-fired-power-plants/.
[37] See further: http://reclamationforwhom.files.wordpress.com/2012/09/provincial-city-distribution-of-nrp-projects.pdf.

A Network for the Integrity of Coastal Habitats and People's Resilience (the Network) was formed at the People's Summit on the Impacts of Reclamation held in October 2012.[38] It was launched out of concern that the 'resulting biomass loss will have immediate and severe ecological and socio-economic impacts, such as coastal community and fisher folk displacement and the destruction of ecosystems'.[39] Participants called for a ten-year moratorium on reclamation projects pending a comprehensive, transparent and consultation-based review of the Philippine's outdated national policies on reclamation projects.[40]

Stakeholders have filed a petition for a writ of kalikasan with the Court of Appeals to stop a proposed reclamation project, which will impact the 175-hectare mangrove and marine habitat at the Las Piñas-Parañaque Critical Habitat and Ecotourism Area (LPPCHEA) and cause unprecedented flooding in the area. It has been noted that:

> 'Past experiences on land reclamation projects have proven to be disadvantageous to fishing communities and their environment. The Pamalakaya fisher folk federation recalled that land reclamation paved the way for the demolition of fishing communities along Manila Bay and the destruction of rich mangrove areas during the time of former Presidents Ferdinand Marcos.'[41]

In Congress, the House of Representatives Committee on Natural Resources tackled various House Resolutions (HRs) on the impacts of reclamation. The Committee recommended the revocation of the ECC issued by the DENR for reclamation projects in Las Pinas and Paranaque.

In Cebu, stakeholders filed administrative and criminal cases against national and local officials, including the provincial governor and the municipal mayor of Cordova, for undertaking an illegal reclamation project which will destroy one of the biggest sea grass areas in Central Visayas and abundant corals and mangroves ecosystems.[42] DENR officials were likewise included as respondents due to: the irregular issuance of the ECC without the

[38] Materials from the Summit are available at http://reclamationforwhom.wordpress.com/presentations-and-summit-materials/.
[39] Resolution approved by Summit Participants (available at http://reclamationforwhom.wordpress.com/presentations-and-summit-materials/.
[40] See further: http://www.remate.ph/2012/11/govt-reclamation-projects-will-kill-philippine-coasts-marine-biodiversity/.
[41] See further: http://reclamationforwhom.wordpress.com/the-summit/.
[42] See further: http://newsinfo.inquirer.net/159109/cordova-reclamation-sends-gwen-6-officials-to-ombud.

required public consultation; [43] and consideration of the severe impacts on the rich mangroves, corals and seagrass ecosystems upon which fisherfolk and their families and communities rely for their sustenance.

Conclusion and Recommendations

Civil society continues to play a very active role on holding the Philippine Government to account in the environmental context. This has been evidenced in the past year by the first ever People's Summit seeking to oppose the *National Reclamation Plan* and the nationwide opposition launched against the Government's decision to build several new coal-fired power plants in the coastal environment in flagrant disregard of the domestic renewable energy legislation.

Crisis leads to opportunities. The vigorous engagement of civil society in opposing unsustainable projects undertaken by Government needs to be sustained. Time is of the essence. Who knows? The collective voices of the people in relentlessly pushing for the protection of the environment and defending the severely threatened coasts may prove to be the impetus to make Government more accountable and responsive to the compelling needs of the people, its 'vast, rich and diverse coastal and marine resources'[44] and the planet.

[43] The *Local Government Code*, R.A. 7160, provides that: 'Duty of National Government Agencies in the Maintenance of Ecological Balance - It shall be the duty of every national agency or government-owned or -controlled corporation authorizing or involved in the planning and implementation of any project or program that may cause pollution, climatic change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover, and extinction of animal or plant species, to consult with the local government units, nongovernmental organizations, and other sectors concerned and explain the goals and objectives of the project or program, its impact upon the people and the community in terms of environmental or ecological balance, and the measures that will be undertaken to prevent or minimize the adverse effects thereof' (section 26). Section 27 further states that: 'Prior Consultations Required - No project or program shall be implemented by government authorities unless the consultations mentioned in Sections 2 (c) and 26 hereof are complied with, and prior approval of the sanggunian concerned is obtained…'.

[44] *Philippine Development Plan* (supra note 6).

COUNTRY REPORT: RUSSIAN FEDERATION
New Environmental Policies and Laws

IVAN GOLUBUSHIN*

Environmental Policies and Reports

On the 30 April 2012, the President approved the *Fundamentals of the Environmental Development Policy* for the period up to 2030.[1] It is stated that the main reason for the adoption of this document is to ensure environmental safety during the modernization of the economy and to promote innovative development. The document identifies areas requiring priority attention that include: increasing responsibility for environmental offences; introducing innovative technologies; and promoting the use of environmental impact assessment.

The draft *Forest Policy*[2] is under development. It is supposed to deal with matters such as the ownership of forests, the organization of the system of forest management, and problems associated with the protection and reproduction of forests. It was developed with the active participation of Greenpeace, the World Wide Fund for Nature, scientists, the Federal Forestry Agency.

Following the United Nations Conference on Sustainable Development (Rio+20) that took place in Rio de Janeiro, Brazil in June 2012, Russia submitted a report on the implementation of the principles of sustainable development in the Russian Federation.[3] This document shows the progress in the implementation of the principles of sustainable development in Russia over the last 20 years. It also defines the long-range objectives of sustainable development and establishes priority directions for development in Russia.

New Environmental Laws

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[1] See further: http://www.consultant.ru/.
[2] See further: http://www.rosleshoz.gov.ru/activity/politics/docs/projects/0.
[3] See further: http://news.kremlin.ru/media/events/files/41d4020395b7808496b0.pdf.

The Russian Government introduced a number of new laws and amendments to existing laws of relevance to the environment during 2012.

The *Presidential Decree* No. 1157 of 10 August 2012 "On Holding the Environment Year in the Russian Federation in 2013"[4] states that the aim of holding the Environment Year in Russia is to assert every individual's right to a healthy environment. In order to implement this statement, the Russian Government has received instructions to draft and adopt a plan of the main events to be organised for the Environment Year. It has been recommended to the executive authorities of Russian regions to host events as part of the Environment Year.

The *Federal Law* No. 132-03 of 28 July 2012 "On Amendments to Certain Legislative Acts of the Russian Federation Concerning State Regulation of Merchant Shipping in the Area of the Northeast Passage"[5] defines "the area of the Northeast Passage". It also defines the legal status and borders of this route. In order to ensure safety and to prevent and monitor pollution of the marine environment by vessels, the law sets out the rules for shipping in the Northeast Passage. The law also introduces icebreaker support, pilotage and ice-breaking fees set in accordance with Russian Federation law on natural monopolies based on the actual quantity of services provided.

With the aim of increasing the efficiency of state regulation, the *Executive Order* No. 906 of 27 June 2012 "On Functions of the Ministry of Natural Resources and Ecology of the Russian Federation and the Ministry of Economic Development of the Russian Federation"[6] was promulgated. Under this law, the role of development of state policy and legal regulation in forestry affairs has been delegated to the Ministry of Natural Resources and Environment. The functions involving the development of state policy and legal regulation in monitoring the legal protection and use of the results of intellectual activity of civil, military, special and dual nature, created using the federal budget funds, as well as monitoring state contractors and the executors of government contracts in the said field of activity, have been delegated to the Economic Development Ministry.

The *Presidential Decree* No. 859 of 15 June 2012 "On the Russian Federation Presidential Commission for Strategic Development of the Fuel and Energy Sector and Environmental Security"[7] established the Commission and its constituent members. The Commission's aim

[4] See further: http://www.consultant.ru/.
[5] Ibid.
[6] Ibid.
[7] Ibid.

is to coordinate the work of the federal and regional executive authorities, local self-government authorities, and organizations in developing the fuel and energy sector, ensuring industrial, energy and environmental security, and rational use and effective management of the minerals and raw materials resource base.

In 2012, great attention was paid to preparations for ratifying two international agreements: the *United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*[8] (*Aarhus Convention*); and the *Convention on Environmental Impact Assessment in a Transboundary Context*[9] (*Espoo Convention*). Draft laws have been prepared with a view to implementing these conventions domestically. These laws are available on the website of the Ministry of Natural Resources and Environment of the Russian Federation.[10]

International Conferences

The Nevsky International Ecological Congress is an annual international congress that has taken place in St Petersburg since 2008. Its mission is to promote the international environmental security framework. The Fifth Nevsky International Ecological Congress took place in the Tavricheskiy Palace, St Petersburg, on the 17-18 May 2012. It was held to discuss a broad range of issues, such as: the international legal framework of environmental security for sustainable development; cross-border cooperation in environmental protection for sustainable development; the development of an economic toolbox for managing energy efficiency and reducing environmental costs of industrial activity and safe disposal of waste in an innovative developmental paradigm; environmental imperatives with a view to improving conditions of human life and health; cultivating environmental awareness among the population and promotion of greener life styles; environmentally-sound integrated water management; education and science in search for environmental solutions; and cooperation between the government, business community and the civil society for effective green policies.[11]

[8] See further: http://www.unece.org/env/pp/treatytext.html.
[9] See further: http://www.unece.org/env/eia/eia.html.
[10] See further: http://www.mnr.gov.ru/regulatory/detail.php?ID=128792; and http://www.mnr.gov.ru/regulatory/detail.php?ID=129454.
[11] See further: http://www.ecocongress.info/5_congr/koncept_e.html.

COUNTRY REPORT: UNITED KINGDOM
Reflections on Scotland's New Water Resources Bill

SARAH HENDRY*

Recent Developments

Scotland is one of four national jurisdictions within the United Kingdom (UK), with its own legal system, court structure and private law regime (since the *Treaty and Act of Union* (1707)). In 1999, a "devolved" Scottish Parliament was established under the *Scotland Act* (1998), with responsibility for *inter alia* property law, the environment and water, and implementation of relevant EU directives. Certain matters including taxation and competition were however reserved to the Westminster (UK) Parliament. The new Parliament provided an excellent opportunity to address many neglected areas of domestic law, and it very quickly showed its interest in water, with a wide-ranging inquiry (*Scottish Parliament Transport and Environment Committee Report* No.9 of 2001) followed by a suite of legislative reforms that are discussed below. Currently, Parliament is considering the *Water Resources Bill*[1] (2012), which if enacted will comprise both a high level policy initiative and a series of specific measures to better manage the resource. This Country Report will examine the *Water Resources Bill* and its surrounding policy agenda in the context of the reforms already enacted in the last 10 years.

The Legislative Context

As noted, since devolution Scotland has enacted a succession of water acts. The *Water Industry (Scotland) Act* (2002) established Scottish Water (SW) as a single national public corporation for the supply of drinking water and waste-water services, replacing three regional authorities. The *Water Environment and Water Services (Scotland) Act* (2003) transposed the *EU Water Framework Directive* (2000/60/EC, (*WFD*)) established a process for river basin management and enabled new water use regulations. The *Water Services (Scotland) Act* (2005) established the economic regulator for SW and introduced some

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[1] The *Water Resources (Scotland) Bill* No.15 2012 and all associated documentation are available at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/52620.aspx.

limited competition in the commercial sector for retail services. Amongst the many secondary rules enacted, the most important have been the *Water Environment (Controlled Activities) (Scotland) Regulations* (now SSI 2011/209) that brought in new integrated water use licences, covering abstractions, discharges, dams and river works. Some of these rules (especially comprehensive abstraction controls) were required by the *WFD* but in addition, the opportunity was taken to reform, update and consolidate much pre-existing legislation. In addition we might note the introduction of a series of technical directions, applicable to the regulator, which define and implement "good" water quality under the *WFD*. These establish conditions, limits and values for all the elements of the *WFD* system for ecological quality – flow, morphological alterations, chemical and physic-chemical standards, as well as the biological assessment at the core of ecological quality. The attainment of good status is a major preoccupation for most EU member states in terms of water management currently, and Scotland has been consistently proactive, transposing the *WFD* many months in advance of the deadline, and setting very ambitious goals for the second and third river basin management plans, whereby 97% of water bodies should be at "good" status by 2027. So it is perhaps surprising that the Scottish Government, and Parliament, are still inclined to enact more legislation relating to water, and this certainly provides evidence of political commitment and engagement with a water agenda.

The "Hydro Nation" and the Water Resources Bill

The high-level policy initiative currently being promoted by the Scottish Government is known as the "Hydro Nation" (Scottish Government (2010),[2] (2012)[3]). The Government has consulted twice around this concept, designed to maximise the uses and benefits of the water resource in Scotland. Principally, the Hydro Nation looks at how Scotland could best use water resources to contribute to the Government's policy goals, including sustainable economic development and the climate/carbon agenda, and how Scotland could assist other countries in the governance and management of their water resources and water services. In order to take this initiative forward, the *Water Resources Bill* proposes *inter alia* a new duty on Ministers to "develop the value" of the water resource, and new powers and duties on the public water services provider, Scottish Water, to supplement this. In addition the Bill includes provision on a number of areas - maintenance for septic tanks, management of priority substances, catchment protection and others – which will contribute to the better management of the resource and amend the existing law.

[2] Scottish Government, *Building a Hydro Nation* (2010), available at www.scotland.gov.uk.
[3] Scottish Government, *Scotland the Hydro Nation: Prospectus and Proposals for Legislation* (2012), available at www.scotland.gov.uk.

Scotland's Water and Scottish Water

Scotland is a water rich nation. With a population of just over 5 million and population density of 57/km^2, Scotland has approximately 100,000 km of rivers, 150 lochs with a surface area of over 1km and nearly 12,000 km of coastline. Annual rainfall averages 1431 mm/annum and exploitable surface water resources are equivalent to 16,000m^2 per person per year, well in excess of the European average of 4600m^2. Although the population distribution and coastal variations may mean water shortages in some areas at some times, Scotland is blessed with an abundant resource.

Water contributes to the Scottish economy in many different ways, including forming part of the natural resources that support tourism; as a key input to fisheries, whisky and other agricultural and food produce; and as a source of hydro power. Furthermore, in Scotland, there is a single public sector provider for almost all water and sewerage services, Scottish Water, set up in 2002. Scottish Water is a public corporation but regulated using a similar model to the (fully divested) English water and sewerage companies, and has its efficiency and effectiveness benchmarked against those providers. It has made significant improvements in efficiency and customer service in the 10 years of its existence and is in the upper quartile of performance across the UK, as measured by the economic regulator the Water Industry Commission for Scotland (WICS). Our experience has been that in terms of service delivery and achieving social and environmental goals, it is the regulation, not the ownership of the assets, which is important.

Scottish Water is seen as a key player in the Hydro Nation agenda, and as contributing in a number of different ways. One is as a model of governance in the water services sector; another is its role in the Scottish Government's climate change and carbon agenda.

Critical Analysis of the Hydro Nation and the Water Resources Bill 2012

Scottish Water and Governance

Scottish Water offers one example of a successful model of governance for water services in the public sector. Most water services are, and will continue to be, provided by the public sector, with a mix of private sector participation as appropriate to the jurisdiction; the major concessions of the 1990s will be less common and therefore it will be helpful to identify good practice examples of public sector delivery. In the "privatising" years of market liberalisation

and the Washington consensus, there was much focus on the economic regulation of private sector participants, rather neglecting the needs of the public sector. Because England and Wales pursued the route of full divestiture of water services (*Water Act* (1989)) and set up a complex model for economic regulation for the new water and sewerage companies, it was later possible to adopt a similar model of price control in Scotland. These price controls are set by the WICS within policy objectives and principles of charging set by the Ministers, and enforceable against Scottish Water under the *Water Services (Scotland) Act* (2005). The policy objectives and principles include both social and environmental goals as well as the necessary service standards (drinking water quality, pressure, etc., and including customer service), taking a holistic approach and ensuring that all these requirements should be met at a price that is affordable to the poorest. The Government considers, and this author would agree, that there is something of interest here to others, who may also be seeking a better way of regulating the public sector. This is not to say that every aspect of Scottish Water's governance arrangements would be appropriate to another jurisdiction; for example, a single national public corporation is unlikely to be feasible in a country with a large population. But it is very helpful to have an example of a public sector provider that is working well and meeting all the policy goals. Scottish Water itself has established a subsidiary, Scottish Water International, to assist with outreach work in this regard and there have been some new innovations in governance arrangements. Most recently, we have seen the establishment of the Customer Forum, on which this author sits; a new body which will work with the WICS, Consumer Focus Scotland (which has an advocacy role in water services under the 2005 Act) and Scottish Water to better reflect customer priorities around the discretionary elements of Scottish Water's investment programme (ie, those which are not driven by environmental law or other mandatory drivers).

"Developing the Value" of the Water Resource

Insofar as the "Hydro Nation" has been given legislative expression, this centres on the duty to develop the value of the resource. This duty is placed on Ministers, and has not been without criticism, especially as there is a definition of "value" in this regard which specifies (only) that value may have "*economic and other benefit*". It has been suggested in responses to the Government consultations and in evidence to the Parliamentary Committee, that any such development duty should be counterbalanced by (at minimum) specifying that "environmental and social" benefits are part of defining "value". Alternative suggestions included enacting a duty to take an ecosystems approach, or giving statutory recognition to the inherent value of water for its own sake. It remains to be seen whether the Parliament will consider any of these changes, as the Bill is still at its first stage. The issue

has been complicated by earlier suggestions by Ministers and civil servants that the Government is considering the bulk sale of water to England, as one way of realising value – despite the technical, environmental and political reasons that would tend to militate against such a proposal. Indeed the Bill includes a whole new regime for bulk abstractions (in addition to the controls that already exist) that had not been consulted upon and has also attracted some critical comment.

In addition, Scottish Water has new functions in this regard; a specific new power to assist in that development, along with a duty to develop the value of its own assets and expertise, and a duty to promote the use of its assets for the generation of renewable energy. Both of these duties are qualified to the extent that they are not inconsistent with the exercise of Scottish Water's core functions (ie the provision of water and sewerage services to most of the population). In themselves these seem unobjectionable, as any entity would surely wish to maximise their assets and expertise; again though the precise meaning and intent comes back to what is meant by developing value in this context. The Government's view is that this will comprise of all the activities set out in the two Hydro Nation consultations, to be expanded on and followed through over the next couple of years – industrial innovation, knowledge transfer (from industry and of a governance agenda), further development of academic expertise, and an international development element, taken forward through new as well as existing institutions.

The Water Resources Bill – Parts 4 -7

The remaining Parts of the Bill are more technical and perhaps less exciting, but certainly important and useful, and protective of the water environment.

Scottish Water has new powers to manage catchments upstream, to improve raw water quality and reduce downstream treatment. These include powers of entry, monitoring and inspection and will be in addition to the monitoring carried out by the environmental regulator, the Scottish Environment Protection Agency (SEPA). One of the benefits of having a vertically integrated water services provider, who carries out all functions from abstraction of the bulk supply, through treatment and distribution, removal of waste water and its treatment and discharge back into the water environment, is that the service provider has a real engagement with the water cycle and can play a major role in catchment management; there is increasing evidence of global good practice in such initiatives (such as the New York Catskills). It will be important to have good coordination between SW's activities here and the existing monitoring and other catchment work carried out by SEPA, especially as

Scotland has recently introduced new regulations controlling diffuse rural pollution; it is of course necessary to avoid incentivising land managers to do things that they should already be required to do by law. Our Centre's evidence to the Parliamentary Committee suggested that there should be a duty to work in partnership around catchment management, and also a general duty in relation to educating water users (not just applicable to the catchment protection provisions).

There are also new provisions relating to sewers and their contents. If enacted, it will be possible to require industrial operators to eliminate or diminish "priority substances" before they are discharged as trade effluent. This is good in principle, as it will reduce the costs of treatment and the need to make special provision for specific difficult substances. It looks ahead to the review of the *Priority Substances Directive* (2008/105/EEC, Annex X to the WFD and COM (2011) 876). It does leave open the possibility that if operators install their own pre-treatment then revenue to SW from trade effluents will fall, and it does not address the possibility that some priority substances may emanate from private houses or other sources of domestic sewage. Two of the substances affected by proposed revisions to the *Priority Substances Directive* are contained in ibuprofen and in the contraceptive pill; unfortunately these are substances (and purposes) unlikely to respond to an education campaign and impractical for prohibition. There are also new offences and penalties for the passage of fats, grease and oils into sewers, mainly affecting trade premises (although there is a general offence applying to all users of the system). There will always be difficulties around identifying the precise source of damaging substances in sewers, and this is another area where more emphasis on water education by SW might be desirable.

There is also much needed new provision for the maintenance of commonly owned private sewage treatment works (generally, septic tanks). It enables any one owner (or more than one, of course, but any one is empowered) to carry out the works and then recover the costs from the others. Notice must be given in writing, with certain specified information, and the recipient has 28 days to apply for a review to the Sheriff; the notice lasts for 12 months. Liability to pay, and the right to enforce, are personal and do not lapse when the property is sold. In the policy memorandum, it is stated that a more comprehensive scheme, such as empowering SW to taking over such works, is not acceptable as it would interfere with property rights. It seems likely that cost is a bigger factor here; most owners of a malfunctioning common septic tank would probably be delighted if the public authority took it over. If there is resistance from a large proportion of owners, then much will depend on one person being willing to do the administration, outlay the cost and then go to court to recover payment, so it is only a partial solution. It will though be very effective for the most common

situation, where one part-owner is unwilling to participate, and therefore the others will need to pay (only) a proportion of that one share of the cost.

Finally, the Bill includes some new provisions on deemed contracts for commercial supply (where supply is provided but no agreement is in place) and a new regime for water shortage orders, tying into rules on emergency abstractions.

Conclusions and Future Research Agendas

In conclusion, the *Water Resources Bill* makes some useful changes to the current rules for managing water resources. In terms of future policy agendas however, it is the "Hydro Nation" part that is of most interest. This brings together work in water, international development and climate change/carbon management and it is excellent news for those working in water that the Government here has chosen to focus on water as a way of working across these policy areas. It is hoped that there will be opportunities in terms of governance agendas as well as export of expertise and technology that will raise Scotland's profile in terms of water management. Scotland has expertise, and potential models for others, both in governance of resources and in the delivery of water services. The latter has been discussed above in terms of effective delivery in the public sector. In water resources and catchment management, from a standing start in implementing the WFD we have been proactive; as well as the statutory system we have (for example) two UNESCO IHP HELP basins, in the Tweed and the Dee, which have been commended for their governance arrangements; Scottish Water's new powers for catchment protection will be a useful part of this. We would very much like to see the Parliament adopt our suggestion of giving legislative expression to taking an ecosystems approach. Evidence from other witnesses to the Parliamentary Committee also supported this – an ecosystems approach is found in the Government's new land use strategy and if placed in law could be of real interest to many jurisdictions. A new body is being established, the Hydro Nation Forum, to provide high level oversight of the policy agenda; there is a new Centre of Research Expertise in Water (CREW) and proposals for an innovation park to support technological developments. We bear in mind that there is an active supply chain in the private sector supporting water services in Scotland and their interest in the Hydro Nation is increasing as the agenda becomes better known. There will be both doctoral and post-doctoral opportunities funded by the Government next year and there will be water projects in a new Climate Justice Fund for development work. Overall then, these are exciting times to be working in water in Scotland.

COUNTRY REPORT: SOUTH AFRICA
Developments in Environmental Law during 2012

MICHAEL KIDD*

Introduction

Although there was no new significant environmental legislation during 2013, there were several judgments that warrant discussion. There are several important environmental Bills in the pipeline, but discussion of those can be held over until later.

Cases

In the two previous South African Country Reports, I discussed the *Maccsand* decisions in the High Court and then in the Supreme Court of Appeal (SCA). In 2012, the matter was decided by the Constitutional Court.[1] As expected by most commentators, the court reached a finding on the principal issue that did not depart from the decisions of the two courts a quo. In brief, this issue was whether the holder of a mining right (in general terms - this could include any mining-related right, including a prospecting right) was required to obtain the relevant land-use planning authorisation before commencement of mining, or whether the granting of the mining right rendered such authorisation unnecessary. In both previous decisions, the courts held that the holder was not relieved of having to obtain land use planning permission under the relevant legislation (in this case, the *Western Cape Land Use Planning Ordinance*[2] (LUPO)).

The Constitutional Court characterized the principal issue as 'whether a holder of a mining right or permit granted in terms of the Mineral and Petroleum Resources Development Act[3] (MPRDA) may exercise those rights only if the zoning scheme made in terms of LUPO permits mining on the land in respect of which the mining right or permit was issued'.[4]

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[1] *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) (this judgment will be referred to as *Maccsand* throughout the rest of this article).
[2] See *City of Cape Town v Maccsand (Pty) Ltd* 2010 (6) SA 63 (WCC) and *Maccsand (Pty) Ltd and another v City of Cape Town and Others* (2011) 6 SA 633 (SCA).
[3] *Act* 28 of 2002.
[4] *Maccsand,* para 34.

The court held that the regulation of land use (the function of LUPO) 'constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government'.[5] Because (most) mining takes place on land, there would inevitably be an overlap between the functions of the LUPO and the MPRDA, but this overlap 'does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments'.[6] The court observed that there was nothing in the MPRDA that excluded the application of LUPO in respect of the granting of mining rights. Moreover, the MPRDA in section 23(6) provides that a mining right in terms of the Act is 'subject to this Act, *any relevant law*, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years'.[7]

Maccsand's arguments as to why LUPO should not be applicable were dealt with by the court as follows. First, the argument that LUPO was not a 'relevant law' because it does not apply to mining (as opposed to something like the *Mine Health and Safety Act*, for example) was rejected by the court as there is nothing in the MPRDA that confines the phrase 'relevant law' to laws regulating mining only. Consequently, the ordinary grammatical meaning is applicable.[8] The second argument posited that mining being subject to compliance with LUPO would result in local government usurping the functions (mining, in this case) of national government in a constitutionally impermissible manner. The court rejected this argument because LUPO does not regulate mining – it regulates land use. LUPO and the MPRDA operate alongside each other.

A further argument was raised to the effect that allowing the municipality to exercise land use decisions in terms of LUPO would enable the local government to 'veto' decisions of the national sphere on a matter that falls within the exclusive competence of the latter. The response of the court was that -

> 'the Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government

[5] Ibid, para 42.
[6] Ibid, para 43.
[7] Emphasis added.
[8] Ibid, para 45.

> to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another'.[9]

Maccsand argued further that, since LUPO provided for the landowner to apply for the rezoning of land, a holder of mining rights that was not the landowner (as was the case in *Maccsand*) would never be able to exercise those rights. The court observed, however, that land may also be rezoned at the instance of the municipality and the province. Since, in this case, the municipality was opposed to rezoning, 'it is still open to Maccsand to request the Provincial Government to intervene and have the rezoning effected'.[10]

Maccsand's final argument was, if both the MPRDA and LUPO apply to land use for mining, then the application of the two laws gives rise to a conflict that must be resolved by means of section 146 or section 148 of the *Constitution*. The main reason for dismissing this argument was that, according to the court, there is no conflict between the two statutes as each 'is concerned with different subject matter'.

The court thus held that the appeal must fail. There is little new or surprising in the judgment as it essentially echoes what had been decided in the SCA and the High Court before. The reasoning process of the court outlined above is, in my opinion, unassailable and the decision is supported.

The Constitutional Court also dealt with the issue of the application of the *National Environmental Management Act*[11] (NEMA) and its provisions relating to environmental impact assessment to the mining application. The Constitutional Court agreed with the position taken by the SCA - since the applicable provisions of NEMA were not applicable to the mining activities at the time, NEMA was not applicable. In the course of reaching this conclusion, the court made some rather confusing (and incorrect) statements about the applicability of NEMA vis-à-vis the MPRDA. The legal position in this respect is an absolute minefield and it is hoped that proposed amending legislation will clarify issues. At the end of the day, potential mining must be subject to environmental impact assessment, but the crucial issues to be determined by the legislative amendments will be the standards applicable and, probably most importantly, who will make the decision – the Minister of Mineral Resources (who is responsible for the promotion of mining in the country) or the competent environmental authorities (national or provincial). Watch this space.

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[9] Ibid, para 47.
[10] Ibid, para 49.
[11] Act 107 of 1998.

A second case, *Minister of Mineral Resources v Swartland Municipality and Others*[12] dealt with essentially the same issue as the *Maccsand* case and the court came to the same conclusion.

Still on the subject of land-use planning (this time without the added complexity of mining), the judgment in *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* [13] involved an attempt at unravelling interwoven spatial planning regimes. It concerned a planned development within the Bitou Municipality, just outside of the urban area of Plettenberg Bay. The applicant sought to have the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan (RSP) amended to have the relevant properties, at the time designated for 'recreation' use changed to 'township development'. Although the municipality supported the application, the MEC (provincial minister) refused the application.

For present purposes, only one aspect will be considered – the argument that the RSP was invalid because it was 'based upon and informed by race-based separate development [apartheid] planning principles'. The court identified that the RSP had been prepared and approved in 1982-3, when the 'full panoply' of apartheid legislation, including the *Group Areas Act*, was in force. The Applicant thus argued that the RSP is rooted in apartheid policy and thus is in conflict with several aspects of the *Constitution*. In response, it was argued on behalf of the MEC, that (in short) the race-based elements of the RSP had been ignored since the *Group Areas Act*'s repeal in 1991 and that no decisions taken in terms of the RSP since then had been informed by apartheid thinking.

In a detailed analysis of the RSP, the court highlighted aspects that were grounded in apartheid thinking and concluded, in short, that it was not possible to divorce individual planning decisions from the underlying racial basis of the plan. Although recognising that individual decisions had been taken without direct reference to apartheid considerations, any amendments to the RSP had been ad hoc and there had not been a comprehensive review of the plan after the demise of apartheid, which would have been necessary to remove the underlying race-based assumptions in the document. The conclusion of the court was, therefore, that the RSP is -

> 'an instrument that violates the founding values of human dignity and non-racialism in s 1 of the Constitution and the fundamental rights of equality and dignity in ss 9 and 10 of the

[12] [2012] ZACC 8.
[13] 2012 (3) SA 441 (WCC).

> Constitution. … If past laws sanctioning racial segregation materially influenced the content of the RSP, as I find to be the case, inconsistency with the Constitution is manifest'.[14]

The same RSP was involved in the case of *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning.*[15] The case involved a review under section 6 of the *Promotion of Administrative Justice Act*[16] against a decision dismissing the applicant's appeal against a refusal of an environmental authorisation[17] for which it had applied. The activity for which authorisation was required was a retirement village, to be established on a property currently zoned for agricultural use. The relevant RSP had been amended to allow for 'township development'.

Almost five years after the application had been lodged, the environmental authorisation was refused on the following grounds: fynbos vegetation on the site required conservation; part of the property comprised a critical biodiversity area; and there were concerns about urban sprawl, and provision of water and sewage. Moreover there was opposition to the development taking place outside the 'urban edge' and the 'no go' alternative would enable the area to retain a rural setting. An (administrative) appeal against the decision was unsuccessful, the appeal decision essentially reiterating the points outlined above.

The applicant had several arguments as to why the decision ought to be set aside but only one will be discussed here - that there were relevant considerations which the Minister failed to take into account, viz. the surrounding land usages and recent structure plan amendments. The court took into account a number of surrounding developments and structure plan amendments as well as the apparent fact that the MEC regarded previous land use decisions having been taken in the area as having been wrongly decided. The MEC's department was on record as having indicated that the effects of these previous incorrect decisions would be, in effect, corrected by making use of the environmental authorisation process to refuse developments. This rather complex situation was further complicated by the fact that the relevant RSP had been declared unconstitutional in the *Shelfplett* case, discussed above, although the invalidity had not been declared at the time the administrative decision in the *Clairison's* case was made. The court decided that the MEC had erred in not taking into account the factual aspect of the existing surrounding

[14] Ibid, para 51.
[15] Unreported case 26165/2010 (WCC). Judgment handed down on 16 May 2012.
[16] Act 3 of 2000.
[17] An 'environmental authorisation' is the authorisation envisaged by section 24 of NEMA, following an environmental assessment process.

developments, although some of the legal reasoning leading to this conclusion is, in my view, dubious. The applicant's other arguments were also accepted by the court, and the decision was set aside.

Overall, while one can sympathise with the applicant on the basis that its proposed development would appear to be in keeping with the existing surrounding developments, this decision would make it very difficult for an official to make decisions that prevent further unlawful development in the face of the factual presence of such developments. Moreover, even if the surrounding developments were lawful, surely there could be circumstances in which an MEC is entitled to decide that there is a need to prevent further development in an area?

If the decision in *Clairison's* was debatable, there can be little argument that the decision in *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West*[18] is plain wrong. The case involved the illegal construction of a lodge (the Kgaswane Lodge) in the Magaliesberg, in a protected environment.[19] The activity in question had been 'rectified' in terms of section 24G of NEMA and an appeal by the applicant against the section 24G rectification decision had been dismissed. The effect of this was that the development was authorised, despite not having gone through the environmental assessment process it ought originally to have followed. The application in this case was a review against the decision to dismiss the applicant's appeal and a request for an order requiring demolition of the lodge, which was all but complete at the time of the application. This case is not only a weak judgment but also highlights the problems with the section 24G process, which urgently needs an overhaul.

For purposes of this article, discussion will focus on three main issues. The first is the environmental management framework (EMF) for the area in question and whether or not it ought to have been taken into account in the decision. The second is the question of ecotourism, and the third the matter of costs.

The applicant argued that the MEC, in deciding the appeal against the s 24G decision, ought to have taken the relevant EMF into account. The EMF indicates, inter alia,-

[18] Unreported *Case 1776/2010 (NWM).*

[19] A protected environment is a protected area in terms of the *National Environmental Management: Protected Areas Act* 57 of 2003 (see sections 28-30). It is possible for development to take place in such a protected area, subject to authorisation.

> 'that the area where the Lodge is located, is a zone marked "highly sensitive" on the Environmental Sensitivity Map, and further that the EMF for the MPE [Magaliesberg Protected Environment] indicates the types of activities that would be undesirable in that particular area, which listed activities are identified and include hotels, public and private resorts and conference facilities'.[20]

The main problem with the applicability of the EMF in this case was its timing. The EMF was published in the *Gazette* on 17 March 2009, a few days after the Chief Director had decided on the section 24G application on 9 March 2009. The appeal decision by the MEC was, however, handed down on 19 January 2010.

The court decided that the EMF was not applicable, in essence because it was not yet 'in force' when the section 24G decision was made.[21] While this may be accurate as far as the initial decision is concerned, it certainly is not in regards to the appeal decision. The court reasoned: 'As to whether or not the EMF of the MPE area should have been considered by the MEC on appeal because of the fact that it had become operational when he was seized with the appeal, is an issue that has to be considered by establishing whether or not the EMF for the MPE area could be applied retrospectively, in that regard'.[22] But the retrospectivity of the application of the EMF is completely irrelevant in this case. As the court, correctly, recognised later in the judgment,[23] the appeal provided for in section 43 of NEMA, and which was applicable in this case, is a 'wide' appeal: the appeal is essentially a new decision and the review of the decision is the review of the appeal decision.[24] The application for review recognized this in that it asked for the *appeal* decision to be reviewed and set aside. This required the MEC on appeal to take the EMF into account, not because there was a rule allowing for its retrospective application, but because it was applicable when the MEC decided the matter. The result of the MEC not taking it into account is that the decision failed to take into account a (critically) relevant consideration and, consequently, the decision must be invalid. The review application ought, therefore, to have been granted.

Related to this aspect is the applicant's argument that, although the EMF was not gazetted at the time of the initial section 24G decision, the factual matrix on which it was based must have been known to the decision-makers (the EMF originated in the same department that

[20] *Magaliesberg Protection Association*, para 45(d).
[21] Ibid, para 49.
[22] Ibid, para 50.
[23] Ibid, para 53.
[24] See C. Hoexter, *Administrative Law in South Africa* 2nd ed (2012) 68-70.

made the section 24G decision). Ultimately, taking into account the relevant considerations in this regard is not only taking into account considerations that are in existence in a legal sense, but factual considerations. The facts upon which the drafters of the EMF concluded that the zone was 'highly sensitive' did not emerge only when the EMF was published, but were well-known when the initial decision was made. This argument is very compelling and was not really considered by the court.

The second noteworthy aspect is the emphasis given by the court to the argument that the lodge was an example of ecotourism and, consequently, a desirable development in the area in question.[25] This is problematic because the assertion was not interrogated at all by the court. A recreational development in a protected area is not axiomatically an ecotourism development. The court seems completely oblivious to this.

Finally, the court, in considering an order as to costs, felt that section 32(2) of NEMA was not applicable because, in essence, the applicant was unreasonable in asking for the demolition of the lodge.[26] (I say 'in essence' because it is very difficult to follow the 'reasoning' of the court in this regard). While it may have been tactically ill-advised for the applicant (apparently) to ask only for a demolition order, the court was able to make any order that was just and equitable in the circumstances.[27] Moreover, the applicant was not only asking for the demolition of the lodge, it was also asking for the review and setting aside of the decision. This latter aspect is important because, even if the court had no appetite to order demolition, declaring the decision invalid does send an important message.

A subsequent judgment refused leave to appeal and whether this matter is taken further will be interesting. For such a weak judgment not to be ventilated further on appeal will be a travesty.

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[25] Ibid, paras 67, 68 and 75.

[26] Section 32(2) of NEMA reads: A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.

[27] Promotion of Administrative Justice Act 3 of 2000, section 8(1).

Conclusion

The *Maccsand* decision on the mining/land use planning interface was welcome and important, but legislative amendments might change the effect of the judgment. As for the other judgments discussed here, several involving the simultaneous application of environmental legislation and administrative law, the courts are still often not getting it right. When faced with imperfect application of environmental law by the administrative bodies responsible for its implementation, it is important for courts to be able to lay down markers for appropriate administrative action. If the courts fail to do this, it need hardly be said that the effectiveness of environmental law is severely compromised.

COUNTRY REPORT: ESPAÑA
Contemporary Shifts in Spain's Environmental Regime

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Abstract

The environmental regulations adopted by Spain during the period under examination have been marked by the change in Government after the general elections held on 20 November 2011, and by the grave economic crisis in which the country finds itself. Although no new environmental legislation has been passed, important changes have been introduced to existing laws in the form of "decree-laws", and numerous regulations have been approved. There is a growing trend in Spain to use the economic crisis to justify the introduction of changes to environmental law at both state and regional level. New environmental regulations are passed or existing ones are modified with the aim of reactivating the economy. Furthermore, the processes of liberalization and administrative simplification continue to advance. This can be clearly seen in the increase in communications procedures and statements of compliance regarding environmental matters that, in contrast to the traditional administrative authorizations, postpone environmental controls to some point after the start of the activity; and in the elimination of environmental requirements that are regarded as obstacles to the development of economic activities with the aim of facilitating the start-up of new activities.

Introducción

La actividad normativa desarrollada por España en materia de protección del medio ambiente durante el año 2012 ha venido marcada por el cambio de gobierno acontecido y por el inicio de una nueva legislatura, tras la celebración de elecciones generales el pasado 20 de noviembre de 2011 y la victoria en las urnas del Partido Popular, que obtuvo la mayoría absoluta. Estos nuevos acontecimientos, unidos a la grave situación de crisis económica que atraviesa este país y a los recortes presupuestarios y a la contención de gasto por parte de las administraciones públicas, han condicionado la orientación y desarrollo de toda la acción pública estatal y, por lo tanto, también la de protección del medio ambiente.

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Es evidente que el fin de una legislatura y el inicio de otra nueva, así como la reorganización del ejecutivo estatal, han condicionado la etapa examinada. La actividad normativa desarrollada por el Estado durante el período objeto de análisis ha sido amplia y han visto la luz un buen número de normas en materia ambiental, todas ellas provinentes de la acción normativa del Gobierno. Se trata, además, de las primeras normas en materia ambiental que se aprueban por el nuevo Gobierno del Partido Popular, tras su victoria en las urnas.

En estos meses (diciembre 2011-noviembre 2012), no se ha aprobado ninguna nueva ley en materia de protección del medio ambiente, cuestión lógica por otra parte, si tenemos en cuenta el tránsito de una a otra legislatura y de un gobierno a otro y las transformaciones producidas, tanto en la composición del Congreso de los Diputados y del Senado como en las estructuras organizativas y en las personas que han asumido responsabilidades al frente de las mismas. Sin embargo, sí se han introducido modificaciones importantes en preceptos concretos de otras normas con rango de ley previas, como el Texto Refundido de la Ley de Aguas, la Ley del patrimonio natural y de la biodiversidad y la Ley de residuos y suelos contaminados. El instrumento elegido a estos efectos ha sido el decreto-ley, por lo que es el Gobierno y no el Parlamento, el que ha aprobado normas con rango de ley en este ámbito. La materia ambiental no ha escapado a una tendencia bastante generalizada en España en los últimos tiempos de intensa utilización del decreto-ley para la adopción de medidas ante la situación de grave crisis económica que padece este país, aun cuando la utilización del decreto-ley sólo está prevista con carácter excepcional en la Constitución Española, “en caso de extraordinaria y urgente necesidad”. También mediante Decreto-ley se han intensificado los procesos de liberalización y simplificación administrativa, iniciados en 2009 a raíz de la transposición de la Directiva de servicios en el mercado interior, y que han conducido este último año a la supresión de las licencias de actividad y de obras para determinadas actividades comerciales y servicios.

Salvo la adopción de algunos decretos-leyes con incidencia en la materia, la actividad normativa desarrollada por el Estado en el ámbito de la protección del medio ambiente se ha realizado fundamentalmente a través de normas reglamentarias. Destaca, por una parte, la normativa que procede a la reestructuración de las competencias ambientales, ubicando el grueso de las mismas en el nuevo Ministerio de Agricultura, Alimentación y Medio Ambiente. Por otra, se han aprobado varias normas reglamentarias en ámbitos sectoriales diversos (protección del medio marino, patrimonio natural y biodiversidad, aguas, ruido, residuos…), aunque en muchos casos no se trata propiamente de nuevos reglamentos, sino de modificaciones de los ya existentes justificadas por motivos diversos.

Por otra parte, se han publicado los instrumentos de ratificación de algunos convenios internacionales, entre los que destacan el Protocolo al Convenio de 1979 sobre contaminación atmosférica transfronteriza a gran distancia en materia de metales pesados, hecho en Aarhus el 24 de junio de 1998, y el Convenio internacional de las maderas tropicales, hecho en Ginebra el 27 de enero de 2006; y ha entrado en vigor el Acuerdo entre España y el Principado de Andorra sobre el traslado de residuos, hecho en Madrid el 29 de noviembre de 2011.

Por último, en este período también se ha evidenciado la conflictividad competencial entre el Estado y las Comunidades Autónomas. Así lo ponen de manifiesto los recursos de inconstitucionalidad, admitidos a trámite por el Tribunal Constitucional, contra la Ley 40/2010, de 29 de diciembre, de almacenamiento geológico de dióxido de carbono, promovidos por la Xunta de Galicia y la Generalitat de Cataluña –que se unen al ya presentado anteriormente por Aragón–; contra la Ley 2/2011, de 4 de marzo, de economía sostenible, promovidos por el Gobierno de la Generalitat de Cataluña y por el Gobierno de Canarias; y contra la disposición final primera del Real Decreto-ley 12/2011, de 26 de agosto, por el que se modifica la Ley 1/2000, de 7 de enero, de enjuiciamiento civil, para la aplicación del Convenio internacional sobre el embargo preventivo de buques y se regulan competencias autonómicas en materia de policía de dominio público hidráulico, promovidos por el Consell de la Generalitat Valenciana, las Cortes Valencianas y el Consejo de Gobierno de la Región de Murcia. Se ha planteado, además, por parte de la Generalitat de Cataluña, un conflicto positivo de competencia en relación con el Real Decreto 1494/2011, de 24 de octubre, por el que se regula el Fondo de Carbono para una Economía Sostenible. Y el Presidente del Gobierno ha planteado dos recursos de inconstitucionalidad, también admitidos a trámite por el Tribunal Constitucional: uno contra determinados preceptos de la Ley de Castilla-La Mancha 6/2011, de 10 de marzo, de declaración del parque natural del Valle de Alcudia y Sierra Madrona; y otro contra determinados preceptos de la Ley de Castilla-La Mancha 5/2011, de 10 de marzo, de declaración del parque natural de la Sierra Norte de Guadalajara.

La Actividad Normativa Desarrollada Por El Estado En Materia Ambiental

La Reestructuración de las Competencias Ambientales: De Nuevo el Medio Ambiente sin Ministerio Propio

El cambio de gobierno mencionado, como viene siendo habitual, ha ido acompañado de una reestructuración ministerial. Mediante el Real Decreto 1887/2011, de 30 de diciembre,

se ha establecido la estructura orgánica básica de los departamentos ministeriales. Tras esta reorganización administrativa, el medio ambiente continúa sin contar con un Ministerio específico, situándose el grueso de competencias ambientales en el nuevo Ministerio de Agricultura, Alimentación y Medio Ambiente, cuya estructura orgánica básica ha sido desarrollada por el Real Decreto 401/2012, de 17 de febrero. La desaparición de departamentos específicos en materia ambiental es una tendencia que se está acentuando en España en los últimos años, no sólo en el ámbito estatal, sino también en el autonómico.

El Real Decreto-ley 17/2012, de 4 de Mayo, de Medidas Urgentes en Materia de Medio Ambiente

La norma más importante en materia ambiental dictada en el período objeto de examen es el Real Decreto-ley 17/2012, de 4 de mayo, de medidas urgentes en materia de medio ambiente, posteriormente objeto de tramitación como ley. De este modo, la materia ambiental es objeto de atención en uno de los numerosos paquetes de medidas que con carácter urgente y utilizando la figura del decreto-ley ha venido aprobando en los últimos meses el Consejo de Ministros. A través de esta norma se acomete la reforma parcial de tres normas con rango de ley de gran importancia en materia ambiental: el Texto refundido de la Ley de aguas, la Ley de patrimonio natural y de la biodiversidad, y la Ley de residuos y suelos contaminados, aunque también se modifica una Ley no ambiental, la del mercado de valores, para realizar algunos ajustes en materia de comercio de derechos de emisión.

Se trata de una norma que ha suscitado un buen número de críticas por parte de las asociaciones ecologistas, tanto por el instrumento elegido para emprender estas reformas legislativas y la merma de la participación pública que ha supuesto, como por el propio contenido de algunas de las medidas adoptadas (especialmente, en materia de residuos, por cuanto cierra la puerta a la implantación de sistemas de depósito, devolución y retorno de residuos, recogidos ahora con carácter voluntario). Esta norma se justifica en el Preámbulo por el actual contexto económico: “En una situación como la actual, en la que se están encarando profundas reformas estructurales que permitan la reactivación de nuestra economía y la generación de empleo, resulta indispensable la reforma urgente de ciertos aspectos de nuestra legislación ambiental que contribuyan a lograr ese objetivo, sin merma del principio de protección”. Partiendo de esta premisa, la reforma “se orienta a la simplificación administrativa, eliminando aquellos mecanismos de intervención que por su propia complejidad resultan ineficaces, y lo que es más grave, imponen demoras difíciles de soportar para los ciudadanos y dificultades de gestión para las Administraciones públicas”. Por ello, la simplificación y agilización administrativa de las normas ambientales y la

necesidad de que estas normas sean claras y sencillas, junto a argumentos de índole económica, se convierten en elementos justificadores de la reforma. Incluso llega a afirmarse en el Preámbulo que “la legislación ambiental también debe ser sostenible”.

Los Procesos de Liberalización y Simplificación Administrativa Continúan: El Real Decreto-ley 19/2012, de 25 de Mayo

También debe mencionarse el Real Decreto-ley 19/2012, de 25 de mayo, de medidas urgentes de liberalización del comercio y de determinados servicios, que tiene por objeto el impulso y la dinamización de la actividad comercial minorista y de determinados servicios y tramitado también posteriormente como ley. Este Real Decreto-ley da un paso más allá en el impulso de reducción de cargas y licencias en el ámbito del comercio minorista y elimina todos los supuestos de autorización o licencia municipal previa para las actividades comerciales minoristas y la prestación de determinados servicios previstos en su anexo, realizados a través de establecimientos permanentes, situados en cualquier parte del territorio nacional, y cuya superficie útil de exposición y venta al público no sea superior a 300 metros cuadrados. Es más, la flexibilización afecta también a todas las obras ligadas al acondicionamiento de estos locales, no siendo exigible licencia o autorización previa para la realización de las obras de acondicionamiento de los locales para desempeñar la actividad comercial cuando no requieran de la redacción de un proyecto de obra. Para estas actividades, las licencias serán sustituidas por declaraciones responsables o por comunicaciones previas, relativas al cumplimiento de las previsiones legales establecidas en la normativa vigente. De este modo, para este tipo de establecimientos ya no podrán argüirse razones de protección ambiental para justificar el mantenimiento de la licencia. Como se pone de manifiesto en su Preámbulo, “Mediante este real decreto-ley se avanza un paso más eliminando todos los supuestos de autorización o licencia municipal previa, motivados en la protección del medio ambiente, de la seguridad o de la salud públicas (…) Se considera, tras realizar el juicio de necesidad y proporcionalidad, que no son necesarios controles previos por tratarse de actividades que, por su naturaleza, por las instalaciones que requieren y por la dimensión del establecimiento, no tienen un impacto susceptible de control a través de la técnica autorizatoria, la cual se sustituye por un régimen de control ex post basado en una declaración responsable”.

Avances en Materia de Planificación Hidrológica: La Aprobación de los Planes Hidrológicos, Una Asignatura Todavía Pendiente

En 2012 se han publicado diversos Reales Decretos (1329/2012, de 14 de septiembre; 1330/2012, de 14 de septiembre; 1331/2012, de 14 de septiembre; y 1332/2012, de 14 de septiembre) por los que se aprueban los planes hidrológicos de varias cuencas internas de Andalucía y Galicia, con arreglo a lo establecido por la Directiva marco de aguas. Con la aprobación de estos planes hidrológicos se avanza en el cumplimiento de la Directiva marco de aguas, cuya transposición al ordenamiento jurídico español ha implicado la introducción de novedades significativas en la planificación hidrológica (en el ámbito territorial de los planes hidrológicos, que pasa de ser la cuenca hidrográfica a la demarcación hidrográfica, en la que también se incluyen las aguas costeras y de transición; en sus objetivos y contenido; y en su procedimiento de elaboración y revisión) que obligan a revisar los planes hidrológicos existentes hasta ese momento.

Sin embargo, no puede ocultarse el enorme retraso con que se está produciendo la aprobación de los planes hidrológicos de cuenca en España, si tenemos en cuenta que el plazo expiraba en diciembre de 2009. Aun cuando se han aprobado algunos planes hidrológicos de cuencas intracomunitarias, todavía queda pendiente la aprobación de todos los planes hidrológicos de cuenca intercomunitarios. Este incumplimiento ha llevado al Tribunal de Justicia de la Unión Europea a dictar la Sentencia de 4 de octubre de 2012, en la que declara el incumplimiento de España, al no haber adoptado, a 22 de diciembre de 2009, los planes hidrológicos de cuenca, salvo en el caso del Distrito de la Cuenca Fluvial de Cataluña.

Otras Normas Ambientales de Interés

En el período analizado se han aprobado, a nivel estatal, numerosas normas de rango reglamentario. Cabe destacar, en primer lugar, algunos reglamentos de desarrollo de la Ley 41/2010, de 29 de diciembre, de protección del medio marino, y de la Ley 42/2007, de 13 de diciembre, del patrimonio natural y la biodiversidad: el Real Decreto 1599/2011, de 4 de noviembre, por el que se establecen los criterios de integración de los espacios marinos protegidos en la Red de Áreas Marinas Protegidas de España; y el Real Decreto 1628/2011, de 14 de noviembre, por el que se regula el listado y catálogo español de especies exóticas invasoras.

En segundo lugar, destaca el Real Decreto 1290/2012, de 7 de septiembre, por el que se modifican el Reglamento del Dominio Público Hidráulico, aprobado por el Real Decreto 849/1986, de 11 de abril, y el Real Decreto 509/1996, de 15 de marzo, de desarrollo del Real Decreto-ley 11/1995, de 28 de diciembre, por el que se establecen las normas

aplicables al tratamiento de las aguas residuales urbanas. Con estas modificaciones se pretende solventar la carencia de diversas disposiciones normativas, en el desarrollo reglamentario del texto refundido de la Ley de Aguas y resolver las ambigüedades y las diversas insuficiencias de regulación normativa detectadas, por cuanto dificultan una gestión racional de dicho dominio.

En tercer lugar, se ha aprobado el Real Decreto 1311/2012, de 14 de septiembre, por el que se establece el marco de actuación para conseguir un uso sostenible de los productos fitosanitarios, que traspone al ordenamiento español la Directiva 2009/128/CE, del Parlamento Europeo y del Consejo, de 21 de octubre de 2009, por la que se establece el marco de actuación comunitario para conseguir un uso sostenible de los plaguicidas.

Por último, se han aprobado otras normas de interés en materia de residuos (Real Decreto 777/2012, de 4 de mayo, que introduce algunas modificaciones en el Real Decreto 975/2009, de 12 de junio, sobre gestión de los residuos de las industrias extractivas y de protección y rehabilitación del espacio afectado por las actividades mineras; y el Real Decreto 1080/2012, de 13 de julio, que modifica el Real Decreto 1749/1998, de 31 de julio, por el que se establecen las medidas de control aplicables a determinadas sustancias y sus residuos en los animales vivos y sus productos), ruido (Real Decreto 1038/2012, de 6 de julio, mediante el cual se modifica el Real Decreto 1367/2007, de 19 de octubre, por el que se desarrolla la Ley 37/2003, de 17 de noviembre, del ruido, en lo referente a zonificación acústica, objetivos de calidad y emisiones acústicas) y protección civil (Real Decreto 1070/2012, de 13 de julio, por el que se aprueba el Plan estatal de protección civil ante el riesgo químico).

La Jurisprudencia Ambiental: Algunos Aspectos de Interés

A nivel jurisprudencial, se han dictado varias Sentencias del Tribunal Constitucional que han contribuido a delimitar el alcance de las competencias estatales y autonómicas en materia de protección del medio ambiente. Entre ellas, destacamos, en materia de evaluación de impacto ambiental, las Sentencias 1/2012, de 13 de enero, y 34/2012, de 14 de marzo, que reiteran el criterio ya sentado en sentencias anteriores (13/1998, de 22 de enero, y 11/2006, de 16 de enero), conforme al cual es constitucional la atribución a la Administración del Estado de la evaluación de impacto ambiental de los proyectos que le corresponda aprobar o autorizar. De este modo, aun cuando en principio la evaluación de impacto ambiental forma parte de la gestión en materia de protección del medio ambiente y, en consecuencia, su realización debería corresponder a las comunidades autónomas con arreglo a la

Constitución Española y los Estatutos de Autonomía, no es éste el criterio que debe aplicarse, ya que en este ámbito se considera la evaluación de impacto ambiental como una actividad vinculada al título competencial sectorial que ampara la actividad sujeta a evaluación. De este modo, el ejercicio de la competencia en materia de evaluación de impacto ambiental y, especialmente la realización de la declaración de impacto ambiental, corresponde a la Administración pública donde reside la competencia sustantiva para la realización o autorización del proyecto. Por ello, la Administración del Estado será competente para realizar la declaración de impacto ambiental cuando sea también esta Administración la competente para autorizar el proyecto.

En relación con la contaminación electromagnética y más concretamente las instalaciones de radiocomunicación resulta de gran interés la Sentencia 8/2012, de 18 de enero, que resuelve un recurso de inconstitucionalidad interpuesto por el Presidente del Gobierno estatal en relación con diversos preceptos de una Ley autonómica sobre ordenación de las instalaciones de radiocomunicación. En esta Sentencia, el Tribunal Constitucional afirma el carácter básico de la regulación estatal de los niveles tolerables de emisión y concluye que las Comunidades Autónomas no pueden alterar esos estándares, ni imponer a los operadores una obligación de incorporar nuevas tecnologías para lograr una minimización de las emisiones, no sólo porque ello resultaría contrario a las bases establecidas por el Estado en materia sanitaria, sino también porque de esa forma se vulnerarían, en último término, las competencias legítimas del Estado en materia de telecomunicaciones.

En materia de tributación ambiental, la reciente Sentencia del Tribunal Constitucional 196/2012, de 31 de octubre, ha declarado inconstitucional el impuesto de Castilla-La Mancha sobre determinadas actividades que inciden en el medio ambiente, creado por la Ley 11/2000, de 22 de julio.

Consideraciones Sobre La Evolución Reciente de la Normativa Ambiental

La normativa ambiental adoptada en el período examinado ha venido marcada por la situación de crisis económica que atraviesa España. La introducción de cambios en la legislación ambiental justificados por la crisis económica es una tendencia en alza en estos momentos en España y no sólo a nivel estatal sino también autonómico. El contexto actual ha propiciado la reforma de algunas regulaciones de los recursos naturales vigentes y consolidadas en España desde hace años. Entre ellas, cabe destacar la reforma del Texto Refundido de la Ley de Aguas acometida por el Real Decreto-ley 17/2012, y la futura reforma de la Ley de costas, actualmente en tramitación en el Congreso, con el objeto de

reactivar la actividad económica vinculada con ciertos usos del litoral y priorizar el uso privativo de la costa.

Además, continúan avanzando los procesos de liberalización y simplificación administrativa. Se siguen sustituyendo autorizaciones ambientales por comunicaciones y declaraciones responsables, trasladándose los controles a un momento posterior al inicio de la actividad, frente a lo que había venido siendo habitual; y se eliminan requisitos ambientales entendidos como obstáculos al desarrollo de las actividades económicas, todo ello con el fin de agilizar los trámites para la puesta en marcha de actividades.

Este proceso desregulador, iniciado en primer término con la transposición de la Directiva de servicios y continuado por otras normas y medidas administrativas adoptadas para dinamizar la actividad económica, plantea, en términos de reducción del control público ambiental, una serie de riesgos importantes en el ámbito del Derecho ambiental, como la eliminación injustificada de restricciones o requisitos ambientales necesarios. Las políticas de liberalización no dejan de plantear riesgos de regresión para los logros ambientales que se habían venido produciendo hasta hace poco. En efecto, estos procesos “anticrisis”, en pro de la reactivación de la actividad económica, al intensificar las medidas de liberalización, desregulación y simplificación administrativa con el fin de eliminar trabas y obstáculos administrativos, están introduciendo el riesgo de desregulación ambiental y de reducción de los estándares de protección. Se advierte una tendencia clara a la rebaja de los estándares de protección ambiental tanto en el ámbito estatal como en el autonómico como consecuencia del protagonismo de las medidas políticas y administrativas destinadas a reactivar la economía, existiendo ya algunos indicios de ese proceso.

Por otra parte, las políticas ambientales encuentran importantes limitaciones en el actual contexto económico. En efectos las políticas ambientales se enfrentan a duros recortes presupuestarios. En el ámbito estatal, si bien la media de rebaja de los presupuestos en los Ministerios es de casi el 17%, en el caso del Ministerio de Agricultura, Alimentación y Medio Ambiente, el descenso en el presupuesto de gastos ha llegado a más del 30% y afecta especialmente al medio ambiente y a materias como el desarrollo rural sostenible, la calidad del agua, la conservación de la biodiversidad y la protección y mejora del medio natural, la prevención de la contaminación y la lucha contra el cambio climático.

COUNTRY REPORT: THAILAND
Recent Developments in Forestry Rights in Thailand

WANIDA PHROMLAH*

Introduction

This Country Report discusses recent forestry rights arrangements in Thailand. The Report begins with a brief outline of the current forestry rights followed by more detailed discussion of the issues that may be implied from the current forestry rights arrangements. The conclusion to this Report identifies research agendas for consideration by the IUCN Academy of Environmental Law.

Current Forestry Rights Arrangement

Rights to forests in Thailand are held by the State: the power to determine use, access, control and management of forests is vested in the State.[1] A number of reforms have been attempted, once the management of forests by the State was recognised to have failed. Such reforms aim to increase the involvement of all stakeholders, particularly forest-dependent people, recognizing their customary forestry practices and allocating some rights to decision-making on forest management to them.[2]

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[1] Regional Office for Asia and the Pacific of Food and Agriculture Organisation of the United Nations, 'Thailand Forestry Outlook Study' (2009) *Asia-Pacific Forestry Sector Outlook Study II - Working Paper Series* No. APFSOS II/WP/2009/22, FAO, 15; L. Sureeratna, '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 *Forestry Policy and Institutions Working Paper 14: Understanding Forest Tenure in South and Southeast Asia* (2007) FAO, 326-327; and F. Wataru, 'Dealing with Contradictions: Examining National Forest Reserves in Thailand' (2003) 41(2) *Southeast Asian Studies*, 209.

[2] J. Hafner & Y. Apichatvullop, 'Farming the Forest: Managing People and Trees in Reserved Forests in Thailand' (1990) 21(3) *Geoforum*, 338; Wataru (supra note 1), 228; P. Hirsch, 'Forests, Forest Reserve, and Forest Land in Thailand' (1990) 156(2) *Geographical Journal*, 170-171; V. Brenner et al, 'Thailand's Community Forest Bill: U-turn or Roundabout in Forest Policy?' (1999) *SEFUT Working Paper* No. 3 (Revised edition), Albert-Ludwigs-Universität Freiburg, 15-16; J. Lasimbang & C. Luithui, 'Natural Resource Management Country Studies: Thailand' (2006) United Nations Development Programme: Regional Indigenous Peoples' Programme, United Nations, 35; Y. Sumarlan, 'How Participatory Is Thailand's Forestry Policy?' (2004) *Policy Trend Report*, Institute for Global Environmental Strategies (IGES), 52.

However, the reforms leave the power of decision-making with state agencies; the community can conduct forestry practices only if approved by the State.[3] A movement aimed at legalizing community rights to forests started in the early 1990s.[4] Since then, the *Community Forest Bill* has been drafted and debated by stakeholders.[5] The issues of debate encompass what the rights to forest are; what common property to forest is; what the definition of a forest community is; and whether the community can live in protected forest lands or not in harmony with forest.[6]

The Thai *Constitution* recognises the rights of the community to forest management,[7] but in practice communities have not been able to take advantage of this law. This is due to the fact that there has been no revision of the relevant forestry laws so as to implement the *Constitution*.[8] The long proposed *Community Forestry Bill* that was enacted in 2007, suggests that a forestry community is a ''social group'' living in the same locality and having the same cultural heritage, who can apply for recognition of that status after a minimum of five years' experience in safeguarding forest land. Existing government rules (which still prevail) define a ''community'' as comprising at least 50 individuals living in proximity to forest, regardless of how long they have been there or how forest is managed. There was concern by the opposition that people may exploit this legal gap by using 50 people to establish a community forest, as a way of maximising their private interest such as through conducting commercial plantations rather than managing forest in desirable ways. The fear is that this may contribute to deforestation.[9]

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[3] E. Fischman, 'The Relevance of Tenure and Forest Governance for Incentive Based Mechanisms: Implementing Payments for Ecosystem Services in Doi Mae Salong' (2012) *View of Doi Mae Salong*, IUCN, 8-9; Lasimbang et al (supra note 2), 18.

[4] FAO, 'Reforming Forest Tenure: Issues, Principles and Process' (2011) *FAO Forestry Paper* No. 165, 39.

[5] R. Fisher, 'Thailand's Forest Regulatory Framework in Relation to the Rights and Livelihoods of Forest Development People' in H, Scheyvens (ed), *Critical Review of Selected Forest-Related Regulatory Initiatives: Applying a Rights Perspective* (2011) Forest Conservation Project (Institute for Global Environmental Strategies (IGES), 73-75; Sumarlan (supra note 2), 52-54; C. Johnson & T. Forsyth, 'In the Eyes of the State: Negotiating a ''Rights-Based Approach'' to Forest Conservation in Thailand' (2002) 30(9) *World Development*, 1595-1596.

[6] Fisher (supra note 5), 69; Sumarlan (supra note 2), 54; Rights and Resources Initiative, 'Thailand's Community Forest Bill: Jeopardizing Rights and Livelihoods?' (2008) *Rights and Resources Initiative*; Rights and Resources Initiative, 'The Thailand Community Forest Bill' (2008) *Rights and Resources Initiative*.

[7] *Thailand Constitution* (2007), sections 66-67 read with sections 27-29, 56-60, 62, 73, 81-82, 85, 87, 163 and 290.

[8] Rights and Resources Initiative, 'Tenure Data: Thailand' (2012) Rights and Resources Initiative, 1; M. Colchester & C. Fay, 'Land, Forest and People: Facing the Challenges in South-East Asia' (2007) *Listening, Learning and Sharing: Asia Final Report*, Rights and Resources Initiative, Appendix 1 in the Table titled 'Comparative Table of Tenures'.

[9] Johnson et al (supra note 5), 1596; N. Jinarat, *The Process of Public Policy Formulation: A Case Study of the Community Forest Bill B.E. 2550 (2007)* (2010), 140.

Government officials often believe that forestry communities are a main cause of deforestation; for example, through “slash-and-burn” practices causing significant loss of forests.[10] In 1998, the new Director-General of the RFD indicated a lack of trust that people could live in harmony with the forests. This led to more re-working of the *Community Forest Bill*, and more debates on such issues among stakeholders. [11] Forest dependent communities argued that they had been living in harmony with forests for generations.[12]

After long debate, the *Community Forest Bill* was passed by the Parliament on 21 November 2007. [13] However, the Bill has not come into effect as it has been challenged on constitutional grounds.[14]

At present, forestry rights in Thailand are controlled by six Forestry Acts including the *Forest Act*, B.E. 2484 (1941), the *Wildlife Conservation and Protection Act*, B.E. 2535 (1992), the *National Parks Act*, B.E. 2504 (1961), the *National Reserved Forest Act*, B.E. 2507 (1964), the *Forest Plantation Act*, B.E. 2535 (1992), and the *Chainsaw Act* B.E. 2545 (2002).[16] These laws focus on extracting[17] and conserving forest areas and overlook the interests of community groups - particularly indigenous and disadvantaged groups whose livelihoods depend on forests.[18] As a result of the difficulties in reconciling community interests to either commercial exploitation or environmental protection, implementation of forestry laws is very difficult and can be considered to have failed, as it has been resisted by those who are impacted.[19]

Lessons Distilled From the Current Forest Property Arrangements

Secure forest tenure can provide a stronger incentive to all stakeholders to properly manage forests.[20] It can ensure the forest users earn longer-lasting benefit from forests, which encourages them to invest in forest management.[21] With no assurance that such rights will be long-lasting, forest users can feel reluctant to dedicate themselves to investing in forest management. As a result, insecure rights to forests can fuel forest users exploiting as much forest as possible as quickly as possible to maximise their short term interests. This can

[16] K. Manassrisuksi & W Sangkrajang, 'Forest Land Management In Thailand' (2011) *Country Reports on Forest Tenure in Asia and the Pacific: Proceedings of APFNet Workshop on Forest Tenure*, Asia-Pacific Network for Sustainable Forest Management and Rehabilitation, 130-131; V. Jalayananavin & S. Vitayaudon, 'Forest Law Enforcement and Governance in Thailand' in *Forest Law Enforcement and Governance: Progress in Asia and the Pacific* (2010) Asia-Pacific Forestry Commission: FAO, 191.
[17] Lasimbang et al (supra note 2), 16.; M. Matsumura, 'Coercive Conservation, Defensive Reaction, and the Commons Tragedy in Northeast Thailand' (1994) 18(3) *Habitat International*, 110.
[18] Wataru (supra note 1), 208. Rights and Resources Initiative, 'What Rights?: A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights' (2012) Rights and Resources Initiative, 16.; Fisher (supra note 5), 78.
[19] Matsumura (supra note 16), 106 and 112.; FAO Regional Office for Asia and the Pacific (supra note 1), 20.
[20] G. Feder (1993) *The Economics of Land and Titling in Thailand* cited in R. Heltberg, 'Property Rights and Natural Resource Management in Developing Countries' (2002) 16(2) *Journal of Economic Surveys* , 207; F. Romano et al, 'Understanding Forest Tenure: What Rights and for Whom?: Secure Forest Tenure for Sustainable Forest Management and Poverty Alleviation: the Case of South and Southeast Asia (with case studies of Orissa and Meghalaya, India and Nepal)' (2006) *Access to Natural Resources Sub-Programme: Livelihood Support Programme (LSP) Working Paper* No. 29, FAO, 11; B. Robinson, M. Holland & L. Naughton-Treves, 'Does Secure Land Tenure Save Forest?: A Review of the Relationship Between Land Tenure and Tropical Deforestation' (2011) *CGIAR Research Program on Climate Change, Agriculture and Food Security:Working Paper* No. 7, 30-31.
[21] Robinson et al (supra note 19), 30; L. Ellsworth & A. White, 'Deeper Roots: Strengthening Community Tenure Security and Community Livelihoods' (2004) Ford Foundation, 6; J. Bruce, K. Wendland & L. Naughton-Treves, 'Whom to Pay? Key Concepts and Terms Regarding Tenure and Property Rights in Payment-based Forest Ecosystem Conservation' (2010) *Tenure Brief: University of Wisconsin-Madison,* 7.

cause considerable forest degradation. An example is the insecure property rights to forest land driving deforestation in the Brazilian Amazon.[22]

The FAO (2008) states that "both formal titling of individual ownership and systems based on customary tenure can respond to the needs of the poorest and marginalized groups"[23] which ensures that social equity in forest management is being met.[24] The Thailand *Constitution* recognises the rights of the community to forest management,[25] but as a result of a lack of revision of forestry laws to implement the *Constitution,* [26] decision-making on forest management remains with state agencies[27]. This diminishes the security of rights of the community to forest management, as decisions can be readily changed by the state officers.[28]

The six Forestry Acts[29] focus on either commercially exploiting[30] or conserving forest areas. They largely overlook the interests of community groups - particularly indigenous and disadvantaged groups whose livelihoods depend on forests.[31] The Acts retain the power of decision-making on forest management with state agencies.[32] The response of these agencies to community demands and interests has been based upon attempts to either ignore or incorporate community interests as a subset of state control (rather than by attempting to legitimate these interests as suggested by the *Constitution*).

An example is the community forest project being implemented by forestry conservation agency, RFD. This project is intended to increasingly involve the community in maintaining and protecting forest land. To involve the community under this project, the RFD relies on section 17 of the *Forest Act*, B.E. 2484 (1941) and section 19 of the *National Reserved Forest Act*, B.E. 2507 (1964) as the administrative power enabling it to implement the

[22] C. Araujo et al, 'Property Rights and Deforestation in the Brazilian Amazon' (2009) 68(8–9) *Ecological Economics*, 2464; W. Sunderlin, A. Larson & P. Cronkleton, 'Forest Tenure Rights and REDD+: From Inertia to Policy Solutions' in A. Angelsen et al (eds), *Realising REDD+: National Strategy and Policy Options* (2009) Center for International Forestry Research, 154.
[23] FAO, 'Understanding Forest Tenure in Africa: Opportunities and Challenges for Forest Tenure Diversification' (2008) Forestry Policy and Institutions Working Paper No. 19, 19.
[24] FAO (supra note 4), 56.; Winrock International & The Ford Foundation, 'Emerging Issues in Community Forestry in Nepal' (2002), 30.
[25] See note 13.
[26] See note 14.
[27] See note 3.
[28] A. White & A.Martin, 'Strategies For Strengthening Community Property Rights Over Forests: Lessons and Opportunities For Practitioners' (2002) *Forest Trends*, 1.
[29] See note 16.
[30] See note 17.
[31] See note 18.
[32] See note 3.

community forest project. Both Acts further strengthen state ownership over forest lands and limit the practices people can conduct in forest areas.[33]

To illustrate, section 19 of the *National Reserved Forest Act*, B.E. 2507 (1964) empowers the RFD president to appoint RFD staff to implement Community Forest Projects. Under this project, the RFD staff, working with the community, is to undertake forestry activities in reserved forest land with the aim of protecting and maintaining reserved forest. The community can have rights to forest management only under conditions set by the RFD president through his staff.[34] There is no assurance of the forestry rights of the community, as these can be changed by the conditions issued by the State.[35] Even though the community has the right to propose a community forest management plan, which can be registered as a community forestry project, the final decision for a plan to be registered is completely subject to state discretion. This does not assure the forestry rights of the community.

Customary Forestry Practices Undermined by National Forestry Laws

Traditional knowledge is potentially significant in effective forest governance.[36] Local communities have long settled in forest areas and have practical forest-management skills. Such skills include techniques of identifying animal and plant species to be preserved,[37] knowledge about non-timber products to be utilised, the best season for collection of forest products,[38] ways to protect forests from forest fires,[39] and traditional patrolling approaches.[40] Traditional forest knowledge contains the means to exploit forest for subsistence, not for commercial purposes.[41]

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[33] Fischman (supra note 2), 8-9.
[34] Ibid.
[35] See note 26.
[36] J. Parrotta & R. Trosper (eds), *Traditional Forest-Related Knowledge: Sustaining Communities, Ecosystems and Biocultural Diversity* World Forests (2012) 1st Ed, Springer, 4.
[37] Forest People Programme (supra note 8), 6-7, 16 and 22.
[38] Ibid, 6 and 10.
[39] Forest Peoples Programme (supra note 10), 16; S. Karki, 'Community Involvement in and Management of Forest Fires in South East Asia' (2002) Project FireFight South East Asia, IUCN & WWF, 13.
[40] S. Kritsanarangsan & K. Thaiying, 'Thailand: Forest Management Through Local Level Action; Small Grants Programme for Operations to Promote Tropical Forests (SGPPTF)' (2008) European Commission, United Nations Development Programme, Southeast Asian Regional Centre for Graduate Study and Research in Agriculture, 7; A Salam, T. Noguchi & R. Pothitan, 'Community Forest Management in Thailand: Current Situation and Dynamics in the Context of Sustainable Development' (2006) 31(2) *New Forests*, 281.
[41] Forest Peoples Programme (supra note 10), 21; J. Amornsanguansin & J. Routray, 'Planning and Development Strategy for Effective Management of Community Forestry: Lessons from the Thai Experience' (1998) 22(4) *Natural Resources Forum*, 280.; C. Colfer & Y. Byron (eds), *People*

However, use of these forms of knowledge is not likely to thrive in the context of a professionalised and bureaucratised forestry agency culture, not least of all because of the power relationships associated with modern forestry management strategies (whether for commercial or conservation management purposes). The use of traditional forest knowledge can be best supported by providing communities with secure rights to forests.[42] If the community has secure rights to manage the forest, they have a greater opportunity to apply their traditional forest knowledge to manage the forest sustainably.[43]

In Thailand, even though the *Constitution* has recognised the right of the community to preserve its traditional knowledge and the right to participate in natural resource management, including forestry traditional knowledge and management,[44] this has not been translated into effective means for recognising customary forestry practices. The constitutional challenges to the new *Community Forestry Act* represent a further barrier to the implementation of the constitutional protection of the interests of forest dependent people.[45]

The Government continues to enforce restrictive conventional forestry laws, which significantly limit the community in the area of forest management, particularly limiting the power of the community to make decisions on forest management together with the Government. As a result, the customary forestry practices are not respected and not recognised by laws, and these practices can are undermined.

Government's Lack of Trust in the Community to Effectively Manage Forests

Although over generations the community has demonstrated that it can effectively manage and can live in harmony with forests, Thai forestry authorities have yet to trust these community practices and approve community competence.[46]

Managing Forests: the Links Between Human Well-being and Sustainability (2001) Resources for the Future and CIFOR, 304; J. Nelson & M. Venant, 'Indigenous Peoples' Participation in Mapping of Traditional Forest Resources for Sustainable Livelihoods and Great Ape Conservation' (2008) Forest Peoples Programme, UNEP, 1.

[42] Parrotta et al (supra note 36), 23-25.

[43] Ibid.

[44] *Thailand Constitution* (1997), section 46; *Thailand Constitution* (2007), section 66.

[45] Parrotta et al (supra note 36), 375; Forest Peoples Programme (supra note 10), 27-28.

[46] Regional Office for Asia and the Pacific of Food and Agriculture Organisation of the United Nations, 'Thailand Forestry Outlook Study' (2009*) Asia-Pacific Forestry Sector Outlook Study II- Working Paper Series* No. APFSOS II/WP/2009/22, 31; Colchester et al (supra note 14), 13.

Trust among actors in forest management is necessary for them to manage forest resources through collaborative efforts[47] that can result in effective forest management.[48] By way of illustration of the problem, mistrust and conflict between government departments and local stakeholders has been demonstrate to have caused a major barrier to effective forest governance in Pakistan and Nepal. In Pakistan, mistrust between forest officials and forest users has led to tension in joint forest management programmes. Similarly, in Nepal, different views and mistrust regarding forest land reform among political parties, the state and local people have made it difficult to make progress on forest-land reform.[49] Similar dynamics are evident in Thailand today.

A lack of trust between Government and communities can inhibit effective decentralization of forest governance and constrain innovation in finding locally appropriate solutions to deforestation.[50] If the government mistrusts the community, the government will hold tightly to its discretionary powers in administration of forest management. As the power of decision-making remains vested with state agencies; the community can only conduct forestry practices if approved by the state. Given the nature of community knowledge and community dynamics, this is not likely to result in effective harnessing of the capacity of the community.

Divergent Views Among Stakeholders

There is a variety of stakeholders with different interests in forests. They include commercial foresters, users of the non-harvest values of the forests such as hunters and collectors of plants, those concerned with biodiversity and other conservation values, those concerned with carbon sequestration, people whose interests are cultural and religious, and forest dependent (particularly subsistence) communities. The long debates that emerged during the drafting and ratification of the *Community Forest Bill* highlight that the many forest stakeholders have significantly different views on forestry issues and potential rights. Such differences include diverse attitudes to the issue of what the rights to forest are (or should

[47] T. Kusumanto, 'Shaping Opportunities for Improving Forest Quality and Community Livelihoods in Central Sumatra and East Kalimantan, Indonesia' in R. Fisher, R. Prabhu & C. McDougall (eds), *Adaptive Collaborative Management of Community Forests in Asia: Experiences from Nepal, Indonesia and the Philippines* (2007) Centre for International Forestry Research, 120.
[48] Ibid, 100.
[49] National Centre of Competence in Research (NCCR) North-South, 'Mediated Policy Dialogues to Address Conflict Over Natural Resource Governance' (2011) Regional Edition South Asia No. 2: South Asia Research Evidence for Policy, National Centre of Competence in Research (NCCR) North-South, 1-2.
[50] D. Capistrano, 'Decentralization and Forest Governance in Asia and the Pacific: Trends, Lessons and Continuing Challenges' in C. Colfer, G. Dahal & D. Capistrano (eds), *Lessons from Forest Decentralization: Money, Justice and the Quest for Good Governance in Asia-Pacific* (2008) Earthscan, 215.

be), what is common property within forests, the definition of a forest community and concerns about whether the community ought have the right to live within protected forest lands, and whether if people can live in harmony with forests being managed for different values.[51]

To achieve effective forest management, it is important to ensure that consensus among stakeholders is achieved.[52] As highlighted in this case of Thailand, reforming rights to forests is essentially a process of negotiation among stakeholders who have different perspectives and interests. Once agreement is reached as to how these human matters can be reconciled, the legal issues of how to draft and implement suitable laws become feasible. Without this consensus, the legal problems remain insurmountable even if there is a formal constitutional provision in place.

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 Laws and Institutions to Ensure Security of Forestry Rights for the Community?

Secure forest tenure can provide a stronger incentive to all stakeholders to properly manage forests.[53] In contrast, having immediate rights, or informal licenses to use forests, with no assurance that such rights will be long-lasting, will make forest users reluctant to dedicate themselves to investing in sustainable forest management. This in turn can fuel forest users exploitation of the forests as quickly as possible and over as much of the forest as possible so as to maximise their insecure their interests. This is likely to cause significant loss of forests, to the cost of all interests. Researching how laws and institutions can be arranged to ensure security of forestry rights of the community, whilst accommodating other legitimate interests, would be an important underpinning for effective forest governance in Thailand.

How Can Laws and Institutions Assure and Recognize Customary Forestry Practices?

[51] Supra note 6.
[52] FAO, 'Reaching Consensus-Multi-Stakeholder Processes in Forestry: Experiences from the Asia-Pacific Region' (2007) *RAP Publication* No. 2007/31, 4; FAO (supra note 4), 66-67.
[53] Supra note 20.

Laws relating to intellectual property rights might be a basis for strengthening protection and recovery of the value of people's knowledge that has been traditionally used to protect and sustainably exploit forests. However, existing intellectual property rules are weak in the protection that they can provide for customary intellectual products and traditional practices.

At the local level in India, peoples' biodiversity registers (encompassing records of individuals' knowledge of biodiversity, its use, trade, and efforts for its conservation and sustainable exploitation) have been established and recognised in the Indian *Biological Diversity Bill* (2000). These have reportedly contributed to the recovery and conservation of traditional forest-related knowledge in India.[54] This is a start, but it is clear that the protection and recognition of customary knowledge and interests falls well short of what is needed to ensure sustainable and equitable forest governance, insofar as the interests of forest communities are concerned.

How Can Laws and Institutions Achieve Effective Negotiations That Result in Mutual Understanding and Maintain Trust and Collaboration?

A government is likely to be reluctant to make reforms for transferring management rights to the community if they are not confident that the community can effectively manage the forests.[55] Reviewing the implementation experiences in different jurisdictions could help governments to reflect on the success and impacts of community forestry practices, and this could increase decision-makers' confidence in the effectiveness of community ownership and control reforms.[56]

One approach to reviewing implementation experiences to support effective negotiation processes that may be worth researching further is 'Adaptive Collaborative Management' (ACM). This encompasses three core elements, including the communication and creation of a shared vision, social learning and joint action.[57] ACM has been used to create ways of involving stakeholders in forest management in Nepal, Indonesia and the Philippines,[58] enabling them to express and to share ideas and to learn from each other's experiences.

[54] Parrotta et al (supra note 36), 580.
[55] FAO (supra note 4), 70.
[56] Ibid.
[57] Fisher et al (supra note 47), 18.
[58] R. Fisher, R. Prabhu & C. McDougall, 'Introduction: People, Forests and the Need for Adaptation' in Fisher et al (supra note 47), 6.

This has resulted in mutually agreed decisions [59] and building trust regarding forest management.[60]

The International Union for Conservation of Nature (IUCN) initiated a project entitled 'Strengthening Voices for Better Choices (SVBC)' between 2005 and 2009 in six countries: Brazil, Ghana, Democratic Republic of Congo, Tanzania, Sri Lanka and Vietnam. This project originated from the understanding that forest management and conservation are determined by options for society, and that reform of governance systems only occurs with the support of society. This requires the effective involvement of stakeholders and the negotiation of mutual interests. For this reason, the SVBC project focused on supporting, facilitating and promoting multi-stakeholder dialogue (MSD), whilst contributing to capacity-building and a more genuine participation of stakeholders in forest governance.[61] It would be worthwhile for Thailand to consider the extension of project, opening up a multi-stakeholder dialogue and a learning process which could result in improved forest and community outcomes based upon greater trust and understanding.

Forest property right reform is a learning process.[62] It requires an adaptive approach to gradually and continuously identify incremental and experiential changes that can be useful for supporting reform.[63] It would be worthwhile to carry out further research on what type of rights should be devolved to what levels[64]. The outcomes of this could be useful to increase decision-makers' confidence in the reforms' effectiveness.

Conclusion

This Report has discussed the recent arrangements regarding rights to forest in Thailand. The arrangements have attempted to increase the involvement of all stakeholders, particularly forest-dependent people, recognizing their customary forestry practices and allocating some rights to decision-making on forest management to them. However, the reforms have failed even given a clear constitutional mandate, as the power of decision-

[59] Fisher et al (supra note 47), 17-18.
[60] Kusumanto (supra note 47), 116.
[61] L. Pires, 'Strengthening Voices for Better Choices: Lessons Learnt About the Development of Sectoral Agendas for Forest Governance in Acre' (2010) IUCN, 7-8.
[62] FAO (supra note 4), 55
[63] Ibid, x, 44 and 55.
[64] P. Katila, 'Devolution of Forest-related Rights: Comparative Analyses of Six Developing Countries' (2008) Tropical Forestry Reports, 115-130; P. Cronkleton, J. Pulhin & S. Saigal, 'Co-Management in Community Forestry: How the Partial Devolution of Management Rights Creates Challenges for Forest Communities' (2012) 10(2) *Conservation and Society*, 93.

making has remained with state agencies; the community can conduct forestry practices only if approved by the state.

Significantly, existing arrangements do not adequately provide secure forestry rights for the directly affected community, and this may lead to undermining of traditional forest-related knowledge which can play a key role in sustainable forest management.

Timely research and reform proposals to overcome the failings of the current forest property arrangement would provide useful input to Thailand’s efforts to achieve sustainable forest management that is also in the interests of the less powerful people who depend on the forests for their livelihood.

COUNTRY REPORT: UGANDA
Environmental Provisions in the New Oil Bills (2012)

EMMANUEL KASIMBAZI*

Introduction

In 2006, the Government of Uganda announced that there were commercial oil reserves in the Albertine Graben along the border between Uganda and the Democratic Republic of Congo. More discoveries have been made and the preparations are underway to exploit these oil resources. The Government of Uganda has tabled three Bills to regulate exploration, production, refining, processing and transportation. The three Bills are the *Petroleum (Exploration, Development and Production) Bill* (2012), *Petroleum (Refining, Gas Processing, Conversion, Transportation and Storage) Bill* (2012) and the *Public Finance Bill* (2012). The Bills contain some environmental provisions.

Background to Oil Exploration and Production in Uganda

Exploration activities in Uganda are concentrated in the Albertine Graben, along the western border of Uganda and DRC. The Albertine Graben is one of the richest biodiversity hotspots in the world. Seven of the country's ten national parks and over 20 forest reserves are located in the Albertine Graben. The area is also home to internationally recognized water-bird species, the Murchison Falls-Alberta Delta Wetland System Ramsar site, and 53 species of fish.

The *National Oil and Gas Policy of Uganda* (2008) requires laws to operationalize the policy. As a result, the following three Bills have been drafted and presented to Parliament.

The Petroleum (Exploration, Development and Production) Act (2012)

The Bill provides that one of its purposes is to operationalize the *National Oil and Gas Policy of Uganda* by ensuring public safety and protection of public health and the environment in petroleum activities. Under section 4, the Bill requires compliance with environmental

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principles. Thus a licensee or a person who performs functions, duties or powers under the Bill is required to give effect to the environmental principles prescribed by the *National Environment Act* and other laws.

Section 5 of the Bill vests property in, and the control of, petroleum in the Republic of Uganda. Under section 6, petroleum activities are not to be conducted without an authorization, license, permit or approval. Section 4(3) empowers the National Environment Management Authority (NEMA), in consultation with the Petroleum Authority of Uganda (PAU), to grant a license for the management, production, transportation, storage or treatment of waste arising out of petroleum. A person is prohibited from carrying on any of the activities mentioned above without a license.

Part III of the Bill establishes institutions for managing petroleum activities. Under section 9, the Minister responsible for Petroleum Activities is empowered to grant and revoke licenses; and initiate, develop and implement oil and gas policy. Under section 10, the Bill establishes the Petroleum Authority of Uganda (PAU). Its functions are to enforce the requirements in a license or regulations; to protect the health and safety of workers and the public; to promote efficiency, economy and safety on the part of licensees; and to ensure the efficient and safe conduct of petroleum activities. The PAU is empowered to give to the licensee directions to ensure proper and optimal production of petroleum and to encourage best conservation practices. Section 18 establishes the Board of Directors of the PAU. One the members shall have experience in any of health, safety and environment matters.

Section 48 empowers the Minister to open up areas for petroleum activities. The Minister is required to ensure that an evaluation of preliminary geological, geophysical and geochemical data is conducted. An assessment has to be made of the impact of the petroleum activities on trade, industry and the environment, and of possible risks of pollution, as well as the economic and social effects that may result. Section 48(3) requires the Minister to make a public announcement of areas to be opened up for petroleum activities and in the announcement to publicize the impact assessments to the public, affected local authorities, government agencies and associations or organisations which are likely to have a particular interest in the matter.

Section 69 makes provision for the application of production licenses. The holder of a petroleum exploration license shall have exclusive right to apply for the grant of a petroleum production license over that area which has been shown to contain petroleum. Section 71 requires that an application for the grant of a petroleum production license shall be

accompanied by a report on the petroleum reservoir; a field development plan and information such as safety measures including measures to deal with emergencies and for the protection of the environment.

Section 73 provides that the applicant will submit an acceptable field development plan and petroleum reservoir report to the Minister. A petroleum production license shall not be granted unless the development plan takes proper account of best petroleum industry practices and safety factors. A petroleum production license requires the licensee to carry out an environmental impact assessment.

Section 85(1) requires a licensee to carry out petroleum activities in a proper and safe manner and in accordance with the requirements of the applicable law, regulations and conditions and best petroleum industry practices. This same provision requires the licensee to take all reasonable steps to secure the safety, health, environment and welfare of personnel engaged in petroleum activities including controlling waste or discharge into the surrounding environment and preventing damage to petroleum bearing strata in any area not covered by the license.

The licensee is required to prevent water or other matter entering any reservoir through the wells, except when in accordance with properly approved plans and best petroleum industry practices; and to prevent of the pollution of any water well, spring, stream, river, lake or reservoir. If pollution occurs, the licensee has to treat or disperse it in an environmentally acceptable manner and warn persons of the possible hazards.

Under section 103, a petroleum production license shall not preclude the granting to a person other than the licensee, the right to undertake exploration for and production of natural resources other than petroleum and scientific research, provided it does not cause unreasonable inconvenience to the petroleum activities.

Section 96 requires a licensee to use approved methods acceptable to the PAU for storing of petroleum. Petroleum shall only be placed or kept in an earthen reservoir as a temporary measure during an emergency, or for test purposes in a remote area, subject to the prior consent of the Authority.

Section 97 provides that a licensee shall not flare or vent petroleum in excess of the quantities needed for normal operational safety without the approval of the Minister on the advice of the PAU. Facilities shall avoid gas venting or flaring under normal operating

conditions. Flaring or gas venting for operational safety shall require the written consent of the PAU.

Section 97(4) provides that in the case of an emergency, the licensee may gas vent or flare without the consent of the PAU. However, where the licensee shall ensure that the gas venting or flaring is kept at the lowest possible level and submit to the Authority a technical report detailing the nature and circumstances that caused the emergency situation.

Decommissioning Plan

Section 109 requires a licensee to submit a decommissioning plan to the Authority before a license expires or is surrendered. The PAU may issue directions and shall stipulate a time limit for implementation. The obligation to carry out the direction applies even where the direction is made, or is to be implemented, after the expiry of the license.

Section 126 makes provisions for liability of a licensee for pollution. Where pollution damage occurs during a petroleum activity and the activity has been conducted without a license, the party that conducted the petroleum activity is liable for the damage, regardless of fault. This liability rests on any other person who has taken part in the activity, and who knew, or should have known, that the activity was conducted without a license.

Under section 132, a licensee requires the written consent of the relevant authority for activities on any land dedicated for a public purpose or burial, or over which a mining lease, an exploration license or a right to cultural site has been granted. Written consent is also required for actions within two hundred meters of any inhabited, occupied or temporarily unoccupied house or building; or for any land within fifty meters which has been cleared or ploughed or otherwise *bona fide* prepared for the growing of agricultural crops or on which agricultural crops are or have been recently grown; or within one hundred meters of a cattle dip-tank, dam or water used by human beings or cattle.

The Bill requires written consent from Uganda Wildlife Authority for activities in a national park or wildlife reserve, and a written consent from the National Forestry Authorities for activities in a forest reserve.

Under section 133, a landowner of an exploration or development area shall retain the right to graze stock upon or to cultivate the surface of the land in so far as the grazing or cultivation does not interfere with petroleum activities.

Under section 134, a landowner or licensee with a license other than one under the Bill, shall retain the right to movement and other activities where the subsurface activities do not interfere with an exclusive right, or with petroleum activities in the area.

Section 137 provides that petroleum activities shall enable a high level of safety. A licensee shall evaluate the risks to the health of persons employed; and as far as reasonably practicable, prevent the exposure of the persons. Section 138 requires that an operator shall ensure the safety of any person employed or otherwise present at or in the vicinity of any installation; and protect the environment and natural resources, including taking precautions to prevent pollution; and ensure that relevant persons are informed of those precautions.

Section 139 requires a participant in petroleum activities to maintain emergency preparedness. He or she shall ensure that necessary measures are taken to prevent or reduce harmful effects, including to the extent possible, to return the environment to the condition it had been in before the accident occurred. The licensee is required to maintain security against attacks against facilities and have contingency plans to deal with such attacks; and shall support relevant authorities in emergency and security drills and participate in such drills. Section 140 requires establishment of a safety zone surrounding every facility.

The Petroleum (Refining, Gas Processing and Conversion, Transportation and Storage) Bill (2012)

The Bill intends to provide for health and safety. Section 2 recognizes the need to ensure public safety and protection of public health and the environment in midstream petroleum operations. The Bill reproduces similar environmental provisions as the *Petroleum (Exploration, Development and Production) Act* (2012). Section 4 requires compliance with environmental principles; section 13 requires application for a license to refine, process, convert, transport and store gas and oil; section 27 provides for work practices for licensees; section 39 provides restrictions on flaring or venting; section 44 requires a decommissioning plan, section 60 specifies liability for damage due to pollution and section 65 and 66 provide requirements for health and safety.

The Public Finance Bill (2012)

One of the objectives of Bill is to establish a legal framework for the collection, allocation and management of petroleum revenue in a responsible, transparent and accountable manner. Section 63 requires that the operational management of the Petroleum Investment Reserve be governed by the principles of transparency, accountability, intergenerational fairness and equity and in accordance with the principles of portfolio management, to avoid prejudicing the reputation of Uganda.

Conclusion

The *Uganda Oil Policy* (2008) requires updating the oil laws in Uganda to bring on board among other things international best practices in areas like Improved Oil Recovery (IOR) and Health, Safety and Environment (HSE) standards. It recognizes the need for Uganda to participate in the Extractive Industries and Transparency Initiative (EITI) to ensure transparency. One of the objectives is to ensure that oil and gas activities are undertaken in a manner that conserves the environment and biodiversity. Relevant strategies include**:** ensuring necessary institutional and regulatory frameworks to address environment and biodiversity issues relevant to oil and gas activities; the presence of the necessary capacity and facilities to monitor the impact of oil and gas activities on the environment and biodiversity; promoting environmental protection in oil and gas activities; requiring oil companies and their contractors/subcontractors to use best practices in ensuring environmental protection and biodiversity conservation; and requiring oil companies and any other operators to return all sites on which oil and gas activities are undertaken to their original condition as an environmental obligation.

Whilst the Bills include environmental provisions, they are still weak in areas related to the processes of environmental impact assessments and strategic environmental assessment for oil and gas activities; environmental monitoring and audits of oil and gas activities; ensuring and monitoring compliance of oil and gas activities with environmental guidelines; and recognition of international performance standards in the oil and gas sector on environmental sustainability.

COUNTRY REPORT: UNITED KINGDOM
Energy, Badgers and Noise Pollution

REBECCA BATES*

Introduction

This Country Report on the United Kingdom focuses on three main issues. Firstly, it considers the *Energy Bill* (2012) and the Government's attempt to 'decarbonise' the country's energy sector and increase the inclusion of gas within the energy mix. Secondly, the Report returns to the issue of badger culling, this time is connection with a cull order for parts of West Somerset and West Gloucester. Thirdly, it considers the recent case of *European Metal Recycling Limited v The Environmental Agency* [2012] EWHC 2361 (Admin).[1] Each of these developments is considered in turn below.

Energy Bill 2012 (UK) and the Gas Generation Strategy – 'Decarbonisation' and Shale Gas Exploration

On 29 November 2012, the Department of Energy and Climate Change (DECC) released its long awaited *Energy Bill* (2012). The Bill is at the core Government's wider climate change strategy and will put in place measures to replace current energy generation capacity and improve the grid to meet rising demand.[2] In particular the Bill focuses Energy Market Reform (EMR),[3] which aims to transform the UK's current energy sourcing from being predominantly carbon reliant to a wider mix, including renewables. This 'decarbonisation' of Britain's energy sector will however come at a significant cost, an estimated £110 billion over ten years, a large part of which is expected to be born by consumers.

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[1] *European Metal Recycling Limited v The Environmental Agency* [2012] EWHC 2361 (Admin).
[2] Department of Energy and Climate Change (DECC), 'Energy Bill, Summary Aide Memorie' (available at http://www.decc.gov.uk/assets/decc/11/policy-legislation/Energy%20Bill%202012/7087-summary-aide-memoire-energy-bill-2012.pdf).
[3] Ibid.

At the core of the *Energy Bill*, is the objective of Energy Market Reform (EMR), which was originally set out in the *Energy Market Reform White Paper* (2011).[4] According to the Explanatory Memorandum of the *Energy Bill*, the core EMR objectives are:

> '…the carbon reduction targets as set out in the Climate Change Act 2008 which include a 34% reduction of carbon by 2020 and a 80% reduction by 2050; to ensure the security of energy supply...[and] to take into account the cost to consumers ; and to the legally binding EU targets of 15%of UK energy to supplied from renewable sources from 2020.'[5]

The purpose of EMR is to ensure that these objectives are met through the 'incentivisation' of the market to meet increasing demand through low carbon energy production. At present one fifth of the UK's energy generation's capacity is timetabled to close over the next ten years, while at the same time demand for electricity is predicted to double from its current level by 2050.[6] The *Energy Bill* aims to achieve this objective through a number of measures including providing long-term 'Contract(s) for Difference' (CFD) to generate low carbon investment supported by contributions from licensed energy suppliers[7] and the introduction of a capacity market intended to ensure the continuity of supply through a forecasting and bidding system aimed at providing 'reliable electricity supplies at an affordable price'.[8] Moreover, as part of this transition, the Bill aims to increase wind and nuclear generation to provide an enhanced mix of intermittent and inflexible generation.[9] This shift will be supported by a 'renewables transition' designed to promote investment in this area and an 'Emissions Performance Standard (EPS)' which will impose an 'emission limit duty' on new operators of fossil fuel plants.[10] Initially, the EPS annual limit will be equivalent to 450g of CO2 per kilowatt hour of electricity for a plant operating at baseload.[11] Many of these initiatives will be financed through changes in consumer energy pricing. Most significantly the levy charged to consumers for clean energy projects will increase over time. Whist the final figure for the levy is yet to be determined, the Committee on Climate Change estimates that the average energy bill will increase by £110 per year.[12]

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[4] Department of Energy and Climate Change (DECC), *Electricity Market Reform (EMR) White Paper* (available at http://www.decc.gov.uk/en/content/cms/legislation/white_papers/emr_wp_2011/emr_wp_2011.aspx).
[5] Energy Bill 2012, Explanatory notes, paragraphs 6 and 7.
[6] Department of Energy and Climate Change (supra note 2).
[7] Energy Bill 2012, Explanatory notes (supra note 5), chapter 2.
[8] Energy Bill 2012, Explanatory notes (supra note 5), chapter 3.
[9] Ibid.
[10] Energy Bill 2012, Explanatory notes (supra note 5), chapter 8.
[11] Ibid.
[12] Committee on Climate Change, Household Energy Bills – impacts of meeting carbon budgets (December 2011) (available at

The Bill also contains provisions for the creation of an 'Office for Nuclear Regulation' (ONR). These changes follow the 2008 government review of nuclear regulation, chaired by Dr Tim Stone. The review made a number of recommendations, including the restructuring of the then Nuclear Directorate with an independent nuclear regulator. In February 2011, the Government announced its intention to create the ONR and has already established the agency as part of the Health and Safety Executive (HSE) pending the legislation. The *Energy Bill* provides the formal legislative framework for the operation of the new nuclear regulator.[13]

However, it is perhaps the most controversial part of the *Energy Bill* that is the least defined. The Bill, as part of its objective to 'decarbonise' Britain's energy supply, supports the expansion of gas exploration and the increased use of gas within the energy mix.[14] This expansion is supported by Government's *Gas Generation Strategy* that was announced in December 2012. The Strategy aims to add 26GW of gas generating capacity to the grid by 2030.[15] The *Energy Bill* is intended by the DECC to provide 'certainty' for this market change. However, as part of its statements surround the Strategy, the DECC has announced its support of shale gas exploration as a potential means of diversifying energy supplies and meeting this target.[16] In a related measure, on 13 December 2012, the DECC announced the resumption of exploratory hydraulic fracturing (fracking) for shale gas. 'Fracking' involves the setting of underground explosions which are injected with water and chemicals designed to release the gas contained within the shale rock cavities, a process that is currently used widely in the United States.[17] The process has previously been used in Britain, however was halted in 2011 after it was believed to have caused two minor earthquakes near Blackpool.[18] The exploration firm Cuadrilla owns four sites in Lancashire, which are licensed to drill for shale gas. It is likely that following the Government's announcement that these activities will resume. The DECC has stressed that the resumption of shale gas mining is to be

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http://downloads.theccc.org.uk.s3.amazonaws.com/Household%20Energy%20Bills/CCC_Energy%20Note%20Bill_bookmarked_1.pdf).

[13] Department of Energy and Climate Change (DECC) 'Changing ONR' (available at http://www.hse.gov.uk/nuclear/ndchanges.htm); Energy Bill 2012, Explanatory notes, Part 2.

[14] Department of Energy and Climate Change (DECC) 'Gas Strategy will Support Decarbonsiation of Energy Mix' (5 December 2012) (available at http://www.decc.gov.uk/en/content/cms/news/pn12_157/pn12_157.aspx).

[15] Ibid.

[16] Department of Energy and Climate Change (DECC), *Gas Generation Strategy* (December 2012) (available at http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/oil-gas/7165-gas-generation-strategy.pdf).

[17] L. Horsburgh, 'Fylde Fracking: The new Aberdeen or toxic gamble?' BBC News (Lancashire, 13 December 2012) (available at http//www.bbc.co.uk/news/uk-england-lancashire-20627877).

[18] Ibid.

undertaken with additional controls designed to minimise the seismic risks that may arise as a result of the exploration.[19] Significant concern however exists relating to the potential environmental and seismic impacts of these activities.[20]

The utilisation of fracking as part of the Government's energy market reform highlights the challenges involved in transitioning from a coal based economy. While the *Energy Bill* (2012) supports the increased use of renewables, its focus on gas and nuclear is evidence of another missed opportunity to shift the British energy sector onto a 'clean' and sustainable path. Whilst enhancing the role of gas in the energy mix must be welcomed from a climate change perspective, it remains to be seen whether reliance on shale gas exploration provides another set of environmental challenges.

Biodiversity and Farming: Badger Cull – West Somerset and West Gloucestershire

The issue of badger culling and the management of bovine terbuculosis (TB) in cattle has 'spread' from Wales to England over recent months. A proposed cull in Wales was abandoned last March following a significant public outcry and a judicial review of the cull order.[21] Since this time, the Welsh Assembly has authorised a trial vaccination in the cull area in West Pembrokshire, which is currently ongoing.[22] However, despite these developments and the vaccine trial, another controversial cull order has been issued in neighbouring West Somerset and West Gloucestershire.

The West Somerset and West Gloucestershire cull (the West Somerset cull) was authorised by an order made by the Government Agency, Natural England on 4 October 2012. Natural England granted the licence following an application made by a company representing 'farming and land management' interests in the cull area. The licence itself permits the undertaking of 'control measures' within the 'West Somerset Pilot Area' that covers an area of approximately 400 square miles.[23] The control measures were authorised under the

[19]Department of Energy and Climate Change (DECC), 'New Controls Announced for Shale Gas Exploration' (13 December 2012) (available at http://www.decc.gov.uk/en/content/cms/news/pn12_164/pn12_164.aspx).
[20] P. Ekins, 'The UK's new Dash for Gas is a Dangerous Gamble' New Scientist (6 December 2012) (available at http://www.newscientist.com/article/dn22594-the-uks-new-dash-for-gas-is-a-dangerous-gamble.html).
[21] See *Badger Trust v the Welsh Minister* [2010] EWCA Civ 807.
[22] BBC News, 'More than 1,400 badgers vaccinated against TB in Wales' (28 November 2012) (available at http://www.bbc.co.uk/news/uk-wales-20534842).
[23] T. Feilden, 'Badgers Back in the Firing Line' BBC News (2 October 2012) (available at http://www.bbc.co.uk/news/science-environment-19921298).

licence for one annual six-week period over the next four years.[24] The issue of the licence met with substantial public concern and reignited the debate regarding the effectiveness of culling as a means to manage the problem of bovine TB. It has also produced the single largest animal rights campaign seen since the introduction of the fox hunting ban.[25] It again, as in the instance of the proposed Welsh cull, raises issues concerning the protection of endangered species in the face of agricultural and economic imperatives. Badgers are protected in England under the *Protection of Badgers Act* (1992), which prohibits the killing, injuring or taking of the animal and any form of interference with a badger 'sett'.[26] The Act defines a 'sett' to be 'any structure or place which displays signs, indicating the current use by a badger'.[27] However, despite these protections the Act also allows for activities to be conducted under licence which impact badgers and/or their setts provided that there is 'suitable justification' for the actions and the issue is not able to be resolved through other means.[28]

In 2011, 3,741 farms in England suffered from outbreaks of bovine TB and 34,183 cattle were slaughtered as a result of the infection.[29] While the link between badger populations and the incidence of bovine TB is well established, there is much less consensus regarding the effectiveness of culling as a means to controlling infection. The widest study on the issues, undertaken by Sir John Krebs in 1996, found that while culling badgers could reduce the incidence of infected cattle in the cull area, that the movement and/or displacement of the remaining badgers increased the incidence of disease in surrounding areas. In light of these findings the report held that the benefit in terms of infection rates was minimal and given the significant costs associated with culling, that overall it was not economically viable.[30] With respect to the proposed West Somerset cull, Britain's leading animal disease scientists have, in an open letter to The Observer newspaper,[31] criticised the Government's decision to adopt cull measures as a means to manage bovine TB in cattle. The Department of Environment, Food and Rural Affairs (DEFRA) has despite these concerns asserted its intention to continue with the planned cull and to 'maximise the benefits shown in previous

[24] Natural England, 'Badger Control Licence issued in West Somerset' (available at http://www.naturalengland.org.uk/about_us/news/2012/041012.aspx).
[25] Damian Carrington & Jamie Doward, 'Badger Cull 'Mindless', says Scientists', The Observer (13 October 2012) (available at http://www.guardian.co.uk/environment/2012/oct/13/badger-cull-mindless).
[26] *Protection of Badgers Act* 1992 (UK).
[27] Ibid.
[28] Natural England, 'Badgers' (available at http://www.naturalengland.org.uk/ourwork/regulation/wildlife/species/ badgers.aspx#legal).
[29] Feilden, (supra note 23).
[30] Ibid.
[31] Open Letter, 'Culling Badgers could Increase the Problem of TB in cattle', The Observer (14 October 2012) (available at http://www.guardian.co.uk/theobserver/2012/oct/14/letters-observer).

trails'.[32] There is however no denying that the issue has become one of a highly political nature, with a number of Members of Parliament, including the Prime Minister David Cameron, commenting on the proposed cull actions.[33]

In the face of substantial public outcry the Government announced in October 2012, that it was to delay the proposed cull until 2013. This decision was based upon the timing of the cull and the risk that in its current form an extended cull may encroach on the December breeding season.[34] In another action related to public concern, the House of Commons was required to debate the proposed measures as a result of receiving a petition containing over 150,000 signatures. In a non-binding vote the House of Commons rejected the cull measures 147 to 27 in favour.[35] The majority of the House instead argued for vaccination, improved testing and stronger biosecurity measures to be adopted to manage cattle infections.[36] The debate proved to be highly divisive demonstrating the deep divisions between the Environment Secretary, farming advocates and the majority of Parliament. At the time of writing, the cull is planned to proceed in 2013.[37] However it is likely that significant opposition will continue to be expressed regarding the proposed actions.

The badger is an iconic British species and it is perhaps due in part to this status that such heated debate has emerged over the proposed cull and the wider issues associated with the management of TB in cattle. However, outside the headline making debate lies a fundamental conflict between species protection and agriculture. The legal protection afforded to badgers, under the *Protection of Badgers Act* (1992) clearly contains provision for substantial exceptions to be made under the Act. The West Somerset cull, if it goes ahead in 2013, will aim to eradicate approximately 70% of badgers in the cull area.[38] Clearly, the capacity for such an exception to be made under the Act raises serious concerns regarding its efficacy and compatibility of licences and the objectives of the Act. More widely the West Somerset cull and the unwillingness of the Government to consider the more costly

[32] Department for Environment, Food and Rural Affairs (DEFRA), 'Badger Cull to Proceed Next Year' (23 October 2012) (available at http://www.defra.gov.uk/news/2012/10/23/badger-cull/); Carrington et al (supra note 25).
[33] Ibid.
[34] R. Prince, 'Badger Cull is Shelved – to Fury of Farmers' The Telegraph (23 October 2012) (available at http://www.telegraph.co.uk/earth/earthnews/9627264/Badger-cull-is-shelved-to-fury-from-farmers.html).
[35] D. Carrington, 'Badger Cull: MPs vote 47 to 28 for Abandoning Cull Entirely' The Guardian (25 October 2012) (available at http://www.guardian.co.uk/environment/2012/oct/25/badger-cull-vote-government-defeat).
[36] BBC News, 'MPs Reject Government Plans for Pilot Badger Cull' (25 October 2012) (available at http://www.bbc.co.uk/news/world-20085441).
[37] Department for Environment, Food and Rural Affairs (DEFRA), (supra note 32).
[38] BBC News, 'Badger Cull: Government Delays Scheme Until Next Year', (23 October 2012) (available at http://www.bbc.co.uk/news/uk-politics-20039697).

vaccination option again raises concerns regarding the environmental agenda of the Coalition Government and their capacity to balance ecological and economic imperatives.

Noise Pollution: *European Metal Recycling Limited v The Environmental Agency* [2012] EWHC 2361 (Admin)[39]

This case concerns noise pollution and provides important insights into the interpretation of the recently enacted *Environmental Permitting (England & Wales) Regulations* (2010). The claimant, European Metal Recycling Limited (EMR), operated a metal waste disposal and reclamation yard in Stoke-on-Trent, Staffordshire. The operations on the site are regulated under the *Environmental Permitting (England & Wales) Regulations*. The site operating permit was originally issued to the site's previous operator and was transferred to EMR on 19 July 2010. EMR, upon taking control of the site substantially increased its 'commercial activity' leading to a number of noise complaints from surrounding residents.[40] The complaints resulted in the regulator, the Environmental Agency, varying the conditions of the permit taking effect from 31 August 2011. The varied conditions required that:

> 'emissions from all activities shall be free from noise and vibrations at levels likely to cause pollution outside the Site…unless the operator has used appropriate measures, including but not limited to those specified in any approved noise and vibration management plan to prevent or where it is not practical to minimise the noise and vibration'.[41]

However, despite the changes made to the licence the complaints continued and the Agency initiated an investigation. Following the investigation and discussions between the parties, on 20 February 2012 the Agency served EMR with a notice under regulation 37, 'Enforcement notice of Suspension and Requirement to take steps'. A notice under regulation 37(4) requires a suspension notice to (i) specify the risk of serious pollution and (ii) the steps required to remove such a risk.[42]

At issue before the High Court was the Environmental Agency's conclusion of the presence of a 'risk of serious pollution' and compliance of the notice with regulation 37(4)(ii). The claimant EMR, argued that it failed to define the steps required to remove the risk and how compliance was to be realised and that the 'threshold for compliance' was otherwise

[39] *European Metal Recycling Limited v The Environmental Agency* (supra note 1).
[40] At paras 1-5, per HH Judge Pelling QC.
[41] At para 2.
[42] At para 3 and 6.

imprecise and vague. EMR, following the issue of the notice, applied and was granted an interim injunction from the High Court.[43]

There were thirteen grounds of challenge put forward by EMR.[44] Of particular interest was the risk of 'serious pollution'. The Noise Impact Assessment conducted by the Environmental Agency found that the weekday noise levels on the site were generally between 51 dB(A) and 58 dB(a) increasing at times to 62 dB(A). There was agreement between the parties that noise pollution was capable of being classified as 'serious pollution' under regulation 37, however EMR disputed that that their operations on the site had posed such a risk in light of the time that lapsed between the commencement of their operations at the site and the issue of the enforcement notice. Judge Pelling QC however dismissed these objections asserting that the question as to the existence of such as risk is 'manifestly' one for the judgement of the [Environmental Agency]'. [45] His Honour also noted the only potential means of challenging the Agency's decision was on the basis of irrationality. This ground of appeal was not however open to EMR in this instance as the evidence before the Court demonstrated that the Agency had adequately considered the evidence before them, including the Noise Impact Assessment, and were clearly within the scope of their discretion to conclude that the risk of serious pollution has been established. Moreover, the Court held that the failure of the Agency to notice the risk during their early investigations into residents' complaints also did not support the argument that there was no formal basis for their conclusion.[46]

The second substantial ground of appeal related to EMR's assertion that wording of the enforcement notice did not comply with regulation 37(4)(2) as it failed to define the steps required to remedy the pollution risk. Also in light of regulation 37(4)(2) it was asserted that the notice also failed to provide a 'defined threshold' under which compliance may be satisfied as was 'otherwise vague and imprecise'. [47] Specifically, Schedule 2 of the enforcement notice issued by the Environmental Agency provided steps required to 'design and implement measures that eliminate the risk of serious pollution from noise'. Following a consideration recent case law[48] regarding the wording of abatement and suspension notices, the Court held that regulation 10 placed a 'mandatory requirement' on the Agency 'to specify what steps had to be taken in order to remove the risk that triggered the service of the

[43] At paras 16-32.
[44] At para 16.
[45] At para 17-20.
[46] At para 18-19.
[47] At para 21.
[48] See *R v Falmouth & Turo Port Authority Ex p . South West Water Limited* [2001] QB 445.

notice'. Judge Pelling asserted that this requirement could be met by providing 'an outcome or outcomes rather than by steps in the sense of specifying works to be undertaken on the site'. The Agency was not however permitted to require the elimination of the risk of serious pollution without identifying how this objective was to be realised. The Court held that on this ground alone that the notice was invalid and EMR was entitled to a quashing notice.[49]

European Metal Recycling Limited v The Environmental Agency provides important insights into the scope of discretionary powers of the Environmental Agency and the operation of regulation 37.

[49] *European Metal Recycling Limited v The Environmental Agency* (supra note 1), para 30.

COUNTRY REPORT: UKRAINE
Land Law Problems in the Ukraine

HALYNA MOROZ*

Land relations are a very important sphere of social relations. The legal regulation of land must reflect its value as the object of human relations. The laws governing land relations are influenced by social, political, economic and ecological factors. Unfortunately, the potential for conflict in relevant spheres of social life cannot but be reflected in the state of land legislation. This is illustrated in the Ukraine by laws intended to protect agricultural lands from being redeveloped for other purposes.

The key law governing the market for land in the Ukraine is the Law “About the Land Market” adopted on 9 December 2011. On 20 December 2011, the Verkhovna Rada (or Supreme Council of the Ukraine) extended a moratorium on the transfer of agricultural land to non-agricultural uses until 1 January 2013, but more recently has not supported prolonging the moratorium until 1 January 2014.

On 16 October 2012, the Verkhovna Rada adopted the Law “About the Introduction of Changes to the Land Code of Ukraine (About the Circulation of Agricultural Land)”. The amendments deal in the part with the moratorium on alienating agricultural land. Under this law, the date on which the moratorium will expire is not specifically prescribed, but depends on the adoption of a law controlling the transfer of agricultural land, instead of the law controlling the land market noted above. As a result, the moratorium now has an indefinate duration.

Not less important is the formation of a state land bank. On 6 September 2012, the Verkhovna Rada adopted the Law “About the Introduction of Changes to Some Legislative Acts of Ukraine Concerning the Delimitation of Land of State and Municipal Property”. This enables the Cabinet of Ministers of Ukraine to transfer state agricultural land to the state land bank. This is a state-owned entity which cannot be privatised. This approach is intended to enable more effective management of state land and the implementation of state policy on

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private land, which is aimed at: increasing agricultural production; realising public infrastructural projects; developing agricultural areas; and creating ecological reserves and other public policy goals.

According to the "Transitional Statements" for this Law, state and municipal property are considered to be transferred to the state land bank automatically upon its formation. However, the process of delimiting these lands and developing an inventory of them has not been completed (although official documents tell a different story).

Previously, granting land title to the State was regulated under the Law of Ukraine "About the Delimitation of Land of State and Municipal Property" 2004. However, this law was not effectively implemented because of the substantial costs involved. However, the process of title clarification has commenced. The measurement of titled land projects is progressing and title details have been confirmed in some cases. With recent reforms, this incremental land titling procedure has been drastically changed. Public title is automatically created with the creation of the state land bank. This situation indicates the lack of a systemic approach to dealing with the complex issues of land title, and it is likely that the lack of such an approach will influence the quality of land titles. Official announcements suggest that further investment will be made to address the problem of titles in public land.

There is currently 10.6 million hectares of state agricultural land in Ukraine. There is a great contemporary need for a more reliable system regulating land title to deal with large tracts of land, the ownership of which remains unclear (2 million hectares); or in respect of which there remain unclaimed shares (1,5 million hectares). It is also neccessary to settle the management of small parcels of arable land constituting 7 million parcels (shares), the average area of which is each 3-4 hectares. This fragmentation and uncertainty creates impediments to effective agricultural production.[1] As a result, early in the development of the state land bank, it will be important to take measures to consolidate rural land if this initiative is to overcome the negative economic, ecological and social consequences associated with the current fragmentation of agricultural land title. This needs to be overcome to ensure stable income from the lease of land plots, which will in turn promote increased agricultural investment and the replenishment of the state budget.

To achieve stable development of rural regions, protection of the environment, protection of land and rational usage, optimization of the system of land tenure is needed. This requires

[1] See further http://www.kmu.gov.ua/control/publish/article?art_id=245684296.

clarification of legal relations over land and other real estate, which requires access to a reliable cadastre. International experience suggests that cadastral-registration systems play an important role in managing real estate, taxing and lending security, property market information and legal governance in the real estate market. Reliable title-registration systems are an essential attribute of the economy of all economically-developed countries.[2] In this regard, the Law "About the State Land Cadastre" was adopted in Ukraine in July 2012. It will come into effect on 1 January 2013. Prior to its introduction, there was no reliable land database in Ukraine. The cadastre existed only on paper, and was randomly adjusted resulting in corruption and a lack of transparency. Ukraine is one of the last countries in the civilized world to implement a computerised cadastre system. Modern software should enable an effective cadastre-registration system within this law.

The newly adopted Law "About the State Land Cadastre" proposes a system of many bylaws to supplement this law and to develop its principles. Accordingly, on 17 October 2012, the Cabinet of Ministers of Ukraine adopted the resolution "About the Confirmation of the Procedure of Managing the State Land Cadastre". This document defines the sequence for issuing cadastral identifiers to plots of land, which is essential to their registration. The resolution defines the process for using registers and documents of the State Land Cadastre by different categories of users. This addresses the use of extracts from the State Land Cadastre, references that contain generalized information about land (areas), and copying of the cadastre map (plan) and other documents within the State Land Cadastre. The resolution comes into effect simultaneously with the Law of Ukraine "About the State Land Cadastre from 1 January 2013.

These innovations suggest that there is an opportunity for positive changes in the procedure of state registration of land plots and titling of rights to real estate. Whether the new system will be effective, only time will tell.

[2] *Conceptual Principles of Managing the State Land Cadastre in Ukraine* (available at http:www.dzk.gov.ua/control/main/uk/publish/article/157431).

COUNTRY REPORT: UKRAINE

Shale Gas Development in Ukraine: Risks and Current Regulation

SVITLANA ROMANKO[1] & NADIYA KOBETSKA[2]

Introduction

Ukraine is widely believed to have Europe's largest reserves of new energy resources. During 2011, Ukraine agreed to cooperate with 21 companies to produce hydrocarbons, particularly shale gas and coal bed methane. The Ukrainian Government is very interested in shale gas exploration, but experts believe that political and legal risks remain the main impediment to gas investments in Ukraine. The main arguments in favour of developing the shale gas industry are:

- the gas industry has a competitive advantage as an alternative energy resource, though its future might be uncertain. Ukraine wants to be an independent player in the gas resources market and not to be dependent on Russia.
- The involvement of foreign companies will enable the exploitation of domestic reserves of gas by the Ukraine, and this is gradually becoming a state strategy.
- Ukraine expects to start production of shale gas in 2017. Government officials refute arguments about environmental threats and expect this resource to meet all the energy needs of the State.

In considering the viability and attractiveness of this energy resource it is useful to take into account the experience of countries that have succeeded in shale gas production: USA, Canada, and neighboring countries in Europe (including Poland). In Western Europe (in the oil and gas fields in Germany, the Netherlands, Great Britain and Norway (North Sea)) various methods (including 'hydraulic fracturing' or 'fracking') have been used to increase the production rate of wells by 3-10 times.

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In the USSR, hydraulic fracturing has been undertaken since 1952 in fields in the Volga-Ural Region, North Caucasus, Azerbaijan, Turkmenistan and Ukraine. However, there are demonstrated risks with the use of such methods to increase gas yields.

Population health and environmental safety should be taken into account as key social values. The region identified for gas production has large recreational areas, national reserves, mountain forests, high population density and insufficient water supply. The critical need is to solve the major global problem of natural resources development: achieving the right balance between economic benefit and social and environmental values.

According to an expert report commissioned by the British Government in June 2012: "hydraulic fracturing - a controversial method of extracting shale gas - is safe, with careful compliance with the safety measures and proper management of the process".[3] However some European countries (including France, Switzerland, Czech Republic and Bulgaria) have banned shale gas development in their tertitories because of perceived risks. In Romania, a moratorium on exploration work on shale gas has been imposed. Opponents of fracking claim that hydraulic fracturing pollutes groundwater and can lead to earthquakes. The U.S. Geological Survey has, for example, partly linked the increase in the number of earthquakes in the central United States to the fracking and oil industries operating in the area.

Several issues should influence the future of the hydraulic fracturing industry in the Ukraine.

- *The EU Regulatory Framework* - The current EU regulatory framework for hydraulic fracturing has a number of gaps. Importantly, the threshold for Environmental Impact Assessments to be carried out on hydraulic fracturing activities in hydrocarbon extraction is set far above any potential industrial activities of this kind, and thus should be lowered substantially.
- *Life Cycle Analysis* - In the framework of a Life Cycle Analysis (LCA), a thorough cost/benefit analysis could be used to assess the overall benefits for society and its citizens. A harmonized approach to be applied throughout EU27 should be developed, based on which responsible authorities can perform their LCA assessments and discuss them with the public.

[3] See further: http://www.guardian.co.uk/environment/2012/jun/29/shale-gas-fracking-expanded-regulated.

- *Nature of Chemicals Used in the Process* - It should be assessed whether the use of toxic chemicals for injection should be banned in general. At least, all chemicals to be used should be disclosed publicly, the number of allowed chemicals should be restricted and its use should be monitored. Statistics about the injected quantities and number of projects should be collected at the European level.
- *Nature and Capacity of Regulatory Authorities* - Regional authorities should be strengthened to take decisions on the permission of projects which involve hydraulic fracturing. Public participation and LCA should be mandatory in these decision-making processes. Hydraulic fracturing always goes hand in hand with the use of heavy machinery and hazardous chemicals. Citizens have to be protected as well as the workers operating these materials and machinery on a daily basis.[4] The General Manager of Chevron, Derek Mehnes, during a meeting with Ukrainian Prime Minister Mykola Azarov assured that the work will be conducted "quickly, safely and with care for the environment". But, according to the former Minister of Environment Sergei Kurykin, the potential risk of chemical contamination of surrounding areas and damage due to seismic activity in the shale gas is even present when all contemporary technologies have been utilised.

Current State of the Hydralic Fracturing Production Process in the Ukraine

In May 2012, the Cabinet announced the winners of the tender process to extract shale gas in the Olesky and Yuzovskyi areas. These were Chevron and Shell respectively. The Production Sharing Agreements (PSAs) concluded between the Governemnt and these companies are expected to be finalised within 120 days of this announcement. This time frame has been extended to 160 days. Previously, the Cabinet has approved tenders and concluded PSAs in respect of Yuzovskyi (in the Donetsk and Kharkiv Region) and Olesky (in the Lviv Region) to extract hydrocarbon reserves of shale gas. After signing the PSAs, the extraction companies are granted a special permit to use the subsoil for geological research for 50 years (which can be extended). It is also anticipated that by the end of 2012, tenders will also be granted to undertake fracking in Slobozhansky (Kharkiv region), Scythian and Foros (both of which are situated in the deep shelf of the Black Sea). Public opinion about the environmental risks associated with these activities was not taken into account in this case.

[4] Directorate for Internal Policy, Economic and Scientific Policy: *Impacts of Shale Gas and Shale Oil Extraction on the Environment and on Human Health* (2011) European Parliament, Brussels (available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/envi/dv/shale_gas_pe464_425_final_/shale_gas_pe464_425_final_en.pdf.

The main problems that make the implementation of the *Aarhus Convention* in Ukrainian environmental legislation difficult in the context of these fracking activities are: the lack of accurate, reliable and complete information; the lack of provision of appropriate information by Central Government when dealing with local authorities, citizens and NGOs; the lack of transparency in individual companies' fracking applications; the lack of experience of government officials when dealing with these applications; the prevalence of highly corrupt authorities; and a complex legal, tax and environmental environment.

Before celebtrating its illusory energy independence, the Ukrainian Government should consider the following key issues raised during the public consultation process undertaken in in Ivano-Frankivsk in late 2011:

- Do the existing laws adequately address the new technology being used for shale gas development?
- Are the existing laws adequately enforced?
- Are there conflicting provisions that make it difficult for industry to comply with the regulations?
- Is there a clear distinction between national and local regulatory authority?
- What role will international agreements such as the *Aarhus Convention* and the *Kyoto Protocol* play in shale gas development?
- Are the production sharing laws adequate to create enough transparency and predictability to promote investment?
- Where are the proceeds sent? Does a percentage go to local governments in the impacted areas - to help pay for infrastructure like water supplies and roads?
- Is there adequate baseline information of air and water quality and monitoring and enforcement to ensure air and water quality are not compromised?
- How should water used in the hydraulic fracturing process be disposed of?
- Will the government regulatory agency require best management practices such as:
    - Closed loop systems – without need to use open waste pits;
    - Use of non-toxic chemicals in hydraulic fracturing;
    - Green completions to avoid venting or flaring of gas; and
    - Multi-well well pads, to reduce the need for wells on the surface.
- What areas must be off-limits to shale gas development due to ecological or water quality concerns?
- Are there enough trained oil and gas workers and inspectors to ensure that the laws and best management practices are being used?

Perhaps, Ukrainian legislation will give us the answers?

Relevant Ukrainian Legislation

In Ukraine, shale gas development is reguated by the following main laws and policies:

- *Mineral Resource Code of Ukraine* (27/7/1994 № 132/94-ВР)
- *Law of Ukraine on Oil and Gas* (12/7/2001 № 2665-III)
- *Law on Production Sharing Agreements* (14/09/1999)
- *General State Program of Mineral Raw Material Development till 2030.*
- *List of Mineral Resources of State Importance* (12/12/1994 (amended on 12/28/2011)), that lists shale gas as a mineral resources of the state importance.

The existing laws and policies do not adequately address the new technology being used for shale gas development. The *Law on Production Sharing Agreements* does not create enough transparency and predictability to promote investment. Generally, development of unconventional gas in Ukraine is very slow in both theory and practice both.

The *Existing General State Program of Mineral Raw Material Development till 2030* and *Law on Production Sharing Agreements* do not give the whole picture. Local governments do not have authority to influence the terms or language contained in the production sharing agreements. The Ukrainian Cabinet should develop a National Program of Shale Gas Development which places areas subject to shale gas development under strict state control and which also provides financial and technical assistance to local authorities in whose territories fracking activities are authorised. Strict measures need to be put in place to monitor the environmental impacts of the fracking activities and the respective powers of national and local authorities over these activities need to be strictly delineated. Any approvals should also be preceded by environmental impact assessment studies clearly evaluating the potential threats hydraulic fracturing activities pose to fresh water supplies, soil and air quality.

Conclusion

The Law Institute of Prekarpatsky National University after Vasyl Stefanyk, in collaboration with the Colorado University (USA), have been working on this issue for last six months at

the request of Ukrainian Government and UNEP. Our part of the Report developed under this project focused on basic problems of local self-government participation in the shale gas development and legal regulation. In summary, Ukraine should expand legal opportunities for promoting the participation of local governments in the process of approving fracking activities within their territory and creating specific legal guarantees to protect their constituencies from the possible environmental, economic and social impacts associated with them.

COUNTRY REPORT: UKRAINE
Water Management, Civil Society Action, Local Environmental Governance and Nature Conservation

OLYA MELEN*

During the last ten years in the Ukraine, around 30 state policy and program documents were developed in the environmental sphere, with more than 300 such instruments in total. They were approved by different bodies including the President, Parliament and several government institutions. Implementation was hampered by scarce financial resources from the state budget. Thus their role was merely declarative. In 2011, the Government of Ukraine adopted a regulation on control, optimization and integration of state programs. This suspended the operation of numerous state programs and restricted the preparation of new programs.

In addition to the enactment of state programs, the Parliament of Ukraine is slowly developing new regulatory strategies. The *Environmental Strategy of Ukraine* was adopted in 2010; and in 2011, it was complemented by a *National Action Plan on the Implementation of Environmental Strategy* with specification of activities and sources of funding. These documents were widely debated by the public due to pressure from the European Union. Prior to the *Environmental Strategy* being passed, programs on environmental monitoring, radioactive wastes, solid municipal wastes, the formation of an ecological network and other such arrangements were developed.

In 2012, the Parliament of Ukraine approved the *State Program of the Development of Water Management and Environmental Recovery of River Dniepr Basin*, intended to operate until 2021. Dniepr River provides the drinking water supply of Kiev, the capital of Ukraine. It is therefore important for millions of people. The Program aim to achieve the following goals: determination of a state water policy able to satisfy the needs of the population, economy, conservation and recovery of water resources; introduction of an integrated management system based on a basin-wide approach; renewal of irrigated lands; optimization of water use; and control of potential water disasters.

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The Program is to be implemented in two stages. The first (2013-2016) should address the protection of drinking water supply; recovery of small rivers; provision of centralised water supply in villages, improvement of monitoring of surface waters; and regional programs for water management. During the second stage (2017-2021), the State will focus on development and implementation of river basin management plans; new river basin councils; improvement of water quality; and wastewater discharge controls. This program suspends the operation of two older programs: *State Program on the Development of Water Management* and the *National Program of the Ecological Recovery of Dniepr Basin and Improvement of Drinking Water Quality*.

In 2012, the President of Ukraine enacted the *Strategy of the State Policy of Promotion of Civil Society in Ukraine* with priority measures for its implementation. It aims to introduce mechanisms of cooperation between local authorities and the public, based on the principles of partnership, mutual responsibility and recognition of human rights and freedoms. The plan for the Strategy makes reference to the need to comply with the provisions of the *Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*. At the meeting of the parties to *Aarhus Convention* in 2011, Ukraine was declared to be in non-compliance by the Compliance Committee. Thus, the issue of the implementation of *Aarhus Convention* in Ukraine is a matter of urgent national importance.

Recent Legislative Developments

Environmental legislation in Ukraine undergoes constant change aimed at addressing environmental governance challenges, the deteriorating ecological situation and limitations on the rights of public in environmental decision-making. In 2011, key changes in the powers and responsibilities of important Ministries took place. These administrative reforms were ongoing in 2012. The most important law passed in 2012 was the Law “On Amendments to Environmental Laws and Optimization of the Powers of Local Bodies Responsible for Environmental Protection”. The powers of local departments of the Ministry of Ecology and Nature Protection in 25 regions were removed and reassigned to the local state administrations, ecological inspectors and the Ministry itself.

The main law “On Nature Protection” was amended with new articles redefining the powers and responsibilities of the state bodies and local government in the sphere of nature protection. New powers for nature protection were given to the local state administrations,

namely the right to conduct environmental monitoring, to perform "ecological expertise",[1] to approve the limits of use of natural resources of local importance, to issue emission limits, to issue waste storage (disposal) permits (for non-hazardous wastes) and other matters. The law also supports the operation of the Red Book Commission, the key advisory body for the use of Red Book listings (threatened species). This Commission is often under pressure from the Ministry of Ecology and Nature Protection as the latter wants the support of the Commission on challenging issues relating to the use of threatened species. The Commission now operates under the auspices of the National Academy of Science of Ukraine to ensure its independence.

The law also brought changes for the work of public environmental inspectors in Ukraine. It increases their control powers over fishing and hunting. Public inspectors operate in Ukraine assisting state environmental inspectors in controlling the use of natural resources. Under the new law, the objects of state environmental control include: land; subsoil, surface and underground waters; air; forests; flora and fauna; marine ecosystems; protected areas; and GMOs.

The administrative changes to the state bodies responsible for nature protection have not been completed. The need for laws to address the loopholes and omissions will arise. The major roles of local departments of the Ministry of Ecology and Nature Protection will be finally distributed in 2013 and that will demand more changes in legislation. Hopefully such changes at the local level will improve the environmental situation, slow down environmental degradation in Ukraine and hamper the excessive use of natural resources.

[1] The term "ecological expertise" is a former Soviet Union term which refers to the equivalent of an environmental impact assessment which is considered and approved or disapproved by a state environmental agency.

CLAUDIA CINELLI: EL ÁRTICO ANTE EL DERECHO DEL MAR CONTEMPORÁNEO

(Tirant Blanch, Valencia, 2012) 364 pp.
ISBN: 978-84-9004-918-1

REVIEWED BY LIZIANE PAIXÃO SILVA OLIVEIRA*

Abstract

Concerns about the changes in the Arctic environment has renewed discussions about the balance between the right of sovereignty of each country to exploit their own resources as they wish and the intention to promote environmental protection around the region. The book "El Ártico ante el Derecho del Mar contemporáneo" analyses these issues from a legal perspective. The purpose of this book is to identify the application of international norms, of co-existence and of cooperation rules in the Arctic.

Review

L'étude des questions politiques et juridiques relatives à l'état de la réglementation de l'Arctique sont, à l'heure actuelle, de la plus haute importance. La valeur économique de la région, dû à l'extension de ses ressources naturelles (gaz et huile[1]) , ajoutée à sa valeur environnementale pour l'ensemble de l'humanité, a attiré l'attention internationale sur l'Arctique et contribué à la naissance de conflits d'intérêts en ce qui concerne la démarcation des plates-formes continentales, le droit de passage, l'exploitation des fonds sous-marins et des zones de pêche.

Cette région, qui a déjà fait l'objet d'une règlementation, est régit par la Convention des Nations Unies sur le droit de la mer de 1982 qui fixe la zone économique exclusive des Etats côtiers – Canada, Danemark, Etats-Unis, Norvège et Russie. Néanmoins, les Etats Unis

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[1] Sur l´exploitation d'huile dans l'Arctique voir: Bederman, David J. *High Stakes in the High Arctic: Jurisdiction and Compensation for Oil Pollution from Offshore Operations in the Beaufort Sea*, Duke University School of Law, 1984.

n'ont pas ratifié ce texte. De plus, les peuples dits « arctiques » (Inuit, Sâmes, Évenks, parmi d'autres), ayant développé des modes de vie particulier, occupent cette région et ont rôle important à jouer en tant qu'acteurs du droit international dans le décisions et le destin de l'Arctique. A l'heure actuelle des changements climatiques une réflexion s'impose : comment faire cette région devenir une zone de développement durable?

Le récent ouvrage de Claudia Cinelli, « El Ártico ante el derecho del mar contemporáneo » apparaît comme une contribution importante pour la compréhension de la réalité arctique, ou comme elle l'appelle "la question arctique", c'est-à-dire l'équilibre entre la satisfaction des intérêts particuliers et la préservation des intérêts communs.[2] L'auteure expose avec perspicacité et précision, à partir de données empiriques, politiques et juridiques, les problèmes juridiques et environnementaux auxquels la région doit faire face, tels que, par exemple, les changements géo-physiques qui provoquent le dégel, les disputes quant à la démarcation de l'espace maritime, les accords de coopération et de coexistence signés par les gouvernants des "pays arctiques".[3]

Très clairement écrites et de facile compréhension même pour un lecteur profane, les 369 pages de l'ouvrage sont divisées en un chapitre d'introduction, présentant un panorama historique et mythologique de l'Arctique, puis deux autres parties présentent géographiquement et juridiquement cette région, formée en majeure partie par une zone maritime, avec de multiples ressources naturelles et un environnement sauvage. En 2008, la Commission Européenne, dans son communiqué "L'Union européenne et la région Arctique", a établi en tant qu'Arctique la zone comprenant l'Océan Arctique et le territoire des huit États arctiques (Canada, Danemark, États-Unis, Finlande, Islande, Norvège, Russie et Suède) autour du Pôle Nord. Un autre aspect analysé par l'auteure est celui des droits souverains des États arctiques et la proposition de coopération pour la protection de l'écosystème en se fondant sur la Déclaration de Ilulissat (2008) et sur le Droit de la mer.

Après les commentaires préalables sur les principales caractéristiques physiques et juridiques de l'Arctique, la première partie de l'ouvrage étudie la coexistence entre les États riverains du Cercle Polaire Arctique. Dans cette partie, l'auteure se penche sur l'analyse détaillée de la souveraineté territoriale, aérienne et maritime des États-Unis, de la Norvège,

[2] Voir BERKMAN, P.A. Self intersts and common interests, *YPL,* vol. I, 2009, p. 511-525. VEDRINE, C. Ressources en Arctique et revendication étatiques de souveraineté, *RGDPI,* vol. 113, n. 1, 2009, 147-158.
[3] Voir NORDQUIST, M.H. et alii. *Changes in the Arctic environment and the law of the sea*. Martnus Nijhoff, 2010. BERGER, T.R. et alii. *The Arctic : choices for peace and security : proceedings of a public inquiry.* Seattle, U.S.A.: Gordon Soules Book Publishers, 1989.

du Canada, de la Russie et du Danemark sur les fondements du Droit international. Elle commente tout d'abord les jurisprudences de la CIJ, comme dans le cas "Île Hans (Tartapaluk)", le cas U.S. v. Escamilla, le cas du Plateau continental (Lybie/Tunisie). Elle analyse ensuite l'intérêt des États de définir si les routes maritimes dans l'Arctique sont comprises comme étant des eaux intérieures, comme le prétendent la Russie et le Canada afin d'exercer leur souveraineté absolue, ou en tant que mer territoriale et que soit reconnue la liberté de navigation internationale par les routes de l'Arctique, comme le défendent les États-Unis. Il est certain que, selon la compréhension de l'auteure, la navigation trans-arctique (Passages Nord-Ouest et Nord-Est) réduit les distances entre les principaux ports. Un autre point important étudié dans les détails est celui des limites les plateaux continentaux. Selon l'auteure, le processus de délimitation n'a pas encore été conclu et des études scientifiques et techniques sont encore en cours d'exécution afin de déterminer l'extension des plates-formes et définir où commence la zone internationale de fonds marins arctiques, patrimoine commun de l'humanité.

La seconde partie de cet ouvrage concerne la pertinence internationale de la coopération locale, régionale et internationale dans l'Arctique: l'analyse de l'évolution de la coopération entre les États riverains, depuis les propositions de coopération pour la paix de la région dans les années 1980 jusqu'aux coopérations pour la protection et le développement de l'environnement[4] et des peuples autochtones. Hélas, comme le souligne l'ouvrage, le débat sur un régime juridique de patrimoine commun de l'humanité du fond marin et du sous-sol de l'Arctique est resté dans l'oubli. On observe que, dans l'Arctique, la dynamique est différente de celle mise en place en Antarctique: ici, la préoccupation est davantage tournée vers l'exploitation des ressources marines que vers la préservation de la région pour des recherches scientifiques, comme c'est le cas là-bas. Toujours dans cette seconde partie de l'ouvrage, l'auteure aborde la formation, la structure et le fonctionnement du Conseil Arctique, organe politique qui se consacre à promouvoir la coopération, la coordination et l'interaction entre les États du groupe arctique. Attentive à toutes les questions ayant cette région pour objet, Claudia Cinelli passe au crible la politique arctique de l'Union européenne, analysant le rôle joué par le Parlement européen, ainsi que la Commission européenne, et observe une présence marginale des Nations-Unies dans le déroulement des questions de coopération mises en œuvre sur l'Arctique.

[4] Sur le régime de protection de l'environnement dans l'Arctique voir : KOIVUROVA, T. Environmental Impact Assessment in the Arctic: A Study of International Legal Norms, Ashgate Publishing, 2002. NOWLAN, Linda. Artic legal regime for environmental protection, IUCN, 2001.

Particulièrement réussi, cet ouvrage présente un état des lieux actualisé de l'application des normes internationales, de la coexistence et de la coopération entre les "États arctiques" permettant une régulation transversale des questions relatives à la région arctique face au Droit de la Mer. Sa lecture permet à tous ceux qui s'intéressent au Droit international, chercheurs, juristes ou étudiants, une meilleure compréhension des enjeux politiques et juridiques complexes autour des frontières territoriales, aériennes et maritimes de l'Arctique grâce à la recherche minutieuse et exhaustive réalisée par l'auteure.

ELLEN DESMET: INDIGENOUS RIGHTS ENTWINED WITH NATURE CONSERVATION

(Intersentia, Cambridge, 2011): xxxix; 723 pp
ISBN 978-9-40000-133-6

REVIEWED BY BENJAMIN J. RICHARDSON*

With the loss of biodiversity and diminishing abundance of wildlife, effective nature conservation law has never been more urgent. Species are becoming extinct at up to 1,000 times higher than in pre-industrial times,[1] leading scientists to warn that the planet is sliding into the sixth mass extinction.[2] Many of the remnant species-rich enclaves are in areas inhabited or used by Indigenous peoples. In addition to Indigenous legal traditions, in both domestic national law and international law a range of institutions, rules and policies have been adopted that ostensibly recognise the importance of biodiversity to Indigenous livelihoods and affirm Indigenous rights to harvest and manage such wildlife.[3] But many policy and legal issues remain unresolved in this realm, including the status and relevance of Indigenous people's traditional environmental knowledge and the scope for Indigenous involvement in protected area management.

Ellen Desmet's tome, *Indigenous Rights Entwined with Nature Conservation*, provides a timely and significant contribution to the relatively modest literature on this topic,[4] although there is a much larger body of scholarship on human rights and the environment.[5] Desmet, a postdoctoral research fellow at the Human Rights Centre of Ghent University in Belgium, critiques how

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[1] B. Normander, *State of the World 2012: Moving Toward Sustainable Prosperity* (The Worldwatch Institute, 2012), chapter 15.
[2] A.D. Barnosky, N. Matzke, S. Tomiya, G.O.U. Wogan, B. Swartz, T.B. Quental, C. Marshall, J.L. McGuire, E.L. Lindsey, K.C. Maguire, B. Mersey & E.A. Ferrer "Has the Earth's Sixth Mass Extinction Already Arrived?" *Nature* (2011) 471: 51.
[3] B.J. Richardson, "The Ties that Bind: Indigenous Peoples and Environmental Governance" in B.J. Richardson, S. Imai and K. McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009): 337-70.
[4] Some of the significant earlier works include L. Watters*, I*

Western nature conservation has been based on 'often flawed perceptions of nature and has frequently entailed a denial of the rights, needs and knowledge of indigenous peoples and local communities' (p. 46). Furthermore, she indicts legal instruments for protected areas and wildlife management that 'sometimes reflect erroneous or romanticized ideas with regard to the characteristics of [Indigenous] communities' (p. 42).

Over some 700 pages of weighty analysis, the author focuses on investigating two overarching questions that relate to current legal developments that touch on Indigenous peoples and nature conservation: 'What exactly does this policy shift mean in terms of international human rights law? And how has this new paradigm been translated and applied at the national and local level?' (p. 2). The "policy shift" in question is from a period when nature conservation law ignored indigenous peoples to an era where it increasingly purports to recognize and respect their rights and interests. Yet, using a combination of human rights analysis and legal anthropological research methods, Desmet finds that many nature conservation initiatives still do not meet the standards of international human rights laws, and at national and local levels there is often a significant discrepancy between legal principle and practice. Her findings are derived not only from a broad analysis of the global and local interface between indigenous rights and nature conservation, including the work of international bodies such as the World Bank and the International Union for the Conservation of Nature, but also an extensive case study based on ethnographic fieldwork of Peruvian nature conservation legislation and its application in the Güeppí Reserved Zone. The book does not offer a one-size-fits-all model of how to reconcile the ecological and human rights dimensions of nature conservation. Rather, the most appropriate legal and policy arrangements are said to depend heavily on each local context and time.

Desmet also draws attention to the need sometimes to accommodate the interests and rights of non-indigenous local communities that may live near protected areas and whose interests, as in her case study of the Güeppí Reserved Zone, can differ markedly from their indigenous neighbours. And within each indigenous community they may be a diversity of conflicting values and preferences regarding environmental protection and economic development. Furthermore, the author persuasively argues that environmental knowledge and wisdom is not exclusively held by Indigenous peoples, and that successful nature conservation may best be secured through decision-making processes that combine Western and local environmental knowledge. Desmet further demonstrates her nuanced treatment of the subject-matter by highlighting how

'not all indigenous practices are necessarily sustainable' owing to 'technical innovations brought along by globalization … combined with the needs created by the liberal market economy' (p. 63).

The book concludes with an assortment of practical recommendations for lawyers, including on drafting legal instruments and their implementation, which include advice about integration of women's perspectives in decision-making and elimination of anachronistic and paternalistic restrictions such as limiting community hunting to use of 'traditional methods' (p.649). Curiously missing from her analysis and recommendations however are the role of institutional structures. Desmet focuses on rights but says relatively little about the important place of institutional mechanisms such as those established for the joint management of national parks in Australia and the wildlife management regimes created under Canada's comprehensive land claims agreements.[6] Her recommendations also include insightful advice on comparative law research methods and the contribution of ethnographic fieldwork.

With its interdisciplinary style and multi-jurisdictional coverage, Desmet's book will undoubtedly become a landmark reference work for scholars, students and policy-makers around the world interested in the interconnections between nature conservation and the rights of Indigenous peoples. Her volume should also appeal to scholars of human rights law and legal pluralism. The case study of Peru, which occupies nearly half the book, brings into the English environmental and human rights literature an important perspective from Latin America that is often not visible. Readers, however, will likely be frustrated by the book's absence of an index, which is unfortunate given the size and scope of this volume. On the other hand, the tables of cases and legislative materials and the substantial bibliography helpfully direct readers towards further research into this topic. Overall, *Indigenous Rights Entwined with Nature Conservation* is an impressive work that exemplifies many of the hallmarks of legal scholarship at its best.

[6] See G. Nettheim, D. Craig, and G. Meyers, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, (Aboriginal Studies Press, Canberra, 2002).

DAVID R. BOYD: THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT

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REVIEWED BY LAURA STONE*

In my first year of law school, a professor asked: does law systematically advance social and environmental ends, or does it merely confirm them? He suggested that the most important steps towards gender and racial equality were taken not by innovative legal cases, but in the messy interactions of civil society, corporate actors and politics. The law comes limping along, belatedly concretizing societal developments. My class of 70 fresh-faced constitutional law students was stymied. Full of ambition and no small measure of self-importance, we were confronted with the notion that perhaps law (and by implication our budding careers as lawyers and legal academics) would not matter much after all.

David Boyd's book, *The Environmental Rights Revolution*, is a refreshingly hopeful tonic for those activist lawyers disheartened by their discipline. Boyd is a practicing environmental lawyer and a pragmatic academic; he is clearly interested in the role and possibilities of law to improve our environment. His conviction is that law, and legal form, does matter. His subject is the constitutional right to live in a healthy environment, and the book is a study of the potentially transformative impacts of such constitutional protections. While acknowledging the effects of a particular constitution will depend on the complex interaction of legal, social, cultural and economic factors, Boyd seeks to demonstrate that the constitutionalization of environmental protections will generally lead to benefits such as stronger domestic laws, increased public participation, and improved environmental outcomes.

This is an ambitious project. As Boyd notes, there is a limited empirical data on whether

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constitutional protections of the environment matter.[1] Seeking to address this gap in the literature, Boyd conducts a survey of the nearly 150 nations that have constitutional protections of the environment and, more significantly, attempts to assess their impacts on domestic environmental outcomes.

The book is organized into three parts: Part One provides background and context to the emergent right to a healthy environment. Part Two explains Boyd's empirical approach, and provides an assessment of the effects of the constitutional right to a healthy environment on environmental laws and jurisprudence. Part Three presents his lessons learned on the advantages and disadvantages of constitutionalizing the right to a healthy environment. Boyd's important conclusion is that these constitutional provisions are having significant positive effects, and that constitutionalization of a healthy environment consistently correlates with superior environmental performance.

The book begins by exploring three developments that have converged to spark the "environmental rights revolution". The first is the shift towards constitutional democracies in regions such as Eastern Europe, Asia and Africa as well as in countries that have a history of parliamentary democracy. As Boyd notes, more than half of the world's national constitutions have been written since the mid-1970s, and many others have been significantly amended. This shift coincides with the "rights revolution" - the proliferation of international human rights instruments and the prevalence of rights-based language and approaches in so many areas of contemporary social and intellectual life. These two developments coupled with an ever-increasing awareness of our global environmental crisis have resulted in the emergence of a right to live in a healthy environment.

Having thus set the stage, Boyd develops these themes with chapters on the broad theoretical and philosophical debates about rights, and the right to a healthy environment in international law. These two chapters are summaries of the existing scholarship in these areas. Readers with significant background in human rights law will not find anything new, but the chapters are clearly written and provide some useful context. Part One is completed by a presentation of the results of Boyd's survey of environmental protection provisions in national constitutions. The compilation of recent data is a useful resource, as it covers the 147 national constitutions that incorporate some form of environmental protection provisions, with explicit recognition in 92

[1] David R. Boyd, *The Environmental Rights Revolution* (Vancouver, UBC Press, 2012) at 45-46.

constitutions. Interestingly, no other human right has gained such rapid widespread recognition.

The heart of the book is contained in Part Two. Here Boyd sets out his framework and methodology for assessing effects. This is a challenging undertaking, as Boyd acknowledges, causality is difficulty to trace and isolate from the larger domestic context. The book uses two approaches: first, national environmental legislation is reviewed to determine if the constitutional protection has been incorporated. The assumption is that this demonstrates at least a *prima facie* indication of a discernible impact. The second approach is an analysis of lawsuits and judicial decisions related to the constitutional protection of a healthy environment. These two lenses are applied to 92 countries grouped by region. The next few chapters present this country-by-country analysis, and make for interesting reading for both environmentalists and constitutional law scholars. In addition to providing a brief overview of each region, there are little snapshots of successes and challenges in various countries. Part Three presents a global survey of lessons learned, reviewing the advantages and "theoretical disadvantages" of constitutionalizing the right to a healthy environment.

As a human rights lawyer, I was initially sceptical of Boyd's enthusiasm for the particular legal form of constitutionally entrenched rights. The mechanisms that drive social change are complex, and one can find equivalent human rights protections in countries that employ diverse legal forms. (Compare, for example, Canada with its constitutionally entrenched *Charter of Rights and Freedoms*, and Australia, where there is no national Bill of Rights). Boyd does acknowledge the difficulties inherent in tracing the causal links between law and environmental outcomes. However, his analysis of the data suggests that most countries with explicit constitutional protection of the right to live in a healthy environment do have stronger environmental laws, increased public participation, and a growing body of progressive court decisions. Interestingly, his research also suggests a correlation between constitutional protections of the environment and superior environmental records, such as smaller per capita ecological footprints and slower growth in greenhouse gas emissions. Overall, the book is an excellent resource and Boyd has done an admirable job of convincing at least this (initially sceptical) reader of the potential of constitutionally entrenched environmental rights.