

OTHER INTERNATIONAL DEVELOPMENTS

Elizabeth Haub Prize**2006 Prizes for Environmental Law**

The 2006 Elizabeth Haub Prize for exceptional achievements in the field of environmental law was awarded on 18 October 2007 in Brussels, Belgium by the Free University of Brussels and the International Council of Environmental Law with support of the Elizabeth Haub Foundation. In a departure from precedent, the Jury decided to grant the 2006 award to two eminent personalities, Professor Dinah Shelton and Judge Thomas A. Mensah, who have pushed the margins in their respective work.

Professor Edwin Zaccai, on behalf of the Rector of the Free University of Brussels, thanked the Jury and opened the meeting. He greeted all those attending and delivered the following address:

“Mesdames, Messieurs,

Le Prix Elizabeth Haub, institué en 1973, est décerné chaque année par l'Université Libre de Bruxelles et le Conseil international du droit de l'environnement, dont le siège est à Bonn. Le jury est présidé par le Rector de l'ULB, qui cette année vous prie instamment d'excuser son absence, étant empêché d'assister à la remise de l'édition 2006, qui a lieu aujourd'hui. Outre le fait de récompenser les réalisations ayant apporté une contribution positive à l'évolution du droit de l'environnement, le Prix souligne celles qui ont abouti à des initiatives pratiques ayant conduit à faire prévaloir ce droit. Les réalisations de niveau international sont particulièrement appréciées dans le cadre de cette distinction.

Depuis sa création, c'est-à-dire en 34 ans, le droit de l'environnement s'est développé de façon extraordinaire, et pourtant certaines caractéristiques de ce droit semblent se maintenir. J'en citerai trois. L'importance pratique des règles et décisions juridiques pour des avancées politiques et sociales clés tout au long des combats pour la protection de l'environnement, et ce dans tous les pays. Les défis d'innovation auxquels est soumis ce droit, du fait qu'il n'entre pas directement dans une série de catégories

usuelles: il doit concilier propriété privée et espaces publics; valeurs économiques et sociales d'une part, et critères issus des sciences naturelles de l'autre. Ou encore la possibilité de faire une place à la protection d'intérêts d'êtres qui ne vivront qu'au futur.

Ces dernières années l'intérêt sociopolitique et médiatique semble plus affirmé pour les questions, multiformes, de protection de l'environnement. Après le Prix Nobel de la Paix en 2004 à Mme Wanghari Maathai, voici il y a quelques jours que des personnes et institutions particulièrement engagées envers la reconnaissance des problèmes climatiques futurs sont elles aussi encouragées par cette institution prestigieuse. Il est difficile néanmoins de savoir dans quelle mesure cette attention médiatique se maintiendra sur ces sujets.



Dr Edwin Zaccai (ULB), Dinah Shelton and Thomas Mensah

Courtesy: ULB

En ce qui concerne spécifiquement le climat on peut peut-être deviner que si les changements prévus se manifestent, de nouveaux enjeux encore vont se poser pour le droit de l'environnement: définir des cadres juridiques pour des déplacements d'installations, d'activités, de propriétés, ou des modifications importantes de leurs capacités de fonctionnement du fait d'évènements naturels majeurs devenant permanents. Définir des partages de responsabilités en fonction des implications dans ces phénomènes. Tout ceci n'est certes pas nouveau dans le droit de l'envi-

ronnement, mais pourrait prendre en partie de nouvelles formes. Peut être des spécialisations inédites apparaîtront-elles à l'avenir, portant sur les «droits climatiques»?

Quoiqu'il en soit des priorités médiatiques, le rôle d'universitaires est évidemment de travailler sur la durée, comme l'ont fait les deux lauréats que nous avons l'honneur de récompenser aujourd'hui. Mais avant de venir à leur présentation, un mot encore pour nous réjouir de ce que notre université proposera dès la rentrée de l'année prochaine un module de droit de l'environnement et aménagement du territoire dans le cadre du nouveau Master en droit.

J'en viens maintenant à une brève introduction de nos deux invités.

Professor Dinah Shelton as a professor of international law and expert in the field of international environmental law and international human rights, has regularly given courses in these topics since the early 1980s, in American and other universities. She joined the George Washington University Law School in 2004. She has had very close contact with French-speaking universities in Europe, such as Paris and Strasbourg. This is best reflected in her close co-operation with Professor Alexandre Kiss, with whom Prof. Shelton published, among others, two major books *European Environmental Law* and *International Environmental Law*. Let us remember here that Professor Kiss was awarded the same Elizabeth Haub Prize in 1979. In the field of human rights Professor Shelton has also contributed to major reference works, such as the three-volume *Encyclopedia of Genocide and Crimes against Humanity*, that she edited in 2004.

As well as Prof. Shelton's intensive academic activities, she has collaborated with a number of associations and institutions. I will only mention two of them, from a long list. Within IUCN, Prof. Shelton chaired a sub-Committee on Human Rights and the Environment. Secondly, under the auspices of UNITAR, the United Nations Institute for Training and Research, our guest was instrumental in establishing an advanced summer course on environmental law for civil servants and junior scholars in Budapest, with the ambition to make it as prestigious as the summer courses in human rights, which are held in Strasbourg.

After studying at the University of Ghana in 1956, then at the University of London, and at Yale University, Dr Thomas Aboagye Mensah, was Dean of the Faculty of Law in the University of Ghana until 1968. Then he joined the International Maritime Organization (IMO), where he served for 22 years. In 1969 he was in this town, Brussels, as the Executive Secretary for the Brussels Conference on

Marine Pollution, before being involved in other major international conferences. Dr Mensah worked on the drafting and implementation of international agreements on marine environment protection, which in turn became a model for new treaties and standard-setting arrangements in other environmental fields. This includes for example a contribution to the preparation of the UN Stockholm Conference (1972), based on the IMO experience. Definitely a lover of the seas, in 1996, Dr Mensah joined the International Tribunal for the Law of the Sea, ITLOS, a UN organisation, based in Hamburg, where he served first as president until 1999, and then as judge until 2005. In this context, Judge Mensah has contributed to the advancement of international environmental law, by a very pro-



From left: Helga Haub, Dinah Shelton, W.E. Burhenne and Thomas Mensah

Courtesy: ULB

found understanding of several types of conflicts occurring in the marine environment.

Professor Shelton, Judge Mensah, these two short presentations give only a brief insight into your highly accomplished careers. The University is honoured to offer you today the Elizabeth Haub Prize.”

Following the address accepted with applause, Professor Zaccai called the Laureates and the Secretary of the Jury to read the award certificates. Dr Wolfgang E. Burhenne presented the gold medals, hung them around the Laureates' necks and in his capacity as Executive Governor of the International Council of Environmental Law made the following statement:

“Dear Mrs Shelton, Dear Dinah, Dear Mr Mensah, Dear Tom,

I am happy to see you both here this evening. Customarily, the Jury only awards one Prize for Environmental Law per year, but the exceptions being the rule, I think you are an ideal pairing.

Dinah, you are very distinguished in the academic world, while also pursuing a practical goal – fostering development of environmental law. Tom, you are very

distinguished in the institutional field and highly respected as a member of judicial fora. Your main focus has been achieving practical results in the development of environmental law.

The criteria for receiving the prize are as follows: Firstly, one must make a positive contribution to the evolution of environmental law; and secondly, one must have practical success in initiating this evolution. Both of you fit the criteria very well. And together you are a testimony to the variety of ways there is to achieve the same goals through different means.

Let me begin with our lady. I cannot do justice to her seemingly endless list of publications. I speculate that it is over 200. It includes not only writing on the environment or human rights, but also work on other subjects that I had never expected. Together, these achievements mark a formidable contribution to environmental law, both international and comparative.

Personally, I must acknowledge her invaluable contribution to the Draft International Covenant on Environment and Development. After formulating a text with a large group of experts, it was Dinah who wrote the extensive commentary for the first edition. Later, she was Rapporteur for the further development of the text and continued updating the commentary for the second and third editions.



The Laureates

Courtesy: ULB

Dinah was also instrumental in reminding the last IUCN General Assembly in Bangkok of the potential use of the Martens Clause. Not enough has been done for its implementation so far and we will still need her help to push the subject in the future. Let her later explain to us the potential of this Martens Clause.

An important feature in her life during the past few decades has been her professional partnership with Alex Kiss. It proved to be an exceptional combination of skills, talent and languages. Two milestone publications on international environmental law made Kiss/Shelton a “brand name”. Additionally, their more practical projects for instance helped to identify aspects of environmental law that were important for the judiciary throughout the world.

Alas, Alex is no longer here to participate in this ceremony. Nevertheless, he was in attendance at the Haub Laureates meeting in Murnau, when the prize to Dinah was announced. Albeit already very sick at the time, his joy at the Jury’s selection of his “other professional half” was significant.

I know how busy she is and how many people wish for a little bit of her time. Yet, through it all she has time for home and family. I was even told that her affectionate golden retriever participates in the inspiration for her environmental writings.

Lastly, I was very impressed by the warm congratulations she received from her University upon winning the Prize. Such personal achievements deserve to be recognised by those who are also benefactors of her hard work and devotion to the cause of environmental law.

Tom, we have known each other for quite a while. I still remember your early days at UNEP after Omar Ahmed; later in IMO as an active legal advisor concerned with the wide variety of fields in which the organisation is concerned; and finally as the person who built the International Tribunal for the Law of the Sea. The story goes that you did not expect to be elected as the Tribunal’s first President and that your wife encouraged you to accept the position. And that’s not all we love her for!

Your patience and capacity to hear the arguments of others has always been much admired – a particular quality for a judge, in national or international affairs. Perhaps you trained for this endurance during your school days in Ghana as you walked the ten kilometres to and from classes every day. This quality was especially important when you became Chairman of the UN Compensation Commission Environmental Claims Panel, established in the wake of the 1991 Gulf War. This was an enormously difficult task, to which you quietly and constructively contributed – together with Peter Sand, who is here today, and José Allen. This is, of course widely known, despite the confidentiality of the proceedings.

You are also well-known as a food enthusiast and very good cook. During a trip in a submarine in the Bay of Eckernförde, you not only showed your interest in the technical aspects, but also indulged in Labskaus – a famous mariner’s dish – which is not everyone’s favourite. Perhaps, this was an unforeseen occasion to further develop your palate and demonstrate your skill to combine many ingredients in negotiations.

I hoped you would be coming in traditional national dress and it reminds me of your deep attachment to your family and your love for the culture of your country. Speaking English, I am told, better than an English intellectual, you are at the crossing between two cultures. Therefore, it is no surprise that you have gladly shuttled between London and Ghana over the years.

I have already congratulated you before on your being awarded the German Commander's Cross of the Order of the Merit. It was given to you for your instrumental contribution in setting up the Tribunal of the Law of the Sea in Hamburg and enabling the city to assume a special role at the heart of the world's maritime regime. Nevertheless, I cannot refrain from noting that the German Federal President made his decision following the Jury's pronouncement to give you the Haub Prize!

Dinah and Tom, considering all of your great accomplishments, it could be supposed that you need a break. But, I will be the first to say that both of you should not think that you can rest on your laurels. We will need to bother you from time to time for advice!

Before we depart tonight, I will provide you both with a copy of the proceedings from the last Elizabeth Haub Laureates Symposium that took place in Murnau in 2006, thanks to the generosity of the Haub family, who established and nurtured this Prize for over three decades. This account of the Murnau meeting illustrates that today is not the only occasion when you will have to speak as Laureates of the Elizabeth Haub Prize. Further insights into your respective fields of expertise will be demanded in the future, as the Laureates meet again."

Following a round of applause, the Chair of the Jury, Professor Walter Hecq thanked Dr Burhenne for his com-

ments and asked Professor Dinah Shelton to take the podium. Dr Shelton delivered her paper (see below). After applause, Professor Hecq asked Judge Thomas A. Mensah to deliver his paper (see below). Following another round of applause, the Chair thanked both Laureates.

Before moving on, Dr Hecq announced that, once more, two Laureates had been chosen to receive the 2007 Prize, as the Jury was unable to decide on only one winner. A request was made to the sponsors of the Prize for their approval and they agreed to the exception to the rule. Again breaking with precedent, the Chair asked the sponsors if the names of the winners could be revealed to those in attendance. It was agreed and the 2007 winners of the Elizabeth Haub Prize for Environmental Law were announced as follows: David Freestone and Françoise Burhenne-Guilmin.

To conclude, Dr Helga Haub, Chair of the Elizabeth Haub Foundation, expressed her gratitude to Dr Shelton and Judge Mensah for their wonderful insights and vigour in contributing to the cause of environmental law. She thanked the Free University of Brussels for holding the ceremony and commented that she could not believe that the Prize had been around for so long.

The Chair of the Jury closed the meeting and invited all guests to a reception. (ATL)



Human Rights and the Environment: Problems and Possibilities

by Dinah Shelton*

In the space of one week in the second half of August, 2007, two non-governmental organisations, an intergovernmental organisation, a leading US law school, a major foundation, and the government of a small island developing state all telephoned my office to inquire about taking a rights-based approach to the problem of global climate change. While the linkages between human rights and environmental protection have been increasingly strengthened in the 35 years since the Stockholm Conference on the Human Environment,¹ the calls were evidence that the present concern with climate change has accelerated and broadened consideration of the utility of a rights-based approach to environmental protection.

To understand the possibilities and the problems of a rights-based approach, it is useful to compare it to other common legal techniques used to safeguard the biosphere nationally and internationally. If the comparisons demonstrate advantages to adding a rights-based approach, it will then be useful to review and assess the current state of the law prior to evaluating the prospects, limitations and problems that need to be addressed for this approach to achieve its full potential.

Legal Approaches to Environmental Protection

Various analytical constructs can be invoked in law in order to protect the natural world and ecological processes on which life depends: economic incentives and disincentives, regulatory measures, criminal law, and private liability regimes all form part of the framework of international and national environmental law. In general, existing legal measures can be grouped into four broad categories: traditional private tort and property law; public regulation; market mechanisms; and constitutional or human rights law.

Private law was probably the first approach used, and it resonates in the best-known international decision concerning environmental harm, the inter-state *Trail Smelter* arbitration. The arbitral panel, which found no international precedents on point, heavily relied on inter-state cases from within federal systems. Most of these judgments were, in turn, founded on concepts of nuisance, *i.e.*, tort liability imposed because, after examining and balancing the benefits and burdens accruing to the two parties, one party's use of its property or resources was deemed an unreasonable interference with the other party's property or sovereign rights. Private tort actions, and similar ones based on property concepts of trespass, were for

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centuries the primary avenue for mitigating or halting pollution in domestic legal systems.

In addition to private actions based in tort or property law, many countries have relied on the long-established property doctrine of public trust to protect those resources deemed to fall within the public domain.² The doctrine of public trust, traced to Roman law, holds that navigable waters, the sea, and the land along the seashore are common property open for use by all.³ Modern courts have adopted and applied the public trust doctrine, conferring trusteeship on state governments, with an initial focus on fishing rights, access to the shore, and navigable waters and the lands beneath them.⁴ After the publication of an influential law review article in 1970,⁵ courts in the United States began to expand the doctrine and apply it to other resources, including wildlife and public lands.⁶

The public trust doctrine emphasises the duties of the trustee rather than the individual rights of the beneficiaries, often imposing a constitutional obligation on the government to conserve the corpus of the trust and ensure common access to and use of it by present and future generations.⁷ It may be appropriate to ask whether the grant of a constitutional right to a specific environmental quality adds to the public trust guarantees, given that both doctrines impose duties on the public authorities in favour of the environment. The answer may be that public trust doctrine extends only to those natural resources that are viewed as part of the corpus of the trust and not to the environment as a whole.⁸ Public lands may be included, but not the regulation of activities on private property, unless they impact on public lands. A rights-based approach, in contrast, potentially extends to all activities public and private that harmfully impact environmental quality, because the focus is on the actual or potential harm caused, not the place where it occurs.

In the 1960s, environmental law rapidly shifted from a reliance on property and tort law to one of public regulation. General environmental protection statutes were enacted along with specific laws to ensure clean water, clean air, and the survival of endangered species. Christopher Schroeder has argued that the shift from private to public law has three advantages – “one procedural, one remedial and one substantive”.⁹ On a procedural level, environmental regulation ideally determines levels of environmental quality through a public process that involves collective choices, rather than through a series of private actions and reactions (negotiation or litigation). Of course, this process may be distorted by a lack of transparency or lobbying by powerful interests, but in theory it offers the benefits of a democratic and participatory process. In remedies, the emphasis is on prevention rather than liability (although successful nuisance actions often led to injunctive relief to prevent further harm). Finally, substantively, the regulatory system sets levels of environmental quality that the cost-benefit or balancing approach used in tort actions cannot normally achieve, because the latter tend to rely on corrective justice rather than deterrence and they may underestimate the collective losses caused by environmental harm.¹⁰

Beginning in the 1980s, with deregulation and privatisation, market-based approaches to changing human be-

haviour emerged as an alternative to command-and-control and other approaches.¹¹ In part, this move constituted a reaction to dense regulatory networks that were deemed inefficient and a drain on competitiveness and investment.¹² Public choice theorists argued that state regulation distorted the market because of the impact of powerful lobbying interests, resulting in considerable loss of economic efficiency.¹³ Many industrial countries reacted to perceptions of “overregulation” by reforms that shifted to market-based mechanisms which promised reduced transaction costs and improved operational incentives for business. However, economic instruments have often not entailed deregulation because they themselves require laws and institutions to oversee the operation of taxes, labelling information, tradeable permits, and charges. Purely market-based approaches such as voluntary agreements have proven less acceptable because they can be inequitable, ineffective, and unable to truly account for harm to public goods like air, water and other parts of the commons.¹⁴

The rights-based approach differs from all the preceding models in several key respects. First, it emphasises each individual’s right to a certain quality of environment, because that quality is linked to, indeed a prerequisite for, the enjoyment of a host of internationally and domestically guaranteed rights. Former UN Secretary-General Kofi Annan in his 1998 *Annual report on the work of the [UN] organisation* said the rights-based approach is beneficial because it “describes situations not simply in terms of human needs, or of development requirements, but in terms of society’s obligations to respond to the inalienable rights of individuals”. Environmental protection undoubtedly is a pre-condition to the enjoyment of some internationally guaranteed human rights, especially the rights to life, health, private and home life and cultural rights, and it also directly or indirectly impacts other rights as well.¹⁵ Environmental protection is thus an essential instrument in the effort to secure the effective enjoyment of human rights. In the past, various pre-conditions to the enjoyment of fundamental rights have been elevated to rights’ status themselves.

Conversely, the exercise of certain human rights is also essential to achieving environmental protection, which is sought not only for its relationship to human well-being, but because nature has intrinsic value. This approach is well illustrated by the 1992 Rio Declaration on Environment and Development. Its Principle 10 formulates a link between human rights and environmental protection largely in procedural terms, declaring that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, shall be guaranteed because “environmental issues are best handled with the participation of all concerned citizens, at the relevant level”.

These rights-based approaches were initially thought to have the defect of being non-justiciable, however courts are increasingly enforcing constitutional and international rights to environmental quality.¹⁶ Many courts have broadened standing to permit legal redress for violations of environmental rights, without requiring individualised injury to health or property, because one major motive for

guaranteeing environmental rights is to prevent injury from occurring.¹⁷

The Rights-based Approach in International and National Law

Most UN human rights treaties were drafted and adopted before the Stockholm Conference and therefore they contain few textual references to the environment.¹⁸ Later global treaties¹⁹ and declarations²⁰ do contain such references, while environmental agreements have incorporated procedural human rights deemed necessary or advantageous to achieving environmental protection,²¹ calling upon states to take specific measures (a) to ensure that the public is adequately informed about the risks posed to them by specific activities,²² (b) to give broad rights of participation in decision making and (c) to afford access to remedies for environmental harm.²³

At the regional level, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms does not mention the environment. Later regional treaties, beginning with the African Charter on Human and Peoples' Rights, include specific environmental rights.²⁴



In practice and jurisprudence, the former United Nations Human Rights Commission took several initiatives reflecting its awareness of the links between human rights and the environment. It appointed a Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,²⁵ whose mandate continues and includes investigating complaints about illicit trade.²⁶ In its resolutions on this matter, the Commission consistently recognised that such trade “constitute[s] a serious threat to the human rights to life, good health and a sound environment for everyone”.²⁷ The Commission also named a Special Rapporteur on the right to food whose mandate includes the issue of access to water.²⁸ The Commission specifically linked enjoyment of the right to food with sound environmental policies and noted that problems related to food shortages “can generate additional pressures upon the environment in ecologically fragile areas”. Several UN resolutions have affirmed the “right to drinking water supply and sanitation for every woman, man and child”.²⁹

International human rights treaty bodies have indicated through General Comments³⁰ and observations on state

reports that they view environmental protection as a prerequisite to the enjoyment of the internationally guaranteed rights they monitor. In addition, they have received and decided complaints from applicants who allege that environmental conditions affecting them have deteriorated to the point that their internationally guaranteed human rights have been violated. Most of the individual communications filed with the UN Human Rights Committee by those harmed by environmental conditions have invoked the minority rights guarantees of art. 27.³¹ Many of them have been dismissed on procedural grounds, without the Committee deciding the merits of the complaint. Those that have been decided have primarily addressed whether or not the affected community was able to participate effectively in the decision-making process.³²

The three regional human rights systems have examined complaints that environmental deterioration has affected guaranteed human rights to life,³³ health,³⁴ property, privacy, home and family life,³⁵ and the right to a remedy.³⁶ Despite the fact that the European Convention contains neither a right to health nor a right to environment, decisions of the former Commission and the Court have held that environmental harm attributable to state

action or inaction that has significant injurious effect on a person's home or private and family life constitutes a breach of Convention Article 8(1). The harm may be excused if it results from an authorised activity of economic benefit to the community in general, as long as there is no disproportionate burden on any particular individual; *i.e.*, the measures must have a legitimate aim, be lawfully enacted, and be proportional.³⁷ States enjoy a margin of appreciation in determining the legitimacy of the aim pursued,

but the Court will hold the state to the level of environmental protection it has chosen and generally finds a violation if the state fails to enforce its own laws and constitutional guarantees.³⁸

In the Western Hemisphere, the Inter-American Commission has devoted attention to environmental quality as it affects human rights.³⁹ In a report on human rights in Ecuador, the Commission responded to claims that oil exploitation activities were contaminating the water, air and soil, thereby jeopardising the lives and health of the people of the region.⁴⁰ The Commission noted that:

*[t]he realisation of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.*⁴¹

While each state has the right to exploit its natural resources, “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human

rights protected by the American Convention".⁴² The Commission concluded that

*[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being ... The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.*⁴³

In Africa, *SERAC v. Nigeria*⁴⁴ contains a full exposition of the implications of a rights-based approach to environmental protection. Like the situation reviewed by the Inter-American Commission in Ecuador, this communication alleged that oil production activities produced contamination causing environmental degradation and health problems. Among other violations that it found, the Commission held that Nigeria breached its obligations with respect to the right of peoples to a "general satisfactory environment favourable to their development" (Article 24).⁴⁵ The obligations were found to contain four separate but overlapping duties: to respect,⁴⁶ protect,⁴⁷ promote,⁴⁸ and fulfil⁴⁹ the guaranteed right, entailing "a combination of negative and positive duties".⁵⁰ The Commission concluded its analysis by emphasising that environmental rights, and economic and social rights are essential elements of human rights in Africa, that the Commission intends to apply them, and that "there is no right in the African Charter that cannot be made effective".⁵¹

Turning to the national level, some 130 constitutions in the world, including nearly all amended or written since 1970, specify state obligations to protect the environment or a right to a particular quality of environment. About half the constitutions take the rights-based approach and the other half proclaim state duties. In the United States, there is no mention of the environment in the federal constitution⁵² – adopted in 1789 – but some 60% of the state constitutions,⁵³ all revised or amended since 1959, include environmental protection among their provisions.⁵⁴ Some constitutions articulate public policy in requiring the government to act in favour of environmental protection; other constitutions establish funds for environmental programmes or call for the acquisition of natural resources as part of the public trust. A third group of half a dozen states recognises the right of citizens to a safe, clean or healthy environment.⁵⁵

Prospects and Problems

The four approaches examined herein are not mutually exclusive; in fact, they are all necessary to achieve the goals of human rights and environmental protection. A right to environment cannot be achieved without regulation, while the right to property entails the ability of property owners to protect against environmental nuisances and trespass. Market mechanisms can provide the incentives and disincentives to reduce pollution.

The advantages of rights-based approaches to environmental protection are several. First, because human rights are maximum claims on society, elevating a clean

environment to a right raises it above a mere policy choice. Rights are inherent attributes that must be respected in any well ordered society. The moral weight attached to a rights label exercises an important compliance pull on members of society.

Second, all legal systems establish a hierarchy of norms. Constitutional or human rights guarantees usually are at the apex and "trump" conflicting norms of lower value. Thus, to include respect for the environment as a constitutional right, or international human right, ensures that it should be given precedence over other legal norms that are not rights-based. This is important given the short-term costs that sometimes make it politically unpopular to adopt and implement measures of environmental protection. When governments and business entities are concerned with economic growth and compete for economic activities they may be reluctant to assume the costs involved in environmental protection, despite the long-term benefits this brings. Any "race to the bottom" can be partly countered by elevating environmental protection to a guaranteed right.⁵⁶ Such a brake or limitation on domestic political processes is potentially an important consequence of a right to environmental quality.

Third, the emphasis on rights of information, participation, and access to justice encourages an integration of democratic values and promotion of the rule of law in broad-based structures of governance. Thus, ensuring these rights is not only a means to produce decisions favourable to environmental protection, but can reinforce respect for human rights, the rule of law and democratic values more generally. Experience suggests that repressive regimes also tend to ignore environmental conditions, *i.e.*, "governments that show a disregard for their citizens' basic rights often protect the environment poorly as well"⁵⁷ and that citizen efforts to counter environmental harm tend to promote democratic governance as well as enhance compliance with environmental norms.

This link should not be surprising: the process by which rules emerge, how proposed rules become norms and norms become law, is highly important to the legitimacy of the law and legitimacy in turn affects compliance. To a large extent, legitimacy is a matter of participation: the governed must have and perceive that they have a voice in governance through representation, deliberation or some other form of action.

Fourth, a rights-based approach allows the use of international petition procedures to bring international pressure to bear when governments lack the will to prevent or halt severe pollution that threatens human health and well-being. In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation. Sometimes the problem results from a combination of governmental lack of capacity and lack of political will. Pollution may be caused by powerful enterprises whose business and investment are important to the state, or the state may have inadequate monitoring systems to ensure air or water quality. Even in these instances, petition procedures can help to identify problems and encourage their resolution, including by the provision of technical assistance. States may even welcome complaints if

the results give them leverage in the domestic political arena to overcome opposition to needed measures.

While the advantages of a rights-based approach are compelling, there are also legitimate concerns with taking a rights-based approach to environmental protection and recognised limits to what can be accomplished. First, relying on existing human rights guarantees is anthropocentric, because environmental harm must affect human well-being before human rights guarantees can be invoked. Unless there is a specific right to a healthy or ecologically balanced environment, international human rights procedures cannot be used on behalf of the environment or to prevent threats to other species or to ecological processes. This anthropocentric approach is reflected in the European Court's decision in the case of *Kyrtatos v. Greece*.⁵⁸

of change through laws and institutions we have created, but the environment as a whole should benefit.

A second limitation to a rights-based approach to environmental protection is found in the limited remedial mandates of human rights bodies. The European Court can award monetary damages, but has no power to order injunctive relief or mandate specific action. Thus, rights may be vindicated with money for the applicants to move away from the environmental harm, but it is not clear that the environmental conditions themselves are improved. *Fadayeva v. Russia*⁵⁹ is a case in point; the applicant was awarded compensation, but the polluting industrial facility remained in operation as before. A further limitation is that the decisions of the Inter-American Commission, the African Commission, and the UN bodies are recommen-



The representative of the Rector speaking

Courtesy: ULB

The applicants own property adjacent to a protected wetland, an important natural habitat for various protected species. The European Court found a violation of the fair hearing provisions article 6 § 1 because a local judgment blocking construction on the site had been ignored by local authorities. With respect to article 8, however, the Court found no violation, affirming that the crucial element for article 8 is actual harm to a person's private and family life, not deterioration of the environment *per se*. While this limits the types of cases that can be brought before human rights bodies, it must be recognised that any environmental improvement that is obtained through the case law should positively impact all components of the relevant ecosystem and not just humans; we may be the agent

of change through laws and institutions we have created, but the environment as a whole should benefit. While the duty of good faith cooperation with international treaty bodies suggests that states should comply, they may take the view that mere recommendations need not be strictly followed.

Third, many states like the United States typically envisage rights as restraints on governmental power, with duties of governmental abstention. Environmental rights, however, not only require state abstention from governmental activities that harm the environment, they require affirmative management of resources and regulations to ensure that private conduct – which is responsible for the large majority of environmental harm – is properly controlled. This means interfering with uses of private

property. Indeed, the major difference between constitutional provisions that are based on traditional doctrines of public trust and those that enshrine environmental rights seems to be the extent to which private-source environmental harm will be addressed. Including the right to environment in the constitution places it on an equal footing with rights to property and allows for a balancing of community and individual interests more than does public interest doctrine. It also may involve courts more frequently in undertaking the balance, shifting decision making from legislative and executive bodies.

Fourth, the issue of a right to an environment of a certain quality is complicated by both temporal and geographic elements absent from other human rights protections. While most human rights violations affect only specific and identifiable victims in the present, environmental degradation harms not only those currently living, but future generations of humanity as well. A right to environment thus implies significant, constant duties toward persons not yet born, the implications of which need careful consideration.

On the international level, another policy consequence that might arise from a rights-based approach to environmental protection could be significant. In climate change negotiations and in issues relating to international watercourses, debate often centres on equitable allocation of rights and responsibilities. Traditional international law is state-based and would divide rights and responsibilities according to sovereign equality, using historic responsibility for harm, wealth, capacity or other factors to determine the “common but differentiated responsibilities” of each party. A rights-based approach on the other hand might suggest a *per capita* allocation based on the equal rights and responsibilities of each individual, giving certain countries considerably more permissible greenhouse gas emissions and reducing the allowances of others.

The most politically charged aspect of a right to environment may be the potentially vast expansion of the territorial scope of state obligations. Presently, human rights instruments require each state to respect and ensure guaranteed rights “to all individuals within its territory and subject to its jurisdiction”. This geographic limitation reflects the reality that a state normally will have the power to protect or the possibility to violate human rights only of those within its territory and jurisdiction. Nature recognises no political boundaries, however. A state polluting its coastal waters or the atmosphere may cause significant harm to individuals thousands of miles away. States that permit or encourage GHG emissions or depletion of the tropical rain forest can contribute to global warming that threatens the entire biosphere. Much more consideration is due this issue. Fear of potentially vast liability makes many states reluctant to embrace environmental protection as a human right.

Other objections have less merit. It has been asserted that the right to environment cannot have a content specific enough to be justiciable because environmental conditions and regulations are inherently variable.⁶⁰ However, constitutional rights to a safe and healthy environment are increasingly being enforced by courts. In India, for exam-

ple, a series of judgments between 1996 and 2000 responded to health concerns caused by industrial pollution in Delhi.⁶¹ In some instances, the courts issued orders to cease operations.⁶² South African courts also have deemed the right to environment to be justiciable. In Argentina, the right is deemed a subjective right entitling any person to initiate an action for environmental protection.⁶³ Colombia also recognises the enforceability of the right to environment.⁶⁴ In Costa Rica, a court stated that the right to health and to the environment are necessary to ensure that the right to life is fully enjoyed.⁶⁵ Courts have found the necessary laws and means of interpretation to give effect to the guaranteed rights.

Ultimately, the definition of a right to environment must include substantive environmental standards to restrict harmful emissions and other environmental degradation. Although establishing standards requires regulation of environmental sectors based upon impact studies, such regulation is already done. Adoption of environmental standards demands research and debate involving public participation, but substantive minima are a necessary complement to the procedural rights leading to informed consent. Otherwise, a human rights approach to environmental protection would be ineffective in preventing serious environmental harm.

Establishing the content of a right through reference to independent and variable standards is currently used in human rights with regard to economic entitlements, and need not be a barrier to recognition of the right to a specific environmental quality. Rights to an adequate standard of living and to social security are sometimes defined in international accords such as the European Social Charter or Conventions and Recommendations of the International Labour Organization. States implement these often flexible obligations according to changing economic indicators, needs and resources. The human right can be seen then to provide a “framework”, a basic guarantee on which international, national and local laws and policies can be elaborated.

It is impossible for a human rights instrument to specify precisely what measures should be taken, *i.e.*, the products which should not be used or the chemical composition of air which must be maintained. These technical requirements are negotiated and regulated through international environmental norms and standards, giving content to the right to environment by reference to independent environmental findings and regulations capable of rapid amendment. The variability of implementation demands imposed by the right to environment in response to different threats over time and place does not undermine the concept of the right, but merely takes into consideration its dynamic character.

Human rights exist to promote and protect human well-being, to allow the full development of each person and the maximisation of the person’s goals and interests, individually and in community with others. This cannot occur without a safe environmental milieu, *i.e.*, air, water and soil. Pollution destroys life and health and thus not only destroys the environment, but infringes human rights as well. From the perspective of the law of state responsibil-

ity, there may be little difference between a state that arbitrarily executes persons and a state that knowingly allows drinking water to be poisoned by contaminants. In both instances, the state can be responsible for depriving individuals of their life in violation of human rights law; in the second case, international environmental law is also implicated. Implementing and enforcing the latter will also help protect the former, since human rights and environmental protection both ultimately seek to achieve the highest quality of sustainable life for humanity within the existing global ecosystem. The links between the two are thus inescapable and legitimate a rights-based approach to environmental protection.

Notes

1 At the Stockholm concluding session, the linkage was reflected in the preamble of the concluding Stockholm Declaration, wherein they proclaimed that

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.

Principle 1 of the Stockholm Declaration established a foundation for linking human rights and environmental protection in law, declaring that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”. In resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being.

2 One author asserts that “[e]ach of the successful provisions [in state constitutions] invokes some combination of the concepts undergirding the public trust doctrine: conservation, public access, and trusteeship”. Matthew Thor Kirsch, “Upholding the Public Trust in State Constitutions”, 46 *Duke L.J.* 1169–1210, 1173 (1997). Provisions that refer to “trust” include Haw. Const. art. XI; Pa. Const. art. I, § 27; Va. Const. art. XI, § 3. For provisions outlining public trust principles, see Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59.

3 Justinian, *Inst.* 2.1.1. (T. Sanders Trans. 1st Am. ed. 1876).

4 See, e.g., *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927). Fishing rights, free access to the shore, and navigation are traditional rights that are reaffirmed in several state constitutions as well as in jurisprudence. See, e.g., Cal. Const. art. I sec. 25; R.I. Const. art. I sec. 17; Ala. Const. art. 1 sec. 24.

5 Joseph Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention”, 68 *Mich. L.Rev.* 471 (1970). See also Bernard Cohen, “The Constitution, the Public Trust Doctrine, and the Environment”, 1970 *Utah L. Rev.* 388.

6 See, e.g., *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984).

7 Alaska's constitution, for example, guarantees the latter: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use”. Ala. Const. art. VIII, § 3. Rhode Island's Constitutional amendment, added in 1986, also focuses on public rights of access and use, coupled with a legislative mandate:

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

8 For various approaches to the reach of the public trust, see: Scott W. Reed, “The Public Trust Doctrine: Is it Amphibious?” 1 *J. Envtl L. & Litig.* 107, 107–08, 118 (1986); Charles F. Wilkinson, “The Public Trust Doctrine in Public Land Law”, 14 *U.C. Davis L. Rev.* 269, 316 (1980); Alison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory”, 15 *Harv. Envtl. L. Rev.* 393, 398–99 (1991).

9 Christopher H. Schroeder, “Lost in Translation: What Environmental Regulation Does that Tort Cannot Duplicate”, 41 *Washburn L.J.* 583 (2002).

10 *Id.*

11 See, generally, Klaus Bosselmann and Benjamin Richardson, eds, 1999, *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy*.

12 A.W. Reitze Jr., “Environmental Policy – It is time for a New Beginning”, 4 *Columbia J. Envtl L.* 111 (1989).

13 See H. Stretton, 1994, *Public Goods, Public Enterprise, Public Choice: Theoretical Foundations of the Contemporary Attack on Government*; P.M. Jackson and C.M. Price, 1994, *Privatisation and Deregulation: A Review of the Issue*.

14 See Eckard Reh binder, “States between Economic Deregulation and Environmental Responsibility”, in Bosselmann and Richardson, *supra* note 11 at 58–93.

15 One study has estimated that 40% of the world's deaths can be attributed to environmental factors. Pimental, D., “Ecology of Increasing Diseases: Population Growth and Environmental Degradation”, *Bioscience* (October 1998). In addition, some 1.2 billion people in developing countries lack clean and safe drinking water, with the result that waterborne infections account for 80% of all infectious diseases worldwide. In many areas industrial and household wastes are dumped directly into rivers and lakes. Air pollution adversely affects the health of 4 billion people. Some 2.5 billion kg of pesticides are used worldwide each year – a 50 fold increase over the past 50 years – resulting in about 3 million cases of human pesticide poisonings being reported annually.

16 The Montana Supreme Court indicated some of the parameters of its constitutional provision in the case *Cape-France Enterprises v. The Estate of Peed*, 305 Mont. 513, 29 P.3d 1011 (2001), describing the right to a clean and healthy environment as “a fundamental right that may be infringed only by demonstrating a compelling state interest. . . .” one that is, “at a minimum, some interest ‘of the highest order and . . . not otherwise served,’ or ‘the gravest abuse endangering [a] paramount [government] interest [.]’”. *Armstrong v. State* 1999 Mt. 261, 296 Mont. 361, 989 P. 2d 364, at fn. 6. See also the discussion later in this article.

17 See, e.g., *Montana Environmental Information Center v. Department of Environmental Quality*, 296 Mont. 207, 988 P. 2d 1236 (1999).

18 The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (16 Dec. 1966) speaks primarily of the working environment, guaranteeing the right to safe and healthy working conditions (art. 7 b) and the right of children and young persons to be free from work harmful to their health (art. 10 para. 3). The right to health (ICESCR, art. 12), however, goes further and expressly calls on states parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” and “the prevention, treatment and control of epidemic, endemic, occupational, and other diseases”.

19 The *Convention on the Rights of the Child* (New York, November 20, 1989) refers to aspects of environmental protection in respect to the child's right to health. Article 24 provides that States Parties shall take appropriate measures to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution”. (Art. 24(2)(c)). States parties also are to provide information and education on hygiene and environmental sanitation to all segments of society. (Art. 24(2)(e)). *ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (Geneva, June 27, 1989) contains numerous references to the lands, resources, and environment of indigenous peoples (e.g., arts. 2, 6, 7, 15). The Convention requires states parties to take special measures to safeguard the environment of indigenous peoples (art. 4). In particular, governments must provide for environmental impact studies of planned development activities and take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

20 The most recent UN human rights text, the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on September 12, 2007 with only four dissenting votes (USA, Canada, Australia and New Zealand) contains several provisions related to environmental rights. In addition to protection of indigenous lands (arts. 10, 25–27) and resources (arts. 23, 26) the declaration contains procedural rights of participation (art. 18) and prior informed consent (art. 19) as well as a specific article on the environment. Article 29 provides:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

21 See e.g., the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus, June 25, 1998); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes (Geneva, 18 Nov. 1991), art. 2(3)(a)(4); Convention on the Protection and Utilisation of Transboundary Rivers and Lakes (Helsinki, 17 Mar. 1992), art. 16;

the regional seas agreements; Convention on Civil Responsibility for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), arts. 13–16; and United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), 31 *I.L.M.* 849, art. 6. Non-binding texts include the European Charter on the Environment and Health, adopted 8 Dec. 1989, First Conference of Ministers of the Environment and Health of the Member States of the European Region of the World Health Organization (“every individual is entitled to information and consultation on the state of the environment”); Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific (Bangkok, 16 Oct. 1990), A/CONF.151/PC/38 (Para. 27 affirms) “the right of individuals and non-governmental organisations to be informed of environmental problems relevant to them, to have necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment”); Arab Declaration on Environment and Development and Future Perspectives (Cairo, Sept. 1991), A/46/632, cited in UN Doc. E/CN.4/Sub.2/1992/7, 20 (affirming the right to information about environmental issues).

22 See, e.g., the Helsinki Convention on the Transboundary Effects of Industrial Accidents, 31 *I.L.M.* 1330 (1992), which, recognising “the importance and urgency of preventing serious adverse effects of industrial accidents on human beings and the environment”, requires that states parties provide adequate information to the public and, whenever possible and appropriate, give them the opportunity to participate in relevant procedures and afford them access to justice (Art. 9). Annex VIII to the Convention details the information to be provided. Agreements requiring environmental impact assessments generally demand assessment of any effect caused by a proposed activity on the environment, specifically including human health and safety. See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 Feb. 1991), 30 *I.L.M.* 800, art. 1(viii). 23 See, e.g., Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999); the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification (14 Oct. 1994), which places human beings at the centre of concern to combat desertification (Pmb) and requires states parties to ensure that all decisions to combat desertification or to mitigate the effects of drought are taken with the participation of populations and local communities. (Art. 3). The Convention places an emphasis throughout on information and participation of local communities. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (September 10, 1998), EMuT, 998:26, Article 15(2), requires each state party to ensure, to the extent practicable that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention. The *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (Montreal, January 29, 2000), 39 *I.L.M.* 1027, Art. 23 concerns public awareness and participation, requiring the Parties to facilitate awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Access to information on imported LMOs should be ensured and the public consulted in the decision-making process regarding such organisms, with the results of such decisions made available to the public. Further, each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House created by the Convention.

24 The African Charter on Human and Peoples’ Rights, (Banjul, June 26, 1981), Article 24 provides that “All peoples shall have the right to a general satisfactory environment favourable to their development.” The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights also contains a right to environment, but did not add it to those rights subject to the individual complaint procedure. Article 11, entitled: “Right to a healthy environment” proclaims:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation and improvement of the environment.

The 2004 Revised Arab Charter on Human Rights, once it comes into force, will also guarantee a right to a safe and healthy environment. Its Article 38 specifies:

Every person has the right to an adequate standard of living for himself and his family, that ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

25 Resolution 2001/35, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, E/CN.4/RES/2001/35.

26 All of the reported cases involved harm to persons as a result of the transboundary movement of hazardous materials, nearly always in violation of national and international environmental law. See the Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of toxic and Dangerous

Products and Wastes on the Enjoyment of Human Rights, Addendum, Commission on Human Rights, E/CN.4/2001/55/Add.1 (21 Dec. 2000), documenting *inter alia* damage to tissues from arsenic poisoning, risks to health from the dumping of heavy metals, illnesses from pesticide use at banana plantations, deaths from petrochemical dumping, and kidney failure in children due to contaminated pharmaceuticals.

27 Commission on Human Rights, Resolutions 199/23 and 2000/72.

28 Resolution 2001/25, The right to food, E/CN.4/RES/2001/25 of 20 April 2001. The Commission’s Sub-Commission on Promotion and Protection of Human Rights also pressed the issue of the right to drinking water and sanitation, conducting a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realisation of the right to drinking water supply and sanitation. Resolution 2001/2, Promotion of the realisation of the right to drinking water and sanitation, E/CN.4/Sub.2/RES/2001/2 of 10 August 2001.

29 The Commission also adopted several resolutions linking human rights, health and the environment, such as Res. 2005/60 (20 April 2005), entitled *Human rights and the environment as part of sustainable development*. The resolution cited relevant UN conferences from Stockholm to Johannesburg and the goals and targets of the United Nations Millennium Declaration.

30 The UN Covenants on human rights, as well as other UN human rights treaties, authorise their treaty bodies to issue General Comments, which constitute authoritative legal interpretations of the rights and obligations contained in the treaty. In General Comments on the right to life and on the minority rights provision of the Covenant on Civil and Political Rights, the UN Human Rights Committee has indicated that state obligations to protect the right to life can include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics. See the General Comment on Article 6 of the Civil and Political Covenant, issued by the United Nations Human Rights Committee, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.3 (1997) 6-7 [hereinafter *Compilation*] and General Comment 23 paras. 7, 9 in *Compilation* at 41. The General Comments of the Committee on Economic, Social and Cultural Rights that refer to environmental rights include those on the Right to Adequate Food, General Comment 12, E/C.12/1999/5, the Right to Adequate Housing, General Comment 4 of 13 Dec. 1991, *Compilation*, HRI/GEN/1/Rev.3, 63, para. 5, and General Comment 14 “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (Article 12).” U.N. CESCR, General Comment 14, U.N. Doc. E/C.12/2000/4 (2000). Most recently and importantly, the Committee adopted its important General Comment No. 15 on the right to water at its November 2002 session. ICESCR, Arts. 11 and 12, E/C.12/2002/11, 20 January 2003. The Committee had previously recognised, in its General Comment No. 6, that Art. 11 implies a right to water.

31 The International Covenant on Civil and Political Rights permits complaints to be filed pursuant to the provisions of its Optional Protocol against States Parties to the Covenant and Protocol, provided domestic remedies have been exhausted and other conditions of admissibility are met. Communications concerning environmental conditions include: *Communication No. 67/1980, EHP v. Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20; *Communication No. 645/1995, Bordes and Temeharo v. France*, CCPR/C/57/D/645/1995, 30 July 1996; *Communication No. 511/1992, Ilmari Lansman et al. v. Finland*, Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996); *Kitok v. Sweden*, *Communication No. 197/1985, II Official Records of the Human Rights Committee 1987/88*, U.N. Doc. CCPR/7/Add.1, at 442; *Communication No. 431/1990, O.S. et al. v. Finland*, decision of 23 March 1994, and *Communication No. 671/1995, Jouni E. Lansmann et al. v. Finland*, decision of 30 October 1996.

32 *Communication No. 547/1992, Apirana Mahuika et al. v. New Zealand*, CCPR/C/70/D/547/1993, views issued November 16, 2000.

33 See *Oneryildiz v. Turkey* (GC), Nov. 30, 2004 (holding national authorities responsible for the deaths of the applicants’ close relatives and for the destruction of their property due to a methane explosion at a municipal waste dump known to be in danger of such an explosion). The Court determined that Article 2 includes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction. This obligation extends to any activity, whether public or not, “in which the right to life may be at stake, and *a fortiori* in the case of industrial activities which by their very nature are dangerous, such as the operation of waste-collection sites.” *Oneryildiz*, para. 71. The primary duty on the state is to put into place a legislative and administrative framework governing the licensing, setting up, operation, security and supervision of dangerous activities and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.

34 In the Inter-American case *Yanomami v. Brazil* it was alleged that the government violated the American Declaration of the Rights and Duties of Man by constructing a highway through Yanomani territory and authorising exploitation of the territory’s resources. These actions had generated the influx of non-indigenous persons who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomani rights to life, liberty and personal security guaranteed by Article 1 of

the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI). Case 7615 (Brazil), INTER-AM.CH.R., 1984–1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985).

35 *Lopez-Ostra v. Spain*, 303-C Eur.Ct.H.R. (1994); *Anna Maria Guerra and 39 others v. Italy*, 1998-1 ECHR, judgment of 19 Feb. 1998 and *Fadeyeva v. Russia*, App. NO. 55723/00, judgment of 9 June 2005.

36 In the Inter-American system, the landmark case is that of the *Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua*, decided by the Inter-American Court of Human Rights. The complaint, first filed at the Inter-American Commission on Human Rights, protested government-sponsored logging of timber on indigenous forest lands. The Court judgment of August 31, 2001 declared that the State violated the right to judicial protection (art. 25 of the American Convention) and the right to property (Article 21 of the Convention). It unanimously held that the State must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. Pending demarcation of the indigenous lands, the State must abstain from realising acts or allowing the realisation of acts by its agents or third parties that could affect the existence, value, use or enjoyment of those properties located in the Awas Tingni lands. The Court also awarded monetary reparations.

37 Many of the European environmental cases invoking the protection of privacy and home life involve noise pollution. See *Arrondelle v. United Kingdom*, (1980)19 DR 186; (1982) 26 DR 5; *Powell & Raynor v. United Kingdom*, 172 Eur.Ct. H.R. (1990); and *Hatton and Others v. The United Kingdom* (GC) 2003, 37 EHRR 28, applying a “fair balance” test and finding no violation due to aircraft noise from Heathrow Airport.

38 See, e.g., *Okuy and Others v. Turkey*, App. no. 36220/97, judgment of 12 July 2005, in which the applicants complained under Article 6 of the Convention that their right to a fair hearing had been breached on account of the administrative authorities’ failure to enforce the judicial orders to halt the operations of the Yatagan, Gökova (Kemerköy) and Yeniköy thermal-power plants in the Mugla province of south-west Turkey. Relying on Article 56 of the Turkish Constitution and section 3 (a) of the Environment Act, the applicants argued that it was their constitutional right to live in a healthy and balanced environment, and their duty to ensure the protection of the environment and to prevent environmental pollution. In examining this case, the European Court not only referred to the domestic law of Turkey, but also to Principle 10 of the 1992 Rio Declaration on Environment and Development and to Parliamentary Assembly Recommendation 1614 (2003) on Environment and Human Rights. Given the applicant’s constitutional rights and the international law in point, the Court was satisfied that the applicants could arguably claim that they were entitled under Turkish law to protection against damage to the environment caused by the power plants’ hazardous activities. It followed that there existed a genuine and serious “dispute” concerning a “civil right,” thus Article 6 applied and had been violated.

39 Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997) [hereinafter *Report on Ecuador*]; Inter-Am.C.H.R., *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29, rev. 1 (1997); Inter-Am. C.H.R., Third Report on the Situation in Paraguay, OEA/Ser.L/V/II.110, Doc. 52, 9 March 2001.

40 *Report on Ecuador*, p. v. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report.

41 *Report on Ecuador*, *id.* at 88.

42 *Id.* at 89.

43 *Id.* at 92, 93. According to the Commission, information that domestic law requires be submitted as part of environmental impact assessment procedures must be “readily accessible” to potentially affected individuals. Public participation is required by Article 23 of the American Convention, which provides that every citizen shall enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives.” Finally, the right of access to judicial remedies is called “the fundamental guarantor of rights at the national level”.

44 Decision regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1 (Afr. Comm’n Hum. & Peoples’ Rts. May 27, 2002), at <<http://www.umn.edu/humanrts/africa/comcases/allcases.html>> [hereinafter Decision].

45 The Commission also found violations of the right to non-discrimination (Article 2), the right to life (Article 4), the right to property (Article 14), the right to health (Article 16), the right to housing (implied in the duty to protect the family, Article 18(1)), the right to food (implicit in Articles 4, 16, and 22), and the right of peoples to freely dispose of their wealth and natural resources (Article 21).

46 Respect for rights entails refraining from interference with the “enjoyment of all fundamental rights”. With regard to socio-economic rights, in particular, respect means that “[t]he State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others,

including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.” *Id.*, para. 45.

47 Protection of rights requires legislation and provision of effective remedies to ensure that rights-holders are protected “against other subjects” and “political, economic, and social interferences”. *Id.* para. 46.

48 Promotion involves such actions as “promoting tolerance, raising awareness, and . . . building infrastructures”. *Id.*

49 Fulfilment of rights and freedoms requires the state to move its “machinery” toward the actual realisation of rights – for example, by directly providing, as necessary, “basic needs such as food or resources that can be used for food (direct food aid or social security)”. *Id.*, para. 47.

50 *Id.*, para. 44 (citing Asbjørn Eide, “Economic, Social and Cultural Rights as Human Rights”, in *Economic, Social and Cultural Rights: A Textbook* 21 (Asbjørn Eide, Catarina Krause and Allan Rosas, eds, 1995) [hereinafter *Economic, Social and Cultural Rights*]).

51 *Id.*, para. 68.

52 On efforts to imply environmental rights in the federal constitution, see Roberts, “The Right to a Decent Environment: Progress Along a Constitutional Avenue”, *Law and the Environment* 134, 165 (M. Baldwin and J. Page, Jr. eds); Roberts, “The Right to a Decent Environment, E=MC²: Environmental Equals Man Times Courts Redoubling Their Efforts”, 55 *Cornell L. Rev.* 674 (1970); Note, “Towards a Constitutionally Protected Environment”, 56 *Va. L. Rev.* 458 (1970).

53 See Ala. Const. art. VIII; Cal. Const. art. X, § 2; Fla. Const. art. II, § 7; Haw. Const. art. XI; Ill. Const. art. XI; La. Const. art. IX; Mass. Const. § 179; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; Ohio Const. art. II, § 36; Pa. Const. art. I, § 27; R.I. Const. art. 1, § 17; Tex. Const. art. XVI, § 59; Utah Const. art. XVIII; Va. Const. art. XI, § 1. For discussions of these provisions, see: A.E. Dick Howard, 1972, “State Constitutions and the Environment”, 58 *Va. L. Rev.* 193, 229; Roland M. Frye, Jr., 1975, “Environmental Provisions in State Constitutions”, 5 *Envl. L. Rep.* 50028–29; Stewart G. Pollock, “State Constitutions, Land Use, and Public Resources: The Gift Outright”, 1984 *Ann. Surv. Am. L.* 13, 28–29; Robert A. McLaren, 1990, Comment, “Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation”, 12 *U. Haw. L. Rev.* 123, 126–27.

54 For a listing of all environmental provisions in state constitutions, see Bret Adams *et al.*, 2002, “Environmental and Natural Resources Provisions in State Constitutions”, 22 *J. Land Resources & Envtl. L.* 73. See also Carole L. Gallagher, 1997, “*The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*”, 9 *Fordham Envtl. L.J.* 107.

55 The states are: Hawaii, Illinois, Massachusetts, Montana, Pennsylvania and Texas. Hawaii’s Constitution, Article XI, section 9, reads: “Each person has the right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings”.

56 See Kirsten Engel, 1997, “State Environmental Standard-Setting: Is there a ‘Race’ and is it ‘to the Bottom’?” 48 *Hastings L.J.* 271.

57 Hari M. Osofsky, 2005, “Learning from Environmental Justice: A New Model for International Environmental Rights”, 24 *Stan. Envtl. L.J.* 71, 88.

58 ECHR (2003), Judgment of 22 May 2003.

59 ECHR, judgment of 9 June 2005, Rep. Judgments & Decisions 2005-IV.

60 See, e.g., Günther Handl, “Human Rights and Protection of the Environment: A Mildly ‘Revisionist’ View”, in A.A. Cancado-Trindade, ed., 1992, *Human Rights and Environmental Protection*; Alan Boyle and Michael Anderson, eds, 1996, *Human Rights Approaches to Environmental Protection*.

61 As early as 1991, the Supreme Court interpreted the right to life guaranteed by article 21 of the Constitution to include the right to a wholesome environment. See *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480 (1991). In a subsequent case, the Court observed that the “right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life”. *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420, 1991 (1) SCC 598.

62 See, e.g., M.C. Mehta v. *Union of India & Others*, JT 1996, reprinted in 1 *The Environmental Activists’ Handbook* at 631.

63 *Kattan, Alberto and Others v. National Government*, Juzgado Nacional de la Instancia en lo Contencioso administrativo Federal. No. 2. Ruling of 10 May 1983, La Ley, 1983-D, 576; *Irazu Margarita v. Copetro S.A.*, Camara Civil y Comercial de la Plata, Ruling of 10 May 1993 (available at www.eldial.com) (“The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person”).

64 *Fundepublico v. Mayor of Bugalagrande and Others*, Juzgado Primero superior, Interlocutorio # 032, Tulua, 19 Dec. 1991 (“It should be recognised that a healthy environment is a *sine qua non* condition for life itself and that no right could be exercised in a deeply altered environment”).

65 *Presidente de la sociedad Marlene S.A. v. Municipalidad de Tibas*, Sala Constitucional de la corte Supreme de justicia. Decision No. 6918/94 of 25 Nov. 1994.



Soft Law: A Fresh Look at an Old Mechanism

by Thomas A. Mensah*

A common view among international law scholars and commentators is that there are two types of legal principles and norms in international law. The two types are designated as “hard law” and “soft law”, respectively, and the general consensus appears to be that these two types are essentially different from each other. The usual criterion used to distinguish “hard law” from “soft law” is whether a particular rule or principle is “legally binding”, that is to say, whether it constitutes a “legally binding undertaking”. Thus, according to Anthony Aust “soft law” is used to describe “international instruments that their makers recognise are not treaties, even if they employ imperative language such as ‘shall’ but have as their purpose the promulgation of ‘norms of general or universal application’”.¹ In the same vein, Antonio Cassese describes “soft law” as a “body of standards, commitments, joint statements or declarations of policy or intention, resolutions adopted by the United Nations General Assembly or other multilateral bodies”.² According to him “the standards, statements and other instruments at issue do not impose legally binding obligations”.³ And Philippe Sands refers to “so-called rules of soft law which are not binding *per se*”.⁴ The implication of these views and statements is that while “hard law” provisions establish legally binding rules and create legal obligations on individual States, “soft law” instruments are not legally binding and, as such, do not impose any obligations on any States.⁵

But while there appears to be general agreement in theory that there is a difference between “soft law” and “hard law”, there is no such consensus on what the essential distinguishing features of hard law rules and standards are, as opposed to soft law, and *vice versa*. A criterion that is often suggested is that “hard law” results from the conscious and willing acceptance by States that a particular rule or standard is legally binding on them whereas “soft law” consists merely of general principles that States agree to be desirable but which they do not consider as sufficient or appropriate as a basis of binding commitments towards one another. Thus Cassese writes that soft law is to be distinguished from “legally binding undertakings”. According to him, the distinction as to whether an instrument establishes a legally binding commitment depends on the intention of the authors of the particular document, and this intention may be inferred from the relevant circumstances.⁶ Others suggest different criteria for distinguishing soft law from hard law. For example, Dinah Shelton believes that “in many cases, hard law instruments can be distinguished from soft law by internal provisions and final clauses”. In the end, however, she concludes that “the characteristics of each (soft law and hard law) are increasingly difficult to identify”.⁷

It would appear, therefore, that an approach that postulates a strict separation between “soft law” and “hard law” is based on a concept of law that is overly formalistic and perhaps even simplistic. For, regardless of the form in which soft law instruments may be cast and irrespective of the intentions or expectations of the parties formulating them, many principles, rules and standards contained in “soft law” instruments do in fact have legal consequences that go beyond what would be expected from mere statements of aspirations. In fact, the concept of “soft law” itself is far from monolithic.⁸ Just as in municipal law there is usually a variety as well as a hierarchy of legal norms (with some rules very general in scope while others are more specific and direct) so it is also with the principles and rules of international law: there are gradations in the content and scope of different principles and rules, with significant variations in the effects and impacts that they variously have on the actions and expectations of States and other relevant actors. In the same way, there are considerable differences in the legal effects of various international principles and rules that are generally considered to be of the nature of “soft law”. While some of these may be no more than statements of agreed common positions and policies, with no suggestion or expectation that they will create any legal commitments, some others may in fact be statements of what the parties involved consider to be the law that is or should be applicable in particular fields.⁹ And, although some soft law principles and rules are consciously and deliberately formulated as mere statements of shared aspirations, many of them are intended (and recognised) by the States concerned as evidence of law that should apply between them. In other words, soft law instruments may not merely point States to the direction of hard law, but may actually be designed to crystallise agreed principles and standards into applicable law.¹⁰ Where this is the case, the soft law principles and instruments will in time produce legally binding rules in a way that is not different from other forms of international law making.

To sum up, the difference between “hard law” and “soft law” may not be as definitive and clear-cut as is sometimes claimed. In the words of Professor Alan Boyle, “the non-binding force of soft law can be overstated”.¹¹ Similarly the Secretary General of the United Nations has noted that “the boundaries of positive law (between ‘law’ and ‘pre law’ or ‘soft law’) cannot always be clearly defined”.¹² Along the same lines, Vaughan Lowe has observed that “the distinction between ‘hard law’ and ‘soft law’ is not great”. He continues: “In terms of the strength of the expectation of compliance, there is no necessary distinction between the categories of ‘hard’ and ‘soft’ law, though there are, of course, great differences in relation to the various forms within each category. . . . The real differences

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between hard and soft law lie in the process by which the rule is articulated and the consequences of its breach. The essential natures of normativity of hard and soft law are not different".¹³ Thus, although resolutions of the General Assembly are very often cited as examples *par excellence* of soft law instruments, some of them may, nevertheless, have significant legal consequences and, indeed, normative value. As the International Court of Justice (ICJ) noted in its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, a resolution of the General Assembly may in fact constitute "evidence important for establishing the existence of a rule or the emergence of an *opinio juris*, or it may show the gradual evolution of the *opinio juris* required for the establishment of a new rule".¹⁴ In the same way, provisions of an international treaty that has not entered into force may be considered to represent "soft law" in the sense that while they may not have full binding force, they nevertheless express the agreed views and policies of the States which participated in formulating the provisions.¹⁵ This was one of the reasons underlying the decision of the International Court of Justice, in the *Tunisia/Libya Continental Shelf* case, to base itself on a draft provision in the Convention of the Law of the Sea before the Convention had been adopted and well before it came into force. In its decision the Court stated that it "could not ignore any provision of the draft convention if it came to the conclusion that the content of such a provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law".¹⁶

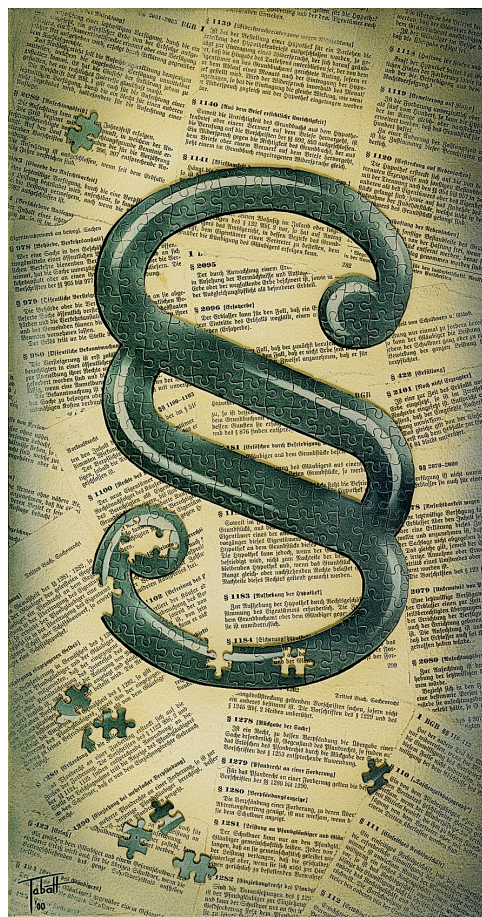
It would appear, therefore, that it is more helpful and instructive to look at soft law not so much by reference to how far it is similar to or different from hard law, but rather in terms of the role that soft law principles and rules actually play in the regulation of conduct and attitudes in any particular field and, even more importantly, how particular soft law principles and rules may be used to regulate or influence the operations of States and other actors in ways that contribute to the protection of the environment and sustainable development.

It is generally recognised that "soft law" is particularly useful in the field of environmental protection.¹⁷ With the possible exception of human rights, no other area of the law has so extensively produced and utilised soft law

principles and rules as international environmental law. There are many reasons why States are willing to develop and rely on soft law principles and rules in their collective and individual efforts to protect and preserve the environment and environmental resources. One reason given for the extensive use by States of soft law for environmental protection is that much of the law in this area cannot be embodied in treaty form because "the subject matter is not yet fully developed or there is a lack of consensus on the content of the rules or principles".¹⁸ But this is not necessarily so in all cases. In some situations where soft law principles and rules are utilised in place of treaties, the subject matter and the general outlines and contents of the principles and rules may in fact be fully developed,

and the decision to adopt a soft law instrument may be dictated solely by the desire to adopt an instrument without delay. Indeed, in some cases, soft law instruments have been deliberately used as a first stage in the process of establishing of a treaty regime. A good example of this was the proclamation of the principle that the seabed and its resources are "the common heritage of mankind". That principle was first embodied in a resolution of the General Assembly in 1970.¹⁹ But the intention of the resolution was to ensure that the principle would be recognised and accepted as applicable law even before it could be incorporated into the 1982 Convention on the Law of the Sea (Article 136), and prior to the entry into force of the Convention. Thus, even as a "soft law" principle, it came to be recognised as a binding rule of the international law of the sea, before it formally acquired the status of treaty law. Other examples of soft law that have metamorphosed into binding treaty law are the UNEP Guidelines on Environmental Impact Assessment which were subsequently incorporated into the 1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context and the UNEP (Montreal) Guidelines on Land-based Sources of Marine Pollution which provided models for regional Agreements on the subject. Another example was the 1983 FAO International Undertaking on Plant Genetic Resources which was transformed into the 2001 Treaty on Plant Genetic Resources for Food and Agriculture.

Perhaps a more convincing reason why "soft law" is used so extensively in the field of environmental protection is that soft law instruments enable States to establish



Pars pro toto

Courtesy: Uwe Tabatt

rules and standards of general application while permitting individual States considerable scope in applying the rules and standards to their particular circumstances and capabilities. In particular, soft law statements and rules help to articulate emerging trends in areas that are recognised to be of common concern to States and other actors in the international community. In that way, they make it possible for States and relevant actors to promulgate general principles and norms in situations where, due to political, scientific or economic considerations, it is not possible for them to agree on the specific standards to be used to implement those principles and norms. And because there is no special form in which soft law rules and standards must be cast, and no fixed procedures by which they must be established, States are able to develop soft law instruments and principles much more flexibly, without being obliged to follow any special procedures or to meet any particular formal requirements. In this way soft law principles and norms have been formulated and promulgated in a wide variety of forms, and they affect and influence the conduct of States or other actors in many different ways. Some soft law instruments state the common positions of States or articulate policies and approaches to the environment that the States involved agree should be adopted by them, either collectively or individually at their respective levels. And although the participating States subscribe to these instruments in some form, this is done on the understanding that no specific action is expected from any of them.²⁰ On the other hand, there are situations in which the soft law instruments articulate agreed standards or guidelines that the States concerned are expected (sometimes even required) to implement in order to meet their national or international obligations with regard to the management of the environment. In such cases, there may be the implication that failure to comply with such standards or guidelines would, at best, constitute undesirable conduct and, at worst, be a breach of duty.²¹ For example, it has been plausibly argued that the requirement for environmental impact assessment, as outlined in Principle 17 of UNCED, has now acquired the status of a generally recognised principle in the law of environmental protection, and that a State which fails to apply this principle to activities within its jurisdiction may be falling short of what is expected of it.²² This view appears to be supported by the decision of the International Law Commission (ILC) to include a provision to the same effect in its draft Articles on the Prevention of Transboundary Harm from Hazardous Activities. Article 7 of the ILC draft Articles stipulates that “any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental assessment”. In its commentary on the draft Articles, the ILC notes the prevalence of provisions on environmental impact assessment in many international treaties and national legislation and endorses its use as an appropriate means for determining whether a particular activity is one which has the potential to cause harm. It may thus be argued that if a State or other entity fails to undertake the necessary environmental impact as-

essment in respect of such an activity, the State or entity might find it difficult to defend itself against a claim for damage if the activity does in fact result in damage to another State or entity.

But, regardless of the form that they may take, and however different they may be from treaty provisions, it is undeniable that soft law principles and rules have played a catalytic and constructive role in the field of environmental protection at the national, regional and global levels; and it is not at all fanciful to believe and hope that they will continue to do so in the future. This will be so in all areas of environment law, including the formulation of rules and standards, in the implementation of international agreements and programmes and in the enforcement of particular regulations and legal regimes.²³

As noted earlier, soft law instruments (declarations and statements *etc.*) are often considered to be useful and indeed necessary for the promotion and development of binding international agreements. In the first place, guidelines and standards that are drafted as non-binding instruments may, nevertheless, acquire considerable strength in actual practice in structuring international conduct. Thus, many principles and rules that were originally formulated as “soft law” declarations have provided theoretical, and sometimes even substantive, underpinnings for international treaty instruments. Among these are the “principle of preventive action”, the “precautionary principle” (or approach), the “principle of sustainable development” and the “principle of common but differentiated responsibilities”.²⁴ More specifically, a number of important instruments developed under the auspices of UNEP have served as the catalyst, or provided building blocks, for many international legally binding agreements, with respect to both the contents and the actual wording of the agreements. In addition to the 1972 Stockholm Declaration, and the 1992 Rio UNCED Declaration, mention may be made of the 1978 UNEP draft Principles on Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States and the 1982 World Charter for Nature. Similarly, the Guidelines issued by the International Atomic Energy Agency (IAEA) in the wake of the Chernobyl incident eventually formed the basis for the Convention on the Early Notification of a Nuclear Incident.²⁵

Another important function of soft law principles and rules is that they provide useful and necessary guidelines for the practical implementation of legally binding treaty instruments. In many cases “soft law” instruments are clearly considered by their framers to be declaratory of a law that is necessary for the implementation of legal principles already agreed by the relevant States in an international treaty or other agreement. This is particularly so in cases where, for one reason or another, the obligations and commitments set out in the treaties are of such a general nature that they require further and more specific parameters for their practical implementation and enforcement. Thus a decision or statement, described as an “agreed interpretation” of a treaty provision, may be used to clarify or amplify the meaning or scope of the provision. This

procedure has been extensively used in many international organisations, including the IAEA, the Food and Agriculture Organization (FAO), the International Maritime Organization (IMO) and the World Health Organization (WHO); and no serious objections have so far been raised against the practice. As Shelton notes, “soft law instruments often serve to allow treaty parties to authoritatively resolve ambiguities in a binding text or fill in gaps”.²⁶

In addition to the use of “agreed interpretations” of treaty provisions by meetings of States Parties or designated bodies, there are cases where special soft law instruments are used for the practical implementation of treaty provisions. These soft law instruments are usually set out as Guidelines or Codes or Recommended Practices. The use of such soft law instruments is a common practice among “standard setting” international organisations such as the IAEA, the FAO, the IMO and the WHO. Thus, the IAEA adopts extensive and detailed Guidelines for the implementation of the Nuclear Safety Convention. In addition the Agency extensively uses non-binding standards in many areas. Indeed, it has been rightly noted that soft law standards of the IAEA “have contributed to the creation of a more convincing framework for the international regulation of nuclear risks”.²⁷ As far as the implementation of the Nuclear Safety Convention is concerned, it is worth noting that the need for implementing Guidelines was recognised in the Convention itself. The Preamble states that internationally formulated guidelines “can provide guidance on contemporary means to achieving a high level of safety”. Similar reliance on “soft law” Guidelines and Codes are used in IMO for the implementation of the 1973/78 MARPOL Convention. Soft law is also used extensively by the FAO for the management and control of fisheries activities.²⁸

In other situations, a soft law statement or instrument may be adopted with the acknowledged intention to establish an obligation on some States or a group of States. An example of such an instrument was the resolution of the Consultative Meeting of the London Dumping Convention which imposed a moratorium on all radioactive waste dumping at sea.²⁹ The moratorium was adopted by a resolution of the Consultative Meeting, and all States Parties to the 1972 Convention were expected to abide by it, and they in fact respected the moratorium, although, strictly speaking, the resolution did not have binding effect. The prohibition only acquired binding status when it was formally incorporated into the Convention by means of the amendment to Annex 1 that was adopted by the Consultative Meeting in November 1993.³⁰

Soft law instruments are also useful in providing ready-made rules and standards which can be incorporated in a treaty regime by reference. In fact some international conventions allow for “soft law” rules that have been developed in other contexts to be “transformed into binding law” by means of simple reference. Examples of this can be found in Part XII of the 1982 Convention on the Law of the Sea dealing with the prevention of pollution of the marine environment. Many of the provisions in that part of the Convention require or permit States to apply and enforce laws, regulations, procedures and recommended

practices established through “competent” or “appropriate” international organisations.³¹ Other provisions stipulate that laws and regulations of States must take into account “internationally agreed rules, standards and recommended practices and procedures”.³² In some cases such references may be to rules and regulations that are of a binding nature on their own. However, in some cases the “regulations, procedures and recommended practices” referred to may in fact be “rules and standards of a recommendatory nature” that have been elaborated within an international organisation or by a diplomatic conference. Where this is the case, it may legitimately be asserted that non-binding regulations and standards that were adopted outside the Convention have been “precipitously transformed” into binding law as a result of the references in the Convention’s provisions.³³ Examples of the rules and standards so transformed are those referred to in article 211 of the Convention which states that national laws and regulations shall conform to “global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment established through competent international organizations or general diplomatic conference”. Another is article 60 of the Convention which provides that, when establishing safety zones around artificial installations in their exclusive economic zones or when making provision for the removal of abandoned or disused installations, coastal states shall have regard to “generally accepted international standards established by the competent international organization to ensure safety of navigation”. By virtue of such reference, soft law rules and standards developed outside the Convention acquire the status of legally binding rules, even though they were not framed originally to have that status. Accordingly, it has been argued that “through the respective provisions, the parties to the Law of the Sea Convention would commit themselves to rules and standards by which they would not otherwise be bound or which, at the time of ratification of the Convention, had not yet even come into force”.³⁴ Some have questioned the propriety of imposing rules and standards on States in this way, *i.e.* by the “back-door” as it were. In particular it has been contended that such a procedure offends against the rule of international treaty law which states that provisions of international agreements should only apply to States which have consented to be bound by such provisions.³⁵ Against this, it may be noted that a State which consents to be bound by the Convention does so in full knowledge that it is also accepting to be bound by the rules and standards that are incorporated in the Convention by reference. And it needs to be pointed out that many of the Convention’s provisions on the subject are so generally worded that, without such application by reference, the obligations arising from them would have little or no practical effect.³⁶

It is also worth noting that soft law instruments can and often do operate as free-standing rules and standards that are accepted to be applicable to operations and activities without necessarily having to derive their binding effect from supporting treaty instruments. This is true of a large body of rules, regulations and recommended practices

established in international standard-setting organisations and agencies. These include the numerous soft law codes and guidelines adopted by the IAEA on nuclear installations, the *Codex Alimentarius* of the FAO and WHO, the radiological protection standards established by the International Commission on Radiation and the recommendations and standards established by IMO to promote ship safety. Although many of these rules and standards are adopted to implement treaty-based obligations, some of them do not derive their legal force from specific treaties as such, except perhaps from the constituent instruments of the organisations in which the standards are developed.³⁷ In many cases soft law standards, as for example standards set by the relevant professions and industries, are recognised as representing the “consensus of expert opinion” and, as such, are accepted without any questions being asked about their binding force. Indeed, in some cases, such as the International Code of Signals adopted by the IMO, they may be the only technically credible international standards that are available on the subject and no State or other actor would imagine operating without reference to them.³⁸

Another way in which soft law principles and rules contribute to the protection and preservation of the environment is through their use in the judicial process. In a variety of ways, soft law principles provide incentives and tools to courts and tribunals in interpreting and applying international treaties, as well as national laws and constitutional instruments. In recent years it has increasingly been recognised that the judiciary has a significant, indeed crucial, role in the development and consolidation of environmental law. And, as the potential impacts of human activities on human health and on ecosystems as a whole have become more and more apparent, it has become equally clear that the judiciary can only hope to respond effectively to the new situation if it is willing and able to adapt, and sometimes even re-fashion, its old tools to meet the new and vastly changed circumstances. In response, many judges have sought and derived considerable aid and assistance from soft law rules and principles in their efforts to extend the frontiers of existing law to areas that need to be regulated and protected but which may not be directly or sufficiently addressed by the existing legal principles or procedures. In doing so, judges in national and international courts and tribunals have been influenced by the fact that, in many cases, there are no authoritative law makers at the international level and also by the general tardiness or inertia of many national legislatures to respond effectively to the emerging threats to the environment. For the most part, this trend has been more welcomed than resisted. It appears that, although there is disagreement with regard to the binding or non-binding status of certain soft law principles such as “sustainable development” or the “precautionary principle”, there is not the same doubt about the role that such principles can legitimately play in the judicial process. Thus, while it is generally acknowledged that soft law principles or rules may not, by themselves, impose obligations on States to conduct themselves in specific ways, it seems to be accepted that some at least of these principles can

properly be utilised as tools in the judicial process *i.e.*, as tools or guides for decision making.³⁹ In that sense, it has been suggested that a soft law rule such as “sustainable development” or the “precautionary principle” or “the polluter pays principle” can “properly claim a normative status as an element of the process of judicial reasoning”.⁴⁰ This approach has in fact been adopted by many courts and tribunals, both at the international and national levels. For example, the International Court of Justice adopted such an approach in respect of the principle of “sustainable development” in the *Gabcikovo-Nagymaros* case.⁴¹ And a similar approach was adopted by the International Tribunal for the Law of the Sea in the *Southern Bluefin Tuna* case, with respect to the “precautionary principle” or “precautionary approach” even if it did not refer to it directly but instead appealed to “prudence and caution”.⁴² At the national level, many courts have been assisted and emboldened by international soft law rules and principles in extending the frontiers of the law to areas that had previously been considered to be out of bounds to the courts. Thus, the Supreme Court of the Philippines used, at least in part, the “soft law” principles of “inter-generational equity” and “sustainable development” in granting the suit of minors who sought protection in their names and in the names of future generations.⁴³ Similar reliance on soft law principles and rules have become an accepted part of judicial practice in many jurisdictions, including India, New Zealand, South Africa and England, to name but a few.⁴⁴ The indications are that this trend will continue and expand. This can only be for the benefit of environmental protection.

Finally, soft law contributes to environmental protection by acting as a model and justification for national laws and regulations. In the first place, when used in national law, soft law principles can be made more precise and will hence be more easily and more effectively implemented. Secondly, when a soft law rule or principle is incorporated into national legislation there is much less likelihood that the legitimacy or binding effect of such legislation can be seriously challenged, even at the international level. While the binding effect of a soft law principle or rule may plausibly be questioned when it is pleaded by one State against another, this cannot be done to the same extent (or at all) when the same rule or principle is being applied as part of the national law of a State. For whatever may be the intention of States in agreeing to a rule of soft law, and whatever hesitations they may have about committing themselves to particular patterns of behaviour, it can justifiably be asserted that States which participate in the adoption of a soft law instrument agree at least that the contents of the instrument represent a statement of policies which they accept as reasonable and legitimate.⁴⁵ Hence, when one of the States decides to embody the principle or policy in its national legislation, the other States which have given their political or moral *imprimatur* to the principle cannot be heard to object to such legislation. And this will be so whether the soft law rule or principle is contained in a Declaration, or in a Code of Practice or even in the text of an international treaty instrument that has not yet entered into force. In the first

place, a State which embodies an agreed soft law instrument in national law can legitimately claim to be advancing the common policy or objective which the States proclaimed when they adopted the instrument. Even more importantly, such a State cannot be accused of acting unreasonably or unilaterally if it decides to implement a policy or standard that has been expressly and publicly declared to be desirable. Thus, for example, a provision in a national legislation of a State which imposes requirements for the conduct of environmental impact assessments in respect of activities within the jurisdiction or control of that State cannot easily be challenged by another State or its nationals on the grounds that such a requirement im-

(OPA 1990) by the United States in 1990. Although there were objections from some States and commentators who considered that the legislation was an unhelpful unilateral action, subsequent developments appear to have vindicated the measures taken, and the international community and international law followed the lead of the United States in due course.

My conclusion, therefore, is that we need to look at the concept of soft law in a much more positive and constructive light than we seem to have done hitherto. I am not suggesting that we should state or even imply that there is no difference between “soft law” and “hard law”. In upholding the usefulness of soft law we do not necessar-

ily have to assert or claim that soft law has the same status or effect as hard law. It would be plainly unjustified and disingenuous to do so. On the other hand, it is neither correct nor helpful to give the impression that soft law is an imposter or even a Cinderella in the international legal system. For one thing, it is not always easy to differentiate soft law from hard law. As Boyle very pertinently and usefully puts it, “soft law is manifestly a multi-faceted concept whose relationship to treaties, custom, and general principles of law is both subtle and diverse. At its simplest, soft law facilitates the progressive evolution of customary international law. It presents alternatives to law making by treaties in certain cir-

cumstances, at other times it complements treaties, while also providing different ways of understanding the legal effects of different kinds of treaties”.⁴⁶ Moreover, whatever may be the difference between hard law and soft law, it is hardly of the same order as the difference between, on the one hand, what can be accepted as having legal consequences and effects and, on the other hand, what can quite easily and generally be agreed to be mere statements of desirable conduct. At all events, it is almost trite at this stage to state that soft law has a legitimate and positive role, especially in the field of environmental protection. For that reason, it is both necessary and desirable for those who participate in the establishment and implementation of environmental law to use all appropriate means and procedures to support the development and increased use of soft law instruments and principles. This can best be done, firstly, by encouraging the adoption of soft law instruments and principles in the areas where, for one reason or another, it is not yet possible or feasible to establish hard



Soft law?

Courtesy: SZ

poses restraints on their activities or interests. In that sense, it can be argued that, even where a soft law principle or rule may not have “binding effect *per se*”, it can provide justification for national laws and regulations which seek to implement that principle or rule. In addition, a national legislative measure adopted to implement a soft law principle or rule can help to advance the cause of environmental protection by reminding other States of the need for effective action. Furthermore, such legislation will underline the obligation of other States and operators to respect the principle or rule, at least in so far as it concerns activities and operations within the jurisdiction of the legislating State or which affect the interests of that State. Indeed in some cases, action by one State in the name of a generally accepted principle may in time serve as a catalyst for similar action by other States or relevant international organisations. An example of such unilateral State action that eventually set the pattern for international action was the enactment of the Oil Pollution Act

and specific rules and standards and, secondly, by promoting the effective and practical application of these principles and rules, both at the national and international levels. We lose nothing by promoting the use of soft law in the areas where it is suitable and possible to do so. The environment will be much the poorer without the contribution that soft law has made, and can continue to make, to the protection and preservation of the environment, to sustainable development for all the inhabitants of the world and to the continued viability of our globe as a whole.

Notes

- 1 Anthony Aust, 2005, *Handbook of International Law*, Cambridge University Press, pp. 11–12.
- 2 Antonio Cassese, 2005, *International Law 2nd Edition*, Oxford University Press, p. 197.
- 3 *Ibid.*
- 4 Philippe Sands, 2003, *Principles of International Environmental Law*, 2nd Edition, Cambridge University Press, p. 124.
- 5 “From the perspective of State practice, it seems clear that resolutions, codes of conduct, conference declarations and similar instruments are not law (soft or hard) albeit they may be related to or lead to law in one manner or another”, Dinah Shelton, “International Law and ‘Relative Normativity’”, in Malcolm D. Evans ed. 2006, *International Law*, 2nd Edition, Oxford University Press, pp. 159–185, at page 181. Some commentators have actually questioned the legitimacy of “soft law”, describing soft law as “norms in the twilight between law and politics”, Bernhardt ed. *Encyclopaedia of International Law*, Max-Planck Institute, Vol. 4, p. 452.
- 6 Cassese, *op. cit.*, note 2 *supra*, at p. 196.
- 7 Dinah Shelton, *op. cit.*, note 5 *supra*, at p. 180.
- 8 Soft law applies to a very wide variety of instruments and rules. They include “resolutions of international organizations, programmes of action, texts of treaties which are not yet in force or are not binding on a particular actor, interpretative declarations of international conventions, non-binding agreements, codes of conduct, recommendations and reports adopted by international agencies and conferences as well as similar instruments and arrangements used in international relations to express commitments which are more than just policy statements but less than law in the strict sense”. *Encyclopaedia of International Law*, Vol. 4, p. 457.
- 9 Thus in the Nicaragua case (*Military and Paramilitary Activities In and Against Nicaragua*) the International Court of Justice relied on a resolution of the General Assembly of the United Nations as evidence of the existence of a customary law rule of international law.
- 10 Between what are purely moral norms and strictly legal ones there are “others the legally binding character of which has been deliberately and sometimes explicitly denied by their authors, but which nevertheless, cannot be considered as being merely morally or politically binding”, *id.*
- 11 Alan Boyle, “Soft Law in International Law-making”, in Malcolm D. Evans, ed., 2006, *International Law 2nd Edition*, Oxford University Press, p. 148.
- 12 “Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order”, Report of the Secretary General of the United Nations A/39/504/Add.1, 1984, at p. 103.
- 13 Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Alan Boyle and David Freestone, eds, 1999, *International Law and Sustainable Development, Past Achievements and Future Challenges*, Oxford University Press, p. 30.
- 14 ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Section 70.
- 15 There is of course another sense in which a treaty not in force may involve obligations on a State. According to the Vienna Convention on the Law of Treaties, a State which has signed a treaty is under the obligation to refrain from acts which would defeat the object and purpose of the treaty (article 18).
- 16 ICJ, *Tunisia/Libya Continental Shelf* case, 1982 ICJ Reports, 38, emphasis supplied.
- 17 Cassese notes that “international guidelines for protecting the environment have been laid down in a host of non-binding (soft law) international instruments adopted by conferences...”, *op. cit.*, note 2 *supra*, p. 491.
- 18 Anthony Aust, *op. cit.*, note 1 *supra*, at p. 11. Also Cassese, *op. cit.*, note 2 *supra*, at p. 196. According to Cassese, soft law is preferred where “for political or other reasons, it is hard for States to reach a full convergence of views and standards ...so as to agree on legally binding commitments”.
- 19 Resolution 2749(XXV) of 1970.
- 20 “Soft law may occur in any circumstance in which States wish to accord

significance to something agreed upon between them which certainly goes beyond the mere expression of its being a desirable objective, or mere aspirations, which may even go beyond an expression of intent, but which is plainly intended to amount to less than a present expression of an intention to be bound by it”, P. Malanczuk, “Space Law as a Branch of International Law”, in L.A.N.M. Barnhoorn and K.C. Wellens, eds, 1995, *Diversity in Secondary Rules and the Unity of International Law*, Martinus Nijhoff Publishers, p. 199.

- 21 Thus, in respect of the IAEA Safety Guidelines, it has been suggested that, “despite their soft law status, it is relatively easy to see them as minimum internationally endorsed standards of conduct, and to regard failure to comply as presumptively a failure to fulfil the customary obligation of due diligence in the regulation and control of nuclear activities”, Alan Boyle, *op. cit.*, p. 147.
- 22 On this see the Separate Opinion of Judge Weeramantry in the *Gabcikovo-Nagymaros* case (Section B).
- 23 “Soft law instruments can also contribute to shaping and developing binding norms, and soft law may also prove helpful as a means of interpreting international law”, *Encyclopaedia of International Law*, *op. cit.*, p. 457.
- 24 On this generally see Nicholas de Sadeleer, 2002, *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press.
- 25 25 ILM 1370, 1986, see Philippe Sands, *op. cit.*, pp. 845–857.
- 26 Shelton, *op. cit.*, note 5 *supra*, p. 181. According to Boyle, “the task of giving guidance on or amplifying the terms of a treaty is performed more frequently by resolutions, recommendations and decisions of other international organizations, and by conferences of parties to treaties”, *op. cit.*
- 27 Alan Boyle, *op. cit.*, p. 147.
- 28 For example, FAO has made use of a mixture of hard and soft law instruments in its efforts to promote the implementation of the fisheries provisions of the 1982 Convention on the Law of the Sea. Thus, although the 1993 Agreement to Promote Compliance with Conservation Measures on the High Seas was adopted as a treaty, it is also a constituent part of FAO 1995 Code of Conduct on Responsible Fishing which is a non-binding instrument. The Agreement and the Code are in turn supplemented by the 2001 Plan of Action on Illegal, Unreported and Unregulated Fishing (IUU Fishing).
- 29 Resolution LDC 21(9) adopted in 1985.
- 30 The amendment was adopted by Resolution LDC 51(16). It entered into force in 1994.
- 31 Law of the Sea Convention, Article 211, paragraph 2.
- 32 Law of the Sea Convention, Article 207, paragraph 1.
- 33 Danilenko, *Law-making in the International Community*, p. 71.
- 34 Hakapää, 1981, *Marine Pollution in International Law*, p. 122.
- 35 Danilenko, *op. cit.*, note 33 *supra*, at pp. 72–74.
- 36 As Boyle pertinently notes, “environmental soft law is quite often important for this reason, setting detailed rules or more general standards of best practice or due diligence to be achieved by the parties in implementing their obligations”. These “eco standards are essential in giving hard content to the open-textured terms of framework environmental treaties”, Boyle, *op. cit.*, note 11 *supra*, at p. 218.
- 37 For example, resolutions of international organisations may be considered as “shaping and solidifying the legally binding obligations which the founding treaty of the organization contains”, *Encyclopaedia of International Law*, *op. cit.*, p. 457.
- 38 The International Code of Signals is managed and updated from time to time by the Maritime Safety Committee of IMO. For information on the origins and operation of the Code see the IMO website: www.imo.org.
- 39 “Certain principles and rules which are emerging as new norms in the process of law making without yet having become accepted as legally binding may, nevertheless, have limited anticipatory effect in judicial or arbitral decision making as supporting arguments interpreting the law as it stands”, Malanczuk, *op. cit.*, note 20 *supra*, at p. 162.
- 40 Vaughan Lowe, *op. cit.*, note 13 *supra*, p. 31. Thus with respect to the principle of sustainable development he observes that it “can be used by a tribunal to modify the application of other norms. It acquires a kind of normativity within the process of judicial decision making. Hence in the context of judicial dispute settlement the concept can plainly affect the outcome of cases.... and the application of the concept will inevitably influence the further development of the law... It is in these senses that the concept of sustainable development has real normative force”, *id.*, p. 34.
- 41 ICJ Reports, 1997, 7.
- 42 ITLOS Reports, 1999, p. 268.
- 43 The *Oposa Case* (Juan Antonio Oposa & Others v. The Honourable Fulgencio S. Factoran & Another, Philippines Supreme Court – G. R. No. 101083).
- 44 See *Compendium of Summaries of Judicial Decisions in Environment Related Cases*, SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy, No. 3, July 1997.
- 45 As the *Encyclopaedia of International Law* puts it, “soft law may have immediate legal effects in the field of good faith”, *op. cit.*, p. 457.
- 46 Alan Boyle, *op. cit.*, note 11 *supra*, at p. 156.

WTO

Climate Change and Biofuels as “Environmental Goods and Services”

by Soledad Aguilar*

The World Trade Organization (WTO) Doha negotiations on the liberalisation of trade in environmental goods and services, seek triple wins for trade, the environment and development, but fail to agree on the basket of goods and services that would deliver them. From bicycles to solar panels, to water treatment services, the Doha environmental goods and services (EGS) mandate leaves room for interpretation and has proved hard to elucidate. Debates during 2007, for example, addressed the classification of agricultural products such as biofuels and organic products as environmental goods, a developing-country proposal defying the traditional technological-products lists by industrialised countries. Such a proposal may prove hard to negotiate, considering the treatment of these products within Doha’s negotiations on agriculture, but it has the potential to achieve a balanced outcome among developing and developed nations.

Industrialised countries lead the market in environmental technologies and environmental services – a sector growing twice as fast as global merchandise trade as a whole – and have, prior to these negotiations, led discussions as *demandeurs* of tariff reductions and market access for EGS.¹ They have been most interested in obtaining tariff reductions and market access for their goods, contrary to the wishes of many developing countries. In general developing countries have, up to now, shown a more protective approach, expressing concerns that a large list of products classified as EGS may create a loophole for these to be imported for different purposes, rendering minimal or null the environmental benefits, while creating competitiveness challenges for small- and medium-sized enterprises or nascent domestic industries.

The WTO Committee on Trade and Environment (CTE) convened a Special Session to address the liberalisation of EGS, focusing in 2007 on defining which goods shall be classified as “environmental” in order to be subject to preferential treatment. In these discussions, some previous positions were altered. In WTO discussions of the listing of agricultural goods such as biofuels and organic products, developing countries are favouring broader inclusion, while developed countries are suggesting a short list of climate-friendly goods and services (for prompt liberalisation), and a limit on other inclusions.

Currently, questions focus on how negotiations should be conducted to arrive at an agreed result among all WTO

members. Substantive discussions also addressed the difficulty of awarding preferential treatment to organic products without violating the WTO principle that prevents discrimination among like products due to process and production methods, and the environmental benefits of biofuels. Proposals presented throughout the year reflect efforts to seek consensus and push negotiations towards the long-awaited “single undertaking” result to the Doha round negotiations.

This article will look at the main issues and arguments presented during the EGS negotiations in the 11–12 June meeting of the special session of CTE in 2007, namely:

- (i) The definition and identification of environmental goods;
- (ii) The type of process that should guide negotiations; and
- (iii) The incorporation of agricultural products in the debate.

Background: The Doha Mandate for EGS

The Doha Declaration,² adopted as a result of the Fourth WTO Ministerial Conference (2001) singled out environmental goods as a group for liberalisation for the first time within WTO negotiations. Environmental services, on the other hand, had previously been included as a specific category within the services sectors’ negotiations.³

The Doha mandate includes specific environment-related issues, most notably in Paragraph 31, under which three key issues should be subject to negotiations:

- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs).[...];
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status; and
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.⁴

Regarding the general approach to negotiations, paragraph 32 instructs members to negotiate on these issues, giving particular attention to: the effect of environmental measures on market access, especially in relation to developing countries and those situations in which the elimination of trade restrictions would benefit trade, the environment and development (triple-win situations); the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); and labelling requirements for environmental purposes.⁵

The CTE is not the only forum for discussions. Negotiations on market access for environmental goods, for

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example, take place in Special Sessions of the Market Access Negotiating Group. The specific treatment of environmental goods, namely the modalities to reduce or eliminate tariffs for this group of goods, has traditionally been understood to fall upon the negotiating group on market access for non-agricultural products (the so-called “NAMA Group”) although not all countries agree to this. In particular, recent proposals seek to include agricultural goods in the debate.⁶ Environmental services, on the other hand, are discussed within the Services Council and Services negotiations. Until the present, most discussions have taken place within the CTE, and it is unlikely that discussions on modalities will evolve in other groups until an agreement on the scope and composition of EGS is agreed.

Definition and Identification of Environmental Goods

An effort to identify products that would qualify as environmental goods for tariff reduction purposes commenced early in negotiations, given that the Doha mandate does not specify what constitutes EGS or the extent of liberalisation.⁷ In 2007, attempts were made to condense previous proposals to address a manageable group of products.

Two main approaches towards product identification were clear during negotiations. The “list approach”, presented by industrialised countries, consisted of proposals listing products countries would like to see classified as “environmental goods” for tariff reduction purposes. The “end-use approach”, by developing countries, featured efforts to ensure a positive environmental outcome by limiting the scope of products included, thus preventing regulatory loopholes that may allow unrestricted imports of dual-use products or technologies without clear environmental benefits.

“List-approach” proponents based their submissions on existing lists such as those by the OECD and APEC, while “end-use approach” supporters sought to identify relevant criteria to classify dual-use products, such as pre-approving environmental projects (India),⁸ or awarding tariff reductions to products used within environmental activities pursuant to multilateral environmental agreements (Uruguay).⁹

During 2007, proponents of the “list approach” (Canada, the European Communities (EC), Japan, Korea, New Zealand, Norway, Chinese Taipei, Switzerland and the United States), presented a non-paper¹⁰ abridging previous proposals into a list of 153 environmental goods along with an updated identification of each product’s environmental benefits.¹¹ The proposal included products chosen from an original list of around 480 products compiled by the Secretariat and included two additional components: a part on special and differential treatment, and a review mechanism to maintain the list in line with technological developments.¹²

Developing countries reacted to the proposal, cautioning that the list reflected the export interests of a few countries, without reference to whether the products were actually used for environmental purposes, and as such, only served to improve market access for those specific coun-

tries/products and did not fully achieve the objective of the Doha mandate.¹³ Colombia, for example, emphasised it had previously suggested the need to establish criteria for the identification of environmental goods, while Ecuador expressed concern that a list approach focused solely on reducing tariffs and did not place sufficient emphasis on special and differential treatment for developing countries and removing non-tariff barriers.¹⁴

In the June meeting, proponents of the “end use” approach (specifically Argentina and India) presented an alternative proposal for identifying environmental goods and services.¹⁵ That proposal involved a multi-step approach that would: identify and agree on a list of environmental activities (such as air pollution control, water and wastewater management, soil and soil conservation, solid waste management, environmental monitoring and analysis, energy-saving management, and renewable energy); develop a country-list of public and private entities that carry out the agreed activities; and notify the list to the WTO for them to be eligible for preferential tariff treatment.¹⁶

Many countries, including Australia, Chile, the USA and Canada voiced their reservations regarding this approach due to the potential creation of a bureaucratic process at the national level. Countries with large market economies did not find the alternative of identifying each potential importer attractive, and expressed concerns over a possible violation of the Most Favoured Nation (MFN) principle if small enterprises were to be discriminated against due to their limited visibility or access to the complex procedures that may be required to be included in such a list.

Switzerland, Korea and others, however, highlighted the fact that the environmental activities identified by Argentina and India were substantially similar to the broad categories identified by proponents of the “list” approach, and saw a potential for convergence in this regard.

In November, “list approach” supporters made a final effort, in an informal meeting, presenting a “climate-goods” list of products – to be given prompt attention in light of the urgency of tackling the climate change problem at a global scale, in time to be submitted to the meeting of trade ministers held at the sidelines of the Climate Meetings in Bali.¹⁷ In their submission, the USA and the EC proposed that the “ultimate objective should be a zero-tariff world for climate-friendly goods in the near future and no later than 2013”¹⁸ and presented a short list of 43 products to eliminate trade barriers facing goods and services directly related to mitigating climate change. The list was drawn from a World Bank list including products such as solar collectors and system controllers, wind-turbine parts and components, stoves, grates and cookers, and hydrogen fuel cells.¹⁹

The “climate goods list” proposal did not leave out previous submissions, but suggested a two-tier process, whereby:

- (i) Trade in 43 goods and services directly related to climate-change mitigation would be liberalised in the short term; and
- (ii) A broader list of environmental goods and services

would be negotiated in the medium term leading to an environmental goods and services agreement based on the 153-products list previously presented by industrialised countries.²⁰

Regarding services, the first tier would include services that could contribute to countries' efforts to address climate change. The proposal suggests that Members could further their climate-change objectives by removing obstacles to foreign competition in sectors such as environmental services (*e.g.*, air pollution and climate control services); technical testing and analysis; energy-related services (*e.g.*, engineering and maintenance services to optimise the environmental performance of energy facilities); and services for the design and construction of energy-efficient buildings and facilities.²¹

The second tier could include the removal of market access barriers to a broad set of environmental and climate-related services, including environmental, energy, construction, architectural, engineering and integrated engineering services.²²

Developing countries reportedly offered mixed reactions. While some, like Egypt, welcomed the short list of goods in tier one, many requested clarifications on the potential for dual-use products in the list. Brazil, on the other hand, insisted on its proposal to include agricultural goods like biofuels and biofuel-manufacturing equipment in the debate, and proposed a different mechanism for negotiations.²³

Liberalisation Process

The Doha mandate's lack of clarity regarding the meaning of environmental goods also applies to the process through which to achieve liberalisation. Initially countries

seemed to share the idea that consensus could be achieved by the CTE through a single multilateral approach to the identification of the products that were to be subject to tariff reductions. However, at an informal meeting of the special session, held on 2 October, Brazil proposed engaging countries in a "request and offer approach", over the course of a number of "offer" rounds, following traditional WTO mechanics whereby countries request specific liberalisation commitments from each other, and then extend the tariff cuts agreed bilaterally to all other nations as a result of the MFN principle.²⁴

At the next formal meeting, on 1–2 November, Brazil outlined its approach as a way to bridge the existing stalemate on discussions regarding products to be covered by EGS negotiations, also presenting a possible "basket" approach as a second-best option, under which each Member could offer to make tariff cuts on a handful of environmental goods.²⁵ Even though many countries expressed their openness to the consideration of a request-offer approach, some felt it may be time consuming and cumbersome and remained in favour of agreeing on a single list or criteria for inclusion as environmental goods.²⁶

The latest proposal on a "climate goods list" by the USA and the EC returned to the simplified list approach, although its "second-tier" option may allow a request-offer approach.

The state of discussions on the process to guide negotiations on EGS seems still to be tilting towards finding agreement on a single list of products. However, a mixed approach may be feasible if countries were to agree on a short list initially (as proposed by the EC and USA) and engage in more complex request-offer negotiations to arrive at a concrete outcome on a broader set of goods in the

medium term. The request-offer approach may also serve to balance developed and developing countries' interests in these negotiations and mobilise them if agreement on a single broader list is deadlocked at some stage of the process.

Agricultural Products and Biofuels as EGS

The year 2007 saw a notable growth in attention to biofuels within the international scene. Not surprisingly, interest was expressed by both developing and developed countries in the May meeting. At that time, Brazil recalled that it had tabled a document in 2005 stating that a definition of environmental goods should cover products of interest to developing countries, such as natural fibres and colourants and other non-timber forest products, and renewable energy including ethanol and biodiesel.²⁷ By June, Brazil was *insisting* that biofuels were an environmental good by definition irrespective of the criteria applied, criticising the fact that the latest presentation by "list-approach" proponents contemplated all kinds of renewable energy products but



Source: Danish Center for Biofuels

Courtesy: World Bank

biofuels,²⁸ and as a result of the debate, presented a new proposal to consider biofuels in negotiations on EGS.²⁹

A number of delegations welcomed Brazil's proposal, including Chile, Colombia and Singapore, Egypt, Ecuador and South Africa, but others raised specific concerns. Canada, for example raised environmental concerns related to biofuel production,³⁰ while the USA, the EC, Japan, Korea and Australia, among others, expressed reservations about the inclusion of ethanol and other biofuels as environmental goods based on their classification as agricultural products. The EC also noted that agricultural goods like biofuels should be considered within negotiations on agriculture and not in the CTE.³¹ These countries debated with Brazil whether the mandate for the EGS negotiations



Courtesy: World Bank

included agricultural products or was reserved solely for industrial goods,³² while other countries like Cuba opposed the inclusion of biofuels based on social and environmental considerations.³³

Biofuels were not the only agricultural products proposed for inclusion as environmental goods. Organic products were also brought to the table in submissions by Brazil (to harmonise regulations through *CODEX Alimentarius*) and by Peru (to identify them as environmental goods subject to tariff reductions).

Regarding the reduction of non-tariff barriers for organic products, Brazil explained that a request to the relevant *Codex Alimentarius* Committees to develop standards for organically produced foods would improve developing countries' capacities to export these products, boosting an agricultural sector that could "pave a route out of poverty for a significant number of small farmers in developing countries". The paper also suggested that such a removal of commercial barriers would benefit trade, the environment and development, the triple-win association sought by the Doha Round.³⁴

Many developing countries including Colombia, Cuba, Bolivia, Pakistan and Thailand were supportive of devel-

oping *Codex*-based standards for organic foods.³⁵ Other countries commented that *Codex* already had such guidelines, while Brazil responded that many WTO Members were not abiding by them and proposed that the standard-setting body decide whether the guidelines needed to be revised.³⁶

Peru's more radical proposal to consider organic products as environmental goods, received a lukewarm response from many countries such as USA, the EC, Korea, Norway and Australia, which cautioned that according special tariff treatment to organic products versus non-organic ones, may lead to a differentiation between like products based on process and production methods, which is not allowed by WTO rules.³⁷ Listing organic products, however, was supported by many developing countries such as Colombia, Chile and South Africa.³⁸

Negotiations on this topic will continue during 2008, and, given the prominence of discussions on agriculture in general within the Doha debate, are likely to be tied to progress in negotiations on non-agricultural (NAMA) products and agriculture respectively, or remain as a "bargaining chip" until the finalisation of negotiations on the single undertaking.

Looking to the Future

The year 2007 seems to have provided added impetus to EGS negotiations on the definition of environmental goods, with several concrete proposals now on the table matching broadly the divisions between industrialised and developing/agriculture-oriented countries. Areas of convergence include the broad categories identified by both groups as those including environmental goods, while consensus is still elusive on the identification of goods themselves.

The stated objective of awarding preferential treatment to EGS in order to generate "triple wins" for trade, the environment and development seems to present a puzzle for negotiators who are faced with the challenge of achieving a goal that does not derive directly from trade liberalisation itself, but will depend on the type of policies adopted to liberalise EGS, the kind of goods and services that receive tariff reductions, and who are the beneficiaries of the economic gains generated by such liberalisation. These questions underlie the seemingly semantic debate over the meaning of EGS.

Thus, current discussions, including the consideration of organic goods and biofuels, have yet to show whether ambitions are high enough to reach the ultimate "pro-development" objectives of Doha negotiations – to ensure environmental and development gains of a sufficient scale and distribution to contribute meaningfully to these areas of global policy – and whether a balanced result for both developed and developing countries may be achieved. At this time, countries are still struggling to find the right products that should benefit from prompt EGS liberalisation to promote sustainable development.

Negotiations are moving forwards at a slow pace, tied to progress in other areas such as agriculture and non-agricultural products, but still show some signs of progress and present a window of opportunity to showcase "triple

wins” of trade liberalisation for trade, the environment and development. In fact, if the latest EC and US proposal on a “climate goods list” were to be accepted as a basis for negotiations, it may pave the way for an initial agreement on a small subset of goods to be enforced in the short term in order to show a “success” in negotiations, while allowing for longer processes to develop on a wider category of goods. It will be hard, however, to deny the quality of “climate-friendly goods” to some bioenergy sources from agricultural origin, a debate that will surely provide an interesting flavour to the next stage of these negotiations.

Notes

- 1 EU and US propose new WTO green trade agreement for Doha round”, European Commission, 30 November 2007. http://ec.europa.eu/trade/issues/newround/doha_da/pr301107_en.htm.
- 2 WTO (2001), “Doha WTO Ministerial 2001: Ministerial Declaration”, Document WT/MIN(01)/DEC/1, November 2001.
- 3 Claro, E., Lucas, N., Sugathan, M., Marconini, M. and Lendo, E. (2007), “Trade in Environmental Goods and Services and Sustainable Development: Domestic Considerations and Strategies for WTO Negotiations”, International Centre for Trade and Sustainable Development (ICTSD), p. 1. <http://www.trade-environment.org/page/outputs/egs/compendium_dec_2007.pdf>.
- 4 WTO (2001), *op. cit.* in footnote 2. The mandate also refers to fisheries subsidies, although this issue is negotiated within the group on WTO trade rules (paragraph 28).
- 5 The Doha Declaration also states that work on these issues should include the identification of any need to clarify relevant WTO rules, and the outcome should, *inter alia*: be compatible with the open and non-discriminatory nature of the multilateral trading system; not affect the rights and obligations of members under existing WTO agreements; take into account the needs of developing and least-developed countries. It also recognises the importance of technical assistance and capacity building in the field of trade and environment to developing countries. WTO (2001), *op. cit.* in footnote 2.
- 6 Claro E. *et al.* (2007), *op. cit.* in footnote 3, p. 3.
- 7 *Ibid.*
- 8 WTO CTESS (2006). “Environmental Project Approach: Compatibility and Criteria. Proposal by India”, Document TN/TE/W/67, 13 June 2006.
- 9 WTO CTESS (2006b), “Summary Report of the Sixteenth Meeting of the Committee on Trade and Environment Special Session, 6–7 July 2006”, Document TN/TE/R/16, 22 December 2006, par. 342.
- 10 WTO CTESS (2007), “Summary Report on the Eighteenth Meeting of the Committee on Trade and Environment in Special Session, 3–4 May 2007”, Document TN/TE/R/18, 8 June 2007.
- 11 The list includes the Harmonized Commodity Coding and Description System (HS)-digit classification for most products and a number of ex-outs, *i.e.*, specific

subcategories beyond the HS 6-digit levels to be defined by individual countries for customs purposes.

- 12 WTO CTESS (2007), *op. cit.* in footnote 10.
- 13 WTO CTESS (2007). Statements by India, Brazil and Pakistan, *op. cit.* in footnote 10.
- 14 WTO CTESS (2007). Statements by Colombia and Ecuador, *op. cit.* in footnote 10.
- 15 WTO CTESS (2007b). “Summary Report on the Nineteenth Meeting of the Committee on Trade and Environment in Special Session, 11–12 June 2007”, Document TN/TE/R/19, 8 August 2007.
- 16 “India, Argentina table new proposal on environmental goods in Doha negotiations”, ICTSD *BRIDGES Trade BioRes*, Vol. 7, No. 12, 22 June 2007. <<http://www.ictsd.org/biores/07-06-22/story5.htm>>.
- 17 Reported herein at page 14.
- 18 Non-paper by the European Communities and the United States, contained in WTO document JOB(07)/193.
- 19 “EU, US Call for Eliminating Trade Barriers to Climate-Friendly Goods and Services”, ICTSD *BRIDGES Trade BioRes*, Vol. 11, No. 42, 5 December 2007. <http://www.ictsd.org/weekly/07-12-05/story5.htm>.
- 20 *Ibid.*
- 21 “EU, US call for eliminating trade barriers to climate-friendly goods and services”, ICTSD *BRIDGES Trade BioRes*, Vol. 7, No. 22, 18 December 2007. <<http://www.ictsd.org/biores/07-12-18/story3.htm>>.
- 22 *Ibid.*
- 23 *Ibid.*
- 24 “Brazil’s call for biofuel liberalisation causes stir in environmental goods talks”, ICTSD *BRIDGES Trade BioRes*, Vol. 11, No. 34, 10 October 2007. <<http://www.ictsd.org/weekly/07-10-10/story5.htm>>.
- 25 Brazil (2007). “Environmental goods for development”, available in WTO CTESS Document JOB 07/146, 1 October 2007. http://www.mre.gov.br/carta_genebra/cartadegenebra5_07_anexos.pdf.
- 26 “Brazil Peru discuss new ideas on environmental goods liberalisation”, ICTSD *BRIDGES Trade BioRes*, Vol. 7, No. 20, 16 November 2007.
- 27 WTO CTESS (2007), *op. cit.* in footnote 10. Paragraphs 191, 202–222.
- 28 WTO CTESS (2007b), *op. cit.* in footnote 15.
- 29 Brazil, *op. cit.* link in footnote 25.
- 30 ICTSD, *op. cit.* link in footnote 21.
- 31 Brazil (2007b), “Carta de Genebra: Informativo sobre a OMC e a Rodada de Doha”, Brazilian Mission to Geneva, V. 6:5, December 2007. http://www.mre.gov.br/carta_genebra/cartadegenebra5_07.pdf.
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The Bottom Billion – Regulation of Natural Resources – by Paul Collier*

Introduction

My new book, *The Bottom Billion* draws attention to the divergence of a group of some 58 impoverished countries from the rest of mankind. Over the past 35 years they have, as a group, diverged at an accelerating rate from the countries that are home to the majority of the population of the developing world. On average their *per capita* income has stagnated and is now only one fifth that of the other four billion people living in developing countries.

This is now the key development challenge: the continued divergence of one billion people who are already at the bottom of the world economy will manifestly generate mounting social tensions.

No one problem accounts for the distinctively poor performance of the economies of the bottom billion: they are stuck in a variety of traps. Unless we understand the traps, our efforts to help will be ameliorative rather than decisive. Further, in order to break the pattern, we need to go considerably beyond aid. The governments of the OECD societies have at their disposal a range of policy

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instruments that are likely to be more effective than aid, yet we have largely neglected them. This article will focus on one trap, the natural resource curse. Not only has this trap been made particularly important due to the current global commodity boom, it cannot be addressed by aid. It is, in fact, an ideal area for regulation. Such regulation would partly be through internationally coordinated laws, and partly through the promulgation of new voluntary international standards and codes.

Resource-exporting developing countries are currently in the throes of booms that were last seen in the 1970s. Many of these countries have been impoverished and economically stagnant for decades and the booms constitute extraordinary opportunities for development. The revenues are often large enough to finance transformation, dwarfing aid flows. However, the last global commodity boom of the 1970s largely failed to deliver transformational development. On the contrary, on the whole its long-term economic consequences were highly adverse. The failure to harness the booms of the 1970s was the result of wrong decisions on the part of governments. In part, these wrong decisions were mistakes: the decision takers would have arrived at different decisions had they realised their consequences. In part, however, they reflected divergences between the interests of the society and of the decision taker: the incentives facing the decision taker did not correspond with the interests of the society that the decision taker was empowered to represent.

Even where past mistakes have been made, international codes can be helpful. The typical low-income commodity exporter has remained prone to mistakes in economic policy because the cadre of well-trained decision takers within the society is still tiny. Adult populations are small, few people get international graduate education, and few of these people return to their country: globalisation is accelerating the emigration of the highly skilled. Even among this limited pool, few are in positions of influence: the salaries of senior civil servants have been radically eroded. Further, because the adverse consequences of mistakes in managing commodity booms occur only long after the decisions were taken, it is easy for a society to misdiagnose its problems. The typical mistake of the 1970s booms was to gear them up by borrowing and consuming the proceeds. When commodity prices crashed, this led to a phase of crisis management termed “structural adjustment”. Nigerians, for example, generally see the boom period as the “good times”, and blame their current poverty on “structural adjustment”.

Thus, the process of learning from mistakes can usefully be complemented by external guidance. International codes can be helpful: they get noticed, and their official status signals that they have been subject to a reasonably rigorous process of scrutiny and assessment and so should be taken seriously. Even where such codes are entirely voluntary, they can change behaviour.

Where wrong decisions were the result of misaligned incentives rather than mistakes, the incentives have to be changed. While in principle, incentives can be changed both by penalties and rewards, in the case of decisions appertaining to resource revenues the key changes are likely to come from new penalties. This is because the private rewards for socially costly decisions are usually too high to be countered by even higher rewards for good



Brazilian Indigenous chiefs of the Kayapo tribe

Courtesy: Wikipedia

decisions. The terrain of penalties opens up a role for the law. Legal process is not the only means by which penalties can be introduced, but it is likely to be a critical part of solutions.

The next section sets out some of the evidence on the resource curse and its causes, including a prognosis for the long-term consequences of the present commodity booms should patterns of behaviour stay unchanged.

The Resource Curse

The “resource curse” is evident from particular situations, such as Nigeria since the discovery of oil, but as a general proposition about those countries that export primary commodities it has been more controversial. There are counter examples to Nigeria, such as the rapid growth of Botswana since the discovery of diamonds. Through recent research, including *The Bottom Billion* and a new work with Benedikt Goderis (Collier and Goderis, 2007), the author has been able to investigate the matter statistically, using data for virtually every country in the world, spanning the period 1963–2003. The results are relevant here. In the first few years, price booms benefit the over-

all economy. However, after around twenty years the effects are often highly adverse. Simulating the current commodity booms in the major African commodity exporters, we find that the long-term effect will be to reduce output relative to counterfactual by around 25%. The resource curse is a reality.

The adverse long-term effects are confined to price booms in non-agricultural commodities. A likely explanation for this is that agricultural booms accrue predominantly to farmers who usually use their windfalls sensibly. In contrast, non-agricultural booms accrue predominantly as government revenue. The current commodity booms are non-agricultural. The long-term effects of these government-managed booms unsurprisingly depend upon initial conditions of governance: above a threshold level there is no resource curse. Norway, a well-governed country, has been able to benefit from its oil not only in the short term but has harnessed the revenues for long-term growth. What is the critical threshold level of governance below which the resource curse sets in? To give a European benchmark, we find that over the forty-year period we analyse, it was at a level of governance approximately equivalent to that of Portugal in the mid-1980s. Unfortunately, almost all of the current commodity booms in low-income countries are occurring in environments where governance is below this threshold. The current commodity booms may not be so demanding of initial levels of governance because today's governments have the advantage over the period we have analysed of being able to learn from the history of that period. Nevertheless, our results suggest that governance is likely to be inadequate to tackle the challenges posed by resource windfalls.

Governance is, however, multi-faceted and in one important respect it has manifestly improved in the resource-exporting countries since the 1970s. Following the collapse of the Soviet Union there was a wave of democratisation and most of those countries are now more democratic. *The Bottom Billion* describes the author's work with Anke Hoeffler, investigating whether democracy improves the economic performance of resource exporters. It finds that whereas in other economies, democracy has such an effect, amongst the resource exporters, performance is significantly worse. Instead of democracy disciplining the decision-taking process, the resource revenues undermine the democratic process. Breaking democracy down, we can identify two critical facets: electoral competition, and checks and balances. The economic damage done by democracy comes from electoral competition and is offset if checks and balances are sufficiently strong. The instant democracies of the 1990s have electoral competition without checks and balances because the latter are much more difficult to establish. As Iraq and Afghanistan demonstrate, elections can be introduced rapidly in any society because they are events and the incentives for parties to participate are strong. In contrast, effective checks and balances are processes, and since their purpose is to limit power, the powerful have little incentive to develop them. An implication is that the wave of democratisation has not improved governance to the level at which the incentives of decision takers are now well-aligned. The improvement of

governance in the low-income resource exporters is thus likely to be critical to whether history repeats itself.

The Role of Codes and Laws

History must not be repeated, but it will be repeated unless there is an appropriate combination of learning to correct past mistakes, and institutional innovation to correct misaligned incentives. The key ideas of *The Bottom Billion* concern the scope for laws, codes and charters in facilitating both learning and the realignment of incentives.

Voluntary codes can be powerful instruments. The Extractive Industries Transparency Initiative (EITI) and the Kimberley Process are both important examples of how voluntary codes are already improving resource extraction. To what extent can this approach usefully be extended?

Voluntary codes have power for four core reasons. Their basic rationale is informational. The code simply codifies good practice and thereby informs governments as to what is generally considered sensible. The codification helps to distinguish this particular advice from the babble of advice, often contradictory, to which governments are subjected. Governments can respect codified advice because they infer that it has been subject to thorough and impartial analysis.

However, the informational role is probably not the most potent aspect of codes. In all the badly governed resource-rich societies there are reformers anxious to critique poor policies. However, the reformers themselves face a coordination problem: each voice for reform is also, often inadvertently, a voice for self-promotion. Thus, for the normal human reasons of personal rivalries, it is often difficult for reformers to come together around an agreed set of objectives. Recognising this, the opponents of reform often play a game of "divide and rule". A code has the advantage of providing a neutral goal around which reformers can rally. By being depersonalised, it is both easier to press for adoption, and easier to defend once adopted than any personalised reform.

Voluntary codes also provide a norm for the coordination of external pressure. Adherence to the EITI rapidly became a condition for some donor assistance, and adoption of the Kimberley Process became a benchmark for NGO pressure.

Perhaps most importantly, codes separate the sheep from the goats. By revealing those governments that are willing to comply with a particular set of standards, they also reveal those that are not. There is a strong incentive for governments not to reveal themselves as being in the latter category. A dramatic instance of this phenomenon was the creation of the Euro, something initially intended so that France could have a common currency with Germany. Once Spain announced that it intended to meet the criteria for membership, Italy and Portugal felt compelled to do the same. Similarly, the Kimberley Process, though voluntary, has rapidly attracted every diamond-producing country in the world.

Where is there currently scope for codes concerning the revenues for resource extraction? Although there are

five most critical decision points that need to be addressed in such a system, only one (extraction) is currently covered. Although there is certainly potential to address the others. First, a new code could cover the design and conduct of the auctions by which the rights to mineral extraction should be sold. A second could cover the specification of the time horizon and tax regime, for example setting limits on the horizon of rights sold by transitional governments. A third could cover the savings rate out of resource revenues likely to be appropriate. A fourth could cover the procedures for public investment.

If these codes are to be promulgated some entity needs to be responsible for them. The precedents for the promulgation of voluntary codes suggest that various approaches can be effective. Many codes of economic behaviour have been promulgated by the IMF and are part of its



Ainu bear sacrifice. Japanese painting 1870

annual Article IV consultation process in which all its member governments are required to participate. The Kimberley Process is run by a public-private partnership between the diamond industry, NGOs and diamond-producing governments. The EITI started as an NGO campaign, was then adopted by the British Government, was then tentatively and temporarily lodged with the international financial institutions and has now become an official international organisation headquartered in Oslo. Hence, there are already proven approaches which could be followed for new codes.

Independent international verification and certification are now standard in many areas of economic activity. The new codes would require two distinct systems of verification, one concerning the conduct of auctions and the other the conduct of public investment. The core rationale for each of them is that a government needs to be able to demonstrate to its citizens that it is in compliance with its own stated commitments. The governments that are most in need of this capacity to enhance their credibility are those with poor reputations that are attempting to reform. Hence, the provision of verification and certification is not a quasi-police operation intended to force compliance upon an otherwise recalcitrant government. Rather, it would enable those governments that were genuinely committed to reform to reveal their type. As such governments revealed their type, corrupt governments would be revealed by de-

fault and this would facilitate pressure for change within their societies. Reformers would be able to ask why their governments had chosen not to comply with international norms that other governments had adopted.

International law is so difficult to get enacted that it must be used very sparingly. Is there a real need for the promulgation of new international law regarding resource extraction? The one area where new law might be pertinent is to reinforce the voluntary code on the auctioning of resource extraction rights by requiring those resource extraction companies based in the OECD to enter into new contracts only through certified auctions of extraction rights. Would this be desirable and is it feasible? The close analogy to such a law is the anti-bribery laws which were adopted across the OECD in a coordinated process orchestrated by that body. It was important for these laws to be coordinated since no single country was prepared to disadvantage its own businesses *vis-à-vis* those of other countries by enacting a law individually.

Laws involve penalties for breaches. However, the court-inflicted penalties need not be severe because the power of deterrence in this case is likely to come predominantly from citizens, both as consumers and as employees. No significant OECD-based resource extraction company could afford to acquire concessions for resource extraction through processes which clearly breached the law. In effect, much of

the power of the law here comes from the information signal conveyed by the detection of a breach. Consumers and employees know to penalise companies that act illegally.

Conclusion

The current commodity booms constitute the most important opportunity for development that low-income commodity exporters have ever had. Yet if history repeats itself this opportunity will be missed. In these countries, aid has limited potency: their governments are sometimes already awash with revenue. A neglected type of assistance, which might be more helpful, is the promulgation of voluntary codes and laws specifically designed to improve the economic governance of resource rents. For the resource-rich countries, improving economic governance is of the essence. In this short review I have suggested how new codes and laws could address both the mistakes and the misaligned incentives that lead inexorably to the resource curse. Difficult as these new codes and laws would be to promulgate, the costs are trivial both relative to the scale of existing development assistance and to the likely beneficial effects.

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Innovation, Technology and Employment

– Impacts of Fiscal Reform and other Market-Based Instruments –

by Jacqueline Cottrell, Anselm Görres and Kai Schlegelmilch*

The Eighth Global Conference on Environmental Taxation, *Innovation, Technology and Employment – Impacts of Environmental Fiscal Reform and other Market-Based Instruments*, took place in the Kardinal Wendel Haus in Munich, Germany, from 18–20 October 2007. Attended by more than 300 participants from five continents and 50 countries, this was the largest and most international event organised by Green Budget Germany since we were founded in 1994, and the largest and most international GCET conference ever.¹

The main aim of the conference was to highlight less well-publicised aspects of Environmental Fiscal Reform (EFR), such as: the stimulation of technical and behavioural innovation; the development of new technologies; and the creation of employment opportunities, as a result of changes within the economy due to both innovation and the effects of the so-called “double dividend”.² Analysing and understanding the positive effects of MBIs (Market-Based Instruments) – and communicating them to a wider audience – has a vital role to play in the implementation of EFR in the future to support a smooth transition to a sustainable economy.

This article describes the findings of six primary workshops, as well as a special side event on EFR in developing countries.

Competitiveness

The first presentation focused on one component of EFR – environmental tax reform or “ETR”. The impact of ETR on competitiveness was discussed by many, for example in a plenary session by Dr Terry Barker, as well as by Professor Mikael Skou Andersen who presented results from the COMETR project – Competitiveness Effects of Environmental Tax Reforms³ – examining the effects of environmental taxation in seven European Union member states,⁴ using the Energy-Environment-Economy model (E3ME).

In five of the EU countries studied, the results show that CO₂ and energy taxes, recycled via reductions in labour and other taxes over the last 17 years, have made a small but positive contribution to economic growth of up to 0.5%. Although some sectors lost out as a result of increased carbon taxation, other sectors boomed, producing on the whole a modest but significant effect on economic growth. In addition, increases in employment of up to 0.5% were also recorded in four of the countries. This positive contribution to economic growth arises because carbon-energy taxation leads to more efficient use of energy while

at the same time lowering wage costs. It also leads to improved competitiveness for energy-efficient businesses and for the development of new products which can also be exported. As environmental performance improved in these countries, ETR also contributed to reductions in greenhouse gas emissions of 1.5–6% in 2004. This supports the “double dividend” hypothesis – that both environment and economy benefit as a result of ETR.

An interesting result of the COMETR project was the difference in outcomes according to whether energy price or energy tax is increased. In the latter case revenues remain in the public purse and can be used to mitigate the effect of distortive taxation elsewhere in the economy. This is a significant result for policy makers discussing how best to implement taxes as an instrument of climate policy without adversely effecting competitiveness.⁵

Key effects of ETR in individual countries identified in the COMETR project included:

- in Sweden, reductions in household fuel demand of 15–20% by 2010;
- in Denmark, as nearly all ETR revenues were recycled via lower employers’ contributions, a boost to employment and GDP via household incomes and spending;
- in Germany, a similar boost to employment and an increase in GDP of 0.2%, predicted to rise to 0.4% by 2012, and a 3% reduction in energy demand;
- in the UK, in response to the “announcement” of the Climate Change Levy, a 14% cut in fuel use in the commercial/retail sectors, and a 1–2% fall in fuel demand in sectors permitted to negotiate Climate Change Agreements (CCAs).

Terry Barker concluded his plenary presentation by demonstrating that a coordinated EU-wide ETR could make a substantial contribution to the EU achieving its 30% GHG reduction target below 1990 levels by 2020 (the target set by the EU Commission conditional to other non-EU countries also acting).

Innovation and Technological Change

European Environment Agency (EEA) Executive Director Professor Jacqueline McGlade warned against inaction in the face of climate change and highlighted the importance of increasing the application of MBIs in the European Union, as reflected in the preliminary results of the OECD survey,⁶ currently underway, of the influence of public policy on stimulating innovations in renewable technologies. Citing many examples of successful environmental fiscal policies in the EU and beyond, McGlade called for much bolder and more comprehensive reforms, creating more challenging incentives, to ensure that Europe captures and retains a significant share

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of the global expansion of clean technologies. Only such ambitious policies can guarantee that the EU's current competitive advantage – resulting from its innovative use of MBIs to create incentives for innovation – is not undermined by technological progress in China and the USA.

Nils Axel Braathen of the OECD analysed research into technological change, concluding that environmental policy does have an impact on the direction of technological change.⁷ While regulation gives clear signals regarding the physically desirable properties of technological change, ETR and EFR tend to direct research and development (R&D) and innovation away from fundamental research and towards using the opportunities for flexibility offered by both instruments. This flexibility is complemented by a further possible advantage of MBIs: namely, that financial incentives for change are usually stronger as a result of their implementation.

Braathen also showed that the exact nature of the incentive created by a certain piece of legislation is of considerable significance: thus, the structure of policy should be examined extremely carefully to ensure that the innovations it stimulates are ultimately the most desirable. In this context, it is of note that the technology-related information requirements for the application of a tax are much lower than in cases where technology standards are to be applied. Thus, the risk of misdirecting innovation and space for “rent-seeking” can be minimised by implementing MBIs. Areas for possible further research in this field include: research on the timing and commitment of the regulator; research on the effects of the specific designs of instruments; and more empirical research on the impacts of specific instruments.

Silja Lupsik and Eva Kraav presented an example of the potential of a well-designed environmental tax to incentivise technological change and innovation. Their case study in Estonia examined innovation in electricity generation from oil shale – the fuel used to produce 98% of Estonian electricity. In response to high rates of environmental taxation on its extraction – equal to 15–18% of the oil shale price – and high taxes on the use of oil shale in power generation – equivalent to a further 15% of the electricity price – new processes have been developed. Pulverised firing (PF) in the existing oil shale power plants has been replaced with the innovative fluidised bed combustion (FBC) technique, increasing the efficiency of the electricity production by 6–7% and reducing SO₂ and NO_x emissions considerably. Further environmental taxes are expected to improve the environmental performance of this and other sectors in the country.

Results from other workshops revealed that some innovative new sectors, such as the environmental manage-

ment services industry, were estimated to be growing at an annual average global rate of 4–8% and commanded markets estimated to be worth more than the global pharmaceuticals industry.

Employment

The successful German ETR was discussed in detail by Kai Schlegelmilch, who quantified the proven positive impacts of the German ETR, partly supported by the quadrupling of the world oil price from US\$9/barrel in 1998 to US\$35/barrel in mid 2000, on the German economy, including:

- annual increases in public transport use since the introduction of the reform in 1999 of up to 1.5% per year;
- numerous examples of benefits for innovative companies from the ETR in the renewable technology and motor vehicle industries;
- preferences in consumption patterns for fuel-efficient cars;
- a boom in car-sharing of 26% in 2000, 22% in 2001, 8% in 2002 and 15% in 2003 (all figures in relation to the previous year);
- and decreased CO₂ emissions from the transport sector for the first time ever (after 50 years of steady growth);
- and significantly, the creation of up to 250,000 employment opportunities in new industries.⁸

Benefits for employment, although highlighted by the German case, were also notable in the results of the COMETR project (which revealed positive or neutral employment effects connected to ETR).⁹ Analyses of the potential employment effects of ETR in Hungary and Estonia revealed in the former that a 1% reduction in labour



Financial centre Hong Kong

Courtesy: Spiegel

costs would increase employment by 1.185%, and in the latter, using a computable general equilibrium model, that positive effects on both employment and the economy were

to be expected following the implementation of a carbon tax, even as in this case, in an economy in transition.

The Energy Sector

Sessions on innovation, technological development and employment in the energy sector included a call from Professor Ernst Ulrich von Weizsäcker for annual energy and resource price increases in proportion to the resource productivity increases of the previous year. Such a policy would, in the long term, create certainty in terms of increasing resource prices and thus would prompt a “race” towards higher resource productivity. Weizsäcker focussed on concrete ways of achieving this policy, firstly by addressing arguments that energy price increases are not politically or economically viable. He denied that the price elasticity of energy prices is low, citing examples where changing energy prices have had a significant impact on behaviour and energy use – such as in EU Member States that have introduced Environmental Taxation – and pointed out that high energy prices are not necessarily damaging to the economy, as exemplified by the case of Japan.¹⁰

The European Commission’s support for ETR as a means of delivering change in the form of innovation, technology and employment was emphasised by DG TAXUD’s Director of Indirect Taxation and Tax Administration, Alexander Wiedow,¹¹ while other speakers focussed on the need for the creation of a workable, flexible, innovation-sensitive legislative framework to create planning stability for and to incentivise innovation in the energy sector in the long term.

Subsequent workshop sessions on energy analysed price and tax incentives for renewable energy production and identified structural, political and legal barriers to the implementation of further EFR in the sector, both within the EU and further afield. One common conclusion of research was a preference for MBIs over and above the subsidisation of renewable energies,¹² and Professor Jon Strand of the IMF suggested that the subsidisation of some renewable energy sectors – photovoltaics and some biofuels – may be excessive. Strand also suggested that support for renewables in the EU seems to focus on existing renewable sources, rather than on creating incentives for basic research and the development of new clean energy technologies.

Policy Design, Public Choice and Governance

Representatives of the European Commission presented the initial findings of the public consultation on the Commission’s *Green Paper on Market-Based Instruments for Environment and Related Policy Purposes*. These revealed generally positive reactions towards intensifying the use of MBI and towards the creation of a cross-cutting MBI forum at European level. In addition, the reform of Environmentally Harmful Subsidies was welcomed, although gradual phasing out was supported, to be accompanied by accommodating measures. In relation to transport, some support was expressed for the inclusion of aviation in the EU ETS, while respondents were more doubtful that this should be the case for road transport.¹³

Further contributions analysed political acceptance issues for environmental taxation. Professor Shi-Ling Hsu concluded that provision of information was crucial when attempting to win over public support for environmental taxation, and predicted that once such a tax has begun to bite and corresponding behavioural changes have taken effect, support for *e.g.*, a gasoline tax should increase. Other analyses reflected these findings, and some presented research that showed the strong support of the general public for EFR measures, once these had been fully understood.

Transport

The success of congestion charging in London and the importance of urban planning as a means of combating congestion and land take were discussed in the transport plenary session. Research results confirmed the potentially devastating impact of biofuels on global food supplies.¹⁴ The research of Roberta Mann and Mona Hymel found that 450lb (approx. 205kg) of corn will feed one person for one year, or can be converted into biofuel to fill the tank of an SUV – once! Similarly, even if 100% of the US grain harvest was converted to ethanol, it would meet less than 16% of automotive fuel use.

Two new environmental taxes recently introduced in the Netherlands were also presented during these sessions. The estimated effects of the newly introduced Air Passenger Tax provided good reason for the implementation of similar taxation elsewhere: growth in passenger numbers is predicted to be 8–10% less at Schiphol Airport, and 11–13% less at other Dutch airports. Half of these passengers are expected to depart from airports across the border (in Germany or Belgium); half are predicted to switch to alternative means of transport or to refrain from their journey. Globally, the tax is predicted to result in 1.5 Mton fewer CO₂ emissions and will generate 350 million Euros in revenue. In the same presentation, Riemara Schuivens of the Ministry of Finance in the Netherlands discussed a new Packaging Tax, which covers 95% of all packaging and is expected to raise 365 million Euros in revenue – providing a further example of the kind of innovative taxation policy long overdue in many OECD countries.

Border Tax Adjustments

One significant finding presented at the conference in a paper by Roland Ismer and Karsten Neuhoff was that Border Tax Adjustments (BTAs) are fully compatible with WTO law, and are thus perhaps the single most important policy tool available to governments to prevent carbon leakage. They suggested that BTAs should concentrate on specific sectors – cement, parts of the steel sector, and certain chemicals – and focus on carbon leakage rather than competitiveness issues.

Kai Schlegelmilch pointed out that BTAs mean that countries and regions that choose to be regional pioneers in climate change mitigation policy would not have to pay the price in terms of reduced competitiveness of energy-intensive industry and its associated costs – job losses and relocation. BTAs are a means of harnessing the power of the market for the benefit of climate protection and at the

same time, they also provide opportunities for new alliances between proponents of EFR and the energy-intensive industries in the EU. The introduction of BTAs should be intensively and seriously analysed by the European Commission, and should be used as a lever in negotiations for the post-2012 climate policy regime, although BTAs could be introduced far earlier than this – in 2009/10 – depending on the progress of the Commission.¹⁵

Special Workshop: Environmental Fiscal Reform in Developing, Emerging and Transition Economies

This workshop, hosted by the German Federal Ministry for Economic Cooperation and Development (BMZ) and the *Gesellschaft für Technische Zusammenarbeit* (GTZ), investigated the potential of EFR and MBIs to be implemented in developing, emerging and transition economies, to fulfil the dual goals of environmental protection and poverty reduction.

Capacity Development and Good Governance

One of the most important requirements for EFR in developing economies emphasised throughout the workshop, and of considerable importance on the international cooperation agenda, was capacity development – the process through which individuals, organisations and societies obtain, strengthen and maintain the capability to set and achieve their own development objectives over time. Capacity development and good governance are mutually reinforcing, and both foster conditions within which EFR can be effectively implemented. Good governance is essential for EFR to be subject to a rigorous policy process at all stages. Capacity development and the role of donors in achieving it can contribute to the development and implementation of EFR in a number of ways:

- The role of donors can be significant at all stages of the policy process, through: the promotion of EFR as a policy tool through delivery of evidence of its potential for poverty reduction; identification of potential policy areas and fields of action; support of negotiation between stakeholders and within government bodies; development of viable legislation; and the provision of support for capacity development outside the legislative process – at administrative level – to ensure smooth implementation and bolster revenue collection capacity.
- EFR requires coordination between different stakeholders with diverse needs and interests, and negotiation between government ministries. Donors can support the development of the capacity to negotiate successfully and to overcome barriers between sectors and government departments by helping build ways of accessing and exchanging expertise, improving information flows, breaking down communication barriers between compartmentalised governmental structures, improving cross-sectoral coordination, and increasing understanding of the negotiation arena.
- However, these negotiating ministries are often severely underfunded – e.g., one workshop revealed that the Environment Ministry in Mozambique receives

0.2% of the country's total budget – and does not have the capacity to develop complex EFR legislation. If donors can demonstrate that EFR is in the interest of governments and that EFR can achieve the joint aims of poverty reduction and environmental protection, this may serve to heighten the political will of decision makers to develop and implement such legislation.

- One major advantage of capacity development is that it encourages a sense of “ownership” of EFR policies and instruments – vital if they are to be pursued with sufficient political will to ensure their effective implementation.

Successful capacity development was identified as a key to long-term sustainable development, as it entails improved governance and thus greater accountability, improved participation, increased transparency, and lower rates of corruption. Because problems of unsustainable resource use – pollution or degradation – often come about as a result of a number of basic governance shortcomings, such as the lack of clearly defined property rights, open access to resources, or the insufficient enforcement of existing rules, improved governance in itself facilitates improved environmental performance.

EFR and Poverty Reduction

The double dividend of EFR in developing economies focuses on poverty reduction, rather than the benefits for the economy generally cited in OECD countries. On the one hand, EFR directly addresses environmental problems that affect the poor, while on the other, the revenues it raises can be used for poverty reduction and sustainable development. The potential of EFR to raise revenue for poverty reduction is an important factor in heightening its appeal to governments in developing and transition economies, and can constitute an entry point into a dialogue on the implementation of EFR.

This potential double dividend highlights another important finding of the Special Workshop. In the OECD guidelines on EFR and Poverty Reduction,¹⁶ the conflict between pro-poor lobbies and the pro-environment lobby is not addressed – yet one of the most commonly voiced arguments against EFR in developing economies is that poverty reduction and development should be prioritised, while the environment should take a back seat.

In addition, while by no means a guarantor for political acceptance, focussing on poverty reduction may be used to overcome resistance to EFR legislation within many sectors of society, particularly sectors that highlight the supposed “regressivity” of particular environmental taxes as an argument against their implementation. In India, for example, the middle and upper classes are much opposed to the taxation of transport fuels, on the grounds that such a tax would be regressive and affect the poor the most. However, in actual fact the poorest in society would be less affected than these classes, as they have little or no direct access to transport fuels. Whether or not legislation is “pro-poor” or potentially regressive is a complex issue, and claims regarding the regressivity of a particular tax should be examined closely, as it is likely that the poverty

reduction potential of EFR outweighs any potential regressive effects it may have.

Revenue Raising

One of the main challenges for developing and transition economies is their ability to organise domestic resources. EFR can provide a relatively simple way – with low administrative requirements and costs – of raising revenue. Furthermore, a proportion of the revenues raised can be used to cover enforcement costs. With this in mind, it is desirable that revenues are used for poverty reduction and sustainable development rather than returned to the public in the form of subsidies, which are in general economically inefficient.¹⁷

Additionally, revenue raised can also be used to secure the sustainability of various sectors of the economy, and any excess used for other purposes. For example, in Uganda, revenue raised by the Fisheries User Levy is used in the first instance to finance sustainable fishing practices, while excess revenues are used to boost the general budget. Such measures can render EFR an appealing instrument for Finance and Environment Ministries alike – and this appeal, experience in the EU and elsewhere has shown, is vital to ensure the implementation of EFR. Further advantages of the revenue raising potential of EFR include bringing foreign exchange earnings into the country, *e.g.*, by imposing an import duty on older vehicles, and the reduction of the dependency of local government on central government revenue, in cases where revenues are raised and used locally.

Policy Analysis for Improved Implementation

In-depth policy analysis and reliable data are vital for the design and implementation of appropriate and effective instruments. Examples cited during the workshop included the South African Treasury's draft policy paper on EFR – A Framework for Considering Market-Based Instruments to Support Environmental Fiscal Reform in South Africa,¹⁸ published in April 2006 – and the Tanzanian government's 2004 Public Environmental Expenditure Review. The latter proved to be a critical turning point in highlighting the considerable potential for environmental resources to contribute to revenue, the significant underpricing of environmental services, and very low revenue collection in Tanzania in *e.g.*, fisheries and wildlife, as well as the relatively low levels of investment and recurrent expenditure on environmental assets and improved revenue capture.¹⁹

The poor rates of implementation and lack of effectiveness found by Tanzania's Public Environmental Expenditure Review revealed a common problem in developing, emerging and transition economies. In Sri Lanka, for example, speaker Stefan Speck revealed that while legislation is in place for the imposition of waste charges on solid waste and waste water, fees are not in actual fact collected and charges are not enforced. The effectiveness of EFR measures rests on more than the quality of the legislation itself – including factors such as how well thought out a particular measure is – but also on the abil-

ity and political will to implement and enforce a piece of legislation, once brought into law. This observation brings us full circle to the important issue of capacity development and good governance, vital at all stages of the policy process to ensure that legislation is well drawn up, that it targets viable areas of the economy, and can be realistically implemented by the relevant authorities.

Sound policy analysis, including understanding underlying governance structures and identifying potential winners and losers from a given piece of legislation, can help governments deal with opposition – perhaps before it has even been voiced – and overcome resistance to EFR. Understanding the characteristics of different stakeholder groups impacts significantly on the results of negotiation and enables win-win solutions to be found. Thus, the tangible benefits of EFR for the majority can be identified and information on these benefits disseminated, while the conflicting goals of government ministries and vested interests can be addressed. Within this process, speakers emphasised the importance of the support of key political actors and the judiciary – support that can be effectively garnered by the provision of sound information emphasising the benefits of EFR for environment, economy and society.

Conclusions

As recently as the start of this century, discussion of environmental taxation and EFR was new in many countries. When the conference series began, the topic of environmental taxation was in its infancy and often regarded as outlandish, and until recently the majority of non-European participants could only regard new EFR approaches as policy measures for the distant future, hardly realisable, even in the medium term, in their home countries.

A sea change became apparent at the Munich conference! In particular in 2006 and 2007, the climate change issue and corresponding global awareness of the gravity of the problem have brought the debate further than we would dared to have dreamed. Today, it is the climate change sceptics who are treading an increasingly lonely road to nowhere, while supporters of EFR and MBI for climate policy have moved towards the mainstream – not necessarily in general politics, but certainly in the expert community. Over and above this shift, since 2000 the foundations of the environmental taxation debate have firmed up considerably: abstract theoretical discussions have been replaced by the reality of EFR instruments, which have long since proven their economic and environmental effectiveness. Rather than refuting theoretical criticisms of EFR, overcoming populist arguments and the power of interest groups have become priorities today. Not only in view of the results presented at the GCET in Munich, there is no need to discuss whether or not EFR is effective, but rather to market it better to ensure that it is implemented more widely and courageously.

It has become clear that the basic message underlying the communication of EFR has changed. Today, we can address the public and decision-makers with more confidence – because EFR has clearly delivered the results its supporters have been claiming it would. Every one of us

should be asking policy makers why they have not yet understood that EFR can protect the environment, mitigate climate change, create employment and contribute to poverty reduction – all at the same time. Intelligent climate protection can often be achieved at little or no cost to the economy, or can even benefit the economy and result in increased rates of growth. Even in cases where EFR carries an economic cost, it will still be far less than the price paid in the long term for poor environmental protection.

Notes

1 The GCET conference series is overseen by a Steering Committee of four professors – Larry Kreiser, Janet Milne, Kurt Deketelaere and Hope Ashiabor – who got together in autumn 1999. The first conference, which took place in 2000 in Cleveland, Ohio, attracted only 60 participants. Subsequent conferences have taken place in Vancouver, Vermont, Sydney, Pavia, Leuven, Ottawa and Munich. In spite of there being no formal conference structure, the series has become a remarkable and influential tradition.

The Munich GCET was innovative, especially in having been organised by an NGO – Green Budget Germany/Förderverein Ökologische Steuerreform – rather than an academic institution (although it acknowledges the valuable academic support of Professor Wolfgang Buchholz from the University of Regensburg). As such it was forward-looking and practical – a new approach.

2 Several papers at the conference analysed the “double dividend” hypothesis. Their findings are discussed below.

3 See: <http://www2.dmu.dk/cometr/>.

4 Sweden, Denmark, Germany, the UK, Finland, the Netherlands and Slovenia (which has not implemented environmental taxation as such, but which has adjusted energy taxes in the industrial sector according to their carbon content).

5 The COMETR Final Report can be accessed at: http://www2.dmu.dk/cometr/COMETR_Final_Report.pdf.

6 For more information, see: http://www.oecd.org/document/47/0,3343,en_2649_34333_35141743_1_1_1_1,00.html.

7 Presentation available online at: <http://www.worldcotax.org/downloads/Presentations/NilsAxelBraathen.pdf>.

8 Powerpoint presentation available online at: <http://www.worldcotax.org/downloads/Presentations/SchlegelmilchKai.pdf>.

9 For more information, visit the COMETR homepage at: <http://www2.dmu.dk/cometr/>.

10 See PowerPoint presentation at: <http://www.worldcotax.org/downloads/Presentations/Weizs%20E4cker.pdf>.

11 Presentation online at: <http://www.worldcotax.org/downloads/Presentations/WiedowAlexander.pdf>.

12 For a detailed analysis of the advantages of MBIs over and above green subsidies see: Görres, A. and Cottrell, J., “Green Subsidies: Politically Popular, Economically Costly, Environmentally Ambiguous” in Deketelaere, K., Milne, J., Kreiser, L. and Ashiabor, H. (eds), *Critical Issues in Environmental Taxation: International and Comparative Perspectives*, Oxford University Press, 2007, pp. 471–487.

13 For more information on the public consultation, and to download the Green Paper, see: http://ec.europa.eu/taxation_customs/article_3849_en.htm.

14 EEA Executive Director Jacqueline McGlade also warned of the potentially devastating impact of biofuels production on the developing world during the GCET press conference.

15 For more details on Border Tax Adjustments please see: <http://www.foes.de/de/downloads/EUStudien/BorderTax.pdf> and <http://www.foes.de/de/FOES41-4Art1.html>.

16 Available online at: <http://www.oecd.org/dataoecd/14/25/34996292.pdf>.

17 As was also shown in the main conference – see footnote 12 for more details.

18 The report can be downloaded from the Treasury web site at: <http://www.treasury.gov.za/divisions/epifr/tax/public/Draft%20Environmental%20Fiscal%20Reform%20Policy%20Paper%206%20April%202006.pdf>.

19 Details available at: <http://www.worldcotax.org/downloads/Presentations/SlungeMkendalKiaraKenyaTanzania.pdf>.



Non-Compliance Mechanisms and International Environmental Law

by Ariana Broggiato*

On 9 and 10 of November 2007 the University of Milan hosted a Conference on Non-Compliance Mechanisms and the Effectiveness of International Environmental Law. The Conference was the outcome of a research project on “*Compliance Systems: alternative means for the prevention, management and settlement of international disputes in international environmental law*”, undertaken by the universities of Milan, Bologna and Parma, and led by Professors Tullio Treves, Laura Pineschi and Attila Tanzi. The project was co-financed by the Italian Ministry of University and Research. The conference featured a presentation by Tullio Treves, followed by four main sessions: panel one on the Practice of Non-Compliance Mechanisms, with contributions from René Lefeber, Veit Koester, Nicola Notaro, Roy Watkinson and Jerzy Jendroska; panel two on Institutional and Procedural Aspects, with contributions from Alessandro Fodella, Massimiliano Montini,¹ Enrico Milano and Francesca Romanin Jacur; a roundtable discussion chaired by Attila Tanzi and panel three on the

Relationship with International Law and European Union Law, with contributions from Malgosia Fitzmaurice, Laura Pineschi, Cesare Pitea, Tullio Treves and Antonio Ali. The conference provided an important forum for scholars to exchange practical experiences of various compliance committees. Its roundtable enabled the airing of a variety of opinions and case-by-case perspectives. The efficacy of non-compliance mechanisms depends on many considerations (the overall objectives of the treaty, the strength of its obligations, its scope of application, the state actors and non-state actors involved in the regime, the interests beyond it). Each mechanism should therefore take into account all recent experiences demonstrating the general interactions between these considerations, rather than general rules.

Background

Compliance mechanisms are of growing interest, as part of a general trend in public international law, in many fields other than environmental protection, where different kinds of compliance procedures or organs have been established in order to promote more effective implementation of the obligations set out in international treaties.

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More specifically, many global and regional Multilateral Environmental Agreements (MEAs) are attempting to implement an alternative between the law of state responsibility and the law of treaties, to deal with breaches of international obligations. Up to now, the issue has not attracted much scholarly attention, especially in Italy, therefore the consortium of the above-mentioned three universities decided to analyse the link between the existence of non-compliance mechanisms and the effectiveness of international environmental law, in order to try to identify what features, if any, ensure the efficacy of a non-compliance mechanism, and consequently the effectiveness of the international obligations at stake. However, it is important to bear in mind that compliance and effectiveness are not synonymous: compliance indicates respect for the obligations undertaken, while effectiveness depends on the strength of the obligations themselves.

Nine compliance mechanisms are already in place, five of which are global and four are regional. Five more are under negotiation, four global and one regional. The project focused on most of the compliance mechanisms already in place or under negotiation, using a common methodology to identify common patterns, while also underlining the differences between them. The method used by the project comprised two perspectives: a vertical one consisting of an analysis of each mechanism, and a transversal one focusing on the common critical issues that emerged during that vertical consideration of the mechanisms. The conference focused mainly on the transversal point of view.

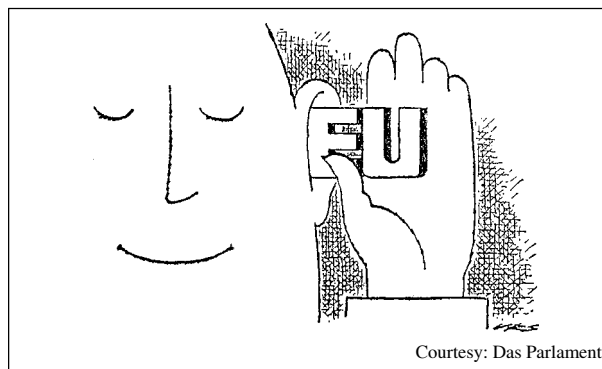
The existence of non-compliance mechanisms raises many doctrinal debates, concerning classical fields of public international law, that was touched on by some of the speakers during the conference. They include the difference between the law of state responsibility, the rules of the law of treaties concerning breaches of international agreements and the solution provided by non-compliance mechanisms, the inner reasons behind the need for this alternative way of solving disputes over non-compliance, the relationship between compliance and dispute settlement, the legal status of the enabling clauses providing the power to establish a compliance committee, the legal status of the decisions of the Conference of the Parties that usually establish a compliance committee and of the outcomes of non-compliance mechanisms. All these interesting issues go beyond the focus of this brief chronicle. The present report will concentrate on the practical outcomes and on the considerations that, according to what was highlighted during the conference, contribute to the success of a compliance mechanism.

Current examples of non-compliance mechanisms in international environmental processes are mainly facilitative, non-confrontational, non-judicial and of a consultative nature. Compliance committees tend to recommend to the Conference of the Parties the adoption of facilitative measures such as financial help or recommendations on how to deal with a difficult situation. In some cases, the measures adopted can be stronger, such as “naming and shaming” a non-complying party, or in extreme cases, suspension of certain privileges, as for example in

the Montreal² and in the Kyoto³ mechanisms. This generally preventative attitude fits very well with the objective and scope of environmental treaties, focusing mainly on prevention⁴ rather than reparation of the occurred damage.

The EU Perspective

In 2005, the European Commission’s Staff Working Paper on Compliance Mechanisms in Multilateral Environmental Agreements⁵ expressed the common position of the EU towards non-compliance mechanisms, including which features can assure the effectiveness of these



Courtesy: Das Parlament

mechanisms according to the EU perspective and experience. In particular, the EU strongly supports the inclusion of a clear enabling clause in the agreement in order to avoid resistance to non-compliance mechanisms being established, with short-term and definite deadlines for their implementation. Moreover, the preference is for standing bodies, not *ad hoc* ones, whose members are independent, sitting in their individual capacities and not as state representatives; with a mixed expertise comprising legal and technical backgrounds. Concerning functions, the EU tends to attribute broad functions to these committees, addressing specific cases of non-compliance and general problems as well, and the EU is generally supportive of broad triggering, with the *caveat* of the need for a case-by-case consideration for public triggering. Regarding transparency, the EU supports open deliberations, while accepting in some cases justified exceptions. The range of available measures should be broad, from facilitative ones to stronger ones including also trade-related measures. Capacity building for non-compliant parties should always be an option. Financial mechanisms, like the one prescribed by the Montreal system, are also considered important.

The features described here can generally be viewed as the ideal, from the point of view of the effectiveness of a compliance mechanism; the roundtable discussions showed that each system has its own peculiar characteristics⁶ and some of them might determine the necessity of a case-by-case consideration, especially over the following issues.

Independence and Expertise of the Officers

The effectiveness of the work of a compliance committee depends on the independence of the officers.

Ideally, to be independent, the committee should be composed of persons sitting in their own capacity and not as State representatives, however, the majority of the committees are made up of state representatives. Notwithstanding this general consideration, even in the case of independent experts, the independence of the officers is difficult to achieve: as noted by Notaro, it could be granted on paper, but it might not be transposed into reality. Independence is a state of mind: you can make it a rule but what if people do not feel independent? On the other hand, as underlined by Lefeber, the Compliance Committee of the Kyoto Protocol,⁷ where, for the first time, members are serving in their individual capacities, in an independent and impartial manner,⁸ is highly politicised, even though it is not comprised of government representatives. Moreover, as noted by Treves, there is a double possible perspective of looking at the relationship between these bodies and political pressure: while a technical body is more protected from such pressure, on the other hand, a political body can protect states more efficiently than a technical one.

Regarding the expertise of the officers, it was agreed that a mixed expertise comprised of legally and technically qualified persons would help the committees in facing both the legal interpretation of the texts,⁹ and the adoption of the best solution to urge states to revert to compliance, in cases of non-compliance. This issue is generally not deeply considered in any legal provision establishing non-compliance mechanisms: usually consideration is given to an equitable geographical representation of the member states, especially in global agreements. As underlined by Jendroska's description of the working of the Inquiry Committee of the Espoo Convention¹⁰ in the case of the Ukrainian Bystroe Canal Project, his direct experience revealed some inadequacy in the consideration of the legal issues by the officers of the committee, only two of which were lawyers. Moreover, some continuity of the work of the officers should be granted for the procedure to be efficient: the composition should not be changed at every meeting, and each officer should sit on the committee for a consistent period.

Funding and Funds

A quite controversial issue is the way in which compliance committees are financed, for two reasons: first, because of the unclear legal nature of the contributions to the budget and secondly because, both in the case of mandatory and voluntary contributions to the work of the mechanism, resources are still inadequate, as noted by Romanin Jacur. For a more efficient use of the budget, meetings of the compliance committees could be held back-to-back with the Conference of the Parties (COP) or other subsidiary bodies, but this only works for committees comprised of state representatives and not of independent experts. Moreover, holding committee meetings in conjunction with COPs, risks preventing the COP from having the necessary time to consider the issues of non-compliance on which the committees report.¹¹

The binding nature of the obligation to contribute to the budget should be recognised. Moreover, a failure to

pay the contribution to the non-compliance funds¹² should be considered as non-compliance itself.

NGO and Civil Society Involvement

Another critical issue in setting up an ideal compliance mechanism is the role to be given to NGOs and public participation in the process. Ideally, public participation should be granted for the procedure to acquire more transparency and to be more effective, since quite often NGOs are the ones possessing more data on possible situations of non-compliance. However, two things need to be considered in granting access to the public: the true independence of these organisations, and the need to avoid overwhelming the procedure with too much work. As underlined by Fodella, a positive role should be given to civil society organisations only if they are truly independent, but some NGOs are financed by States, and, as noted by Notaro, NGOs are as good as the individuals that represent them, and this condition makes it quite difficult to establish clear criteria for involving them in the procedure. Moreover, there is a lack of common understanding of what is intended by "civil society" in this context: some legal regimes consider business organisations as NGOs, but this would not be acceptable in the perspective of involving them in non-compliance procedures by giving them the chance to report data, or giving them the possibility to act as a trigger. Not considering the fact that, as underlined by Lefeber and Koester, this option of triggering is not negotiable at the global level: only in the Aarhus Convention¹³ has it been accepted just because it is a kind of human rights convention. Moreover, in a global system, only western countries' NGOs can afford to cover the cost of participating in the system, and this undermines the sense of their very participation.

Finally, public triggering has the important consequence of increasing the work of the committees, and the mechanism can be killed if there are too many complaints.

Coordination among the Different Committees

As we saw in the beginning, in recent years, non-compliance mechanisms have been established by many MEAs, and this multiplication has brought about the possibility of overlap between them. Some situations raise issues of non-compliance within different procedures (as in the case of the Ukrainian Bystroe Canal Project that raised questions of non-compliance in the framework of the Aarhus Convention and in the Espoo one) at the same time, or in different moments, raising the question of how a legal finding made by one committee can be considered within another procedure. As noted by Pitea, this institutional fragmentation is not necessarily a weakness, and from this starting point a common approach needs to be promoted to coordinate the activities of various bodies. The problem is that subsidiary bodies cannot engage in dialogue with other subsidiary bodies without an *ad hoc* authorisation by the COP, and since some COPs do not meet very often, it might be rather difficult to obtain such authorisation. Some kind of simple communication should be promoted without the necessity of a case-by-case auth-

orisation, maybe referring to the Secretariats of these MEAs to act as facilitators between different mechanisms, as suggested by Pitea. Moreover, in the case of facts and legal findings in the framework of one compliance mechanism, a flexible way is needed for other compliance mechanisms to take them into account, especially considering that these mechanisms usually have different perspectives and focus on different aspects of the same situation. Therefore a culture of cooperation needs to be promoted, enhancing synergies among the different treaty systems for the protection of the environment.

Conclusions

For many of the non-compliance mechanisms described above it is quite early to assess their effectiveness, especially considering that some of them have not started working properly and still focus their attention on general issues rather than concrete situations of non-compliance by states. Anyway, considering all the minor faults that emerged during the Conference and the need for improvement, what should be borne in mind is the very object of a non-compliance mechanism, that is to say the necessity to promote compliance and to urge states that are facing difficulties to comply with the undertaken obligations: a friendly and facilitative attitude should be encouraged, for example opening the floor for a declaration of “problem in compliance” rather than a declaration of “non-compliance”, as suggested by Jendroska, or through the possibility of keeping self submission in closed session, in order to make the states feel more comfortable with their difficulties, as suggested by Koester.

Setting up an ideal non-compliance mechanism is a matter of reaching, in a treaty system, the right balance

between its effectiveness and the concrete need to make the system work: obligations and sanctions that are too stringent can make the states feel not comfortable, therefore an attitude of cooperation should be promoted, taking into account all the case-by-case considerations of the treaty system at stake.

Notes

- 1 Who could not be present to introduce his contribution to the project.
- 2 See the Montreal Protocol on Substances that Deplete the Ozone Layer (signed 16 September 1987 and entered into force 1 January 1989, *ILM*, vol. 26, 1987, p. 1550) to the Convention for the Protection of the Ozone Layer (signed 22 March 1985 and entered into force 22 September 1989, *ILM*, vol. 26, 1987, p. 1550).
- 3 Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted on 11 December 1997, entered into force on 15 February 2005, *ILM*, vol. 37, 1998, p. 22.
- 4 Some environmental damage is not reparable and not even quantifiable, therefore the law of environmental protection focuses on the prevention of the damage, rather than on the reparation of it, and this is one of the reasons why international environmental law prefers to resort to compliance mechanisms rather than to the law of state responsibility and the law of treaties.
- 5 SEC (2005) 405.
- 6 Depending on the very objective of the treaty under consideration, the stringency of its obligations, the range of member states, the interests involved and the very way of working of the mechanism itself.
- 7 See note 3 *supra*.
- 8 Moreover, before assuming their service, they have to take and agree to respect a written oath, declaring to avoid real or apparent conflicts of interests.
- 9 Professor Tullio Treves declared this to be the most important aspect of the work of non-compliance bodies.
- 10 Convention on Environmental Impact Assessment in a Transboundary Context, entered into force on 10 September 1997, *UNTS*, vol. 1989, p. 309.
- 11 Since usually in the procedure the compliance committee formulates recommendations of actions to be considered and adopted by the Conference of the Parties.
- 12 Established, as in the case of the Montreal system, to help countries in difficulties (developing states or states facing a transition period) to comply with the undertaken obligations.
- 13 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters; adopted on 25 June 1998 and entered into force on 30 October 2001, *ILM*, vol. 38, 1999, p. 517.

In memoriam: Christian A. Herter Jr

We mourn the loss of Christian A. Herter Jr, a lawyer, former US Vice Presidential aide and former deputy US commissioner on the International Whaling Commission, who died on September 16, 2007.

Chris taught environmental law at the University of New Mexico and later international law at the Johns Hopkins University School of Advanced International Studies. He also served as Chairman of the Board of the Council of



Ocean Law after the passing of Elliot Richardson.

We came to know Chris through his chairmanship of the Diplomatic Conference for the Convention on International Trade in Endangered Species in 1973. This was an important factor in the successful completion of CITES, which was among the first instruments of the new generation of international conventions on environmental conservation – a landmark in international law.