Part II

International Environmental Law and Law-making

Individuals and Disasters: The Past and the Future of International Environmental Law[1]

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International Environmental Law

It is not easy to pinpoint when and where international environmental law began. While it is possible to look back at historical events – and occasionally curiosities – and label them examples of international environmental law, they would not at the time have been seen as such in the sense that we understand environmental law today. Examples of early multilateral environmental agreements, as we understand them today, can perhaps be seen in certain examples from the late 19th Century. In 1881, for example, an international convention was agreed concerning measures to be taken against *Phylloxera vastatrix*;[3] this was supplemented by an additional convention in 1889.[4] *Phylloxera vastatrix* is a species of root louse native to Mississippi in the United States. Devastating to non-resistant European vines and so small as to be almost impossible to detect, in the twenty years from 1865 the species devastated 70 percent of European vineyards. Feeding on vine roots and leaves, the louse quickly causes a vine to rot and die.[5] From these early beginnings, international environmental law today consists of detailed regimes covering a broad range of environmental issues. These regimes develop and emanate from treaties, general principles, judicial decisions and custom.

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1 This paper is based on a lecture given by the author on 23 August 2005.

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3 Convention on Measures to be Taken against the Phylloxera Vastatrix, Bern, 3 November 1881, *IPE* 1571.

4 Additional Convention on Measures to be Taken against the Phylloxera Vastatrix, Berne, 15 April 1889. See also International Plant Protection Convention (New Revised Text), 17 November 1997, in force 2 October 2005, www.fao.org/Legal/TREATIES/004t-e.htm.

5 For a description of *Phylloxera vastatrix*, see www.winepros.org/wine101/vincyc-phylloxera.htm.

A multilateral environmental agreement usually comes into existence by way of a treaty or convention. This does of course have its own inherent problems. The difficulty of achieving a firm commitment to change from large gatherings of states can be seen in one of the most important Principles in the Stockholm Declaration, in which acknowledgement is made of state sovereignty. Principle 21 states that

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[6]

Echoes of the *Behring Sea Fur Seals*,[7] the *Trail Smelter*[8] and the *Lac Lanoux*[9] arbitrations can be seen in this formulation. The principle, sovereignty, can be seen as an attempt to accommodate the interests of individual states – after the decolonization of many African states in the 1960s sovereignty was a concept guarded especially jealously by the newly independent states – while at the same time attempting to entrench as binding a commitment to environmental protection as possible.

With no international environmental court enjoying jurisdiction, faced with an environmental dispute, states sometimes agree to place the matter before arbitration. Although binding only on the states parties to, and in the context of, the respective disputes, certain of these arbitral decisions have come to be recognized as authoritative and influential. An important arbitration, the *Lac Lanoux Arbitration*, took place in 1957. France had within its own territory diverted a watercourse, thereby affecting Spain. The arbitral tribunal confirmed as a principle of international customary law that states are required to co-operate with each other in order to mitigate transboundary environmental risks.[10] The tribunal held that France had indeed complied with its obligations – in terms of treaty and customary law – to negotiate with Spain, in good faith, before diverting the watercourse. However, the tribunal noted that France's obligation extended to informing and consulting with Spain in regard to the proposed diversion, but that Spain did not have a right to prevent France from going ahead with the project.[11] Arguably, the *Lac Lanoux* principles have been extended to the management of other transboundary risks.

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6 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, 11 *International Legal Materials* (1972) 1416, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503.

7 See *infra*, footnote 69.

8 See *infra*, footnote 88.

9 *Affaire du Lac Lanoux*, XII *United Nations Reports of International Arbitral Awards* at 285-317, Lake Lanoux Arbitration (English Translation), 24 *International Law Reports* (1957) at 105-142.

10 Patricia Birnie and Alan E. Boyle, *International Law and the Environment* (2nd ed., Oxford University Press, 2002) at 126.

11 *Ibid.*

In other words, prior notification and consultation are called for when states perform acts of a hazardous or potentially harmful nature.[12]

Custom is of course an important source of international law. An important attempt at the codification of customary international law came in 1982 with the adoption of the United Nations Convention on the Law of the Sea (UNCLOS).[13] The Convention had taken nearly a decade of negotiation before adoption, and eventually entered into force in 1994. The Convention contains comprehensive provisions on the marine environment. A significant step is taken, for example, in Article 206 of the Convention, which reads:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.[14]

It is important to note the precautionary element of the phrase: '*may* cause substantial pollution'. The article effectively requires that states undertake assessments before carrying out planned activities, even without substantive proof that the proposed activities *will* cause substantial damage. UNCLOS also created a Law of the Sea Tribunal, for resolving disputes under the Convention.

In many cases, international environmental law takes the form of statements of intent, declarations, guidelines or principles. In other words so-called soft law, which does not impose binding obligations on states. The hope of the international environmental lawyer or analyst must be that over time, as principles are repeated in more international conventions, this soft law will harden and environmental principles come to be seen as hard law. This paper will look at some of the ways individuals and environmental disasters have had an effect on the development of international environmental law through its various sources.

12 *Ibid.*, at 127.

13 United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261, www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

14 Article 206, *ibid.*

The Role of Intergovernmental Organizations and Non-governmental Organizations

The period between the two World Wars was not marked by great concern for the environment, but it is important for the founding of a number of bodies which were later to become significant. In 1922, for example, the International Committee for Bird Protection was founded in England; it later became the International Council for Bird Preservation. Eventually in the 1990s the organization transformed into Birdlife International, a 'global conservation federation with a worldwide network of partner organizations.'[15] In 1929, the Dutch Government funded the establishment of an International Office for Documentation for the Protection of Nature (IOPN). This was subsequently restructured in 1948, under the wing of UNESCO, as the International Union for the Protection of Nature (IUPN). In 1956, the organization became the International Union for Conservation of Nature and Natural Resources: the IUCN. From 1990, the name World Conservation Union has been used, although the organization is still probably better known as the IUCN. The World Conservation Union is, according to its own website, the world's largest and most important conservation network. The Union comprises 82 States, 111 government agencies, more than 800 non-governmental organizations (NGOs) and some 10,000 scientists and experts from 181 countries in a worldwide partnership.[16] The Union's mission is 'to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable.'[17] These two bodies, Birdlife International and the IUCN, show how individuals responding to perceived problems can create organizations which ultimately become extremely influential. The IUCN today is partly funded by the United Nations.

In 1945 the United Nations (UN) was established, followed by the Food and Agriculture Organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). The significance of these organizations for the history of international environmental law can obviously not be overstated. It is from the UN that the vast majority of multilateral environmental agreements currently in force derive their authority, and under the banner of which the future of such agreements is likely to be decided. Despite certain problems of legitimacy, consensus and credibility, the UN remains the world's leading intergovernmental and norm-determining body.

An important non-governmental organization was created in 1961: the World Wildlife Fund (WWF), today called the Worldwide Fund for Nature. This organi-

15 See, for example, www.birdlife.org/ and www.americanbirding.org/abalinks/linkspage1a.htm.

16 See, for example, www.iucn.org/en/about/.

17 *Ibid.*

zation works closely with the IUCN and is involved in raising money and campaigning for the protection of wildlife in many countries.[18] In 1970, a small group of environmental activists formed a NGO called Greenpeace International. In 1971 they began a campaign of courageous but non-violent activism in protest against United States' nuclear testing north of Alaska. In 1973 this was expanded, under the leadership of the Canadian David McTaggart, to protest against French nuclear testing in the South Pacific. Greenpeace is today the most visible and well-known of environmental protest groups and provides an important example of how the actions of individuals co-ordinating themselves into a group can influence environmental change.[19]

Pressure from ornithological groups culminated in 1971 with the Convention on Wetlands of International Importance especially as Waterfowl Habitat.[20] Non-governmental groups were prominent in the process; The Netherlands and the USSR backed the Convention strongly, as did groups such as the ICBP and the IWRB, now called Wetlands International. The Ramsar Convention was one of a cluster of international conventions, agreements and declarations on the environment which saw the light of day in the early 1970s. One of the most central was the Stockholm Declaration agreed at the 1972 United Nations Conference on the Human Environment (UNCHE).[21] The Conference itself was, at the time, the largest gathering of states. The Declaration consisted of key environmental principles; the idea that 'man bears a solemn responsibility to protect and improve the environment for present and future generations' can be found in Principle 1. The Conference was chaired by Maurice Strong, who has played an active role in international environmental treaties over three decades. The early 1970s also saw the Convention concerning the Protection of the World Cultural and Natural Heritage, which was driven by UNESCO.[22] At the time of writing, 812 sites (628 cultural, 160 natural and 24 mixed sites in 137 states parties) have been inscribed on the World Heritage List.[23] Unlike the Ramsar Convention, which encourages states parties to designate their own sites, the World Heritage Convention has a World Heritage Committee, which approves nominated sites.

18 See www.worldwildlife.org/.

19 See www.greenpeace.org/international/.

20 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 January 1971, in force 21 December 1975 , 996 *United Nations Treaty Series* 245, www.ramsar.org/key_conv_e.htm (Ramsar Convention).

21 Stockholm Declaration, *supra* note 6.

22 Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, whc.unesco.org/en/175/.

23 See whc.unesco.org/en/list/.

Sovereignty and Environmental Thought

A significant treaty was signed in 1959: the Antarctic Treaty. A number of states had made claims to the area based on discovery, contiguity or significance. The treaty froze all these claims, however, and designated Antarctica as a natural reserve and prohibited any mineral resource activity.[24] Although dated – it would be extremely unusual to find a more modern treaty requiring unanimity of states parties – the Antarctic Treaty shows how states can, if they so desire, form an agreement which benefits the environment and states generally, rather than the individual state itself. In 1968 an extremely influential article, 'The Tragedy of the Commons', was published by Garrett Hardin in the journal *Science*.[25] Hardin postulated a commons on which tribesmen grazed livestock at no cost to themselves. For each tribesman there would always be an incentive to add animals as they could also graze on the common area. If only one tribesman did this, carrying capacity would not be exceeded. If all did, however, then the commons would collapse as a resource which was able to support all. As a metaphor for unsustainable use of the environment, the article has resonated in much future thinking.

The 1972 Stockholm Conference (UNCHE) saw agreement on the founding of the United Nations Environment Programme (UNEP), the only United Nations programme based in a developing country and the only dedicated environmental programme.[26] Non-governmental organizations played an unprecedented role in the founding of UNEP in December 1972.[27] Also in 1972, Christopher Stone published an article entitled 'Should trees have standing?'. In one of the seminal articles in environmental legal thinking,[28] Stone argued that the history and process of law has been the gradual extension of legal rights to entities to whom it was at one time unthinkable that such rights should be granted. These include slaves, children or women, for example. Might it not be, he argued, that at some future time people will look back on today and claim that it was unthinkable that the environment – forests and trees even – should *not* have been given legal rights?

24 Antarctic Treaty, Washington D.C., 1 December 1959, in force 23 June 1961, 402 *United Nations Treaty Series* 71, www.ats.aq/uploaded/SIGNEDINWASHINGTON.pdf. Article 7 of the Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* (1991) 1461, www.ats.aq/protocol.php, provides that '[a]ny activity relating to mineral resources, other than scientific research, shall be prohibited' and Article 25 provides that the operation of the Protocol cannot be reviewed until 50 years after date of entry into force.

25 Garret Hardin, 'The Tragedy of the Commons', 162 *Science* (1968) 1243-1248, www.sciencemag.org/cgi/content/full/162/3859/1243.

26 For a more detailed account of the birth of UNEP see the paper by Donald Kaniaru in the present Review.

27 See, for example, United Nations Environment Programme, 'UNEP Policy on NGOs and Other Major Groups', www.unep.ch/natcom/assets/about_natcom/about_ngos.doc.

28 C.D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects', in C.D. Stone, *Should Trees Have Standing: And Other Essays on Law, Morals and the Environment* (25th Anniversary Ed., Oceana Publications: New York, 1996).

The 1987 release of *Our Common Future*,[29] the Report of the World Commission on Environment and Development, is significant for introducing formally into international environmental discourse the phrase 'sustainable development'. The Report, adopted by the General Assembly in 1987, provided a significant stepping stone for future Conventions and laid the foundation for the convening of the 1992 United Nations Conference on Environment and Development. The Report suggested that:

> sustainable development, which implies meeting the needs of the present without compromising the ability of future generations to meet their own needs, should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises.[30]

In 1992, the United Nations Conference on Environment and Development (UNCED), or Rio Summit, was held. This was, at the time, the largest ever gathering of world leaders and non-governmental organizations and led to the adoption of several important declarations and agreements and the creation of several important entities. The Rio Declaration on Environment and Development was adopted.[31] The Commission on Sustainable Development (CSD) was established by UNCED and the global action plan, *Agenda 21*,[32] was adopted. Despite setbacks, such as the reluctance of the United States and certain other developed states to commit to binding agreements, the Conference sought not merely to issue non-binding principles, but to provide world states with a convincing blueprint for sustainable development, in order that real progress might be made.

In 1993, a seven member Chamber of the International Court of Justice (ICJ) with a remit to deal with environmental issues was established. While the Chamber has not so far been particularly active, the potential now exists for environmental disputes to be adjudicated upon by this special body. Although the special chamber was not seized in the *Gabcikovo-Nagymaros Case (Hungary/Slovakia)* but was heard by the 15 judges presiding in plenum, the case is certainly the most important environmental case so far to have come before the ICJ.[33] The court found that Hungary had been wrong to withdraw from a joint project but that Slovakia had been

29 World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987), UN Doc. A/42/47 (1987)(The Brundtland Report).

30 Preamble, *ibid.*

31 Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm. Although so called soft law and therefore not imposing firm obligations on states, the Declaration is significant as an indication of the direction in which customary international law is moving.

32 *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

33 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997) 7, Separate opinion of Vice-President Weeramantry, at 88, www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm.

wrong in proceeding in any case to complete the project against Hungary's wishes. The ICJ found, in fact, that each state had an obligation to compensate the other. From the environmental point of view, the case is important as the ICJ held that:

> in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.
>
> For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment.[34]

The ICJ then held that it was not its role to dictate the result of such consideration of the effects on the environment.

A nettle which needs to be grasped if the goals of sustainable development are to be successful, is that of human population growth. At the 1994 United Nations International Conference on Population and Development the States present agreed in the Programme of Action[35] that

> [s]ustainable development as a means to ensure human well-being, equitably shared by all people today and in the future, requires that the interrelationships between population, resources, the environment and development should be fully recognized, properly managed and brought into a harmonious, dynamic balance. To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate policies, including population-related policies, in order to meet the needs of current generations without compromising the ability of future generations to meet their own needs.[36]

The early years of the 21st Century saw a potentially important environmental development, which mirrored the increasing linkage of environment and development. The rise of an anti-globalization protest movement in the area of interna-

34 Para. 140, *ibid.*

35 Programme of Action of the United Nations International Conference on Population and Development, Cairo, 13 September 1994, www.iisd.ca/Cairo/program/p00000.html.

36 Principle 6, *ibid.*

tional trade also incorporated environmental protests. In the so called Battle for Seattle, the best-known protest saw the 1999 World Trade Organization meeting in Seattle unable to continue after disruptions.[37] Similar protests were then seen at the 2000 Amsterdam Conference on Global Warming, the 2001 World Economic Forum held in Davos,[38] the 2000 and 2002 International Monetary Fund (IMF) meetings in Washington D.C.,[39] the 2001 Free Trade Area of the Americas Agreement (FTAA) meeting in Quebec,[40] the 2001 European Union Leaders' Summit in Gothenburg, and the 2001 G-8 Summit in Genoa, where a protester was killed by police.[41]

Ten years after the Rio Summit there were great hopes for the 2002 World Summit on Sustainable Development (WSSD), held in Johannesburg, South Africa, as a major summit at which practical solutions could be found for the world's environmental and developmental problems. It is far too early to judge the summit's place in history, but it certainly did not achieve the immediate results that if might have. According to the Summit website:

> [b]y any account, the Johannesburg Summit has laid the groundwork and paved the way for action. Yet among all the targets, timetables and commitments that were agreed upon at Johannesburg, there were no silver bullet solutions to aid the fight against poverty and a continually deteriorating natural environment. In fact, there was no magic and no miracle – only the realization that practical and sustained steps were needed to address many of the world's most pressing problems.
>
> As an implementation-focused Summit, Johannesburg did not produce a particularly dramatic outcome – there were no agreements that will lead to new treaties and many of the agreed targets were derived from a panoply of assorted lower profile meetings. But some important new targets were established, such as: to halve the proportion of people without access to basic sanitation by 2015; to use and produce chemicals by 2020 in ways that do not lead to significant adverse effects on human health and the environment; to maintain or restore depleted fish stocks to levels that can produce the maximum sustainable yield on an urgent basis and where possible by 2015; and to achieve by 2010 a significant reduction in the current rate of loss of biological diversity.[42]

37 See, for example, Anup Shah, 'Protests in Seattle', www.globalissues.org/TradeRelated/Seattle.asp, 18 February 2001.

38 See, for example, Anup Shah, 'Public Protests Around the World', www.globalissues.org/TradeRelated/FreeTrade/Protests.asp, 25 November 2003.

39 See, for example, Bob Franken, Shirley Hung and Mike Ahlers, 'Hundreds Arrested at IMF Protests', archives.cnn.com/2002/US/South/09/27/imf.protests/, 27 September 2002.

40 See, for example, Nick Busse, 'Minnesota Unions, Activists Protest Quebec Summit's Free Trade Pact', www.mndaily.com/daily/2001/04/23/news/new2/, 23 April 2001; and Anup Shah, 'The Mainstream Media and Free Trade', www.globalissues.org/TradeRelated/FreeTrade/Media.asp, 14 July 2002.

41 See, for example, World Development Movement, 'WMD Report on the G8 Summit in Genoa, July 2001', www.wdm.org.uk/campaigns/Genoa.htm.

42 See Johannesburg Summit, 'The Johannesburg Summit Test: What will Change?', www.johannesburgsummit.org/html/whats_new/feature_story41.html.

International Environmental Law and Forestry

Lyster suggests that '[f]orestry conservation laws in Babylon date back to 1900 B.C.' and that 'Akhenaten, King of Egypt, set aside land as a nature reserve in 1370 B.C.'[43] The Norman conquest of England in 1066 could, for example, also be seen in this light. Before 1066, and certainly from the time of the Franks and their kindred tribes in the 7th Century, hunting in continental Europe was regarded as being the exclusive right of the king and his nobles; the Franks were the first to introduce the *foresta* system, which reserved areas and animals for the exclusive use of certain classes.[44] While William the Conqueror basically accepted and enforced existing English laws, the forest laws were different; the system imposed on the Saxon English was like none they had seen before.[45] Vast areas of land were designated as royal forests (*foresta regis*);[46] to protect these arbitrarily imposed rights William imposed the death penalty for the killing of a royal deer, and all deer were by definition considered royal.[47] This attempt to extend laws across boundaries can arguably be seen as an early attempt to create international law in the forest context. Little attention was given to forestry in international law over the next millennium, however; and it is only in the second half of the 20th Century that we begin to find attention turned once again to forestry.[48]

In 1983 the International Tropical Timber Agreement was concluded.[49] The intention behind this agreement was '[t]o provide an effective framework for co-operation and consultation between tropical timber producing and consuming members with regard to all relevant aspects of the tropical timber economy.'[50] The Agreement was significant for its recognition of the different responsibilities held by the timber producing (largely developing) and consuming (largely developed) states, and for its recognition of the need to:

43 S. Lyster, *International Wildlife Law* (Grotius Publications: Cambridge, 1985) at xxi.

44 C.C. Trench, *The Poacher and the Squire: A history of poaching and game preservation in England* (Longmans: London, 1967) at 16.

45 Prior to this wild animals had been ownerless property which could be hunted by anyone, subject only to the laws of trespass.

46 See, for example, C.R. Young, *The Royal Forests of Medieval England* (University of Pennsylvania Press: Philadelphia, 1979) 5.

47 A. Ingram, *Trapping and Poaching*, Shire Album 34 (Shire Publications: Princes Risbourough, 1978) at 5.

48 The *Trail Smelter Arbitration*, for example, concerned damage to forests. See below.

49 International Tropical Timber Agreement, Geneva, 18 November 1983, in force 1 April 1985, sedac.ciesin.org/entri/texts/tropical.timber.1983.html. ITTA 1983 was succeeded by the ITTA 1994, International Tropical Timber Agreement, Geneva, 26 January 1994, in force 1 January 1997, www.itto.or.jp/live/PageDisplayHandler?pageId=201.

50 Article 1(a), ITTA 1983, *ibid.*

> encourage the development of national policies aimed at sustainable utilization and conservation of tropical forests and their genetic resources, and at maintaining the ecological balance in the regions concerned.[51]

This latter recognition of the need for sustainability is significant in the face of the obvious utilitarian thrust of the Agreement, which is visible in goals such as:

> Encourag[ing] increased and further processing of tropical timber in producing member countries with a view to promoting their industrialization and thereby increasing their export earnings.[52]

In 1988, the murder of Chico Mendes in the Amazon rain forest in Brazil highlighted the plight of the world's old growth forests, which are being rapidly logged and cleared with consequent loss of biodiversity and carbon sink capacity. Mendes was a rubber tapper and community activist who was murdered by ranchers, against whose encroachment into the Amazon he was leading a campaign. As a result of the international pressure which followed his murder, the Brazilian government created a number of comparatively large extraction reserves to be restricted from ranching activity.[53]

In 1992 at UNCED in Rio the Forest Principles[54] were adopted. The Forest Principles state in the Preamble that the

> guiding objective […] is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.[55]

The Principles seek to provide a framework in which both conservation and use of forests can be compatible. It has been suggested that:

> Reflecting the wording found in both the Stockholm and Rio Declarations, the Forest Declaration's first principle asserts the State's 'sovereign right to exploit their own resources pursuant to their own environmental policies and [that States'] have the responsibility [sic.] to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' While the well established sovereignty right of State to use its resources is clear from such first principle, at least two other international envi-

51 Article 1(h), ITTA 1983, *ibid.*

52 Article 1(e), ITTA 1983, *ibid.*

53 See, for example, 'Extractive Resources', in Nigel J.H. Smith et al., *Amazonia: Resiliency and Dynamism of the Land and its People* (United Nations University: Tokyo, 1995), http://www.unu.edu/unupress/unupbooks/80906e/80906E00.htm#Contents.

54 Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. III), www.un.org/documents/ga/conf151/aconf15126-3annex3.htm.

55 Preamble, *ibid.*

> ronmental law principles seem to surface from such first principle: (a) that States should not use its territory to cause harm to other States; and (b) the duty to prevent harm.[56]

Although firmly expressed to be non-binding, as a statement of intent – and as recognition of the importance to the world of forests – the Principles are of significance.

A significant case in a national jurisdiction but with potential implications for the development of international environmental law, was reported in 1993. In *Oposa et al. v. Fulgencio S. Factoran, Jr. et al.*,[57] the Philippines Supreme Court was called on to decide on the legality of the Filipino government's decision to issue licences to log timber in land areas greater than were available, potentially leading to the complete destruction of Filipino forests within a decade. The case was brought on behalf of Filipino minors, on the basis of their right to a sound environment for generations to come. The case, said the Court

> has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature'.[58]

The Court ruled that the minors had *locus standi in judicio*, on the ground that

> [n]eedless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[59]

On the merits, the Court then found in favour of the minors' petition.

In October 2004 the Nobel Peace Prize was awarded to Professor Wangari Maathai, in recognition of 'her contribution to sustainable development, democracy and peace'. A Kenyan, she had founded the Green Belt Movement which planted more

56 See The World Bank Group, 'International Environmental Law and the Protection of Forests: Rio's Forest Principles Declaration', www4.worldbank.org/legal/legen/legen_forests.html.

57 *Juan Antonio Oposa et al. v. The Honorable Fulgencio S. Factoran, Jr., in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honorable Eriberto U. Rosario, Presiding Judge of the RTC, Makati, Branch 66, respondents* [G.R. No. 101083. July 30, 1993]. See, for example, www.elaw.org/resources/text.asp?ID=278.

58 *Ibid.*

59 *Ibid.*

than 30 million trees across Africa. She has done much to raise awareness of the importance and the vulnerability of indigenous forests and of the need for the increased planting of trees to sustain people and their livelihoods and to preserve both natural environments and ways of life. The award signals global recognition of this.[60]

In an echo of the murder of Chico Mendes in the Amazon in 1988, in February 2005 a Catholic nun named Dorothy Stang was assassinated in the Amazon. She had worked for years to protect the Amazon rainforests from being opened up to ranching interests.[61] In an ironic parallel to the Mendes case, Brazil's government almost immediately declared that it would take steps to protect some four million hectares of rainforest, by declaring it a conservation area.[62]

Overfishing and Whaling

As early as 1882 it was recognized that the world could have a problem in respect of overfishing. In that year, the United Kingdom, Germany, France, Denmark and Belgium signed the North Sea Fisheries Convention and agreed to mutual rights of visit, search, and arrest of the treaty powers' public vessels.[63] This agreement is staggering when looking at the lack of protection given to the oceans in 2005; after 124 years little has been done to offer substantive protection to marine species.

Before the Second World War, concern about overfishing could be seen in the 1937 International Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish.[64] Although the United States and Canada did not become parties and the Convention never entered into force fisheries did, however, receive a temporary reprieve. During the six years of the Second World War there was very little fishing activity worldwide, and fish stocks recovered somewhat. After the Second World War, although a new fishing treaty was negotiated and entered into

60 See, for example, Katy Salmon, 'Profile: Nobel Peace Prize Winner Wangari Maathai', 21 October 2004, www.peopleandplanet.net/doc.php?id=39.

61 See, for example, Democracy Now, 'Murder in the Amazon: A U.S.-Born Nun and Environmentalist is Gunned Down in Brazil For Opposing Rainforest Logging , 22 February 2005, www.democracynow.org/article.pl?sid=05/02/22/1527243 and Greenpeace International, 'Nun Assassinated Defending Amazon, 13 February 2005, www.greenpeace.org/international/news/nun-assassinated-defending-ama.

62 See, for example, British Broadcasting Corporation, 'Murder Prompts Brazil Amazon Curb', 18 February 2005, news.bbc.co.uk/2/hi/americas/4275781.stm.

63 See, for example, AllRefer.com, 'Fisheries, Environmental Studies', reference.allrefer.com/encyclopedia/F/fisherie-history-of-fisheries-regulation.html.

64 International Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, London, 23 March 1937, not in force. See, for example, http://www.nafo.ca/about/history/early.html.

force,[65] fishing intensified dramatically worldwide. One can only conjecture as to why, if there was international concern in 1882 and again in 1937 and 1946 in relation to fish stocks, there is not now, in 2005, widespread panic.

In 1946 the International Convention for the Regulation of Whaling was signed.[66] The Convention provides an interesting example of how a multilateral environmental agreement can change shape and form over time. In time the convention has become an instrument with an opposite objective to what it began with. The ICRW began as a utilization treaty with twelve states party, all of whom were active whaling nations. The premise was that they would annually decide on quotas, in order to manage whales as a resource, with an annual meeting of an International Whaling Commission (IWC). The quota system was inefficient, however, and whale numbers continued to drop markedly. By 1975 and the years immediately afterward, a number of countries had announced that they would cease whaling, showing how consumer perceptions toward use of natural resources had changed in large parts of the world. In 1982, the International Whaling Commission (IWC) adopted a moratorium on commercial whaling, to take effect from 1986.[67] This represented a sea change from the utilitarian focus of the initial parties to the ICRW in 1946. In the interim years, a number of the states parties (Australia, South Africa, the United Kingdom, and the United States, for instance) had changed their attitudes to whaling and, there being no stipulations as to membership other than statehood, new parties (Austria and Switzerland, for instance) without histories of whaling had joined. Those states parties which wished to continue commercial whaling (Iceland, Japan and Norway, for instance) found themselves outvoted.

Fishing remains an area in which there has been little movement in international law. The Law of the Sea Convention (UNCLOS) of 1982 settled states' exclusive economic zones at 200 nautical miles. This provides an important protective measure, as the majority of marine living resources are to be found within coastal waters rather than on the high seas. The high seas remain, however, an open-access commons. In its *Plan of Implementation*, the World Summit on Sustainable Development committed, inter alia, to the following:

65 Convention for the Regulation of the Meshes of Fishing Nets and the Size Limit of Fish, London, 5 April 1946, in force 5 April 1953, www.oceanlaw.net/texts/mesh.htm.

66 International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

67 See www.iwcoffice.org/index.htm.

> To achieve sustainable fisheries, the following actions are required at all levels:
>
> (a) Maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015.[68]

Biodiversity

In the context of biodiversity, an important early arbitral ruling was the *Behring Sea Fur Seals Arbitration*.[69] Due to overhunting, the stocks of Bering Sea fur seals were being rapidly depleted. As the seals had their birthing grounds on United States territory, coupled with the seals' *animus revertendi*, the US government essentially argued that the seals were US property, giving the US the right to protect them. Consequently, the US arrested a number of British (Canadian) vessels on the high seas. The US also argued that it was the trustee of the seals for the benefit of mankind generally. Britain (Canada) argued that it had the right to hunt seals on the high seas as they were property either *res communis* or *res nullius*. The arbitral tribunal found against the US arguments and freedom of the high seas was held to be the prevailing doctrine.[70] Birnie and Boyle comment that:

> The importance of this decision to the development of the law concerning conservation of marine living resources cannot be overstressed. It laid the twin foundations for subsequent developments over the next century. First, it confirmed that the law was based on high seas freedom of fishing and that no distinction was to be made in this respect between fisheries and marine mammals despite the very different characteristics of the latter, which the tribunal had examined; secondly, it recognized the need for conservation to prevent over-exploitation and decline of a hunted species, but because of the former finding, it made this dependant on the express acceptance of regulation by participants in the fishery.[71]

By way of recommendation, the tribunal also outlined a nine-point plan for conservation, which included

> a prohibited zone; a closed season in a defined area of the high seas, with specific exemptions in favour of indigenous peoples hunting for traditional purposes, using traditional methods; a limitation on the type of vessels used; a licensing system to be operated by the governments concerned; use of a special flag while sealing; the keeping of catch records; exchange of data collected; governmental responsibility for selection of suitable crews; the provisions were to continue for five years or until

68 World Summit on Sustainable Development, *Johannesburg Plan of Implementation*, para. 31, www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. See also paras. 30-34 in respect of fishing and marine ecosystem management.

69 *Behring Sea Fur Seals Arbitration, (Great Britain v. USA)*, *Moore's International Arbitration Awards* (1898) 755.

70 P. Birnie and A. Boyle, *International Law and the Environment*, *supra* note 10, at 649.

71 *Ibid*., at 649-50.

> abandoned by agreement. Moreover, the tribunal went on to recommend that these regulations be enacted into apposite and uniform national laws in *both* states and that national measures be adopted to ensure their enforcement. Thus, the priority of national measures of enforcement, rather than international means, also was established. Finally, a three-year ban on all sealing was recommended, laying the foundation of the moratorium approach to conservation of marine mammals.[72]

Although contractually binding on the participants, the ruling was not binding on other users of the fur seals, such as Russia and Japan, and in practice it made little difference to the overexploitation of the resource. Birnie and Boyle suggest that:

> although it perpetuated the high seas freedom of fishing and hence made conservation more difficult, especially in relation to enforcement, the *Behring Sea* arbitral tribunal strongly supported the need for restraint in exploitation, clearly indicated the requisite measures, and recognized that freedom was not absolute but had to be regulated to take reasonable account of the interests of other states.[73]

Elsewhere, of great importance to the conservation of wild animals and birds were two conventions agreed around the turn of the 20th Century: the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa;[74] and the 1902 Convention for the Protection of Birds Useful to Agriculture.[75] Driven by Germany, the London Convention suggested that all colonial powers in Africa should introduce game regulations. Although most parties never ratified the Convention, as Mackenzie puts it, the Germans and British did so 'enthusiastically'.[76] Many of the provisions suggested in the London Convention echoed the *Behring Sea Fur Seals Arbitration*. A closed season was introduced, the hunting of male animals was only permitted during certain periods and restrictions were placed on weapons which were allowed to be used for hunting. Of relevance for the history of international environmental law is the separation of animals into species worthy of protection and those not so worthy or even those considered noxious and which should be actively exterminated. The latter group contained many species which today are seen as being most worthy of protection: the predators, such as lions and, amongst birds, the raptors and vultures.

Another Convention in the early-1970s cluster was the 1973 Convention on International Trade in Endangered Species (CITES).[77] Although arguably promoting

72 *Ibid*., at 650.

73 *Ibid.*

74 Convention for the Preservation of Animals, Birds and Fish in Africa, London, 19 May 1900, 188 *Consolidated Treaty Series* 418.

75 Convention for the Protection of Birds Useful to Agricuilture, Paris, 19 March 1902, 191 *Consolidated Treaty Series* 91.

76 J. M. Mackenzie, *The Empire of Nature* (Manchester University Press, 1988) 205.

77 Convention on International Trade in Endangered Species of Wild Flora and Fauna, Washington D.C., 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, www.cites.org/eng/disc/text.shtml.

trade in wild animal species by attempting to regulate such trade, the Convention probably provides the most visible and significant international protection for wild animal species today. Again, protection of state sovereignty is emphasized in the Convention; the CITES Secretariat has no jurisdiction within national boundaries. Furthermore, CITES echoed the 1900 London Convention by categorizing wild animal species; CITES affords different degrees of protection from trade to species depending on their listing in the three appendices of the Convention.

The Convention on the Conservation of Migratory Species of Wild Animals[78] and the Convention on the Conservation of European Wildlife and Natural Habitats[79] both signed in 1979 showed a new approach to the conservation of species. There is recognition in both conventions that habitat conservation is as important as the conservation of individual species. This recognition can perhaps already be seen in the 1971 Ramsar Convention, but arguably not in the 1973 CITES Convention. The 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)[80] further emphasized an ecosystem approach. According to Article I of the Convention

> 2. Antarctic marine living resources means the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic convergence.[81]
> 3. The Antarctic marine ecosystem means the complex of relationships of Antarctic marine living resources with each other and with their physical environment.[82]

In 1980 the World Conservation Strategy was launched by UNEP, the World Conservation Union and WWF. This influential document was arguably the first to recognize that long-term efforts were required to solve environmental problems, and that this could not be done unless environment and development objectives were integrated.[83] The World Conservation Strategy was followed in 1982 by the adoption of the United Nations World Charter for Nature.[84] This Resolution of the Unit-

78 Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, in force 1 November 1983, 19 International Legal Materials (1980), www.cms.int/documents/convtxt/cms_convtxt.htm.

79 Convention of the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, *Council of Europe Treaty Series* 104, conventions.coe.int/Treaty/en/Treaties/Html/104.htm.

80 Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 7 April 1982, 19 *International Legal Materials* (1980) 841, www.ccamlr.org/pu/e/e_pubs/bd/toc.htm.

81 Article I.2, *ibid.*

82 Article I.3, *ibid.*

83 See, for example, 'The World Conservation Strategy', in UNEP, *Global Environmental Outlook 3: Past Present and Future Perspectives* (Earthscan Publications: London, 2002), www.unep.org/geo/geo3/english/049.htm.

84 World Charter for Nature, GA Res. 37/7, 28 October 1982, www.un.org/documents/ga/res/37/a37r007.htm.

ed Nations General Assembly set out general principles, including that '[n]ature shall be respected and its essential processes shall not be impaired.'[85] While being aspirational soft law in nature, rather than binding hard law, the Charter did require that '[t]he principles set forth in the present Charter shall be reflected in the law and practice of each State, as well as at the international level.'[86]

In 1989, against much opposition from range states in Southern Africa, the African elephant was placed on Appendix I of the CITES Convention giving the species virtually complete protection from international trade. In a sense an intrusion on national sovereignty, the ban on trade in ivory, coupled with consumer pressure in Western countries proved so effective that controlled trade in ivory has in recent years been allowed again. Although the listing decision was not popular with range states, it has by and large been obeyed and shows that states can act in ways detrimental to their own interests when called on to do so by the international environmental community. This is something of a departure from the experience of the 1982 moratorium on commercial whaling. Norway objected to the moratorium and continues to whale; Japan agreed to the moratorium, but continues to take whales annually under the guise of scientific research; and Iceland and Canada left the International Whaling Commission in order not to be dictated to. The Convention on Biological Diversity,[87] adopted at UNCED in 1992, goes beyond the international and species-based approach of CITES and provides for states parties to commit to the preservation of habitats and ecosystems within their own boundaries. This holistic and ecosystem-based approach surely reflects new understanding of the way in which biodiversity functions and the ways in which it must be protected.

Pollution

Pollution of the atmosphere

The years 1935-1941 saw the deliberations of an important arbitral tribunal. The *Trail Smelter Arbitration*[88] concluded that:

> no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[89]

85 Principle 1, *ibid.*

86 Principle 14, *ibid.*

87 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf.

88 *Trail Smelter Arbitration (USA v Canada)*, 35 *American Journal of International Law* (1941) 684.

89 P. Birnie and A. Boyle, *International Law and the Environment*, *supra* note 10, at 111.

The case concerned pollution damage caused to forests and crops in the United States by pollutants from a smelter in the town of Trail, Canada. Trail had a lead and zinc smelting factory complex with 400-foot high chimneys. As astounding as it might seem today, the question in dispute was whether Canada was liable for the damage caused by the smelter, and whether it had any duty to prevent further damage from occurring. The tribunal decided that Canada did indeed have to take responsibility for past and future damage;[90] the reason that the question would surprise us so much today is in part due to the effect of the arbitral tribunal's decision on subsequent legal discourse. The tribunal, however, took a narrow view to damages, compensating for injury to persons and property, but appeared to exclude wider environmental interests such as wildlife, aesthetic considerations or the unity and diversity of ecosystems.[91] Although Canada was held to have no right to cause damage within the United States, its right to continue to operate the smelter was affirmed.[92] Birnie and Boyle comment that:

> [d]espite criticism of the tribunal for the limited range of national and international sources on which it relied in determining rules of international law, there is no reason to doubt that states remain responsible in international law for harm caused in breach of obligation by transboundary air pollution.[93]

In 1982, a hole was discovered in the ozone layer above Antarctica. British scientist Joseph Farman released results in 1985, which showed that the ozone layer had been depleting since at least 1970; this was due largely to increased use of chlorofluorocarbons worldwide.[94] The world community showed that it was capable of acting swiftly and in concert when required to do so. The 1985 Vienna Convention on Protection of the Ozone Layer – followed two years later in 1987 by the Montreal Protocol on Protection of the Ozone Layer – committed states parties to meeting targets for reductions and the eventual phasing out of ozone depleting substances.[95] By late 2002, 183 states had ratified the Montreal Protocol. Although an apparent example of speedy and determined action, the early commitments made by states parties were in fact to increase production of chlorofluorocarbons before eventually reducing these.[96]

90 See, generally, University of Idaho, 'Trail Smelter Arbirtration, 1938/1941', www.law.uidaho.edu/default.aspx?pid=66516.

91 Birnie and Boyle, *International Law and the Environment*, *supra* note 10, at 121.

92 *Ibid*., at 191.

93 *Ibid*., at 504-5.

94 See, for example, Virtual Globe, '1982: Ozone Hole Discovered Above the South Pole', www.virtualglobe.org/en/info/env/02/ozone09.html.

95 Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987) 1529, www.unep.org/ozone/pdfs/viennaconvention2002.pdf; Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf.

96 See, generally, J. Gribbin, *The Hole in the Sky* (Corgi: London, 1988).

The United Nations Framework Convention on Climate Change (UNFCCC),[97] which sought to have its states parties commit firmly to reductions in emissions of substances that contribute to global warming, was also adopted at UNCED. While 'reaffirming the principle of sovereignty of States in international co-operation to address climate change', the states parties 'acknowledg[ed] that change in the Earth's climate and its adverse effects are a common concern of humankind.'[98] Although a lukewarm commitment and protective once again of the jealously guarded idea of sovereignty, the UNFCCC set the stage for concrete emissions control targets to be agreed to in further Protocols. When the states parties to UNFCCC negotiated the text, they were well aware that – in itself – the Convention would be hopelessly inadequate to meet the challenges of climate change. The 1997 Kyoto Protocol[99] to the Convention was intended to remedy this.[100] The Protocol significantly strengthens the Convention 'by committing Annex I [industrialized] Parties to individual, legally-binding targets to limit or reduce their greenhouse gas emissions.'[101] The Protocol received sufficient ratifications to come into force only in February 2005, ninety days after at least 55 states parties, including Annex I states accounting for at least 55 percent of the total 1990 carbon dioxide emissions from that group, had ratified.[102] The fact that it is now in force can be seen as testament to a welcome determination by the global community to deal with the problem of global warming, even in the face of the refusal by the largest emitter of greenhouse gases, the United States, to ratify.

Marine pollution

In 1954 the International Convention for the Prevention of Pollution of the Sea by Oil,[103] a precursor of later marine pollution conventions which would also deal with pollutants other than oil, was signed. The main concern of the 1954 Convention was operational discharge; the world was not yet overly concerned with major oil spills. Marine pollution received further attention in 1958, with the Conventions on the Law of the Sea signed in Geneva. However, protection of the marine environment generally was given little attention and the Convention focused – as

97 United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

98 Preamble, *ibid.*

99 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22, unfccc.int/resource/docs/convkp/kpeng.pdf

100 See, for example, UNFCCC Secretariat, 'Kyoto Protocol', unfccc.int/essential_background/kyoto_protocol/items/2830.php.

101 *Ibid.*

102 For the status of ratifications of the Kyoto Protocol, see unfccc.int/essential_background/kyoto_protocol/status_of_ratification/items/2613.php.

103 International Convention on for the Prevention of the Sea by Oil, London, 12 May 1954, in force 26 July 1958, 37 *United Nations Treaty Series* 3.

the 1954 OILPOL Convention had done – on operational discharge. The Conventions seemed to suggest, as Birnie and Boyle put it, that states 'enjoyed substantial freedom to pollute the oceans, moderated only by the principle that high seas freedoms must be exercised with reasonable regard for the rights of others.'[104]

The realities of large marine oil spills first came home in 1967, with the grounding – caused by human error – off the English coast of the tanker *Torrey Canyon*, which spilled some 120,000 tonnes of oil. Marine pollution control was at the time in its infancy and the United Kingdom was unprepared to deal with the disaster.[105] The incident led to a number of marine pollution conventions being signed in 1969[106] and in the early 1970s. In 1973, the 1954 OILPOL Convention was replaced by the International Convention for the Prevention of Pollution from Ships.[107] The MARPOL Convention never came into force, but in 1978 was subsumed into a Protocol which has come into force.[108] The MARPOL Convention covers pollution from ships at sea by substances other than oil. In a set of six annexes, the Convention deals respectively with oil, noxious liquid substances carried in bulk, harmful substances carried in packaged form, sewage, garbage generated on vessels, and atmospheric pollution from ships. States parties are required to adopt Annexes 1 and 2, and may adopt the others.

Another major oil spill from a tanker in 1989 occurred when the *Exxon Valdez* ran aground in Prince William Sound, Alaska. The impact on the psyche of the American people was significant, with the images of a pristine environment spoiled reverberating to this day.[109] Ironic comment on the disaster has been made, however, by Al Gore, former Vice-President of the United States: 'when expenditures are required to clean up […] pollution, they are usually included in the national accounts as another positive entry on the ledger. In other words, the more pollution

104 P. Birnie and A. Boyle, *International Law and the Environment*, *supra* note 10, at 351.

105 See, for example, International Maritime Organization, 'Prevention of Pollution by Oil', www.imo.org/Environment/mainframe.asp?topic_id=231.

106 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 29 November 1969, in force 6 May 1975, 970 United Nations Treaty Series 211, www.imo.org/Conventions/contents.asp?doc_id=680&topic_id=258; and International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969, in force 19 June 1975, 973 United Nations Treaty Series 3, www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660.

107 International Convention for the Prevention of Pollution from Ships (MARPOL), London, 2 November 1973, amended before entry into force, 12 *International Legal Materials* (1973) 1085, www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258.

108 Protocol Relating to the Convention for the Prevention of Pollution from Ships, London, 17 February 1978, in force 2 October 1983, 17 *International Legal Materials* (1978).

109 See, for example, ExxonMobil, 'Valdez', www.exxonmobil.com/Corporate/Newsroom/NewsReleases/Corp_NR_Valdez.asp and Emergency Response, 'Prince William Sound: An Ecosystem in Transition', response.restoration.noaa.gov/topic_subtopic_entry.php?RECORD_KEY%28entry_subtopic_topic%29=entry_id,subtopic_id,topic_id&entry_id(entry_subtopic_topic)=238&subtopic_id(entry_subtopic_topic)=13&topic_id(entry_subtopic_topic)=1.

we create, the more productive contributions we can make to national output. The *Exxon Valdez* oil spill in Prince William Sound, and efforts to clean it up, to take one example, actually increased our GNP.'[110]

Pollution from chemicals and wastes

In 1956, the Minamata (or Minamoto) disaster in Japan occurred, where it became apparent that contamination from mercury waste was causing illnesses and birth defects. This drew the world's attention to the dangers of uncontrolled industrialization. It was not, however, until 1968 that the Japanese government finally acknowledged the source of the pollution and chemical dumping finally ceased.[111] The Minamata disaster shows both how the courage of individuals can lead to change – the contamination caused Japanese fishermen to riot at a factory in 1959 and bring a number of court actions against the large corporations responsible – and also how slow governments can be to act.

The early 1960s saw increasing awareness of the scale of environmental problems facing the international community. As part of this new awareness 1962 saw the publication of a book which might arguably be described as the "bible" of environmental literature. After the Second World War, a "miracle" pesticide – dichlorodiphenyltrichloroethane (DDT) – was much used. The pesticide was not directly harmful to humans. In 1962, however, scientist Rachel Carson published *Silent Spring*,[112] which documented how DDT works its way up through the food chain, ultimately having devastating environmental effects. This did much to increase understanding of ecological linkages. Pilloried by the chemical industry, Carson died from cancer in 1964 without ever knowing that her work eventually had the influence she would have wanted it to have. It was not long before *Silent Spring* was recognized to be accurate, and it was not long before environmental concern became an essential part of the 1960s zeitgeist.

In 1978, a national incident in the United States – the *Love Canal* disaster – in which it was realized that industrial chemicals buried secretly in a town had, for years, been causing inordinately high rates of cancer and children to be born with congenital defects focused attention worldwide on the health problems of dumping

110 A. Gore, *Earth in the Balance: Forging a New Common Purpose* (Earthscan Publications: London, 1992) at 187.

111 See, for example, The Free Encyclopedia, 'Minamata Disease', encyclopedia.thefreedictionary.com/Minamata%20disease.

112 Rachel Carson, *Silent Spring* (Hamish Hamilton: London, 1962). See also, for example, www.rachelcarson.org/.

of hazardous chemicals.[113] It was thanks to the activism of individual residents – particularly a local mother named Lois Gibbs – that the problem was discovered and the causes identified.[114]

A pollution tragedy occurred in 1984, when there was a chemical leak from the Union Carbide factory in Bhopal, India.[115] Some 2,000 people died almost immediately and some 15,000 died later; 150,000-600,000 were injured.[116] The disaster showed how, in a globalized world, a disaster within national borders could be blamed on the actions of foreign states or private companies. Union Carbide, an American company, was apparently taking advantage of less stringent environmental standards in the developing world. In a 1992 settlement agreement, Union Carbide agreed to pay USD 470 million to the victims, a figure almost certainly substantially less than would have been ordered had the accident occurred in the United States.

Regarding pollution from wastes, two important conventions on the transportation of hazardous waste are the 1989 Convention on Transboundary Movement of Hazardous Wastes and their Disposal[117] and the 1991 Organization of African Unity[118] Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Wastes within Africa.[119] Of the two, interestingly enough, it is the Bamako Convention which contains the stronger provisions, such as the general obligation that:

> All Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act.[120]

Radioactive pollution

The International Atomic Energy Agency (IAEA) was created in 1956, the dangers of nuclear proliferation being a particular concern following the Second World

113 See, for example, Eckardt C. Beck, 'The Love Canal Tragedy', *Environmental Protection Agency Journal* (1979), www.epa.gov/history/topics/lovecanal/01.htm.

114 See, for example, Center for Health, Environment and Justice, 'Love Canal Dates', www.chej.org/LCdates.htm.

115 See, for example, Union Carbide, Bhopal Information Site, www.bhopal.com/.

116 See, for example, Wikipedia, 'Bhopal Disaster', www.en.wikipedia.org/wiki/Bhopal_Disaster.

117 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, 28 *International Legal Materials* (1989) 657, www.basel.int/text/con-e.htm.

118 Now the African Union

119 Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Bamako, 30 January 1991, note yet in force, 30 *International Legal Materials* (1991) 775, sedac.ciesin.columbia.edu/entri/texts/acrc/bamako.txt.html.

120 Article 4(1), 'General Obligations', *ibid.*

War. A number of international conventions on nuclear energy were to follow in the 1960s. Following the 1986 Chernobyl nuclear disaster in what is today Ukraine, the two 1986 IAEA Conventions: the Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency were adopted.[121] Once again, the world community showed that it could respond quickly to environmental problems, but that it will usually take an international disaster to prompt it to do so.

In 1985, France was preparing to conduct nuclear weapon testing in the South Pacific. In protest, the environmental organization Greenpeace was preparing to sail its ship, *Rainbow Warrior*, into the path of the proposed test fallout. While at anchor in Auckland harbour, New Zealand, the *Rainbow Warrior* was sunk by a bomb placed on the boat. A crewman, Fernando Pereira, was killed. France initially denied involvement; but finally conceded responsibility after several members of its armed forces were arrested and put on trial in New Zealand.[122] Arbitration followed and in 1986 United Nations Secretary General Javier Perez de Cuellar ruled that France was to make a formal apology and to pay USD seven million to New Zealand; in a later adjunct arbitration France was ordered to pay a further USD two million. Greenpeace, in a separate arbitration led by Dr Claude Reymond in 1987, was awarded approximately USD seven million. France also paid reparations to the family of Fernando Pereira, by agreement.[123] The significance of the case for international environmental law can hardly be overstated. A state, one of the five permanent members of the United Nations Security Council, had apparently "gone to war" with a non-governmental environmental protest group, and had then submitted to international arbitration and been required to pay reparations.

The Course of International Environmental Law

It is difficult to know which of the many significant individuals who have contributed to the development of international environmental law – nor which environmental disasters – to include in such a short paper. It appears that, to a large extent, the rise of international environmental law has been driven and directed by the courage of individual people and by the zeitgeist of the times they represent. It

121 Convention on Early Notification of a Nuclear Accident, Vienna, 26 September 1986, in force 27 October 1986, 25 *International Legal Materials* (1986) 1370, www.iaea.org/Publications/Documents/Conventions/cenna.html; Convention on Assistance in Case of Nuclear Accident or Radiological Emergency, Vienna, 26 September 1986, in force 26 February 1987, 25 *International Legal Materials* (1986) 1377, www.iaea.org/Publications/Documents/Conventions/cacnare.html.

122 See, generally, The Sunday Times Insight Team, *Rainbow Warrior: The French Attempt to Sink Greenpeace* (Key Porter Books: Toronto, 1986).

123 See, for example, Transnational Environment Law, 'Case No. 6: "The Rainbow Warrior"', www.jura.uni-muenchen.de/einrichtungen/ls/simma/tel/case6.htm.

has been shaped equally by the occurrence of environmental disasters, for which the world has never seemed properly prepared.

At the beginning of the 21st Century we have many new legal tools with which to tackle environmental problems, yet many familiar problems. There is an international environmental court or, at least, Chamber of the ICJ. There are international agreements and firm commitments to them by their states parties. There are coherent guidelines for sustainable development practice. There are environmental principles recognized by states as approaching the status of fundamental rights, although these tend still to be seen as non-binding soft law.

Many specific problems have yet to be dealt with. For instance, it seems likely that within the next few years there will be a resumption of both the ivory trade and commercial whaling. The clash between the proponents of sustainable consumptive use and preservation is yet to be resolved. Within the context of the International Whaling Commission, for example, Japan, firmly in the sustainable use camp, has in recent years sought to bring into the voting arena many small nations which support its pro-whaling views.[124] Western countries criticising this as mercenary behaviour forget that, arguably, it was only through similar tactics that they managed in 1982 to garner enough votes for a moratorium on commercial whaling.

Environmental disasters are ongoing, and the world still seems woefully unprepared to meet them. Despite the various conventions agreed to in the area of marine pollution, there are still single-hulled tankers of dubious seaworthiness carrying large quantities of oil through dangerous seas. In November 2002, the oil tanker *Prestige* broke up some 130 miles off the coast of Spain with the resulting spill causing serious damage to the Spanish coastline and to fishery beds.[125] In July 2003, the tanker *Tasman Spirit* grounded at the entrance to Karachi Port, Pakistan, spilling some 30,000 tonnes of oil and closing fishery beds for several months.[126]

The difficulties caused by the importance given to the doctrine of state sovereignty are still a hindrance to effective international environmental protection, despite the efforts by the drafters of international instruments like the Convention on Biological Diversity and the UN Framework Convention on Climate Change. The species-based approach to wildlife conservation remains a hindrance to effective protection, despite the holistic approaches taken in more recent international

124 Such as Benin, Gabon, Mongolia, Palau, St. Kitts and Nevis, St. Lucia and St Vincent and the Grenadines. For the full membership list see www.iwcoffice.org/commission/iwcmain.htm#nations.

125 See, for example, International Tanker Owners Pollution Federation Limited, 'Case Histories: Prestige (Spain, 2002)', www.itopf.com/casehistories.html#prestige.

126 See, for example, International Tanker Owners Pollution Federation Limited, 'Case Histories: Tasman Spirit (Pakistan, 2003)', www.itopf.com/casehistories.html#tasmanspirit.

instruments like the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals and the Convention for the Conservation of Antarctic Marine Living Resources.

Overfishing of the world's oceans is today a greater problem than it has ever been. The efforts of the drafters of Conventions aimed at the protection of fisheries, such as CCAMLR, have not kept pace with the technological expertise of fishermen, nor have the various marine pollution conventions proved effective in combating pollution of the seas, either by way of dramatic oil spills or the continual hazard of operational discharge from the countless vessels plying the seas daily. Much remains for both individuals and states to do, and it is important that an understanding of the past informs the future.

Background and Evolution of the Principle of Permanent Sovereignty over Natural Resources[1]

Tuomas Kuokkanen[2]

Introduction

When reading environmental agreements or declarations one may find it strange to discover that a number of texts refer to the principle of permanent sovereignty over natural resources or to states' sovereign right to exploit their own resources pursuant to their own environmental policies. Due to their international nature managing environmental problems would seem to require international co-operation. The principle of permanent sovereignty over natural resources appears, therefore, not to sit comfortably in the environmental sphere.

In fact, the principle of permanent sovereignty over natural resources germinated and grew, not in an environmental context but in relation to the doctrine of expropriation of foreign property. The principle began to develop after the Second World War when a number of colonies became independent. Despite their independence, natural resources in these former colonies where still owned or exploited by foreigners through concession agreements. Newly independent states regarded that traditional rules of international law were obstacles for their development as they protected foreign property rights rather than allowed countries to freely exploit their own natural resources. Therefore, they initiated under the auspices of the

1 This paper is based on a lecture given by the author on 23 August 2005 and on the work: Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme*, The Erik Castrén Institute of International Law and Human Rights, Vol. 4 (Kluwer Law International: The Hague/London/New York, 2002).

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United Nations a process to amend the traditional doctrine on the protection of foreign property.

In order to better understand the background to the principle of permanent sovereignty over natural resources, this article first examines the traditional doctrine of expropriation of foreign property. Thereafter, it deals with the development of the principle as a reaction against this traditional doctrine. The article ends with a discussion on the integration of the principle into the environmental and sustainable law contexts.

The Traditional Law of Natural Resources

During the 19th Century and the first half of the 20th Century foreign investors concluded several concession arrangements with host countries granting them exploitation rights. In international law, such agreements have been regarded as acquired rights which, as such, have been equated with property rights. The traditional principles of international law sought to protect alien property by establishing certain minimum rights. In case a state violated those minimum rights, an alien's own government was entitled to exercise diplomatic protection. The rationale behind the protection provided by international law was to ensure that the rights of foreign investors were not left subject solely to unilateral action by host states. The *Case concerning forests in Central Rhodophia between Greece and Bulgaria,* relating to the peace settlement after the First World War, provides an example of the requirement to respect acquired rights. In the case, the Greek government acted on behalf of certain Greek nationals who, during the Ottoman regime, had acquired rights of property and exploitation in forests situated in Central Rhodophia, a territory ceded to Bulgaria by the Ottoman Empire in 1913. Soon thereafter, the Bulgarian authorities declined to recognize the rights acquired by Greek nationals. The arbitrator in the case found that the attitude of the Bulgarian government concerning the felling rights was incompatible with the respect for acquired rights imposed upon Bulgaria by an international treaty.[3]

The traditional doctrine concerning the expropriation of foreign property is based on a distinction between lawful and unlawful taking. The expropriation of foreign property, according to the traditional approach, is unlawful unless justified by international law. A taking is justified, pursuant to the traditional view, if it is concluded for a public purpose, without discrimination and is accompanied with compensation. The first of the three classical justifications for the taking of foreign property, the requirement that the taking be for a legitimate public purpose, has

3 See *International Arbitral Awards of Östen Undén Arbitration under Art. 181 of the Treaty of Neuilly* (hereinafter *Treaty of Neuilly Arbitration*), 28 *American Journal of International Law* (1934) 760-807.

been regarded as a necessary condition for legality.[4] According to the doctrine, a mere reference to a public interest is not sufficient; there has to be a genuine, or legitimate, public interest to justify the measures taken. The second classical requirement, the principle of non-discrimination, means that a taking must not be directed against foreigners, as such. In the words of the Permanent Court of International Justice, 'discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups'[5] is forbidden. Pursuant to the third requirement, the taking of foreign property becomes unlawful unless compensation is made. In other words, the lawfulness of expropriation depends on the payment of proper compensation.[6] Damages include both the immediate loss suffered (*damnum emergens*) as well as lost profits (*lucrum cessans)*.[7] The so-called Hull doctrine further specified that the concept of just compensation means prompt, effective and adequate compensation.[8] The primary remedy for unlawful taking, according to the traditional doctrine, is restitution in kind and if that is not possible or practicable, just compensation.[9] For example, in the *Case concerning forests in Central Rhodolphia between Greece and Bulgaria*, the arbitrator first examined whether the obligation of restoring the forests to the claimants could be imposed upon the respondent. Having found that restoration was not practicable, the arbitrator awarded compensation.[10]

4 See, for example, *Norwegian Shipowners' Claims (Norway v. United States)*, I *United Nations Reports of International Arbitral Awards* 307, at 332.

5 *Oscar Chinn Case (United Kingdom v. Belgium) (Judgement)*, PCIJ Series A/B, No. 63 (1934) 87.

6 See Memorial Submitted by the Government of the United Kingdom in the *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, ICJ Pleadings (1951) 64 at 102.

7 See, for example, *Affaire du Cape Horn Pigeon*, IX *United Nations Reports of International Arbitral Awards* 63-66 at 65.

8 In 1938, the United States Secretary of State, Cordell Hull, and the Mexican Minister for Foreign Affairs, Eduardo Hay, exchanged notes concerning the payment of compensation for lands expropriated in Mexico since 1927. In the course of these exchanges, Mr. Hull specified the requirement of just compensation.

9 *Case Concerning the Factory at Chorzów (Germany v. Poland) (Claim for Indemnity) (Judgement on the Merits)* PCIJ, Series A, No. 17 (1928) 47.

10 See *Treaty of Neuilly Arbitration*, *supra* note 3 at 802: 'The Arbitrator is of the opinion that the obligation of restoring the forests to the claimants cannot be imposed upon the defendant. There are several reasons which may be given in favor of this opinion. The claimants in whose behalf a claim put forward by the Greek Government has been held admissible, are partners in a commercial organization composed of other partners as well. It would therefore be inadmissible to compel Bulgaria to restore integrally the disputed forests. Moreover, it is hardly likely that the forests are in the same condition that they were in 1918. Assuming that most of the rights in the forests are rights of cutting a fixed quantity of wood, to be removed during a certain period, a decision holding for restitution would be dependent upon an examination of the question whether the quantity contracted for could be actually obtained. Such a decision would also require examining and determining the rights which may have arisen meanwhile in favour of other persons, and which may or may not be consistent with the rights of the claimants. The only practicable solution of the dispute, therefore, is to impose upon the defendant the obligation to pay an indemnity.'

The Critique of the Traditional Approach

By focusing merely on the protection of private property, the traditional doctrine of expropriation of foreign property seemed to disregard, or be inconsistent with, another traditional doctrine: the principle of national sovereignty. In its critics' opinion, the traditional doctrine appeared to be both an interventionist and a repressive doctrine. It was interventionist in the sense that it intervened in the affairs of sovereign states by disregarding their sovereignty and repressive in the sense that it suppressed states' attempts to fully control and to exploit their own natural resources. For example, it was suggested that it was inappropriate to question whether an act was done for public utility purposes.[11] The principle of non-discrimination appeared also to be biased towards foreign investors as it seemed to protect foreigners who, in fact, dominated the economy. The classical doctrine on remedies was similarly vulnerable to criticism. For example, Friedman expressed doubts whether it would be appropriate to 'compel a State to make *restitutio in integrum*.'[12] Moreover, the Hull doctrine seemed to be construed innocently on the basis of the traditional doctrine but, in fact, made the standard of just compensation more stringent.

In light of the above, it can be said that the traditional doctrine shifted the position relating to foreign property rights in the manner of a pendulum swinging to an extreme position, where it provided maximum protection for foreign investors. Antonio Cassese notes that the development resulted from the fact that foreigners belonged to industrialized and powerful countries and that it was in those countries' interests to enhance the protection of foreign investments.[13] Indeed, the requirement of public purpose and non-discrimination seemed to raise the standard of lawful expropriation too high for the newly independent weaker states. Moreover, the Hull standard of prompt, adequate and effective compensation was another obstacle to expropriation. Finally, the traditional doctrine limited states' attempts to assert control over their natural resources by providing restitution in kind as a remedy for unlawful expropriations. Consequently, the traditional law appeared to create an obstacle for the economic development of newly independent states. To reform this area of international law, a revolutionary process to amend the traditional doctrine commenced under the auspices of the United Nations.

11 Gillian White, *Nationalisation of Foreign* Property (Praeger: New York, 1961) at 150.

12 S. Friedman, *Expropriation in International Law* (Stevens and Sons: London, 1953) at 214 (footnote omitted).

13 Antonio Cassese, *International Law in a Divided World* (Oxford University Press, 1986) at 319-320.

The Resolution on Permanent Sovereignty Over Natural Resources

After the Second World War a number of colonies became independent. However, to a large extent, foreigners still either owned or exploited through concession agreements the natural resources of the newly independent states. As Cassese notes, there was a contrast between economic development and sovereignty over national resources, and foreign exploitation of these resources.[14] Gradually, in the view of the newly independent states concession agreements became symbols of interference with a state's sovereignty over its natural resources.[15] The traditional concessions concluded during the colonial period were deemed to be 'inequitable and onerous arrangements.'[16] As a first step, host countries began to tax foreign companies in order to receive a share of their profits. Hossein characterizes these enactments as the beginning of a process whereby governments started to claim an economic rent generated by their natural resources.[17] Some governments further strengthened their positions by forming companies wholly owned by the state.

As the newly independent states often lacked sufficient capital and technical know-how, they often had to rely on the knowledge and expertise of foreign companies. However, it was found in the late 1950s and 1960s, particularly within the petroleum industry, that joint ventures were more equitable than traditional concession arrangements.[18] These developments reflected the growing desire on the part of the newly independent states for economic self-determination and the establishment of conditions under which they could freely exploit their own natural resources. Just like the colonization process, which was largely driven by the desire of the great powers to take over the colonies' natural resources, the desire to return sovereignty over natural resources to the newly independent states became one of the underlying themes of the process of decolonization.[19]

14 *Ibid.*, at 323.

15 L. Henkin et al., *Restatement of the Law Third, Foreign Relations Law of the United States* (American Law Institute: Philadelphia, 1987), vol. 2 at 213.

16 See Kamal Hossain, 'Introduction', in Kamal Hossain and Subrata Roy Chowdhury (eds.), *Permanent Sovereignty Over Natural Resources in International Law* (St. Martin's Press: New York, 1984) ix-xx at ix.

17 Kamal Hossain, *Law and Policy in Petroleum Development: Changing relations between transnationals and governments* (Nichols: New York, 1979) at 13.

18 *Ibid.*, at 17-19.

19 Broms notes that the fact that the colonial powers felt no obligation to grant control over natural resources to local populations led to deep dissatisfaction among the local leaders who understood the value of natural resources. See Bengt Broms, 'Natural Resources, Sovereignty over', III *Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law: Heidelberg, 1997) 520-524 at 520.

The question of the right of each country to exploit freely its natural wealth arose in the United Nations General Assembly for the first time in 1952 when Resolution 626(VII) was adopted. Thereafter, the issue of the permanent sovereignty of peoples and nations over their natural wealth and resources was raised before the Commission on Human Rights in conjunction with the preparation of the draft international covenants on human rights. In the course of the preparation of the draft covenants, a Commission on Permanent Sovereignty over Natural Resources was established to conduct a full survey of the matter. On the basis of a draft prepared by this Commission, the General Assembly adopted Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources on 14 December 1962.[20] The main challenge in the elaboration of the resolution was to find a formula that would recognize the sovereignty of developing countries over their natural resources while providing adequate guarantees for potential investors against arbitrary interference with acquired rights. In the course of drafting the resolution, the text was modified so that ultimately a large number of states could support its adoption. The resolution, as Wolfgang Friedmann put it, aimed at expressing a consensus of the views of capital-exporting and capital-importing countries.[21] In its final form, Paragraph 4 of the resolution reads as follows:

> Nationalization, expropriation or requisition shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.

The paragraph indicated that the law was in a state of flux. The traditional concept of prompt, adequate and effective compensation was replaced by appropriate compensation. At the same time, the traditional requirements of public purpose and non-discrimination were still maintained. Moreover, compensation was to be paid in accordance with both the rules of international law and respective national legislation. However, as the paragraph still contained a reference to international law the question remained open as to whether the resolution, in fact, modified established international law. Nevertheless, the adoption of the resolution was the

20 Permanent Sovereignty Over Natural Resources, GA Res. 1803 (XVII), 14 December 1962. The resolution was adopted by 87 votes to 2, with 12 abstentions. For the development of the principle of permanent sovereignty over natural resources through the political organs of the United Nations in the period up to 1962, see Karol N. Gess, 'Permanent Sovereignty over Natural Resources. An Analytical Review of the United Nations Declaration and Its Genesis', 13 *International and Comparative Law Quarterly* (1964), 398-449; James N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources', 50 *American Journal of International Law* (1956) 854-867; George Elian, *The Principle of Sovereignty over Natural Resources* (Sijthoff & Noordhof: Alphen aan den Rijn 1979) at 83-100; Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) at 36-81.

21 Wolfgang Friedmann, 'Social Conflict and the Protection of Foreign Investment', 57 *American Society of International Law Proceedings* (1963) 126-143 at 130.

first step towards recognizing the sovereignty of the newly independent states over their natural resources and creating 'a legal atmosphere that [was] not dominated by the colonial and imperial past.'[22]

Towards a New International Economic Order

In the 1960s, developing countries began to criticize traditional commercial principles such as reciprocity, non-discrimination and free trade, as well as international economic institutions, in particular the IMF, the International Bank for Reconstruction and Development (the World Bank) and GATT. From developing countries' point of view, international integration did not sufficiently take into account their special circumstances but rather favoured strong western countries and transnational corporations.[23] The first United Nations Conference on Trade and Development (UNCTAD) meeting held in 1964 represented a shift towards a new approach. During the conference, the Group of 77 made a historical joint declaration in which they pledged to strengthen their unity in the future.[24] After UNCTAD I, developing countries continued to press for new demands. They argued that it was necessary to formulate a new charter to establish a more just world order because the international legal instruments on which international economic relations were based were precarious. Consequently, UNCTAD III, held in 1972, decided to commence preparation of a document listing the economic rights and duties of states. Two years later, on 12 December 1974, the General Assembly adopted the Charter of the Economic Rights and Duties of States, by resolution 3281(XXIX).[25] In addition, the 6th Special Session of the General Assembly, held on 9 April – 2 May 1974, adopted a Declaration on the Establishment of a New International Economic Order[26] and a Programme of Action on the Establishment of a New International Economic Order,[27] which together with the Charter of the Economic Rights and Duties of States

22 Richard A. Falk, 'The New States and International Legal Order', 118 *Recueil des Cours de l'Académie de Droit International* (1966-II) 7-103 at 95.

23 See Marthinus Gerhardus Erasmus, *The New International Economic Order and International Organizations, Towards a Special Status for Developing Countries?* (Haag und Herchen: Frankfurt/Main, 1979) at 40-43.

24 See Joint Declation of the Group of 77 at the United Nations Conference on Trade and Development I, 1964, made at the conclusion of the Conference, Geneva, 15 June 1964. See Alfred George Moss and Harry N.M. Winton,, *A New International Economic Order: Selected Documents 1945-1975* (UNITAR: New York, 1976), vol. I at 33-34.

25 Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), 12 December 1974, *Yearbook of the United Nations 1974*, 403-407. For background to the Charter, see Milan Bulajić, *Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order* (2nd ed., Martinus Nijhoff: The Hague, 1993) at 75-199.

26 Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI), 1 May 1974, *Yearbook of the United Nations 1974*, 324-326.

27 Programme of Action for the Establishment of a New International Economic Order, GA Res. 3202 (S-VI), *Yearbook of the United Nations 1974*, at 326-332.

form the three basic pillars of the New International Economic Order (NIEO).

The underlying theme of the NIEO was to strengthen the economic independence of developing countries. With regard to states' full permanent sovereignty over their natural resources, Article 2, Paragraph 1 of the Charter of the Economic Rights and Duties of states reads as follows:

> Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.[28]

The right of every state to nationalize foreign-owned property was construed as a corollary or an expression of permanent sovereignty. According to Article 2(c) of the Charter, each State has the right:

> To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.

Unlike the Resolution on Permanent Sovereignty over Natural Resources, the Charter does not contain any reference to international law as a standard to be applied when determining the amount of compensation. Developing countries insisted on the deletion of the phrase due to their concern that industrialized countries would construe it to mean prompt, adequate and effective compensation.[29] The two other traditional conditions for a lawful taking, non-discrimination and public purpose, were also deleted. The element of non-discrimination was generalized to a requirement concerning relations between states meaning, in particular, that developed countries should grant generalized preferential, non-discriminatory treatment to developing countries. Furthermore, it was argued that nationalization by definition meant the taking of property for public use.

However, the significance of the New International Economic Order was reduced by the fact that many developed states were reluctant to recognize its legal authority. A number of industrialized countries voted against the adoption of the Charter of the Economic Rights and Duties of States. Moreover, a few industrialized coun-

28 See also Paragraph 4(e), Declaration on the Establishment of the NIEO, *supra* note 26: 'Full permanent sovereignty of every State over its natural resources and all economic activities'; and Chapter I, para.1, Programme of Action on the Establishment of the NIEO, *supra* note 27: 'All efforts should be made: (a) To put an end to all forms of foreign occupation, racial discrimination, *apartheid*, colonial, neo-colonial and alien domination and exploitation, through the exercise of permanent sovereignty over natural resources.'

29 Eduardo Jiminéz de Aréchaga, 'Application of the Rules of State Responsibility to the Nationalization of Foreign-Owned Property', in Kamal Hossain (ed.), *Legal Aspects of the New International Economic Order* (Pinter: London, 1980) 220-233 at 225-226.

tries abstained from the vote because the Charter, unlike the 1962 Resolution on Permanent Sovereignty over Natural Resources, did not contain any reference to international law. Nor were the principles proclaimed by the New International Economic Order supported by state practice. In fact, state practice appeared to deviate from the New International Economic Order. For instance, after the adoption of the Charter of the Economic Rights and Duties of States, many developing countries concluded bilateral investment protection treaties in order to attract foreign investments.[30]

Moreover, the New International Economic Order was not, unlike the principle of permanent sovereignty over natural resources, confirmed by case law. For instance, despite the fact that the Iran-United States Claims Tribunal has in its case law implicitly recognized a state's right to nationalize property, it has nevertheless required full compensation for such nationalizations. In the *Texaco case*,[31] sole arbitrator Dupuy regarded the Charter of the Economic Rights and Duties of States 'as a political rather than a legal declaration.' However, he found that the Resolution on Permanent Sovereignty over Natural Resources appeared to 'reflect the state of customary law.'[32] In view of the above divergence, the Charter of the Economic Rights and Duties remained a political rather than a legal document containing mainly *de lege ferenda* or policy considerations.[33] In contrast, the 1962 Resolution on the Permanent Sovereignty over Natural Resources appeared to be generally acceptable as it included an explicit reference to international law.

Integrating Development and Environment

In the early 1970s, environmental problems primarily affected industrialized countries. In these circumstances, developing countries were concerned that environmental protection standards might slow their own economic development. They deemed that it was in their interest to focus on economic development rather than on environmental protection and to oppose strict environmental standards. Apparently, the principle of permanent sovereignty over natural resources served as a sort of defence for developing countries against industrialized countries' demands for environmental regulations. For example, the principle of permanent

30 Referring to this development, Pellonpää notes that by the late 1980s, 'the pendulum ha[d] swung back from the early 1970s.' See Matti Pellonpää, 'International Law and the Protection of Foreign Investments: Contemporary Problems and Trends', *Kansainoikeus: Ius Gentium* (1-2/1988) 16-77 at 16-17.

31 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award on the Merits of 19 January 1977 by Sole Arbitrator Dupuy, 53 *International Law Reports* (1979) 422.

32 *Ibid*., at 492. See also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgement)*, para. 244, www.icj-cij.org/icjwww/icjhome.htm.

33 See Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)', 162 *Recueil des Cours de l'Académie de Droit International* (1979-I) 245-318 at 255.

sovereignty over natural resources is reflected in the first part of Principle 21 of the 1972 Stockholm Declaration while the environmental approach is reflected in the second part:[34]

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States beyond the limits of national jurisdiction.[35]

After the Stockholm Conference, Principle 21 was repeated in several conventions and declarations.[36]

Gradually, however, as environmental problems began to threaten developing countries it was recognized that it was in the mutual interest of both developing and industrialized countries to seek common and long-term solutions to developmental and environmental issues. Industrialized countries admitted their historical contribution to environmental problems and recognized that developing countries lacked sufficient means to exercise appropriate environmental management. For their part, developing countries recognized that it was in their interest to move from the former rigid position based on reliance on national sovereignty towards international co-operation, provided that industrialized countries were willing to

34 See Louis B. Sohn, 'The Stockholm Declaration on the Human Environment', 14 *Harvard International Law Journal* (1973) 423-515 at 492; Martti Koskenniemi, 'International Pollution in the System of International Law', XVII Oikeustiede-Jurisprudentia (1984) 91-181 at 100.

35 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, 11 *International Legal Materials* (1972) 1416, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503

36 See, for example, Preamble, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 29 December 1972, in force 30 August 1975, 11 *International Legal Materials* (1972) 1294, www.londonconvention.org/main.htm; Preamble, Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf; Paragraph 21(d), World Charter for Nature, GA Res. 37/7, 28 October 1982, www.un.org/documents/ga/res/37/a37r007.htm; Article 193, United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261, www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf; Preamble, Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987) 1529, www.unep.org/ozone/pdfs/viennaconvention2002.pdf; Preamble, United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; Article 3, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf; Principle/Element 1(a), Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. III), www.un.org/documents/ga/conf151/aconf15126-3annex3.htm; Principle 2, Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

contribute financially to their participation.[37] They also acknowledged that many ecological processes were affecting them, and that in many cases they were more vulnerable to various adverse effects than industrialized countries. Thus, it appeared rational for both the North and the South to conclude a new global partnership for environment and development.[38]

In 1980, an Independent Commission on International Development Issues, led by Willy Brandt, delivered its report, *North-South: A Programme for Survival*.[39] The report explored ways to 'shape order from contradictions'[40] by striving to identify mutual interests between the North and the South. A few years later, the Programme for Survival was elaborated further in an environmental and developmental context by the World Commission on Environment and Development (WCED), headed by Gro Harlem Brundtland. In its report, *Our Common Future*, the World Commission focused on the reconciliation of environment and development. Having recognized that it is a mistake to separate environmental and development issues, the report introduced the concept of sustainable development.[41] Inspired by the report of the WCED[42], the United Nations Conference on Environment and Development was convened in Rio de Janeiro, on 3-14 June 1992.[43] The Conference adopted the Rio Declaration, the UNCED Forest Principles[44] and *Agenda 21*.[45] Furthermore, the Biodiversity Convention and the UN Framework Convention on Climate Change were opened for signature at the Conference.

37 See, for example, Edith Brown Weiss, 'Environmental Equity and International Law', in *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP: Nairobi, 1995) 7-21 at 11.

38 See Preamble, Rio Declaration, *supra* note 36: '*With the goal of* establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors of societies and people.'

39 Independent Commission on International Development Issues, *North-South: A Programme for Survival Report of the Independent Commission on International Development Issues* (Macmillan: Basingstoke, 1980) at 26.

40 *Ibid*., at 12-13.

41 *Ibid*., at 8-9.

42 See Report of the World Commission on Environment and Development, GA Resolution 42/187, 11 December 1987, *Yearbook of the United Nations* (1987) 679-681: '*Concerned* about the accelerating deterioration of the human environment and natural resources and the consequences of that deterioration for economic and social development. *Agrees* with the Commission that while seeking to remedy existing environmental problems, it is imperative to influence the sources of those problems in human activity, and economic activity in particular, and thus to provide for sustainable development.' The General Assembly also adopted Resolution 42/186 drawn up by an Intergovernmental Preparatory Committee of the UNEP Governing Council. See Environmental perspective to the year 2000 and beyond, GA Res. 42/186, 11 December 1987, *Yearbook of the United Nations* (1987) 661-679.

43 See UN Conference on Environment and Development, GA Res. 44/228, 22 December 1989.The General Assembly stressed, *inter alia*, that 'poverty and environmental degradation are closely interrelated and that environmental protection in developing countries must, in this context, be viewed as an integral part of the development process and cannot be considered in isolation from it.'

44 Forest Principles, *supra* note 36.

45 *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

After the Conference, sustainable development was formally institutionalized as the United Nations General Assembly established the Commission on Sustainable Development.[46] Along with the integration of environmental concerns and development interests, international environmental law and the attempts to establish a new international economic order began to lose their former importance.[47] As the concept of sustainable development encompassed both environmental and developmental elements there was, in effect, no more need to make a distinction between the environment and development. As opposed to working on separate tracks, the common objective was now '[t]he further development of international law on sustainable development giving special attention to the delicate balance between environmental and developmental concerns.'[48]

Conclusions

In light of the above, it appears that international environmental law and the law of natural resources developed until the late 1960s and early 1970s in two distinct contexts. These two processes evolved separately for historical reasons and had hardly any connection with each other. While the environmental project sought to regulate environmental problems and thereby transfer environmental issues from domestic to international jurisdiction, the development project sought to transfer issues relating to natural resources from international to domestic jurisdiction through international regulations and resolutions. As the development and environment processes were later fused together under the doctrine of sustainable law, the historical and substantive background of the principle of permanent sovereignty over natural resources became obscured. For this reason, the principle might prima facie seem to be unfettered. However, in the new context the principle is not absolute but is qualified by environmental considerations.[49]

46 See Institutional arrangements to follow up the United Nations Conference on Environment and Development, GA Res. 47/191, 22 December 1992.

47 See, for example, Thomas W. Wälde, 'A Requiem for the 'New International Economic Order': The Rise and Fall of Paradigms in International Economic Law', in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (Martinus Nijhoff: The Hague, 1995) 1301-1338.

48 See Paragraph 39.1, *Agenda 21*, *supra* note 45.

49 See Schrijver, *Sovereignty over Natural Resources*, *supra* note 20, at 394-395; Patricia Birnie and Alan E. Boyle, *International Law and the Environment* (2nd ed., Oxford University Press, 2002), at 138-139.

International Law-Making for the Environment: A Question of effectiveness

Ivana Zovko[1]

Introduction

Effectiveness of international environmental law lies in the international relations domain. While legal, institutional and policy instruments remain the driving force behind good global environmental governance, their effectiveness rests with non-legal factors such as lobby groups, the media, market processes, domestic politics and international policy bargaining. The question challenging the very crux of international environmental law ponders why the green crisis continues despite more than 500 legally binding and thousands of other multilateral environmental agreements (MEAs) being negotiated?[2] This paper argues that this is due in no small part to the inappropriateness of present day approaches in international environmental law-making that fail to accommodate the variety of legal, political and human dimensions of different environmental issues. This paper is specifically concerned with two issues: i) effectiveness related to the choice of the legal format of an international instrument, in particular legally binding MEAs[3] as opposed to soft law; and ii) institutional fragmentation in international environmental governance.

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2 United Nations Environment Programme, *Multilateral Environmental Agreements: A Summary*, Open-ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance, First Meeting, New York, UNEP/IGM/1/INF/1 (18 April 2001) 3.

3 Hereinafter also referred to as treaties.

It has become evident that parties at the negotiating table are often misinformed about the advantages and the disadvantages of the available formats of international environmental norms. Namely, the principle two formats of environmental regulation that have emerged are soft law, as non-legally binding principles and standards,[4] and instruments of hard law that constitute legally binding norms. MEAs can be of a hard law as well as a soft law character. States often insist on one or the other based on the misconception that soft law is inevitably without legal effect and therefore ineffective. This is not surprising when even academics offer opinions ranging from comparing the authority of soft law to a business card that states 'B.A. Oxford (failed)'[5] to others criticising such sceptics for not looking hard enough to realize the true extent of the legal effects of soft law.[6] Ultimately, it is submitted in this paper that while it is favourable that legally binding MEAs are instituted as instruments of global environmental governance wherever possible, their legally binding character is not the pillar or the guarantee of effectiveness either in terms of insuring compliance or in terms of the accomplishment of the environmental goals pursued. One must look at the reasons why states obey international norms in the first place and, in the context of each individual environmental issue area, decide what would be the most effective and timely instrument to induce the necessary environmental change. Apart from the hard law vs. soft law debate, this paper is concerned with institutional disintegration in international environmental law, which creates unnecessary administrative costs, confuses states parties and deters third party participation, hence undermining the effectiveness of MEAs. The paper calls for additional coherence in the institutional machinery in charge of the further development of established MEAs and their enforcement as a fundamental prerequisite of good global environmental governance.

Effectiveness of International Environmental Law

International legislative activity began to flourish in the field of environmental law in the aftermath of the 1972 Stockholm Declaration[7] which brought the world's attention to the environmental question. Modern MEAs have evolved beyond a compendium of rules and regulations into international environmental regimes (IERs), viewed by Young and Levy as the 'social institutions consisting of agreed upon principles, norms, rules, procedures, and programs that govern the interac-

4 Sands refers to soft law as 'non-binding acts'. See P. Sands, *Principles of International Environmental Law* (2nd ed., Cambridge University Press, 2003) 140.

5 W.M. Reisman, 'Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions', 35 *Vanderbilt Journal of Transnational Law* (2001) 729-747.

6 A. Boyle, 'Some reflections on the Relationship of Soft Law and Treaties', 48 *International and Comparative Law Quarterly* (1999) 901 at 913.

7 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, 11 *International Legal Materials* (1972) 1416, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503.

tions of actors in specific issue areas."[8] Legal discourse concerning effectiveness of MEAs and IERs spans across two decades, drawing from the rich scholarship that has evolved around international relations regime theory.[9] Effectiveness of international regimes as a concept may assume many different meanings as numerous methods exist for assessing regime effectiveness.[10] Commonly, the following are the two key evaluating factors of effectiveness: the impact of an international regime on the problems that it sets out to addresses; and employing the authority of a regime as a measurement of effectiveness – successful enforcement and compliance.

Similar evaluating criteria are employed when analysing the effectiveness of individual MEAs. Chambers, for instance, accentuates as the principal measurement of MEA-effectiveness evaluation of the forecasted changes in the targeted behaviour and ultimately in the environment, while also nominating the following critical points of effectiveness:[11] i) the level of compliance without enforceability through a system of sanctions and penalties; ii) the presence and successfulness of supplementary non-legal instruments that enhance enforcement (capacity-building); iii) treaty linkages, in particular conflicts with other international instruments that may impede upon effectiveness. All of the above criteria are also valid assessment criteria for IER effectiveness. Furthermore, the difficulty in evaluating the criteria to measure the level of impact lies in the challenge of distinguishing the many external influences that may have accounted for change in the regime's target group or activity from the actual consequences of the regime's rules and policies. The following questions must be resolved: How can one measure what has been achieved by a particular international regime? How can one relate an international regime's achievements to the standards that have emerged through the regime in question?[12]

While acknowledging that indeed the true proof of effectiveness lies in the question of whether a treaty has caused change in the behaviour of the targeted actors,

8 O.R. Young and M.A. Levy, 'The effectiveness of International Environmental Regimes', in O.R. Young (ed.), *Effectiveness of International Environmental Regimes: Causal connections and behavioural mechanisms* (MIT Press: Cambridge, Massachusetts, 1999).

9 Research on the effectiveness of international environmental regimes started in 1989 with the work of Keohane and Nye. See R.O. Keohane and J.S. Nye, *Power and Interdependence* (Longman: New York, 1989). See also A. Underdal, 'The Concept of Regime 'Effectiveness" 27 *Co-operation and Conflict* (1992) 227-40.

10 See D. F. Sprinz and H. Carsten, 'The Effect of Global Environmental Regimes: A Measurement Concept', 20 *International Political Science Review* (1999) 359-69; J. Hovi, D.F. Sprinz and A. Underdal, 'Regime Effectiveness and the Oslo-Potsdam Solution: A Rejoinder to Oran Young', 3 *Global Environmental Politics* (2003) 105.

11 B. Chambers, 'Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties', *16 Georgetown International Environmental Law Review* (2004) 501 at 530-531.

12 A similar test is put forward in J. B. Skjærseth and J. Wettestad, 'Understanding the Effectiveness of EU Environmental Policy: How Can Regime Analysis Contribute?', 11 *Environmental Politics* (2002) 99-120 at 106.

or has stopped the deterioration of the environment at the anticipated rate, this paper does not allow for an in-depth analytical assessment of the success of each individual MEA or an IER in this sense. The central case for this study is the second evaluation level: the authority of an MEA or an IER as measured by enforcement and compliance. For the purpose of this discussion, compliance is understood as states meeting their assumed obligations under MEAs, while enforcement relates to the implementation of the consequences of non-compliance with the adopted treaty obligations.[13] One must add that implementation is comprised within the notion of enforcement, and specifically refers to incorporating international norms into domestic law through 'legislation, judicial decision, executive decree or other process.'[14]

International Law-making for the Environment

Multilateral environmental agreements (MEAs)

International law commonly rests on either treaties or international custom.[15] Before the 1900s, international rules concerning the protection and preservation of the environment predominately related to resource management and exploitation and were found in treaties that were not inherently environmental.[16] From the 1911 Convention on the Preservation and Protection of the Fur Seals[17] onwards, however, specialized global international agreements dealing specifically with environmental matters began their assent. In this first period of international environmental law-making, international agreements predominately regulated issues of over-exploitation of living resources, as well as pollution of the marine environment. A clear link can be established between the negotiated treaties and the environmental disasters that prompted their negotiations, conveying the intrinsically reactive nature of international environmental law.[18]

A continuous increase in the intensity of international environmental law-making can be noted since the 1972 Stockholm Declaration, which affirmed the urgent need for an overarching strategy in global environmental governance. For

13 T.E. Crossen, 'Multilateral Environmental Agreements and the Compliance Continuum', 36 ExpressO Preprint Series (2003), law.bepress.com/cgi/viewcontent.cgi?article=1075&context=expresso.

14 D. Shelton, 'Introduction', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000) 1-20 at 5.

15 Sources of international law as per Article 38, Statute of the International Court of Justice (ICJ), www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

16 Convention establishing Uniform Regulations concerning Fishing in the Rhine between Constance and Baselle, 9 December 1869, 9 *IPE* 4695.

17 Convention Between Great Britain, Japan, Russia and the United States Respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, Washington D.C., 7 July 1911, in force 12 December 1911, 214 *Consolidated Treaty Series* 80.

18 For a more detailed overview of the link between environmental disasters and the creation of environmental regimes, see the paper by Ed Couzens in the present Review.

instance, Perrez and Roch claim that over 60 percent of existing MEAs were negotiated after 1972,[19] and only the 1990-1994 period yielded some 35 MEAs.[20] As stated above, MEA's have also now developed into international environmental regimes (IERs). Some examples of IERs include: i) the IER in place to prevent depletion of the ozone layer established under the 1985 Vienna Convention for the Protection of the Ozone Layer[21] and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;[22] ii) the climate change regime created through the 1992 UN Framework Convention on Climate Change (UNFCCC)[23] and the 1997 Kyoto Protocol to the UNFCCC;[24] iii) the IER related to vessel-sourced pollution of the marine environment by tanker ships established by a network of conventions negotiated under the auspices of the International Maritime Organization (IMO);[25] iv) the IER concerning the movement and disposal of transboundary waste provided in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes[26] and the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and

19 P. Roch and F.X. Perrez, 'International Environmental Governance: The Strive Towards A Comprehensive, Coherent, Effective and Efficient International Environmental Regime', 16 *Colorado Journal of International Environmental Law and Policy* (2005) 1.

20 C. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Apoproach* (Kluwer Law International: The Hague, London, Boston, 2000) at 35.

21 Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987) 1529, www.unep.org/ozone/pdfs/viennaconvention2002.pdf.

22 Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf. See also its 1992, 1997 and 1999 Amendments.

23 United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

24 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22, unfccc.int/resource/docs/convkp/kpeng.pdf.

25 International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, 12 *International Legal Materials* (1973) 1319, as amended by Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships 1973, 1340 *United Nations Treaty Series* 61, in force 2 October 1983 (hereinafter MARPOL Convention); International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969, in force 19 June 1975, 973 *United Nations Treaty Series* 3) as amended by Protocols of 1976, 1984 and 1992, as well as the 2000 amendments; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December 1971, in force 16 October 1978, 1110 *United Nations Treaty Series* 57, amended by Protocols of 1976, 1984, 1992, 2000, 2003, as well as by the 2000 Amendments (the 1992 Protocol replaces the 1971 Fund Convention); International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 29 November 1969, in force 6 May 1975, 970 United Nations Treaty Series 211; International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, in force 13 May 1995, 1891 United Nations Treaty Series 51.

26 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, 28 *International Legal Materials* (1989) 657, www.basel.int/text/con-e.htm.

Their Disposal;[27] and v) the biodiversity protection and preservation regime found in the 1992 Convention on Biological Diversity (CBD)[28] and the 2000 Cartagena Protocol.[29]

International soft law

Despite the fact that the traditional understanding of international law does not recognize non-binding norms or so called soft-law as a legitimate source, this concept is firmly embedded in international environmental regulation. Given that states are more inclined to compromise their self-interest and find accord in a non-legally binding format, soft norms have been ground-breaking instruments in the evolution of international environmental law. The 1972 Stockholm Declaration and the 1992 Rio Declaration on Environment and Development[30] were surely pioneers in global environmental governance as they set an overarching framework for global environmental policy and law for the future. Unlike legally binding agreements, soft law is not in conflict with the interstate community that prioritizes sovereignty and state self-interest.

There exist numerous forms of soft law. Usually soft norms either formulate separate international instruments or they are incorporated into legally binding agreements.[31] The latter could be, for instance, treaty provisions that call on parties to 'endeavour to strive to co-operate.'[32] As for separate soft international instruments, these predominately take the form of declarations, resolutions, statements of principles and other hortatory documents. One must note that non-binding international instruments have long evolved from unenforceable statements of policies and principles into target-setting documents that more often than not are accompanied by various surveillance mechanisms supervising their enforcement. Examples of such instruments include resolutions of the Antarctic Treaty Consultative Meetings (ATCM) administered and surveyed through a system of inspections established under the Antarctic Treaty and its Environmental Protocol under the

27 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, Basel 10 December 1999, not yet in force, www.basel.int/meetings/cop/cop5/docs/prot-e.pdf.

28 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf.

29 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, www.biodiv.org/doc/legal/cartagena-protocol-en.pdf.

30 Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

31 As per Baxter, '[T]here are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties.' See R. R. Baxter, 'International Law in Her Infinite Variety' 29 *International and Comparative Law Quarterly* (1980) 549. See also C.M. Chinkin, 'Challenge of Soft Law: Development and Change in International Law' 38 *International and Comparative Law Quarterly* (1989) 850.

32 See D. Shelton, 'Introduction', *supra* note 14, at 10.

auspices of the Antarctic Treaty System (ATS).[33] What is more, an example of a soft law instrument setting concrete targets is the 1989 London Conference of the European Community pledging a reduction of chlorofluorocarbons (CFC) by 85 percent as soon as possible and by 100 percent by 2000, while the legally binding 1979 Montreal Protocol set a much lower reduction target of 50 percent by 1989.[34]

The Choice of Packaging: Legally Binding vs. Soft Law

While an international approach in environmental regulation is still clearly warranted, the question arises whether creating comprehensive and legally binding global MEAs is indeed a prerogative for achieving effective international environmental governance, and whether other types of international instruments, such as those of a soft law nature, are more appropriate in certain cases.

Legally binding MEAs: advantages and shortcomings

The primary difference between legally binding MEAs in comparison to international soft law is that states parties are legally bound to comply solely with the former. The most commonly invoked advantage of treaty law relates to a range of non-compliance mechanisms, enforcement measures, trade sanctions and dispute resolution procedures that are characteristic of legally binding instruments, and that traditionally do not complement international soft law. Non-compliance mechanisms chiefly encompass procedures, instruments and separate organs that promote compliance, address cases of non-compliance, and in general offer uniform interpretation of a treaty regime.[35] Most of the legally binding MEAs and IERs employ the formula of a framework convention followed by a more detailed protocol which is more subject-specialized and comprehensive in comparison to the convention. A number of such regimes have evolved following the 1972 Stockholm and 1992 Rio Declarations, in particular in response to at the time new environmental problems such as climate change, ozone layer depletion, desertification and others. The framework conventions negotiated to address these issues have gained overwhelming support. The UNFCCC has 189 parties, the Kyoto Protocol has 156 parties and the Vienna Convention has 190 parties. For comparison, there were 191 members of the UN as at 15 October 2005.[36] Another advantage of treaty law over soft international instruments are remedies that are readily available to

33 See C.C. Joyner, 'The Legal Status and Effects of Antarctica Recommended Measures', in Shelton (ed.), *Commitment and Compliance*, *supra* note 14, 163-195.

34 See discussion in A. Kiss, 'Commentary and Conclusions' in Shelton (ed.) *Commitment and Compliance*, *supra* note 14, 223-242 at 224.

35 Such mechanisms are for instance the Compliance Committee and Compliance Procedures adopted in accordance with Article 34 of the Cartagena Protocol, or the 1998 Non-compliance Procedure established following Article 8 of the Montreal Protocol.

36 See www.untreaty.un.org/.

those suffering damages pursuant to the violation of legally binding norms, remedies which are usually not available as a result of non-compliance with soft law.

However, neither the broad participation of the international community in a treaty regime nor a high level of compliance guarantee effectiveness of a legally binding MEA in the fundamental sense of resolving the environmental issues that it pursues. For example, the 2002 Assessment Panel concerning the depletion of the ozone layer stated that '[e]ven with full compliance of the Montreal Protocol by all Parties, the ozone layer will remain particularly vulnerable during the next decade or so.'[37]

Moreover, a legally binding MEA is not as flexible as soft law in considering the non-state actors that it targets; states parties are often unable to compel compliance by non-state entities under their jurisdiction that are subjected to the treaty regime. For instance, the OECD Report on non-compliance in the international law of marine pollution emphasized that non-compliance with environmental regulations is still profitable for the shipowner and operator and that

> nearly half of vessels inspected [by port authorities] violate at least one aspect of the international environmental rules concerning the stowage and disposal of oil.[38]

In sum, the effectiveness of legally binding MEAs and IERs may be weakened on account of several different factors.

Limitations in the scope of state commitments and concrete target-setting
Crossen warns that the obligations within global MEAs reflect 'no more than current domestic policies.'[39] It is unlikely that the scope of legally binding rules will ever be strengthened to the necessary extent in a hard law agreement given that its legally binding nature implies potential state responsibility for non-compliance.

Leaving outside the regime states that are among the primary sources of the activity detrimental to the environment in the given issue area
This is the case with the non-participation of the United States, which accounts for 20 percent of world's greenhouse gasses emissions, in the Kyoto Protocol.[40] While

37 United Nations Environment Programme Ozone Secretariat, Findings of the Assessment Panel, ozone.unep.org/Public_Information/4Av_PublicInfo_Facts_assessment.asp.

38 Organization for Economic Co-operation and Development, *Costs saving from Non-Compliance with International Environmental Regulations in the Maritime Sector*, Report by the OECD's Maritime Transport Committee (OECD: Paris, 2003) at 4, www.oecd.org/dataoecd/4/26/2496757.pdf.

39 Crossen, 'The Compliance Continuum', *supra* note 13.

40 Energy Information Administration, *Annual Energy Review 1996* (EIA: Washington D.C., 1997); Energy Information Administration, *Emissions of Greenhouse Gases in the United States 1996* (EIA: Washington D.C., 1997).

the Kyoto Protocol may be effective in its authoritative role across states parties, its true effectiveness will solely be conveyed after the time limits for the completion of the targets set thereunder expire, and the impacts of US non-participation can be comparatively assessed.

Absence of effective non-compliance mechanisms

Most MEAs do not establish non-compliance mechanisms[41] but even when they do, diplomatic means dominate as the preferred method of exerting compliance from states parties. Sanctions and the invocation of the responsibility of a defaulting state are rarely employed, if ever. The lack of a tradition of litigation among states in the sphere of international environmental law can generally be attributed to the high costs associated with international adjudication, as well as the resolve of states to settle disputes principally through diplomacy. Moreover, the proliferation of international courts and tribunals towards the end of the 20th Century[42] was followed by treaty parallelism and concurring jurisdiction of various dispute resolution procedures. Therefore the availability of the rich institutional and procedural infrastructure for the invocation of state responsibility repelled rather than attracted states to adjudication.

Prolonging international legal response

Comprehensive MEAs are not solely difficult to achieve with regard to an adequate overarching scope, but are also often not the timely solution to the environmental issues that they address. Their legally binding character inevitably prolongs the negotiations of an international environmental instrument or even ultimately prevents it from being ratified and coming into force. For instance, the minimum period for a treaty's metamorphosis from adoption to entering into force for IMO conventions on marine pollution ranges between 5-8 years.[43] To this one may add at least 2-5 years for the negotiation process itself. These delays in ratification are often attributable to slow domestic administrative procedures which can be the result of a change in diplomatic representatives responsible for a particular treaty, or because a more pressing issue has taken priority in the relevant government department. However, the said delays may also be the result of external pressures by other powerful non-signatory states, various domestic or transnational lobby groups, public polls or the media. Moreover, states often wait for one another to ratify a treaty, carefully choosing the timeframe for it to come into force. Smaller

41 F. Francioni, 'Dispute Avoidance in International Environmental Law', in A. Kiss, D. Shelton and Kanami Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (Kluwer Law International: The Hague, New York, 2003) 231-243.

42 Over the last two decades, 16 courts, both global and regional, have been established across the world. See C. Romano, 'The proliferation of international judicial bodies' 32 *New York University Journal of International Law and Policy* (1999) 709-749.

43 See K.R. Fuglesang, The International Association of Independent Tanker Owners (INTERTANKO), *The Need for Speedier Ratification of International Conventions,* www.oecd.org/document/37/0,2340,en_2649_34367_33943141_1_1_1_1,00.html.

states often rely on the guidance of strong states. In most cases, political bargaining between states on different common multilateral and bilateral issues is always the final judge of the success or failure of any treaty regime.

Not engaging targeted non-state entities likely to be effected by the treaty regime
The traditional conception of international environmental law-making focusing on states and their relations has evolved to acknowledge the many local, domestic and regional non-state stakeholders as being decisive elements of a treaty's effectiveness.[44] These non-state actors may include different lobby groups from the global, regional and domestic levels, public polling, domestic market prognosis of economic growth and changes in political power in the participating states.[45] This non-legal machinery is central in shaping a MEA in the first place, and it may prolong or disable its implementation and successful enforcement. It is therefore pertinent to consult the various stakeholders, especially those targeted by a treaty, all throughout a treaty's life-cycle.

Regional legally binding MEAs

One cannot overlook the relevance of regional regulation as a form of international environmental treaty-making. Regional instruments have emerged as a potential alternative to global environmental regimes since states agree easier on environmental matters when they have a vested interest in the protection of a particular region, for example, rather than when a matter has global effects not noticed in a certain region. The many regional seas conventions in place at the moment attest to this.[46] Compared to global measures, these regional instruments are more easily agreed upon in a legally binding form, and they often incorporate instruments of liability that are seldom found in legally binding global MEAs. A regional hard law MEA is more likely to be effective across its states parties and in view of the environmental targets that it sets than a global one. The difficulties in regionally developing environmental rules relate to the fact that environmental issues are predominately interlinked and go beyond particular regions; often not all states that are the sources of regional environmental concerns are bound by regional regimes. An example of this are ships sailing in a region subject to a regional treaty regime, without having to abide by the rules of the regime as a result of them flying the flag of third countries and/or flags of convenience (FOC) countries.

44 See the new institutionalism doctrine in D. Victor, K. Raustiala, and E.B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press: Cambridge, Massachusetts, 1998). Also see O.R. Young, 'Inferences and Indices: Evaluating the Effectiveness of International Environmental Regimes', 1 *Global Environmental Politics* (2001) 99.

45 The term participating states is used in this paper to convey any category of state involvement in the international law-making process, whether as a negotiating or signatory state or a state party.

46 For more information on the UNEP Regional Seas Programme, see www.unep.org/regionalseas/About/default.asp.

International soft law

Soft international instruments are not hindered by issues intrinsic to a legally binding format. Specifically, some of the advantages of developing soft international norms instead of mandatory ones include the following: i) it is easier to reach global accord since states have complete control over the type and level of commitment assumed under a soft law instrument; ii) there are less delays in negotiations compared with legally binding MEAs; iii) it is easier to fulfil principles and targets set in soft law since states are allowed to adopt a more customized approach to the choice of instruments for incorporating norms in domestic regimes and for their enforcement; iv) soft law bridges North-South differences more successfully as it leaves more room for dialogue and alternative ways of achieving environmental goals tailored to the specific needs of participating states; v) generally there is a greater level of global interstate dialogue and focus on co-operation that furnishes legally binding environmental instruments on bilateral or regional levels; vi) soft law enables greater participation of non-state actors such as industry and NGOs.

Non-binding international norms will have a greater level of persuasiveness and hence be more effective when they are part of an IER, in particular when legally binding agreements have already been established in the same issue area or when soft law has been produced in a regional IER. One area where legally binding MEAs arguably have an advantage is in the realm of enforcement and compliance. This stems from the general presumption that soft law is not appropriate for achieving timely and concrete environmental targets since states are not compelled to obey it under threat of sanction. One needs to ask, however, how relevant the instruments of coercive enforcement and compliance for compelling obedience with international environmental norms are. The question of why nations obey international law has often been raised by legal and international relations scholars, and the answer has never been one-sided.[47]

Effectiveness through enforcement and compliance: the hard law vs. soft law dilemma

As Charney states, 'No study has determined, however, whether the rate of compliance with an international law norm is greater than that of non-legally binding international norms, 'soft' norms.'[48] The statement directly supports the notion submitted in this paper that there is little difference between soft and hard international instruments in view of their effectiveness as measured by compliance and enforcement. The connection between effectiveness and the enforcement of and

47 See H. Hongju Koh, 'Why Nations Obey International Law' 106 *Yale Law Journal* (1997) 2599. For an account of the bibliography relating to international legal compliance see W.C. Bradford, 'International Legal Compliance: An Annotated Bibliography', 30 *North Carolina Journal of International Law and Commercial Regulation* (2004) 379.

48 J.L. Charney, 'Compliance with International Soft law', in D, Shelton (ed,) *Commitment and Compliance*, *supra* note 14, 115-118 at 116.

the degree of compliance with an international instrument is self-evident. An international norm that is not enforced or complied with has failed. Effectiveness in achieving environmental goals as well as effectiveness as measured by compliance is attained through processes originating predominately from the realm of internal relations and external to international law; the role of coercive enforcement instruments is of subsidiary relevance in compelling obedience with international norms. Namely, states rarely and reluctantly resort to methods such as dispute resolution procedures, invocation of state responsibility, or trade and other sanctions, to compel obedience from defiant states. While the threat of sanctions may be an incentive for a state to act in line with an international instrument, this cannot be the primary means for exerting obedience. From the perspective of legal theory, Koh reasons that 'voluntary obedience, not forced compliance, must be the preferred enforcement mechanism.'[49] One must note that the basis of legally as well as non-legally binding agreements is an accord across the appropriate number of states. It is the processes that lead to this international accord, and those following from it, that offer the most effective instruments for ensuring compliance therewith. As a general rule, Kiss emphases that 'states that have voluntarily negotiated, drafted, and adopted an international instrument comply with the agreement which is the final product of their efforts.'[50]

What then are the alternative instruments that exert compliance with international norms but do not involve coercive enforcement? Some of the means of compelling obedience as viewed by A. Chayes and A.H Chayes as well as by Franck, include the following:

> If Nations must regularly justify their actions to treaty partners […] they are more likely to obey it.[51]
>
> If nations internally "perceive" a rule to be fair […] they are more likely to obey it [52]

Therefore, two of the primary instruments for enforcement of international law include using pressure from other participating states in the same MEA or IER, and effective incorporation of an international instrument into domestic regimes as a process of legitimizing international norms. For the former, there are many ways in which a participating state may instigate ratification from another state, and later compel obedience with a legally binding agreement or soft law norm. Pressure can be exerted through political bargaining by a system of concessions

49 Koh, 'Why Nations Obey', *supra* note 47, at 2645.

50 A. Kiss, 'Commentary and Conclusions', *supra* note 34, at 242.

51 A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press: Cambridge Massachusetts, 1995), cited in Koh,, 'Why Nations Obey', *supra* note 47, at 2645.

52 T.M. Franck, *The power of Legitimacy Among Nations* (Oxford University Press, 1990), cited in Koh, 'Why Nations Obey', *supra* note 47, at 2645.

and reprisals in various areas of interstate co-operation, especially in trade issues. This technique is particularly popular among the countries of the industrialized North.

As for the internalization of MEAs, effective implementation of a treaty or the incorporation of soft law principles into domestic law requires establishing linkages between various elements of the domestic system, each of which may hinder the success and speed of implementation. This includes the judiciary, public prosecutors, the police and customs officers, the justice department, the media, industry and other actors that are likely to be affected by the new regulations. Another element of the effective internalization of international rules is the development of domestic liability and redress regimes that deter non-compliance of non-state actors targeted by the international instrument. In general, there exists a consensus among scholars that effective integration of international law into domestic systems is among the primary instigators of compliant behaviour.[53]

Additionally, Chayes and Chayes include the following in the list of potential non-forceful mechanisms for compelling obedience: transparency; reporting and data collection; verification and monitoring; dispute settlement; capacity-building; and strategic review and assessment.[54] One may also add that monitoring should be performed by impartial observes in the form of either NGOs or IGOs.[55] Furthermore, one must also acknowledge that compliance by both targeted states and non-state targeted actors will depend on the cost effectiveness ratio. As the OECD report illustrated in view of international regulation of marine pollution, it remains cheaper to pollute the marine environment than to comply with strict environmental standards. If the disobedient targeted non-state actor is also a powerful lobby group in one of the participating states, it is likely that the state in question will allow such disobedience and hence be itself in violation of the international instrument.[56]

Finally, the responsiveness of the international instrument to the differences between the developed North and the developing South also counts towards its effectiveness, in particular in view of the difficulties that the South faces in en-

53 Giraud-Kinley notes that 'the effectiveness of international law […] is ultimately measured according to its enforcement at the local level.' See C. Giraud-Kinley, 'The Effectiveness of International Law: Sustainable Development in the South Pacific Region', 12 *Georgetown International Environmental Law Review* (1999) 125-176 at 170. Similarly, Koh emphasizes that the key element in obedience of international regimes is their reaffirmation in the form of an 'internally binding domestic legal obligation' through processes such as judicial description, legislative embodiment, or executive acceptance. See Koh,, 'Why Nations Obey', *supra* note 47, at 2659. See also R. Fisher, *Improving Compliance with International law* (University of Virginia Press: Charlottesville, 1981).

54 See A. Chayes and A. H. Chayes, *The New Sovereignty*, *supra* note 51, cited in Koh, 'Why Nations Obey', *supra* note 47, at 2637.

55 Kiss, 'Commentary and Conclusions', *supra* note 34, at 240.

56 See OECD, *Costs saving from Non-Compliance*, *supra* note 38.

forcement, compliance and even negotiating an MEA. Specifically, developing countries and countries with economies in transition often sign or adhere to treaties without having the right domestic infrastructure or the know-how to implement and enforce them. In this case again, enforcement is not exerted forcefully but through financial and technical support by the North to the South with the objective of strengthening the latter's regulatory and institutional capacity. This is done through legal and technical assistance, training and promotion of education in environmental law matters and environmental law information. The difficulty underpinning the current environmental discourse is the on-going North-South debate in which the industrialized North advocates stringent environmental protection and resource management at the expense of economic growth, while the developing South is cautious in adhering to ambitious environmental rules that may impede upon their economic development. In recognition of these fundamental differences, the principle of common but differentiated responsibility emerged, which includes the commitment on the part of the industrialized North to help the implementation and enforcement of international environmental instruments in the South.[57] All of the above enforcement and compliance mechanisms are already widely employed both with regard to soft and hard international law.

The availability of hard law instruments of enforcement as the final resort for compelling obedience from defiant states is unquestionably significant, and these instruments should be instituted wherever possible. On the other hand, the same type of stronger instruments are to an extent already available for exerting compliance with soft law norms, in particular if they originate from legitimate international organizations such as the UN, IERs such as the ATS, or even from individual states' policies. One can take as an example the UN resolutions imposing a complete ban of high seas driftnet fishing leading the United States, as an advocate of this ban, to secure compliance by threatening trade sanctions against uncooperative states.[58] What is more, the issues commonly invoked as impeding upon soft law compliance may also hinder obedience with hard law. This concerns the question of whether legal obligations are conveyed clearly rather than in a general and residual manner and whether international norms can be transmitted into the domestic realm.

Most importantly, it is argued that it is interstate co-operation, efforts in preserving and achieving international accord and ultimately diplomatic means of pressure that hold the key to compliance with MEAs whether of hard law or soft law character. Therefore, soft law is not per se less effective than hard law in tackling environmental issues. Its lack of legally binding character transforms into ineffectiveness solely when it is not accompanied by adequate compliance machinery.

57 See Principle 7, Rio Declaration.

58 See discussion in D.R. Rothwell, 'The General Assembly Ban on Driftnet Fishing', in D. Shelton (ed.), Commitment and Compliance, *supra* note 14, at 135.

This may either be intrinsic to the IER that the soft law is a part of, to the body that facilitated its negotiations or it can also be established separately.

Making the right choice for forests

It is submitted that legally binding MEAs should continue to be developed as a primary instrument of international environmental governance. Soft law should in principle be used as a subsidiary means for harmonizing differing state behaviour and for setting progressive targets. This will advance environmental governance either through resort once again to soft law or by creating the right climate for the negotiations of a legally binding agreement. Nevertheless, negotiations of a legally binding MEA should only be pressed for when widespread support and comprehensive commitments can be secured in the hard law format, and when there are no doubts concerning compliance. In certain instances, such as in the development of an international agreement on forests, it must be recognized that choosing a legally binding format may permanently halt negotiations. In the case of an international agreement on forests, it seems that the targets placed on the negotiating table were unrealistic and did not convey the established behaviour either in the domestic regimes of negotiating states or in the international domain.[59] When reminded of the common legal progression of international environmental treaty law to embrace a framework convention – protocol formula, it would seem counterintuitive to try to reach consensus on concrete stringent targets already at the initial stages of negotiations. In the first legally binding agreement in a specific issue area, hard law instruments rarely go beyond the framework contents. Furthermore, contrary to some environmental issues such as pollution of areas beyond national jurisdiction, forest degradation does not have an immediately apparent level of urgency that would justify compromising state self-interest and adherence to a legally binding agreement; negotiating states are not under pressure from domestic or international media or public opinion to negotiate or adhere to such a treaty.

All this considered, and in light of the five years of unsuccessful negotiations on an agreement on forests, the option of a legally binding environmental instrument related to forests could be realized in a framework and residual hard law format. Such a framework treaty could then serve as the basis for developing a protocol with concrete targets for deforestation negotiated in the second stage. Alternatively, states could look to a soft law option. The discussion thus far has illustrated that soft international instruments, when accompanied by supervisory organs for overseeing compliance with them, offer a viable alternative to legally binding MEAs and may be just as effective in both exerting obedience with stringent environmental norms as well as in having an impact on the respective

59 For more information on the proposals for an international agreement on forests, see www.un.org/esa/forests/.

environmental issue. Several soft law international instruments specifically related to forests are already available: the 1992 Forest Principles[60] and Chapter 11 of *Agenda 21*.[61] However, neither of them is presently accompanied by effective enforcement and non-compliance mechanisms.

Fragmentation of International Environmental Law: Overcoming Institutional Chaos

MEAs, and IER's in particular, are supplemented by various types of institutional arrangements that facilitate further development of treaty regimes and also supervise their implementation and enforcement. While such institutional underpinning is characteristic of international hard law and involves the establishment of separate IGOs or secretariats within existing IGOs,[62] today MEAs are dominated by what Churchill and Ulfstein refer to as 'autonomous institutional arrangements.'[63] Autonomous institutional arrangements include Conferences of the Parties (COP) or Meetings of the Parties (MOP) which have legislative and decision-making powers; they may also comprise a secretariat, and a number of other bodies such as technical and scientific liaison and expert groups. Soft international instruments can also enjoy such institutional support, in particular when negotiated by one of the institutions that also prescribes international hard law.

The end result is a "forest" of different secretariats, IGOs, COPs and MOPs that are predominately un-coordinated. Ghering rightfully notes that international environmental regimes have 'develop[ed] into comparatively autonomous sectoral legal systems.'[64] Some linkages do exist on the scientific level between different international instruments and their underpinning institutions. For example, the Liaison group on the biodiversity related conventions was created to enhance co-operation and maximize the utility of the treaty regimes in protecting biodiversity.[65] Other synergies refer to the many Memoranda of Understanding (MOU) between

60 Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. III), www.un.org/documents/ga/conf151/aconf15126-3annex3.htm.

61 Chapter 11, Combating Deforestation, *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

62 IMO is the host institution for MARPOL and a long list of other international conventions related to marine pollution; International Oil Pollution Funds (IOPC Funds) administers the 1992 Liability and Fund Conventions; International Whaling Commission.

63 R.R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A little-noticed phenomenon in international law', 94 *American Journal of International Law* (2000) 623.

64 T. Gehring, 'International Environmental Regimes: Dynamic sectoral legal systems', 1 *Yearbook of International Environmental Law* (1990) 1, at 3.

65 See Report of the Fourth Meeting of the Liaison Group of the Biodiversity-Related Conventions, Bonn, Germany, 4 October 2005, www.biodiv.org/cooperation/blg-4-rep-final-en.doc.

various environmental agencies such as UNEP and IUCN, between different MEA secretariats, as well as between different IERs themselves.[66]

Still, MEAs continue to hold separate institutional arrangements despite the recognized need for institutional clean up. Looking at the different conventions related to biodiversity, the Convention on Biological Diversity (CBD), CITES,[67] the Convention on Migratory Species (CMS)[68] and the Ramsar Convention[69] have their own secretariats, whereas the World Heritage Convention[70] has the equivalent institution in the form of the World Heritage Committee, which functions under the auspices of the World Heritage Centre within the United Nations Educational, Scientific and Cultural Organization (UNESCO). All of these hold separate COPs, they are all supplemented by additional bodies such as the CITES and CMS Standing Committees and the Ramsar Convention's Bureau, and they have all established a vast range of scientific committees.

This lack of co-ordination between independent institutional arrangements inevitably detracts from the effectiveness of the treaty or international regime that they support. Reasons for this include the following: lack of co-ordination hinders information exchange, which is particularly important between the various treaty regimes that refer to similar issue areas; inefficient use of funds allocated for capacity-building in developing countries due to unnecessary and high administrative costs related to the functioning of each separate unrelated institutional arrangement, funds that could be invested in actual target programmes; slow bureaucratic procedure; diminished transparency given the enormous number of beneficiaries in the international environmental sphere; and difficulty in ensuring active participation of states parties to the different regimes due to the number of meetings. Only from September to December 2005, some 43 meetings of various supplementary bodies of MEAs and environmental IGOs have been recorded on the UNEP website.[71] Most of these meetings are at least a week long, they are held all around the globe, and their schedules often overlap. Ultimately, institutional fragmenta-

66 See, for example, 2000 Memo of Co-operation on the Global Biodiversity Forum between IUCN and the Ramsar Convention Bureau. In 1996 the Secretariats of the Ramsar Convention and the CBD also signed a Memorandum of Co-operation.

67 Convention on International Trade in Endangered Species of Wild Flora and Fauna, Washington D.C., 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, www.cites.org/eng/disc/text.shtml

68 Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980), www.cms.int/documents/convtxt/cms_convtxt.htm.

69 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 January 1971, in force 21 December 1975, 996 *United Nations Treaty Series* 245, www.ramsar.org/key_conv_e.htm

70 Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, whc.unesco.org/en/175/.

71 See hq.unep.org/Calendar, as at 1 October 2005.

tion both confuses and deters states from participating in treaty regimes that appear overly complex and costly.[72]

The financial aspects of institutional fragmentation and the inefficient use of allocated funds is particularly problematic, given that each MEA must establish channels through which to finance the operation of their secretariats, capacity-building programmes and other activities.[73] UNEP recognizes that funds are predominately secured through the use of traditional mandatory and voluntary trust funds that may be established either by an MEA or separately for specialized purposes. Other examples of sources of funding include the Multilateral Fund for the Montreal Protocol (MLF), the Global Environment Facility (GEF) and the Kyoto Protocol climate-related mechanisms.[74]

It is clear that synergies between various MEAs and IERs must go beyond co-operation on the scientific level, and ought to involve simplifying the existing institutional arrangements and creating solid institutional linkages between different treaty regimes, thus avoiding and resolving potential overlap between them.[75] UNEP was the first step in ensuring effective global governance through institutional integration. Established following the 1972 Stockholm Declaration,[76] UNEP was confirmed in the 1997 Nairobi Declaration as the 'leading global environmental authority that sets the global environmental agenda.' For example, UNEP presently facilitates 17 MEA secretariats, and has numerous programmes for improving what it calls the four Cs: Co-ordination, Coherence, Compliance and Capacity-building in relation to the MEAs.[77] Another step in institutional unification was the creation of the Global Ministerial Environment Forum (GMEF) in 1999, which gathers environment ministers in an attempt to provide a harmonized global environmental policy that can be implemented on the domestic level. GMEF also addresses ways of enhancing the role of UNEP.[78]

72 Gehring also warns that in the present institutional arrangements the technical aspects of implementation and legislative and political authority, such as treaty-making powers, are not separated. See T. Ghering, 'International Environmental Regimes', *supra* note 64 at 2.

73 UNEP, *Multilateral Environmental Agreements*, *supra* note 2.

74 *Ibid.* The report also identifies the World Bank, Regional Development Banks, bilateral arrangements with donor countries, foundations such as the UN Foundation, private sector donors, and NGOs.

75 See United Nations Environment Programme, 'Proposal for a Systematic Approach to Coordination of Multilateral Environmental Agreements', UNEP Doc. No.4/Rev.1, Third Consultative Meeting of the MEA Secretariats on International Environmental Governance (27 June 2001).

76 For a more detailed account of the birth of UNEP, see the paper by Donald Kaniaru in the present Review.

77 See UNEP Proposal, in UNEP, *Multilateral Environmental Agreements*, *supra* note 2 at 1.

78 Report of the Secretary General on Environment and Human Settlements, GA Res. 53/242, 10 August 1999.

Furthermore, the need for integration of the international mechanisms for financing capacity-building in the South was partly met by the establishment of GEF in 1991.[79] It provides funding for programmes and projects related to biodiversity, climate change, international waters, land degradation, the ozone layer and persistent organic pollutants.[80] Nonetheless, the MEAs related to the six environmental areas covered by GEF continue with their own independent institutional machinery for all other matters. What is more, GEF funds can be administered through projects implemented by UNEP, the United Nations Development Programme (UNDP) or the World Bank. Even in this sense, difficulties can be caused by overlap and competition between these three organizations regarding the allocation of GEF projects.

Considering all this, an overarching reform in the institutional arrangements for the enforcement and further development of international environmental law is warranted. Some of the means by which to overcome the present-day piecemeal approach in international environmental governance and to achieve greater institutional coherence include: i) establishing GEF as the central international environmental financial mechanism to assist implementation of MEAs and global environmental policies; ii) strengthening the role of UNEP, in particular UNEPs Governing Council and GMEF as the key co-ordinating bodies between the different MEAs and IERs, providing a permanent forum for dialogue between the different treaty regimes; and iii) creating an independent World Environment Organization that could adopt UNEP as its nucleus and incorporate the facilities provided by other existing IGOs.

Conclusions

This paper has illustrated that there exists no uniform one-fits-all solution in developing effective international instruments of global environmental governance. While legally binding MEAs should remain the primary option given their back-up system of enforcement measures and non-compliance regimes, it has been proven that the availability of such mechanisms is not a guarantee of favourable and notable environmental change or of effectiveness. Global, comprehensive and legally binding instruments should be developed only when the negotiating states are truly capable of implementing the adopted measures in their domestic law, as well as solely when parties are confident that they can exert compliance. On the other hand, soft law can also create commitments for the participating states and can be effective in inducing environmental change. The many advantages of soft

79 For a more detailed account of GEF and its role in financing international environmental regimes, see the paper by Ahmed Djoghlaf in the present Review.

80 J. Helland-Hansen, 'The Global Environment Facility', 3 International Environmental Affairs (1991) 137.

law are based on the fact that it is not incompatible with an international order grounded in the principle of national sovereignty – an intrinsic clash when dealing with legally binding agreements. As such, international soft law can be both an alternative and/or a supplement to legally binding international agreements.

Additionally, the problem of institutional fragmentation in global environmental governance is an issue that will continue to require consideration given that it causes notable delays and financial expense in the functioning of MEAs and IERs. These could be avoided by developing greater synergies between the existing regimes as well as by attributing greater authority to one central agency, be it the existing UNEP or an entirely new one. In sum, effective international environmental governance is best achieved through the functioning of international environmental regimes incorporating both soft and hard law instruments, rather than singular legally binding MEAs. It is further necessary to provide uniform, simplified and effective institutional arrangements for the financing of the activities of IERs, facilitating their implementation and enforcement, as well as bridging North-South differences. In essence, 'a new international environmental governance structure would have to be not only visionary and ambitious, but also pragmatic and modest.'[81]

81 Churchill and Ulfstein, 'Autonomous Institutional Arrangements, *supra* note 63 at 623.

Cross-cutting Issues in Compliance with and Enforcement of Multilateral Environmental Agreements[1]

Elizabeth Maruma Mrema[2]

Introduction

The implementation, compliance and enforcement of multilateral environmental agreements (MEAs) have become the most current contemporary issue of discussion in debates related to international environmental law. Concerns and questions are also put forward on whether it is still useful for governments to continue to negotiate, develop and adopt new environmental instruments while knowing well they will not be effectively implemented or enforced. However, with new scientific findings and certainties concerning environmental challenges, it is becoming difficult to put a halt to the development of new instruments. Consequently, more efforts need to be put in place to ensure that existing environmental instruments are effectively implemented to match the pace of the development of new MEAs. Several mechanisms are currently in place and others are under discussion to assist states parties to MEAs to play a better and more effective role in the implementation, compliance and enforcement of MEAs. That role includes reducing the heavy burden placed upon parties to implement MEAs through grouping cross-cutting issues and clustering MEAs together. This paper discusses some of these measures including the role played by UNEP in working with parties and partners to support MEA implementation through cross-cutting issues and/or clustering.

1 This paper is based on a lecture given by the author on 22 August 2005. The views expressed are the author's own and do not necessarily reflect UNEP's position.

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Why the Current Focus on Promoting Compliance with MEAs?

International environmental law, though one of the youngest and newest disciplines in the field of international law, has grown and continues to grow at a tremendous speed. The last three decades have seen a rapid development of MEAs both at global and regional levels. The exact number of existing MEAs remains uncertain, but literature on the subject estimates the number to range between 250 and 700. The fact, therefore, remains that too many MEAs have been negotiated and adopted and are in force today. The impact and effect of this development is that a number of MEAs duplicate or overlap each other in several aspects, including with regard to principles, norms and institutional arrangements for their implementation, follow-up, reporting and co-ordination. As a result there is a lack of coherence, inadequate implementation and inefficiency and ineffectiveness in implementation, synergies and interlinkages at national, regional and international levels.

Although the growing number of MEAs can be seen as a positive development, it has also had a negative impact on the implementation of the international environmental laws that have been developed. While a large number of MEAs have been developed over the years, their implementation, compliance and enforcement continues to be weak and inadequate. The international community and developing countries in particular are becoming wary of the increasing burden and responsibilities bestowed upon them to effectively implement and enforce the MEAs to which they are parties. In many cases, there is weak or inadequate national capacity to guarantee the required and effective implementation of MEAs. This realization has resulted in the recent shift from the development of more MEAs to ensuring and promoting compliance with and enforcement of existing international norms and policies. The World Summit on Sustainable Development (WSSD) underscored in the *Johannesburg Plan of Implementation*[3] the importance of the international community's task to advance and enhance the implementation of agreed international norms and policies as well as to monitor and foster compliance with environmental principles and international agreements.

The weak or inadequate implementation of MEAs does not mean that parties wilfully choose not to comply with their obligations set under different MEAs. States generally tend to comply with treaties they have explicitly committed to. Nonetheless, factors beyond their control sometimes necessitate breaches or non-compliance with their MEA obligations. Lack of or inadequate capacity to implement MEA obligations are often due to limited financial, human and technical

3 World Summit on Sustainable Development, *Johannesburg Plan of Implementation*, www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

resources and/or lack of environmental awareness among decision-makers, i.e. parliamentarians, enforcement agents, i.e. judges/magistrates, prosecutors, police, customs officials, etc., and among citizens and the general public. Lack of or inadequate intent by the public sector for fear of investors shunning a country with strict environmental regulations, a private sector willing to take environmental risks or simply the environment being considered a secondary issue in a country's development plans are other factors limiting effective enforcement of MEAs. Notwithstanding these and other challenges, MEA secretariats, parties through Conferences of the Parties (COPs) and other partners have instituted measures to promote better and more effective compliance with MEAs and continue to do so. These measures or mechanisms are discussed and illustrated below.

Existing Measures to Promote Compliance with MEAs

Two major kinds of measures or mechanisms exist to facilitate or force a non-compliant state to fulfil its obligations under an MEA.[4] These are diplomatic and/or management measures which place emphasis on preventive measures and therefore, apply the precautionary principle, and coercive and/or enforcement measures which are accusatory and focus on forceful or punitive measures to ensure that treaty obligations are enforced. The former measures underline amicable procedures, consultations and problem-solving in a co-operative atmosphere intended to bring a non-compliant party into compliance. The latter, on the other hand, are punitive in nature and focus on differences and disagreements with a possibility to use force as the last resort to induce compliance with MEA obligations.

Diplomatic/Management measures

As noted above, states tend to wilfully comply with the MEAs they have explicitly committed, to but breaches or non-compliance do occur due to reasons beyond their control such as lack of or inadequate financial, human, technical and institutional capacity to fulfil their obligations. Consequently, diplomatic and/or management measures are some of the facilitative approach mechanisms undertaken or instituted to assist and facilitate countries to create the necessary and prerequisite capacity to comply with their international commitments. Such facilitation and assistance may, in fact, encourage greater participation in a MEA regime since emphasis is on ex ante prevention of environmental harm rather than ex post enforcement to compensate or punish for such harm. Consequently, diplomatic and/

4 The two categories described in this part are largely taken from Tuula Kolari, *Promoting Compliance with International Environmental Agreements – A Multidisciplinary Approach* (University of Joensuu, 2004) at 41-106.

or management measures in practice underline the Rio Declaration[5] principles of prevention and precaution. These principles are executed, as will be illustrated below, through reporting requirements imposed on parties, compliance monitoring, technical and scientific assistance, financial incentives, and issue-linkage or clustering of MEA themes or areas of co-operation, to mention but a few.

Reporting requirements imposed on parties

Virtually most MEAs, if not all, impose an obligation and duty upon parties to prepare, produce and submit periodic national reports to the respective COPs, through the specific MEA secretariat, on how the MEA has been put into force and implemented nationally. These reports enable parties to assess how effectively an MEA is implemented and enforced. The detail of the information required in the national reports and the timing of preparing and submitting such reports differs with each MEA.[6] Such reporting requirements serve as conflict avoidance measures that permit parties to examine and assess the extent to which states are committed to their obligations. They also serve to target assistance towards parties that are most in need of it to bring them into compliance. Reporting requirements under MEAs can also take the form of parties' self-reporting measures, failure with which to comply may result in negative impacts, such as trade sanctions under CITES, for example. They may also create positive impacts and trigger assistance and support where a party lacks the capacity or financial and human resources to compile the information and prepare the required reports. For most MEAs, national reports are prepared and submitted by states parties to the respective MEAs.

Compliance monitoring

The establishment of different types of committees or treaty bodies by MEAs themselves, or by COPs that meet regularly, normally serve as compliance control mechanisms. These bodies are not entrusted with power to impose sanctions against non-compliant parties, but can make recommendations on how such parties can be assisted to comply or on whether to undertake investigations surrounding alleged or detected breaches. On site inspections or monitoring to independently detect violations or non-compliance is a rare mechanism in international environmental agreements. It is, however, commonly used in international disarmament

5 Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

6 See, for example, Article 7, Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf (hereinafter Montreal Protocol); Article 12, United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (hereinafter UNFCCC); Article 15, Stockholm Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, www.pops.int/ (hereinafter Stockholm Convention).

agreements. Very few MEAs provide for strong in-country inspection and it can be considered quite an exception. It is found, for instance, in the 1988 Convention on the Regulation of Antarctic Mineral Resources Activities which, unsurprising, is not yet in force.[7] The 1991 Protocol on Environmental Protection to the Antarctic Treaty equally provides for inspection to ensure compliance with the Protocol.[8] The Ramsar Wetlands Convention[9] has also relied on on-site inspections. Parties to CITES[10] may at times be requested to invite the secretariat for on-site visits to discuss difficulties faced by a party in the implementation of the treaty. When no such invitation is received and the secretariat is not satisfied with a party's compliance by a certain date, imposing trade restrictions may be threatened as a result.[11]

Positive economic measures

For most parties from developing countries and countries with economies in transition, economic measures are the major incentive to implement and enforce their MEA obligations. Without such measures, implementation of MEAs would be even weaker and more inadequate than it is currently. These measures have thus been used as a mechanism to promote compliance with and enforcement of MEAs and they have also been used as a pre-condition for countries to ratify or accede to a particular MEA. Some of the common positive economic measures currently used to induce compliance are either stipulated in the MEA texts themselves and elaborated in specific COP decisions or are set up specifically through such decisions. These include use of financial incentives[12] or economic instruments; techni-

7 Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988, not yet in force, 27 *International Legal Materials* (1988) 868.

8 Article 14, Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* (1991) 1461, www.ats.aq/protocol.php.

9 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 January 1971, in force 21 December 1975, 996 *United Nations Treaty Series* 245, www.ramsar.org/key_conv_e.htm (hereinafter Ramsar Convention).

10 Convention on International Trade in Endangered Species of Wild Flora and Fauna, Washington D.C., 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, www.cites.org/eng/disc/text.shtml (hereinafter CITES).

11 Article XIII(2), CITES.

12 Some MEAs specifically name the Global Environment Facility (GEF) as their financial mechanism. This designation can be found, for example, in the following: Article 20, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf (hereinafter CBD); Article 28, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, www.biodiv.org/doc/legal/cartagena-protocol-en.pdf (hereinafter Cartagena Protocol); Articles 10 and 13, Montreal Protocol; Article 11, UNFCCC. Other MEAs have set up their own funding mechanisms. Examples include the Multilateral Fund under the Montreal Protocol; the Trust Fund (contributions from Parties) under CITES; the World Heritage Fund under Article 15 of the Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, whc.unesco.org/en/175/; the Ramsar Convention's Small Grants Fund (see www.ramsar.org/sgf/key_sgf_index.htm).

cal and scientific assistance;[13] transfer of technology, information and know how[14] either through the principle of shared and/or common but differentiated responsibilities[15]or special funding mechanisms;[16] and support for capacity-building[17] and/or enhancement, which includes training, environmental public awareness and education,[18] particularly among targeted groups, such as customs officials, the judiciary, lawyers, NGOs, etc., as well as empowerment of relevant stakeholders for enhancing enforcement capabilities.

Issue-linkage where co-operation is encouraged

Linking negotiation and/or implementation of MEAs could also be considered a positive inducement for countries to join an international agreement or to better implement existing MEAs. For instance, most if not all developing countries participated at the 1992 UN Conference on Environment and Development as well as supported its outcomes – the Rio Declaration and *Agenda 21*[19] – because development was linked to environment. Linking environment with international trade,

13 See Article 14, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 24 May 1992, 28 *International Legal Materials* (1989) 657, www.basel.int/text/con-e.htm (hereinafter Basel Convention); Article 16, Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September 1998, in force 24 February 2004, 38 *International Legal Materials* (1999) 1, www.pic.int/en/ViewPage.asp?id=104 (hereinafter Rotterdam Convention); Articles 12 and 13, Stockholm Convention.

14 See Article 16, CBD; Article 22, Cartagena Protocol; Article 18, United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, www.unccd.int/convention/menu.php (hereinafter UNCCD); Article 10A, Montreal Protocol; Article 4(3, 7-9), UNFCCC; Article 10, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998) 22, unfccc.int/resource/docs/convkp/kpeng.pdf (hereinafter Kyoto Protocol); Article 10(d), Basel Convention; Article 16, Rotterdam Convention; Article 12, Stockholm Convention.

15 See Article 5(5), Montreal Protocol; Article 20(4), CBD; Article 4(4), UNFCCC.

16 Although most MEAs establish financial mechanisms which raise funds from the contributions of the parties through Trust Funds, Article 21, CBD and Decision III/8, Memorandum of understanding between the Conference of the Parties to the Convention on Biological Diversity and the Council of the Global Environment Facility, www.biodiv.org/decisions/default.aspx?m=cop-03, as well as Article 11, UNFCCC and Decision 12/CP.2, Memorandum of Understanding between the Conference of the Parties and the Council of the Global Environment Facility, unfccc.int/resource/docs/cop2/15a01.pdf#page=55, set up and benefit from the Global Environment Facility (GEF) funding mechanism. Article 10(1), Montreal Protocol establishes a unique Multilateral Fund as well as establishing GEF as a funding mechanism to assist its parties to comply with the Ozone Convention and Protocol. Other examples of Conventions which benefit from GEF funding include UNCCD and the Stockholm Convention.

17 See Article 12(a), CBD; Article 22, Cartagena Protocol; Article 19(1-2), UNCCD; Article 10, Montreal Protocol; Article 9(2)(d), UNFCCC; Article 10(e), Kyoto Protocol; Article 11(1)(c) and 16, Rotterdam Convention; Article 12, Stockholm Convention.

18 See Article 13, CBD; Article 13, Cartagena Protocol; Article 19, UNCCD; Article 9(2), Montreal Protocol; Article 6, UNFCCC; Article 10(e), Kyoto Protocol; Article 10(4), Basel Convention; Article 10, Stockholm Convention.

19 *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

international debt or research and development tends to induce countries to be more interested in environmental issues and consequently to comply with their MEA obligations. At times, countries may be induced to join an MEA so as not to be left without the benefits gained from joining the agreement. For instance, the Montreal Protocol prohibits parties from trading ozone-depleting substances with non-parties. This means that only by becoming a party to the Protocol may a state gain access to international markets for ozone-depleting substances. Furthermore, including financial and technological transfers in MEAs could equally serve as a positive measure of compliance promotion, encouraging countries to join.

Settlement of disputes by diplomatic means

Virtually all old and new MEAs have dispute settlement provisions in them. Such provisions normally begin with a diplomatic statement of a general rule that all disputes should be settled exclusively by peaceful means. Peaceful settlement, dominant in international environmental agreements, accommodates consent, adjustment and compromise. Judicial settlement in court, which has been rarely employed in strictly environmental agreements, is the last resort in dispute settlement mechanisms. Settlement of disputes through diplomatic mechanisms involves the following measures: treaty interpretation, negotiation, third party involvement and good offices or services.

As set out in Article 31 of the Vienna Convention on the Law of Treaties[20] an organ may be assigned to give in good faith an authoritative interpretation of a treaty rule if a party claims that a breach has occurred. This mechanism permits disputes relating to treaty interpretation to be solved amicably and in a less confrontational manner than if the matter were sent to a judicial court for adjudication. However, treaty interpretation may bring the particular agreement into question and its binding force may be affected as a result, making it difficult for the treaty to achieve its intended objectives.

Negotiation is a commonly used mechanism to resolve disagreements between parties under an agreement before it becomes a dispute. It is flexible, informal, not costly, non-confrontational and non-binding, as opposed to judicial or arbitral proceedings. Once parties negotiating an agreement agree on the outcome of their negotiations, it is expected that each party will implement the agreement or decision made in good faith.

Most international agreements include in their instruments a provision for involving an independent third party, either an institutional body or another state, to intervene through negotiation to assist in finding a solution to a dispute, without

20 Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331, www.un.org/law/ilc/texts/treaties.htm.

affecting the third party's own interests. Such a third party can act as a mediator and can appeal to the parties in the dispute and encourage them to find a solution by providing views and ideas as to the basis for a compromise. A mediator usually assists the parties to diagnose their problem and offers suggestions and recommendations to be considered by the parties as a possible solution to the treaty dispute.

Good offices or services are another form of third-party involvement whereby another party, state or institution may offer to act as a host for negotiations and to assist in resolving a treaty dispute. Conciliation, another form of mediation and good offices, is equally utilized as a form of third party involvement. However, unlike the other two which are informal in nature, conciliation is more semi-formal. The parties to a dispute are given an opportunity to be heard, claims and objections are examined and proposals to the parties can be made so as to reach an amicable solution to the dispute. Despite the fact that the conciliation process and procedure is more formal, time-consuming and often as expensive as a judicial settlement or arbitration, its decisions or outcomes are invariably of a non-binding and recommendatory in nature.[21]

With all the examples provided above, it is clear that the diplomatic and/or management measures in place intend to promote and induce compliance with MEAs. They are, therefore, preventive in nature and apply the principle of precaution. Consequently, the management and/or diplomatic approaches are considered preventive and precautionary mechanisms to promote and induce compliance with MEAs. The approaches offer incentives and co-operative problem-solving hence encouraging positive state relations.

Coercive/Enforcement measures

Where there is no political will on the part of a state to comply with its MEA obligations, stricter coercive and enforcement measures, which will not be discussed in great detail in this paper, have been instituted to force a party to comply. Such measures, however, are oriented toward adversarial dispute settlement mechanisms and sanctions, which are confrontational and conflict-driven. Enforcement measures widely used in international environmental agreements in the form of dispute settlement provisions include the establishment of arbitral tribunals composed of a judge or judges normally selected by the parties and whose decisions

21 See, for instance, Article 11(5), Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987) 1529, www.unep.org/ozone/pdfs/viennaconvention2002.pdf (hereinafter Vienna Ozone Convention); Annex II, Part 2, Article 1, CBD; and Article 14(6), UNFCCC, which provide for a mandatory conciliation mechanism.

are respected as final and binding;[22] or submission of a dispute to judicial settlement in an international court.[23]

In some MEAs, coercive measures such as sanctions to induce compliance have or are being used with considerable success. Such sanctions include withholding or suspending treaty privileges until a party is back in compliance. This can be in the form of losing access to technology transfer or financial assistance or losing the right to produce, consume or trade in controlled substances[24] or species[25] or to participate in co-operative mechanisms.[26] Liberia, for instance, was subject to a brief suspension from the Montreal Protocol regime in 1998.[27] As another example, in 1996 Russia received financial assistance to phase out production and consumption of ozone-depleting substances (ODS) by introducing import and export controls on ODS and by reducing their recycling.[28]

Examples of Facilitative Mechanisms for Effective MEA Implementation

Most of the major global MEAs include specific compliance or non-compliance provisions[29] in their instruments as a response to inadequate enforcement. In this regard, a number of key MEAs have established, as appropriate, compliance (or non-compliance) committees, and/or implementation (or standing) committees, and/or have developed guidelines for implementation of their respective MEAs. For example, through the Montreal Protocol, the Ozone Convention has a well established and functioning Implementation Committee and Non-Compliance

22 See Article 11, Vienna Ozone Convention; Article 14, UNFCCC; Article XVIII, CITES.

23 See Article 11(3)(b), Vienna Ozone Convention; Article 20(3)(a), Basel Convention; Article 28(2)(b), UNCCD; Article 27(3)(b), CBD.

24 See the Montreal Protocol Implementation Mechanisms under its Implementation Committee.

25 Under CITES, trade suspensions can be recommended for certain species, a party may be banned from becoming a member of the Standing Committee or lose the right for its experts to participate in CITES permanent committees, or it may be deprived of access to meeting documents.

26 Under the Kyoto Protocol, participation in Joint Implementation, the Clean Development Mechanism and Emissions Trading can be suspended if a party does not meet eligibility criteria for the use of such mechanisms, or its future emission quota may be diminished as a result of a treaty breach.

27 See Report of the 21st Meeting of the Implementation Committee Under the Non-compliance Procedure for the Montreal Protocol, UNEP/OzL.Pro/ImpCom/21/3 (1998), paras. 12-14, ozone.unep.org/Meeting_Documents/impcom/index.asp.

28 See Report of the 19th Meeting of the Implementation Committee Under the Non-compliance Procedure for the Montreal Protocol, UNEP/OzL.Pro/ImpCom/19/3 (1997), Agenda Item 3, ozone.unep.org/Meeting_Documents/impcom/index.asp.

29 See Articles XIII and XIV(1), CITES; Article 34, Cartagena Protocol; Article 27, UNCCD; Article 8, Montreal Protocol; Article 13, UNFCCC; Article 18, Kyoto Protocol; Article 19, Basel Convention; Article 17, Rotterdam Convention; Article 17, Stockholm Convention.

Working Group.[30] Parties to the UN Framework Convention on Climate Change (UNFCCC) are developing compliance procedures and mechanisms through the Compliance Committee established under the Kyoto Protocol.[31] Similarly, parties to the Convention on Biological Diversity (CBD) are also developing procedures and mechanisms to promote compliance and address cases of non-compliance through the Compliance Committee[32] established under the Biosafety Protocol. The Convention on Long Range Transboundary Air Pollution, applying the same model of non-compliance procedure as the Montreal Protocol, has also established its own Implementation Committee[33] to review compliance with the protocols to the Convention.

Other modalities are equally used to develop mechanisms to ensure synergies between and promote compliance with MEAs. These are specific COP decisions or amendments adopted for the promotion of compliance and for remedying non-compliance and the development of specific MEA compliance guidelines. For example, alongside its regular review and analysis of parties' national laws to determine whether such laws meet its implementation requirements, through its Standing Committee CITES is developing Guidelines on Compliance with the Convention.[34] The Basel Convention is also developing Guidelines for monitoring the implementation of and compliance with obligations under the Convention[35] through its Committee[36] for administering mechanisms for promoting implemen-

30 See Article 8, Montreal Protocol and Annex II, Report of the 10th MOP, UNEP/OzL.Pro.10/9 (1998), www.unep.ch/ozone/pdf/10mop-rpt.pdf.

31 See UNFCC COP/MOP Decision 24/CP.7, Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, unfccc.int/resource/docs/cop7/13a03.pdf.

32 See Article 34, Cartagena Protocol and Decision BS-1/7, Establishment of procedures and mechanisms on compliance under the Cartagena Protocol on Biosafety, www.biodiv.org/doc/handbook/cbd-hb-10-bs-01-en.pdf.

33 See Executive Body for the Convention on Long Range Transboundary Air Pollution, Decision 1997/2 concerning the Implementation Committee, its structure and functions and procedures for review of compliance, as amended, Annex V, Report of the 19th Session of the Executive Body, ECE/EB.AIR/75, 16 January 2002, www.unece.org/env/documents/2002/ece/eb/air/ece.eb.air.75.e.pdf.

34 See CITES, Resolution 11.3, Compliance and Enforcement, www.cites.org/eng/res/all/11/E11-03R13.pdf .

35 See www.basel.int/meetings/sbc/workdoc/techdocs.html. Pursuant to Decision II/5, Model National Legislation for the Transboundary Movement and Management of Hazardous Wastes, www.basel.int/meetings/cop/cop1-4/cop2repe.pdf, model legislation to assist parties in implementing obligations was developed and adopted. As mandated by COP-7, guidelines for the preparation of national legislation for the implementation of the Convention are being developed.

36 See Basel Convention, Decision VI/12, Establishment of a Mechanism for Promoting Implementation and Compliance, and Decision VI/13, Interim Procedure for Electing the Members of the Committee For Administering the Mechanism for Promoting Implementation and Compliance, www.basel.int/meetings/frsetmain.php?meetingId=1&sessionId=3&languagId=1.

tation and compliance. The Aarhus Convention[37] similarly has established a Compliance Committee.[38]

The support that has been given to parties by MEA secretariats through these committees or through other relevant international and regional bodies to ensure effective implementation of parties' obligations under those specific MEAs has mostly been in the form of incentives to comply. Such incentive measures include the provision of financial resources, technical assistance, technology transfer, training or awareness-raising as well as assistance in the development of implementing laws or regulations, to mention but a few. By using a carrot and stick approach, these measures are intended to assist the parties to effectively implement their MEAs obligations. The composition of such committees as well as the content and magnitude of the level of support and assistance provided to the parties differ greatly from one MEA to the other. For example, the CITES non-compliance mechanism, which is considered to be the strongest uses two types of measures. CITES offers the carrots of technical assistance and development of model national legislation[39] but also uses the stick of trade sanctions, including suspension or complete prohibition of trade against persistently non-compliant countries,[40] to induce compliance. The Basel Convention[41] and UNFCCC[42] regimes only advise, and provide non-binding recommendations as well as assistance in terms of financial resources, capacity-building and technical support to overcome compliance difficulties experienced by the parties. Non-compliance with the Montreal Protocol may not only lead to recommendations to a party from the Compliance Committee, but may also result in a party being suspended by the COP from benefiting from specific rights and privileges under the Protocol,[43] including provision of funds and trade measures. The Kyoto Protocol Compliance Committee has two regimes to assist its parties.[44] They are, namely, the Facilitative Branch which is designed to provide advice and assistance to parties, give recommendations and mobilize resources to enable the parties to comply and hence promote compliance, and the Enforcement

37 Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, www.unece.org/env/pp/documents/cep43e.pdf (hereinafter Aarhus Convention).

38 See www.unece.org/env/pp/compliance.htm. See also Article 15, Aarhus Convention and Decision I/7, Review of Compliance, www.unece.org/env/pp/mop1docum.statements.htm.

39 See United Nations Environment Programme, *Enforcement of and Compliance with MEAs: The Experiences of CITES, Montreal Protocol and Basel Convention*, (UNEP: Nairobi, 1999) vol. I, at 29-30.

40 For example, the United Arab Emirates in 1985-90, Thailand in 1991-92 and Italy in 1992-3. *Ibid.*, at 30.

41 Article 19, Basel Convention.

42 Article 13, UNFCCC.

43 Article 8, Montreal Protocol, Annex V, Report of 4th MOP, UNEP/OzL.Pro.4/15 (1992), www.unep.ch/ozone/Meeting_Documents/mop/04mop/4mop-15.e.pdf; and Annex IV, Report of 10th MOP, *supra* note 30.

44 Kyoto Protocol, Decision 5/CP.6, Bonn Agreements on the Implementation of the Buenos Aires Plan of Action, Agreement VI, www.unfccc.int/resource/docs/cop6secpart/05.pdf#page=38.

Branch, which has power to determine consequences for parties that encounter problems with meeting their commitments. In this regard, the Enforcement Branch determines non-compliance in which case a concerned party has to make up the difference in the second commitment period, plus a 30 percent penalty. In addition, a party may be barred from selling under the emissions trading programme and be required to develop a compliance action plan.[45]

UNEP's Role in Promoting Compliance with and Enforcement of MEAs[46]

In view of the parallel efforts initiated by MEA secretariats and other regional groupings it became necessary to address in a focused and co-ordinated way these efforts, providing much needed tools and approaches to negotiations. Measures were needed to ensure that developing countries and countries with economies in transition fully appreciated their overall interest in becoming party to, and having the means to implement, the different instruments. Furthermore, realizing that a number of common issues were addressed by compliance mechanisms under different MEAs necessitated the need for guidance tools. These were intended to assist parties to different MEAs to clearly understand the common and cross-cutting issues covered by different MEAs and how they could be executed in a synergistic and integrated manner at the national level, thus reducing the seemingly heavy burden on parties to implement and comply with multiple MEAs. In any case, despite the various mechanisms already in existence at the national, regional and global levels to assist parties to comply with and enforce their obligations under different MEAs, an increase in evading MEA provisions as well as national legislation implementing different MEAs can be noticed.

To further assist governments to better implement, comply with and enforce their obligations under MEAs, with the support and co-operation of governments UNEP has developed Guidelines on Compliance with and Enforcement of MEAs. These Guidelines were adopted by the Seventh Special Session of the UNEP Governing Council (GC) in February 2002[47] and are broadly available for use by governments, MEA secretariats and all those interested. When it adopted the Guidelines, the GC sought to disseminate them to governments, MEA secretariats, international or-

45 The Kyoto Protocol's Compliance Committee held its first meeting in Bonn, Germany on 1-3 March 2006 where the chairs of its two Branches were elected indicating the beginning of its operations.

46 This section is taken and updated from a paper prepared by the author on Cross-cutting Issues Related to Ensuring Compliance with MEAs, and presented at a workshop on Ensuring Compliance with MEAs: A Dialogue Between Practitioners and Academia, held in Heidelberg, Germany, on 11-13 October 2004.

47 Guidelines on compliance with and enforcement of multilateral environmental agreements, UNEP/GCSS.VII/4/Add.2 (2002), www.unep.org/GC/GCSS-VII/.

ganizations and other institutions involved in the implementation of MEAs. It also sought to promote use of the Guidelines through the UNEP programme of work, in close collaboration with states and international organizations. Thus, the GC requested UNEP to strengthen the capacity of developing countries, in particular least developed countries and countries with economies in transition to implement and enforce MEAs using, inter alia, the Guidelines.

Improving compliance, enforcement and implementation of MEAs calls for practical and tangible guidance. Furthermore, in order to strengthen the capacity of developing countries to implement and enforce MEAs and the Guidelines, in particular, UNEP is currently pursuing a three-pronged approach, pursuant to its work programme. This involves developing and refining a Manual on Compliance with and Enforcement of MEAs,[48] convening a series of regional workshops to review, test and solicit comments and input for incorporation into the Manual, [49] and conducting pilot projects or initiatives to implement the Guidelines and the Manual with practical tangible activities focusing on common and cross-cutting issues covered by various MEAs.[50]

Nature and scope of the UNEP Guidelines

The Guidelines[51] are non-binding and advisory in nature. They do not affect MEA obligations in any way. In order to be relevant to a broad range of MEAs, the Guidelines set forth a toolbox of actions, approaches and measures to strengthen the international and national implementation of MEAs. As such, they seek to inform and improve the manner in which parties implement their MEA commitments. Consequently, the selection and application of specific tools in the Guidelines to the specific context of a particular MEA will depend on the characteristics of that MEA, as well as the context of a country or countries, or organizations seeking to apply the tools.[52]

The Guidelines provide approaches to enhancing compliance, recognising that each MEA has been negotiated in a unique way and has its own independent legal status. They acknowledge that compliance mechanisms and procedures should take account of the particular characteristics of the MEA in question. Enforcement

48 For the text of the Draft Manual (as of November 2004) in English, French and Spanish, see www.unep.org/DEPI/programmes/law_implementation.html. The final Manual is forthcoming (in May 2006), and will be available on the UNEP website.

49 Eight Regional Workshops on Compliance and Enforcement of MEAs have been held thus far to test, review and solicit comments and input on the Draft Manual.

50 For a more detailed discussion of the Draft Manual, see below.

51 For the text of the UNEP Guidelines in Arabic, Chinese, English, French, Russian and Spanish, see www.unep.org/DEPI/programmes/law_implementation.html.

52 See Elizabeth Mrema and Carl Bruch, 'UNEP Guidelines and Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (MEAs)', in Proceedings of the 7th International Conference on Environmental Compliance and Enforcement, 9-15 April 2005, Marrakesh, Morocco, vol. 2 (forthcoming).

is essential for securing the benefit of law, environmental protection, public health and safety, deterring violations and encouraging improved performance. They are relevant not only for the present but also for future MEAs. They anticipate and intend to cover a broad range of environmental issues, including global and regional environmental protection, management of hazardous substances and chemicals, prevention and control of pollution, desertification, conservation of natural resources, biodiversity, wildlife, and environmental safety and health, to mention but a few.

The purpose of the Guidelines is to assist governments and MEA secretariats, relevant international, regional and sub-regional organizations, national enforcement agencies, NGOs, the private sector and relevant stakeholders in their efforts to enhance and support compliance with and enforcement of MEAs. The Guidelines outline actions, initiatives and measures for states to consider in strengthening national enforcement and international co-operation in combating violations of laws implementing MEAs. They are intended to facilitate consideration of compliance issues from the design and negotiation stage, and also after the entry into force of the MEAs as well as at conferences and meetings of the parties.

The Guidelines address enforcement of national laws and regulations implementing MEAs in a broad context, under which states, consistent with their obligations under such agreements, develop laws and institutions that support effective enforcement and pursue actions that deter and respond to violations of environmental law and environmental crimes. Approaches include the promotion of appropriate and effective laws and regulations. They accord significance to the development of institutional capacities through co-operation and co-ordination among governments and international organizations for increasing the effectiveness of enforcement.

Though the terms compliance and enforcement are often used loosely and interchangeably, in so far as the Guidelines are concerned compliance refers to the situation in which a state is with regard to its obligations under an MEA, i.e. whether it is in compliance or not. Enforcement, on other hand, refers to a set of actions, i.e. adopting laws and regulations, monitoring outcomes, etc., including various enabling activities and steps, which a state may take within its national territory to ensure implementation of a MEA.[53] In other words, compliance is used in an international context while enforcement is used in a national one. A term that was problematic to define throughout the negotiation process was environmental crime because it is understood differently in different jurisdictions. As a result, the Guidelines opted to use the following phraseology: violations of the provisions of MEAs.

53 See Guidelines 9 and 38, UNEP Guidelines, *supra* note 51.

Overall, the Guidelines seek solutions for addressing shortcomings in compliance and enforcement, which otherwise could undermine the effectiveness of an MEA regime, or in a party's ability to live up to its obligations. Such shortcomings may include lack of national legislation, lack of awareness of the relevant regulations including among industry and consumers, or enforcement authorities, lack of financial resources, costs of compliance, creating a financial incentive for evasion, and inadequate penalties. Other challenging problems are related to detection, dearth of human resources, institutional and technical capability, lack of information and economic intelligence and shortcomings in transboundary co-operation and monitoring.

Cross-cutting issues for MEA compliance under the UNEP Guidelines

The Guidelines, divided into three parts, are intended to inform and affect how parties implement their obligations under MEAs. The opening part, the introduction, recalls the basis of preparing the Guidelines. It acknowledges that the Guidelines are advisory in nature and that parties to agreements are best situated to choose and determine useful approaches for carrying out MEA obligations. The Guidelines, being advisory in nature, are non-binding and in no way intend to affect or alter the obligations of parties to MEAs. In fact, they specifically identify cross-cutting and common issues appearing in a number of international conventions for which implementation, compliance and enforcement could be carried out together in a holistic and synergistic manner.

Chapter I of the Guidelines[54] defines compliance as the fulfillment by the contracting parties of their obligations under an MEA. Implementation, on the other hand, covers all relevant laws, regulations, policies, and other measures and initiatives that contracting parties adopt and/or take to meet their obligations under an MEA.[55] The chapter sets forth a range of institutional mechanisms and approaches to promote compliance. Some of these may be included in the text of an MEA itself, while others may be adopted by the MEA conference of the parties or secretariat or other competent body at a later stage in implementing the MEA.[56] Such mechanisms include preparatory work required for negotiations,[57] effective participation in debates,[58] assessment of domestic capabilities during negotiations,[59] regular review of the effectiveness of an MEA[60] and compliance mechanisms after an MEA

54 Chapter I comprises 29 paragraphs.
55 Guideline 9, UNEP Guidelines, *supra* note 51.
56 Guideline 16, *ibid.*
57 Guidelines 10(a-e), *ibid.*
58 Guideline 11(a-e), *ibid.*
59 Guideline 12, *ibid.*
60 Guideline 15, *ibid.*

comes into effect.[61] Other mechanisms are national implementation plans;[62] reporting, monitoring, and verification;[63] non-adversarial mechanisms to assist parties to comply with an MEA through various economic measures including compliance mechanisms and procedures;[64] and last but not least, dispute settlement mechanisms,[65] which are hardly used in practice. The Guidelines address these approaches in varying levels of detail, but as with other such tools the Guidelines emphasize that the approaches set forth are voluntary and advisory.

Other measures covered in the chapter include a detailed variety of possible actions to be taken at the national level in order to comply with an international agreement. These national measures include preparatory measures such as compliance assessment[66] and developing a compliance plan,[67] as well as the standard complement of implementing laws and regulations.[68] Others include national implementation plans,[69] enforcement programmes,[70] economic instruments,[71] national focal points,[72] co-ordination of governmental authorities[73] and improving the efficacy of national institutions.[74] Involvement of major stakeholders such as communities, women, and youth,[75] the use of the media and other mechanisms to promote public awareness and access to judicial and administrative proceedings[76] are equally addressed. Capacity-building and technology transfer[77] as well as international co-operation[78] are also emphasized as key and important components without which effectiveness of MEAs may be undermined. Most of these national measures are also expanded upon in the second chapter, dealing with enforcement.[79]

Unlike the compliance chapter, which puts emphasis on the international context, the enforcement part in Chapter II[80] focuses on specific measures to be undertaken

61 Guideline 16, *ibid.*
62 Guideline 14(b), *ibid.*
63 Guideline 14(c), *ibid.*
64 Guideline 14(d), *ibid.*
65 Guideline 17, *ibid.*
66 Guideline 18, *ibid.*
67 Guideline 19, *ibid.*
68 Guideline 20, *ibid.*
69 Guideline 21, *ibid.*
70 Guideline 22, *ibid.*
71 Guideline 23, *ibid.*
72 Guideline 24, *ibid.*
73 Guideline 25, *ibid.*
74 Guideline 26, *ibid.*
75 Guideline 27, *ibid.*
76 Guidelines 28-32, *ibid.*
77 Guideline 33(a-f), *ibid.*
78 Guideline 34(a-h), *ibid.*.
79 It should be noted that national focal points and a few other provisions are not.
80 Chapter II comprises 15 paragraphs.

to implement MEAs at the national level. The chapter, therefore, seeks to strengthen national enforcement and international co-operation in combating violations of laws implementing MEAs.[81] The Guidelines provide a set of on-the-ground actions that a party can take at the national level for actual application and implementation of an MEA. What is apparent, however, is the overlap of issues covered in the two chapters, indicating that both the common and cross-cutting issues addressed in the Guidelines are important whether a party assesses its ability to comply with its international obligations or its national enforcement measures for the implementation of an MEA. Another reason for the overlap is historical. The Guidelines were developed through consultative processes carried out by two intergovernmental working groups, namely a Compliance Group and an Enforcement Group. Due to pressure to produce the Guidelines within the timeframe mandated by the UNEP Governing Council,[82] there was no time for the two groups to converge in a plenary session to harmonize and streamline the contents of their then draft proposals. Hence, the two independent chapters as reflected in the Guidelines contain some overlaps.

Like the compliance chapter, the enforcement chapter contains paragraphs defining the terms used.[83] Enforcement refers to the range of procedures and actions employed by a state or its competent authorities and agencies to ensure that organizations or persons potentially failing to comply with environmental laws or regulations implementing MEAs can be brought or returned into compliance and/or punished through civil, administrative or criminal action. Environmental crime refers to the violations or breaches of national environmental laws and regulations that a state determines to be subject to criminal penalties under its national laws and regulations. This flexible approach is intended to accommodate practices under different legal systems.

The subjects handled within the chapter on enforcement, most of which are similar or directly related to subjects in the compliance chapter, include developing national laws and regulations,[84] strengthening institutional frameworks, which includes designation of responsibilities to agencies with clear authority for carrying out stipulated enforcement activities,[85] and ensuring national co-ordination

81 Guideline 36, UNEP Guidelines, *supra* note 51.

82 At its 21st Session, UNEP Governing Council instructed the Executive Director of UNEP to continue to develop the Guidelines on Compliance with and Enforcement of MEAs and submit them for its consideration at its next session, in February 2002. See Compliance with and Enforcement of Multilateral Environmental Agreements, UNEP/GC.21/27, 9 February 2001, www.unep.org/gc/gc21/Documents/index2.html. This gave UNEP less than a year to ensure that the text and content of the Guidelines was agreed upon for consideration and adoption.

83 Guideline 38(a-d), UNEP Guidelines, *supra* note 51.

84 Guideline 40(a-c), *ibid.*

85 Guideline 41(a-o), *ibid.*

among relevant authorities and stakeholders.[86] Others include training of enforcement stakeholders[87] and addressing public environmental awareness and education among targeted groups and stakeholders.[88] The need to enhance international co-operation and co-ordination to facilitate consistency in laws and regulations,[89] co-operation in judicial proceedings[90] and co-operation for strengthening institutional frameworks and programmes[91] are emphasized. Equally, capacity-building and strengthening of enforcement capabilities,[92] which includes co-ordinated, technical and financial assistance to develop and maintain institutions, programmes and action plans for enforcement,[93] are underlined.

It is important to note that while regional bodies, such as the UN Economic Commission for Europe (UNECE), promote compliance of MEAs that are important to their respective regions, MEA secretariats pay particular attention to their specific MEAs as mandated by their respective conventions or COPs and MOPs. UNEP, on the other hand, through its Guidelines on Compliance with and Enforcement of MEAs, covers all types of environmental conventions, whether bilateral, sub-regional, regional or global, as well as both current and future MEAs. Consequently, while MEA secretariats or regional bodies focus on issue-based crossing-cutting matters of specific MEAs or MEAs of regional focus, through its Guidelines UNEP focuses on all MEAs and, in particular, on those which combine common cross-cutting issues. The Guidelines will, therefore, reduce the need to operate separately on implementation issues regarding most MEAs.

Reflected in the Guidelines but also easily identified in the multiple MEAs that urge MEA secretariats, parties and relevant regional and international organizations alike to co-operate and collaborate in partnership, what then are these common as well as cross-cutting issues? Identification and subsequent collaboration among stakeholders within their mandates to enforce MEAs will create synergies and re-enforce interlinkages among MEAs. As a result, duplication or conflicts will be avoided while the burden or responsibilities upon parties to fulfill their obligations under such instruments will be significantly reduced and streamlined. Common and cross-cutting measures spelled out in the Guidelines to facilitate, promote and ensure compliance with and enforcement of MEAs, which are reflected in several MEAs, are also part of the diplomatic and management measures in place to promote compliance. As elaborated earlier, they are intended as precau-

86 Guideline 42(a-c), *ibid.*
87 Guideline 43(a-i), *ibid.*
88 Guideline 44(a-f), *ibid.*
89 Guideline 46(a-c), *ibid.*
90 Guideline 47(a-b), *ibid.*
91 Guideline 48(a-j), *ibid.*
92 Guideline 49(a-e), *ibid.*
93 Guideline 49(a), *ibid.*

tionary measures to prevent non-compliance with the provisions of MEAs. Some of the cross-cutting measures spelt out in the Guidelines, but also reflected in MEA provisions as management measures to promote and ensure effective MEA implementation while taking measures to prevent non- compliance, include: i) support for capacity-building[94] and/or enhancement which includes training, environmental public awareness and education[95] particularly among targeted groups, and empowerment of relevant stakeholders for enhancing enforcement capabilities; ii) financial[96] and technical assistance[97] and transfer of technology,[98] either by shared and/or common but differentiated responsibilities[99] and/or through special funding mechanisms[100]; iii) development or introduction of appropriate national policies and legislation by adopting national policies, implementing and/or elaborating policies and measures or taking appropriate legislative, administrative and other measures to implement and enforce a convention;[101] iv) review of the effectiveness of an MEA by its COPs, MOPs or by the parties themselves;[102] v) preparation and submission of regular and periodic national reports, from annually to every four years, on the status of implementation of specific MEAs for review by COPs through specific provisions under various MEAs[103] or through decisions of

94 See Article 12(a), CBD; Article 22, Cartagena Protocol; Article 19(1-2), UNCCD; Article 10, Montreal Protocol; Article 9(2)(d), UNFCCC; Article 10(e), Kyoto Protocol; Article 11(1)(c) and 16, Rotterdam Convention; Article 12, Stockholm Convention.

95 See Article 13, CBD; Article 13, Cartagena Protocol; Article 19, UNCCD; Article 9(2), Montreal Protocol; Article 6, UNFCCC; Article 10(e), Kyoto Protocol; Article 10(4), Basel Convention; Article 10 Stockholm Convention.

96 See *supra* note 12.

97 See *supra* note 13.

98 See *supra* note 14.

99 See *supra* note 15.

100 See *supra* note 16.

101 See Article VIII(1), CITES, and Resolution 8.4, National laws for the implementation of the Convention, www.cites.org/eng/res/all/08/E08-04.pdf; Article 6, CBD; Articles 9-11, UNCCD; Articles 2A-E, Montreal Protocol; Article 4(2), UNFCCC; Article 2(1), Kyoto Protocol. Pursuant to Articles 4 and 9 of the Basel Convention, model national legislation for the transboundary movement and management of hazardous wastes was prepared and adopted by Decision II/5, *supra* note 35, and updated by COP-3 of the Basel Convention. Currently, guidelines for the preparation of national legislation for the implementation of the Convention are under preparation. See also Article 10, Rotterdam Convention; Article 3, Stockholm Convention.

102 See Article XI, CITES; Article 23(4), CBD; Article 35, Cartagena Protocol; Article 22(2)(a), UNCCD; Article 6, Montreal Protocol; Article 7, UNFCCC; Article 9, Kyoto Protocol; Article 15(5), Basel Convention; Article 18(5), Rotterdam Convention; Article 7(1), Stockholm Convention.

103 See Article VIII(7), CITES, and Resolution 11.17, National Reports, www.cites.org/eng/res/all/11/E11-17R13.pdf; Article 26, CBD; Article 33, Cartagena Protocol; Article 26, UNCCD; Article 7, Montreal Protocol; Articles 12 and 14, UNFCCC; Articles 5 and 7, Kyoto Protocol; Article 13(III), Basel Convention; Article 14, Rotterdam Convention; Article 15, Stockholm Convention. Egypt alone, for example, submitted 59 reports between December 2004 and December 2006 to different environmental bodies, often with similar content but different requirements and details. See analysis done in Reporting Obligations Database, Reporting overview: Egypt, rod.eionet.eu.int/csmain?COUNTRY_ID=109&ORD=NEXT_REPORTING,%20NEXT_DEADLINE.

COPs/MOPs;[104] vi) development of national implementation or compliance plans, strategies and procedures;[105] vii) designation or establishment of focal points and/or competent national authorities[106] to co-ordinate activities for the enforcement of laws and regulations implementing specific conventions, to monitor and evaluate implementation, to collect, report and analyze data, including its qualitative and quantitative verification, and to provide information about investigations, to liaise with secretariats and to exchange information and data; viii) inclusion within the instruments themselves,[107] or by a COP decision or resolution,[108] of non-confrontational dispute settlement mechanisms in the form of review by Implementation,[109] Compliance[110] or Non-Compliance Committees[111]; ix) involvement, through participation as observers in COPs and MOPs, of a wide range of major national stakeholders, such as non-governmental organizations,[112] women,[113] youth[114] and the media as modes of raising awareness and educating the public[115] in the national implementation of conventions; x) encouraging public access to

104 See Ramsar Convention, Recommendation 2.1, Submission of National Reports, www.ramsar.org/rec/key_rec_2_index.htm; See also COP-4 (June 1994), Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980), www.cms.int/documents/convtxt/cms_convtxt.htm.

105 See Articles 6(a) and 18(2), CBD.

106 See Article IX(1)(a), CITES, Management Authorities, and Article IX(1)(b), Scientific Authorities; for the CBD focal points see www.biodiv.org/world/map.aspx; Article 4, Cartagena Protocol (see also www.biodiv.org/biosafety/cna.aspx); Article 5, Basel Convention; Articles 16 and 18, Annex II, Article 5 and Annex III, Article 7, UNCCD; Article 2(7) and 5, Basel Convention; Article 4, Rotterdam Convention; Article 9(3), Stockholm Convention. Often, focal points are established in the ministries responsible for the environment but in other cases are spread out elsewhere in other government departments, national environmental authorities, national secretariats or scientific institutions, to mention but a few.

107 See Article 34, Biosafety Protocol; Articles 6 and 17, Kyoto Protocol; Article 27, UNCCD; Article 17; Rotterdam Convention; Article 17, Stockholm Convention; Article 15, Basel Convention.

108 See Basel Convention, Decisions VI/12 and VI/13, *supra* note 36.

109 See Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf, Decision 1997/2, Annex V, The Implementation Committee, its structure and functions and procedures for review of compliance, www.unece.org/env/eb/Eb_decision.htm, as amended in 2001; UNCCD Decision 1/5, Additional Procedures or Institutional Mechanisms to Assist in the Review of the Implementation of the Committee, ICCD/COP(5)/11/Add.1, www.unccd.int/cop/officialdocs/cop5/pdf/11add1eng.pdf.

110 See the Basel Convention Compliance Committee and the Aarhus Convention Compliance Committee.

111 See Article 8, Montreal Protocol and Annex IV and V, Report of the 4th MOP, *supra* note 43, and Annex II, Report of 10th MOP, *supra* note 30. See also Kyoto Protocol, Decision 24/CP.7 and Annex, *supra* note 31.

112 See Article XI(7), CITES; Preamble, para. 14 and Article 23, CBD; Article 29(4), Cartagena Protocol; Articles 5(d), 19(1) and 22(7), UNCCD; Article 11(5), Montreal Protocol; Article 7, UNFCCC; Articles 15(6) and 16(1), Kyoto Protocol; Preamble, para. 7 and Article 18(5)(b) Rotterdam Convention; Preamble, para. 14 and Article 19(5)(b), Stockholm Convention.

113 See Preamble, para. 13, CBD; Preamble, para. 20 and Articles 8(2)(c), 19(2)(f) and 19(3)(e), UNCCD; Preamble, para. 2 and Articles 7(2) and 10(1), Stockholm Convention.

114 See Articles 5 and 19, UNCCD.

115 See Article 13, CBD; Article 10(4), Stockholm Convention.

administrative and judicial procedures, and environmental information;[116] and xi) international co-operation and co-ordination by the establishment of communication channels and information exchanges among relevant national and international organizations.[117]

The Guidelines and management measures provided in the two chapters are relatively comprehensive but details are not provided as to how they should actually be used in practice. They were designed as an enumeration of considerations, approaches and tools. Consequently, they are just a toolbox or checklist of possible approaches to be used to ensure effective compliance with and enforcement of MEAs. In more than three years of intense review and discussion by experts following the adoption of the Guidelines[118] few, if any, practices or considerations have been raised that are not already provided for in the Guidelines. This is partly due to the broad range of experts, countries, and perspectives involved both in the elaboration and implementation of the Guidelines. It is also due to the general nature of the Guidelines,[119] which do not provide much detail or guidance on how to use the tools it presents, either individually or in concert with other tools.

Role played by UNEP to promote compliance with and enforcement of cross-cutting issues in MEAs.

With the adoption of the Guidelines, as requested by its Governing Council, UNEP has disseminated the Guidelines through its programme of work and in close collaboration with governments and international organizations to governments, MEA secretariats, international organizations and other institutions involved with the implementation of MEAs.[120] It has strengthened and continues to strengthen the capacity of developing countries and countries with economies in transition to implement and enforce MEAs using, inter alia, the Guidelines. As mentioned above, in strengthening the capacity of developing countries to implement and enforce MEAs, UNEP has pursued a three-pronged approach. Activities include developing and refining a Manual on Compliance with and Enforcement of MEAs; convening a series of eight regional workshops to disseminate the Guidelines, test and review the Manual as well as build the capacity of countries to better comply with and enforce MEAs; and conducting pilot projects related to common and

116 See Article 6, UNFCCC; Article 23, Cartagena Protocol; Article 19, UNCCD.

117 See Article 10, Basel Convention; Annex II, Vienna Ozone Convention; Article 9, Montreal Convention; Articles 17 and 18, CBD; Article 12, UNCCD.

118 Between 2003 and 2005, UNEP organized and conducted eight regional workshops around the globe to disseminate the Guidelines, enhance capacity of enforcement officials and raise awareness on the contents of the Guidelines.

119 For example, some Guidelines provide two words regarding the potential role of certification systems in implementing MEAs. See Certification systems in Guideline 41(h), UNEP Guidelines, *supra* note 51, which does not include the preambular language of Guideline 41.

120 *Supra* note 51.

cross-cutting issues on compliance and enforcement of MEAs both generally and based on MEA clusters.

In this regard, UNEP has developed a Manual[121] that expands upon the tools set forth in the Guidelines. If the Guidelines are a toolbox, then the Manual is a sort of User's Guide for those tools. Structured as an annotated commentary to the Guidelines and using clear, simple language, the Manual provides explanatory texts, case studies, checklists, references to additional resources and annexes with supplementary information. UNEP initially developed the Manual as a desk study, and has revised it following each of the series of regional workshops organized and conducted, inter alia, for that purpose. The revisions have taken into account substantive, editorial, and formatting comments as well as new case studies of national, regional, and international experiences provided and highlighted in the workshops. UNEP has also updated the Manual on a rolling basis to incorporate feedback from other events and reviewers.

UNEP has also organized and convened a series of regional workshops between 2003-2005 on compliance with and enforcement of MEAs. These workshops have had two primary goals. They sought to build the capacity of developing countries and countries with economies in transition to use the tools and checklist provided in the Guidelines and Manual to improve their compliance with and enforcement of MEAs. In this capacity, UNEP familiarized enforcement officials and other experts with the use of the Guidelines and Manual. In addition, MEA secretariats have played a key role in educating experts about best practices in implementing and enforcing their respective agreements. These capacity-building workshops have also facilitated an exchange of experiences within a region regarding how to develop, comply with, implement, and enforce MEAs. In this context, experts have been able to learn from the experiences of countries with similar legal and cultural traditions and similar social and economic levels of development. Through these exchanges of experiences as well as through the specific discussions regarding the Manual, UNEP has been able to identify new case studies, explanatory texts, best practices and lessons learned from problematic experiences. If national experiences are to be emulated, caution can be exercised and adjustments can be made to suit specific conditions. As such, the workshops facilitated the iterative revision and refinement of the Manual and helped to ensure regional balance and relevance.

The regional workshops have also provided a sustained dialogue regarding the challenges that developing countries face in complying with and enforcing MEAs, as well as regarding ways that countries can and do to meet those challenges. It

121 *Supra* note 48. The final Manual is forthcoming, with publication in English expected in May 2006, with versions in the other UN languages to follow, resources permitting.

is not surprising that limited technical, financial, and human resources are a significant concern for many countries. Nevertheless, the vast majority of countries participating in the workshops have had at least a few and in some cases many innovative experiences in developing, implementing, and enforcing MEAs. While resources remain a chronic and sometimes severe challenge, countries are developing a variety of creative mechanisms and institutions to ensure they effectively comply with and enforce their obligations under the various MEAs to which they are parties.

Due to the limited resources available to many developing countries the workshops have seen recurrent, widespread interest in a few general themes and approaches calling upon international organizations to assist them to implement their commitments in more efficient ways. There is particular interest, for instance, in creating synergies among related MEAs. These synergies may be thematic, so that a country may implement a cluster of related agreements through a single, holistic law. For example, a national biodiversity law[122] could implement the Convention on Biological Diversity (CBD), the Convention on Migratory Species (CMS), the Convention on International Trade in Endangered Species (CITES), the Ramsar Convention on Wetlands and the World Heritage Convention.[123] Rather than undertake five separate legislative reforms that could yield a patchwork of overlapping and at times conflicting or contradictory laws, a country may opt to undertake a single process yielding a more effective, integrated law that addresses potential overlaps and conflicts in a deliberate fashion. This approach has gathered greater support from small island developing states in particular, due to their small size and the unique challenges they face. Moreover, the amount of time necessary to produce the larger harmonized national legislation to implement a cluster of MEAs is generally perceived to be less than that needed to develop a series of separate implementing laws or regulations. Similar thematic clusters may occur when developing implementing legislation for MEAs related to chemical and hazardous substances and wastes, regional seas and the atmosphere.

Operational synergies are also possible, particularly in capacity-building. For example, customs officers are at the forefront in controlling, reducing and hopefully finally in eliminating illegal trade in endangered species, ozone-depleting substances, hazardous wastes and certain chemicals. While expert knowledge and comprehensive training are often necessary to discern legal from illegal trade, basic training and awareness-raising among customs officers can go a long way in

122 See South Africa National Environmental Management Biodiversity Act No. 10 of 2004, Government Gazatte No. 26436 of 7 June 2004 and Australia Environment Protection and Biodiversity Conservation Act No. 91 of 1999, as amended.

123 Currently, UNEP is collaborating with, as requested by, the Organization of the East Caribbean States to develop framework harmonized legislation for implementation of a cluster of biodiversity-related MEAs to be used as a guidance tool for its member states in developing their national legislation.

helping to identify potentially illegal trade. Accordingly, UNEP, INTERPOL, the World Customs Organization and the secretariats of a number of MEAs, in particular those with trade-related provisions, have launched the Green Customs Initiative.[124] The Initiative aims to build and enhance the capacity of customs officers on trade-related MEAs through the development of manuals and modules, to be used in regional and national training programmes, on their role for the implementation of specific MEAs or clusters of MEAs.[125] Other operational synergies may be seen in capacity-building and training of prosecutors, judges and magistrates who are charged with prosecuting and deciding cases dealing with potential violations of national laws that implement MEAs.[126] As such, a general awareness of and sensitivity to MEAs can be essential for effective enforcement. General training on clusters of MEAs, such as trade-related MEAs, biodiversity-related MEAs and chemical and/or waste-related MEAs, to mention but few, may be more appropriate and cost-effective than single MEA-specific training.

UNEP, in collaboration with MEA secretariats and other international and regional bodies, is undertaking a series of projects to assist and support parties to various MEAs to comply with and enforce MEA obligations. These projects utilize the Guidelines and the Manual on Compliance with and Enforcement of MEAs in various ways, such as to build capacity and develop innovative approaches in a number of areas. These projects include, for instance, capacity-building to improve the effectiveness of various actors participating in MEA negotiations,[127] the im-

124 For more information on the initiative see www.greencustoms.org/.

125 A series of six regional training workshops for customs officials to build and enhance their capacity to implement trade-related MEAs were organized by UNEP and held in 2005. These workshops also reviewed, tested and disseminated a draft Manual prepared for customs officials for implementation of MEAs with trade-related provisions.

126 In this regard, several regional and national training programmes on implementation of international environmental law through clusters of MEAs or generally MEAs targeting a specific group of enforcement officers or stakeholders have been held and/or are currently being organized by different international organizations, including UNEP, to build and enhance the capacity of targeted subjects related to implementation, compliance and enforcement of MEAs.

127 In collaboration with partners such as FIELD, Stakeholder Forum, University of Joensuu, Finland, Environment Canada and others, UNEP has developed a *Primer for Negotiators of MEAs*, a *Manual for NGOs working on MEAs - Negotiating and Implementing MEAs*, a *Negotiator's Handbook on International Freshwater Agreements* and is currently developing a *MEA Negotiator's Handbook* with Environment Canada and the University of Joensuu, to be launched in June 2006. UNEP uses these and other materials to enhance the capacity of negotiators through regular training courses such as the annual UNEP-University of Joensuu Course on International Environmental Law-making and Diplomacy. These tools together with accompanying training materials are being and will continue to be tested and used to build and enhance capacities of MEA negotiators through a series of UNEP-organized regional and national training courses or workshops.

plementation of a cluster of MEAs through national legislation and regulations[128] and the development of MEA compliance and enforcement indicators.[129] Other approaches include enhancing public participation in the development of national reports on the implementation of certain MEAs,[130] developing issue-based models for the implementation of MEAs,[131] conducting transboundary environmental impact assessments,[132] developing guidance and capacity-building tools for the legal implementation of regional seas conventions and action plans[133] and other practical implementation and enforcement measures for MEAs with common and/or cross-cutting issues.

128 In collaboration with Liberian partners and the Environmental Law Institute (ELI), UNEP is working with the Government of Liberia to review and revise their forestry legislation to implement MEAs and other forest related international instruments; with OECS, UNEP has developed framework harmonized legislation for the implementation of a cluster of biodiversity-related MEAs; and with SPREP and the Government of Tonga, UNEP is developing national legislation implementing the cluster of chemicals and waste-related MEAs. South Africa and Australia have already tested this approach through the development of their national biodiversity legislation. See *supra* note 122.

129 In collaboration with partners such as the International Network on Environmental Compliance and Enforcement (INECE), UNEP has developed environmental indicators on compliance with and enforcement of a cluster of biodiversity-related MEAs. The indicators are currently being pilot tested in four countries (Brazil, Costa Rica, Kenya and South Africa) before they are finalized for use as a guidance tool. For more information see www.inece.org/.

130 In collaboration with partners such as EcoPravo, Kiev, Ukraine, UNEP has assisted the Government of Ukraine in promoting public participation in the development and review of national reports for MEA Secretariats. The programme highlighted ways to involve the public in national reporting for the implementation of international commitments made by Ukraine, as well as the role of public participation in the preparation of national reports for a number of MEAs, and tested them in the Conferences of the Parties. UNEP is working with four countries (Ghana, Indonesia, Panama and Seychelles) on harmonization of national reporting to global biodiversity-related MEAs. See also UNEP World Conservation Monitoring Centre, *Towards the Harmonization of National Reporting: Report of a workshop convened by UNEP* (UNEP-WCMC: Cambrdige, 2000), www.unep-wcmc.org/conventions/harmonization/workshop/REPORT.pdf.

131 UNEP, in partnership with selected countries in Africa, Europe and countries with economies in transition is currently also developing issue-based modules for implementation of biodiversity-related MEAs intended to improve the coherence of implementation by providing the same information to all actors and by identifying overlaps, potential conflicts and possible gaps. For more information on the Issue Based Modules Project, see www.svs-unepibmdb.net/.

132 In collaboration with partners such as ELI and the African Centre for Technology Studies (ACTS), UNEP is undertaking case studies on improving public participation in the implementation of transboundary international water agreements through transboundary environmental impact assessment, as well as enhancing capacity through training selected countries on implementation and enforcement of MEAs related to access to genetic resources and benefit-sharing (ABS).

133 Through the Regional Seas Co-ordination Units and the UNEP Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, UNEP has developed an Outline for Guidance on the Review and Elaboration of National Legislation to Implement Regional Seas and Actions Plans which is being used and tested through a series of regional training programmes, in particular in the Caribbean and South Pacific regions, on implementation and enforcement of regional seas conventions.

Conclusion

Although in most cases MEAs take only a few years to develop, with exceptions being found with the UN Convention on the Law of the Sea,[134] which took approximately ten years and the UN Convention on the Law of the Non-Navigational Uses of International Watercourses,[135] which took approximately 30 years, implementation continues for as long as the instrument is in force or operation. Consequently, long-term measures are required to be put in place to ensure the continuous promotion of their implementation, compliance and enforcement. Creating synergies through the clustering of MEAs and promoting implementation of cross-cutting issues becomes one of the key mechanisms to support parties to MEAs while reducing their burden of implementing the many MEAs to which they are parties.

134 United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261, www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

135 United Nations Convention on the Non-navigational Uses of International Watercourses, GA Res. 51/229, 21 May 1997, not yet in force, 36 *International Legal Materials*, untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

Theory and Practice of Non-state Participation in Environmental and Forest-related Decision-Making[1]

Tim Cadman[2]

Introduction

The paper is divided into two parts. It begins with a brief overview of some theoretical elements that contribute to building effective capacity for state and non-state participation in environmental decision-making. The second part of the paper provides a historical outline of the evolution of non-state participation in environmental policy-making within various United Nations institutions and initiatives, most particularly by non-government organizations (NGOs). It continues with an anecdotal selection of national legislation and multilateral environmental agreements, including the work of the United National Forum on Forests, which contain provisions for public participation. This is followed by a review of sources, which comment on globalization and the development of non-governmental approaches to regulation, and the example of forest management certification is presented.

1 Some of the materials presented in this paper were included in a paper prepared by the author for the Environmental Research Event, Hobart, Tasmania, 29 November - 2 December 2005, www.ere.org.au.

2 School of Government, University of Tasmania, Australia. The author was one of the participants of the 2005 University of Joensuu – UNEP Course on International Environmental Law-making and Diplomacy.

Concepts of Participation Relevant to Forest Policy and Law-making

Below, some basic general theories of participation that are relevant to environmental policy-making and forests shall be outlined.

Environmental Democracy

Mason defines environmental democracy as 'a participatory and ecologically rational form of collective decision-making'[3] which rests upon the view that communication and understanding between people is based upon, or at least allows for, agreements based upon convincing reasons rather than force or deception.[4] This view is presented as a normative principle and is grounded in the political philosophy of Jürgen Habermas.[5] Habermas argues that 'only those action norms are valid in which all possibly affected persons could agree as participants in rational discourses',[6] a principle that Mason believes should underpin the communication associated with political decision-making processes about the environment.[7] Mason identifies participation and meaningful involvement in environmental policy-making on all governmental and administrational levels as a test of both democratic legitimacy and the greening of human rights.[8]

Participation: Two approaches

The participation ladder

Despite being over three decades old, Arnstein's Ladder of Citizen Participation still serves as one of the most cogent typological analyses of the 'participation of the governed in their government, in theory, the cornerstone of democracy.'[9] She considers participation a 'categorical term for citizen power', which represents a significant mechanism for social reform as it redistributes power between the haves and the have-nots, and enables the disadvantaged to share in the benefits of affluent society. Significantly, she emphasizes that 'participation without redistribution of power is an empty and frustrating process for the powerless.'[10] Arnstein's model serves as a useful hierarchical typology of power. It categorizes the extent of participation into non-participation, degrees of tokenism and degrees of citizen power, and relates it to the level - or rungs on the ladder - of participa-

3 M. Mason, *Environmental Democracy* (St Martin's Press: New York, 1999) at 1.

4 *Ibid.*, at 8.

5 *Ibid.*, at 8-9.

6 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Blackwell Publishers Ltd: Oxford, 1996) at 459.

7 Mason, *Environmental Democracy*, *supra* note 3, at 9.

8 *Ibid.*, at 73-76.

9 S. Arnstein, 'A Ladder of Citizen Participation', 35 *Journal of the American Institute of Planners* (1969), 216-224 at 216.

10 *Ibid.*

tion. These are described as manipulation, therapy, consultation, informing, placation, partnership, delegated power and citizen control. Such a typology may provide a useful filter through which most decision-making processes could be screened. The ability for a participant to ascertain the extent to which they have control might provide a useful measure in determining whether participation in a given decision-making process will deliver an outcome that meets the needs of the participant. In some cases, refusing to participate could be more productive than taking part.

The participation chain

Simmons and Birchall provide another model, which they call the participation chain.[11] This model includes both the demand side (the general public) and the supply side (service providers, in our case, the agencies of nation state) and places participation within a context of influencing factors. They identify four links in this chain (motivation, mobilization, resources and dynamics) and argue: 'each link needs to be made as strong as possible if participation itself is to be strengthened.'[12] Motivation to participate on the demand side is dependent on the perception that individuals and groups will indeed benefit from participating; on the supply side, service providers 'must decide whether or not they actually want greater participation.'[13] Mobilization requires honest engagement on the part of service providers and consumers, as well as using appropriate methods for engaging participants and making sure the right means to allow for participation are employed. Resources, which strengthen participation, are identified under the broader heading of community development and include training, advocacy schemes, and increasing participants' skills and confidence. Finally, a strong dynamics link requires that agencies understand and communicate their own reasons (motivations) for participation, that the limits to the scope of the initiatives and opportunities are defined in order to manage all participants' expectations, that feedback opportunities are available and that power and other resource imbalances are recognized.[14]

Institutional theory and structure

Ostrom argues that governments face considerable difficulties in determining 'how best to govern natural resources used by many individuals in common.' Citing the case of overfishing off the New England coast, she points out that although everyone knows there is a problem of over-extraction no one can agree how to address the problem.[15] She illustrates this dilemma by quoting Hardin: 'each man is locked

11 See R. Simmons and J. Birchall, 'A Joined-up Approach to user Participation in Public services: Strengthening the 'Participation Chain'', 39 *Social Policy and Administration* (2005), 260-283

12 *Ibid.*, at 277.

13 *Ibid.*, at 275.

14 *Ibid.*, at 277-278.

15 E. Ostrom, *Governing the Commons: The Evolution of institutions for collective action* (Cambridge University Press, 1990) at 1.

into a system that compels him to increase his herd without limit – in a world that is limited.'[16] Her response to Hardin is to examine the types of institutions that might be capable of addressing the need for collective action, whilst delivering collective benefits.[17] Whilst acknowledging that many scholars see state control as the only solution, her interest lies in exploring the kinds of institution from which both the state and private individuals might benefit, arguing that although some form of central control is certainly significant, getting the institutions right is of paramount importance.[18] Of interest to this study is her analysis of the successes and failures of a number of natural resource-based enterprises from around the world and the institutional design principles that she deduces as delivering successful outcomes.[19] Participation in decision-making, conflict resolution and the right to organize are identified as key elements in designing institutions for resource management. Of particular interest is the fact that of the eight failed institutions she investigates out of 21 case studies, seven of them were missing one, two or all of these design principles.

Capacity-building

For the sake of convenience we will define capacity-building here as 'the sum of efforts needed to develop, enhance and utilize the skills of people and institutions to follow a path of sustainable development.'[20] Mason breaks down the term into three components: participative capacity, integrative capacity and strategic capacity.[21] He supports the definition of successful environmental policies as those which lead to quality outcomes that are based on decision-making which includes both public and private actors and which address a range of ecological risks. Any system's capacity/ability to develop environmental policy that identifies and solves ecological problems requires three structural framework conditions: cognitive-informational (available, and applied, environmental knowledge); political-

16 G. Hardin, 'The Tragedy of the Commons', 162 *Science* (1968), cited in Ostrom, *Governing the Commons*, *ibid*., at 244.

17 Ostrom, *Governing the Commons*, *supra* note 15, at 5-6.

18 *Ibid*., at 11-14.

19 *Ibid*., at 90.

20 United Nations Development Programme, 2001 cited in T.J. Downs, 'A Participatory Integrated Capacity Building Approach to the Theory and Practice of Sustainability: Mexico and New England Watershed Case Studies', in W.L. Filho et al. (eds.), *International Experiences on Sustainability* (Peter Lang: Frankfurt am Main, 2002) 179-205 at 186.

21 Mason, *Environmental Democracy*, *supra* note 3, at 72-86.

institutional (accepted constitutional, institutional and legislative norms and rules); and economic-technological (money and expertise).[22] Again, participation is presented in this case as a key component of successful capacity-building.

Non-state Participation in Practice

Birnie outlines the growth of NGO participation within various United Nations environmental policy-making arenas,[23] and some further brief commentary by Mason and Correl and Betsill points to their influence on multilateral environmental agreements.[24] This legacy can be seen in the role accorded to non-state participants in environmental decision-making in national and international environmental legislation, agreements and institutions. Some examples are provided by the United States' National Environmental Policy Act,[25] *Agenda 21*,[26] the Aarhus Convention[27] and the United Nations Framework on Forests (UNFF). Ruggie,[28] Held et al.,[29] Haufler[30] and others comment on the impacts of the globalized marketplace on civil society and business relations, and in particular on how multinational corporations and transnational NGOs have organized themselves around non-state regulatory mechanisms as a response to the changing role of government and the increasing participation of non-state interests in environmental decision-making. Cashore et al. focus on the rise of what they term non-state market driven authority, and provide an example of the market-based approach to governance and regulation through the Forest Stewardship Council forest management certification programme.[31]

22 *Ibid*., at 72-73. See also M. Jänicke, 'Conditions for Environmental Policy Success: An International Comparison', 12 *The Environmentalist* (1992), 47-58; M. Jänicke, 'Democracy as a condition for environmental policy success: the importance of non-institutional factors', in W. Lafferty and J. Meadwocroft (eds.), *Democracy and the Environment* (Edward Elgar Publishing: Cheltenham, 1996) 71-85; M. Jänicke, 'The Political System's Capacity for Environmental Policy', in M. Jänicke and H. Weidner, *Successful Environmental Policy: A Critical Evaluation* (Springer: Berlin, 1997).

23 P. Birnie, 'The UN and the Environment', in A. Roberts and B. Kingsbury (eds.), *United Nations, Divided World: The UN's Roles in International Relations* (Oxford University Press, 2000) 327-383.

24 See Mason, *Environmental Democracy*, *supra* note 3, and E. Corell, and M. Betsill, 'NGO Influence in International Environmental Negotiations: A Framework Analysis', 1 *Global Environmental Politics* (2001) 65-85.

25 National Environmental Policy Act (1969), 42 U.S.C. 4321-4347, ceq.eh.doe.gov/nepa/regs/nepa/nepaeqia.htm (hereinafter NEPA).

26 *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

27 Aarhus Convention, *infra* note 50.

28 J.G. Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', in D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Polity Press: Cambridge, 2003) at 36.

29 D. Held et al., *Global Transformations: Politics, Economics and Culture* (Polity Press: Cambridge, 1999).

30 V. Haufler, *A Public Role for the Private Sector: Industry self-regulation* (Carnegie Endowment for International Peace: Washington D.C., 2001)

31 B. Cashore, G. Auld and D. Newsom, *Governing through Markets: Forest certification and the emergence of non-state authority* (Yale University Press: New Haven, 2004).

The Growth of non-state participation in the United Nations: A historical summary

No examination of the rising non-state contribution to global environmental discourse would be complete without an institutional analysis of the growth of environmental policy within the United Nations and the associated rise of NGOs in decision-making. UN institutional structures and roles and responsibilities are complicated, but it will suffice here to trace the significant elements within the UN upon which subsequent initiatives have been based. An important first step in 1948 - which occurred outside the UN itself, but which was sponsored by the United Nations Educational, Cultural and Scientific Organization (UNESCO) – was the establishment of the International Union for the Conservation of Nature and Natural Resources (IUCN), now the World Conservation Union.[32] Shortly thereafter, the UN's Economic and Social Council (ECOSOC) weighed in by convening the 1949 UN Scientific Conference on the Conservation and Utilization of Resources, although this was limited to information sharing regarding resource use and conservation. Birnie stresses the significance of the IUCN. Consisting, as it does, of state and non-state actors 'has enabled it to be [more] forward-looking and innovative in its approaches than exclusively intergovernmental agencies: private, public and governmental concerns can be brought together to prepare more coherent environmental strategies.'[33] She argues that the issues identified at the United Nations Conference on the Human Environment (UNCHE) in 1972 and the subsequent action plan and related bureaucracies made the greening of the UN and its associated institutions by various NGOs unavoidable. The Stockholm Declaration[34] and the United Nations Environment Programme (UNEP), which arose out of the UNCHE,[35] placed the imperative for environmental action on the global level, and set the future for discussions about the environment within a normative context. For the next few years UNEP set about fulfilling its mandate 'through a strategy of co-ordinated action and close collaboration amongst governments, IGOs, NGOs, UN Bodies, and private societies of all kinds on a wide variety of international issues.'[36]

NGO scrutiny of the Bretton Woods institutions throughout the 1980s also led to policy changes. In 1987, The World Bank, heavily criticized by NGOs for its lack of consultation with local people affected by development/resettlement projects - such as the Narvada Valley inundation programme in India and in the forests of

32 Birnie, 'The UN and the Environment', *supra* note 23, at 335.

33 *Ibid.*, at 336.

34 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, 11 *International Legal Materials* (1972) 1416, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503.

35 For a more detailed account of the birth of UNEP, see the paper by Donald Kaniaru in the present Review.

36 Birnie, 'The UN and the Environment', *supra* note 23, at 350.

Rondônia province in Brazil - established a central environmental department. This department administers another UN initiative, the Global Environment Facility (GEF), a fund designed to encourage sustainable development and environmental remediation programmes.[37] Further criticisms against other institutions, including the General Agreement on Tariffs and Trade (GATT), were acknowledged in the Brundtland Report, *Our Common Future*.[38] In 1992, influenced by the Brundtland Report, the UN General Assembly agreed to convene the United Nations Conference on Environment and Development (UNCED). Birnie identifies two interesting developments in non-state participation in UNCED: sponsorship of the event included support from major corporations such as ICI and private foundations, such as the MacArthur and Rockerfeller Foundations, and the role played by NGOs in a number of preparatory committees (PrepComs), the extent of which she contrasts with UNHCE preparations, where civil society participation was confined largely to inclusion in a cross-sectoral study group to prepare a report designed to identify items for discussion. Birnie acknowledges 'the unprecedented level of public participation in the negotiations in the lead-up to UNCED, and the vast number of NGO observers who were present in Rio to lobby government delegates.'[39]

Interestingly, her criticisms of the UN are directly related to its lack of capacity to effectively deliver good governance at a global level and the onus this places on NGOs:

> The UN system is not effective in assessing, reviewing, and monitoring either the effects of activities or compliance with prescribed measures. Effective scrutiny has been left to NGOs, which have performed the task effectively in several areas, but their activities are necessarily issue-oriented: they cannot themselves carry out the required reforms to remedy the whole range of weaknesses in the system, especially the co-ordinative failures. It is governments that have to legislate and to ensure that their national programmes conform to the UN goals for sustainable development. It is here that NGOs (now often referred to as NGAs – non-governmental actors) can provide the necessary stimulus.[40]

Corell and Betsill agree on the contribution of NGOs to environmental policy-making, commenting that they 'influence international environmental negotiations when they intentionally transmit information to negotiators that alters both the negotiating process and outcome from what would have occurred otherwise.'[41]

37 *Ibid.*, at 358-360. For a more detailed account of the GEF and its functions, see the paper by Ahmed Djoghlaf in the present Review.

38 World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987), UN Doc. A/42/47 (1987)(The Brundtland Report).

39 Birnie, 'The UN and the Environment', *supra* note 23, at 368

40 *Ibid.*, at 372

41 Corell and Betsill, 'NGO Influence', *supra* note 24.

Mason attributes the significance of non-state actors – both multinational corporations and non-governmental organizations – in shaping global environmental regimes to the rise of international legal institutions and such environmental regimes. The rise of the importance of the United Nations and its support for NGOs culminates in his mind with the participatory role accorded to them at UNCED. He acknowledges that NGOs are placed by some commentators 'at the vanguard of a new global civil society'[42] and attributes the penetration of environmental norms throughout international law to NGO participation in UN fora. He sees the global nature of NGO participation as an indicator of the need for transnational public law litigation to guarantee human rights, and likewise attributes the rise of international legal institutions and environmental regimes to non-state actors. Like Birnie, he sees the NGO contribution as being challenged by a lack of participative capacity, the main components of which he identifies as resources and technical capability.[43] These important recurring themes which influence effective participation are further explored below.

Public participation in environmental regulation: some UN-inspired examples

Having explored the historical contribution of non-state interests to the global environmental discourse, it is worth briefly exploring and commenting on the level of recognition accorded to non-state participants within national and international environmental agreements. An early UN reference to non-state participation in decision-making processes is found in a 1963 definition of community development:

> The process by which the efforts of the people themselves are united with those of governmental authorities to improve the economic, social and cultural conditions of communities, to integrate these communities into the life of the nation, and to enable them to contribute fully to national progress. This complex of processes is, therefore, made up of two essential elements: the participation by the people themselves in efforts to improve their level of living, with as much reliance as possible on their own initiative; and the provision of technical and other services in ways which encourage initiative, self-help and mutual help and make these more effective.[44]

Here it is interesting to note the importance placed on the involvement of people in generating solutions to their own problems, and the provision of resources to facilitate that involvement, perhaps anticipating the later, more sophisticated, concepts of sustainable development and capacity-building.

42 Mason, *Environmental Democracy*, *supra* note 3, at 218.

43 *Ibid.*, at 217-230.

44 Ad Hoc Group of Experts on Community Development, *Community development and national development*: R*eport by an ad hoc group of experts appointed by the Secretary-General of the United Nations*, UN Doc. E/CN.5/379/Rev.1 (United Nations: New York, 1963), cited in F. Schmidt, 'Citizen Participation: An Essay on Applications of Citizen Participation to Extension Planning', University of Vermont, 1998, ag.arizona.edu/fcs/cyfernet/nowg/cd_essay.html.

The late 1960s witnessed some of the first attempts at developing national laws for environmental protection, and it is possible to see echoes of the 1963 UN definition articulated in the United States' National Environmental Policy Act of 1969:

> It is the continuing policy of the Federal Government, in co-operation with State and local governments, and other concerned public and private organizations, to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic, and other requirements of present and future generations of Americans.[45]

There are some further interesting elements within the Act, including a recognition of the need to make use of 'the natural and social sciences and the environmental design arts in planning and decision-making', to develop 'appropriate alternatives to […] any proposal which involves unresolved conflicts' and to 'make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment.'[46] The recognition of the social sciences, the value of conflict resolution and the provision of information are all elements that appear in later agreements. In the Act we can see some precursors to what have now become accepted environmental norms, including multi-stakeholder (state and non-state) participation in, and access to, information sharing, as well as the three pillars/triple bottom line concept of sustainability, which appear in the Act as 'social, economic and other requirements.'

By UNCED in 1992 these approaches were becoming increasingly codified in international agreements, as exemplified by *Agenda 21*, the document that was to emerge from UNCED:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities […] and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information publicly available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.[47]

The role of NGOs and the private sector, including their nature and extent of participation, is also formally acknowledged:

45 Section 101(a), NEPA.

46 Section 102 A, E and G, NEPA.

47 *Agenda 21*, *supra* note 26, at 10.

> 27.1 Non-governmental organizations play a vital role in the shaping and implementation of participatory democracy. Their credibility lies in the responsible and constructive role they play in society […] [I]ndependence is a major attribute of non-governmental organizations and is the precondition of real participation. […]
> 27.5 Society, Governments and international bodies should develop mechanisms to allow non-governmental organizations to play their partnership role responsibly and effectively in the process of environmentally sound and sustainable development. […]
> 29.5 Governments, business and industry should promote the active participation of workers and their trade unions in decisions on the design, implementation, and evaluation of national and international policies and programmes on environment and development.[48]

Interestingly for the purposes of linking this review more closely to the theme of forests, it is worth noting that UNCED also led to the adoption of the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, also known as the Forest Principles, which reiterated much of these participatory elements in a more specific, normative, context:

> Governments should promote and provide opportunities for the participation of interested parties, including local communities and indigenous people, industries, labour, non-governmental organizations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.[49]

There are some interesting participatory developments within two post-Rio processes: the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[50] and the United Nations Forum on Forests (UNFF). The Aarhus Convention came into force in 2001, and is directly related to *Agenda 21* and Principle 10 of the Rio Declaration.[51] In its case, however, participation in decision-making and access to justice is confined almost exclusively to the resolution of conflicts around access to, and provision of, information and similar issues. The Convention does not go much beyond existing agreements. The citizen remains an external party accorded a certain set of rights and participation does not extend to an active role in decision-making, marking to some extent a retreat from the more inclusive language of *Agenda 21*, demonstrat-

48 *Ibid.*, at 230 and 235.

49 Principle/Element 2(d), Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. III), www.un.org/documents/ga/conf151/aconf15126-3annex3.htm.

50 Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, www.unece.org/env/pp/documents/cep43e.pdf.

51 Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

ing that the tensions between passive and active involvement in environmental decision-making remain unresolved.

It is worth exploring the UNFF process to gain some relevant anecdotal insight into how UN-initiated environmental processes implement the policy decisions of the General Assembly. The Commission for Sustainable Development (CSD) is the organ within the UN responsible for following the implementation of *Agenda 21*. As forests are one of the issues dealt with by *Agenda 21,*[52] since the Rio Conference, CSD has had a mandate to deal with forests. The CSD is a subsidiary organ of the Economic and Social Council (ECOSOC) of the UN and whatever substantive decisions it makes, usually in the form of draft resolutions, are sent to ECOSOC for final approval. Initially, post-Rio, it was felt that there was a need for a specific body to tackle the forest issue; this was the Intergovernmental Panel on Forests (IPF), which functioned from 1995-97 to 'provide a forum for forest policy decisions.'[53] In 1997 ECOSOC established the Intergovernmental Forum on Forests, which ran until 2000. Both IPF and later IFF were formed as subsidiary bodies to CSD, with reports and decisions being submitted to CSD, and subsequently to ECOSOC. In 2000, IFF4 submitted a final report suggesting that forests were in need of a more independent organ, not linked to CSD. Negotiations were held to develop a draft resolution, which was submitted to ECOSOC. This was approved[54] creating another new international arrangement on forests whereby a third body, the UNFF, was created as a subsidiary organ of ECOSOC itself, at the same level as CSD. The previous arrangement of CSD approving IPF and IFF reports before submitting them to ECOSOC as the final decision decision-making body changed with the creation of UNFF, which reports directly to ECOSOC.[55] There are differences and similarities between CSD and UNFF. Both are subsidiary organs of ECOSOC, but UNFF has universal membership (all the member States of the United Nations are members of UNFF) whilst CSD has limited membership. CSD still has the mandate to follow the implementation of *Agenda 21* but forest issues will not now be discussed by the Commission until its work cycle of years 2012/2013.[56] Whether these changes in institutional arrangements will benefit forests remains to be seen.

52 Chapter 11, Combating Deforestation, *Agenda 21*, *supra* note 26.

53 See www.un.org/esa/forests/faq.html.

54 Report of the fourth session of the Intergovernmental Forum on Forests, ECOSOC Resolution 2000/35, 18 October 2000, www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add3.pdf.

55 For a more detailed account of the UNFF process, see the paper by Pekka Patosaari in the present Review.

56 The author is indebted to Barbara Tavora-Jainchill, Programme Officer, United Nations Forum on Forests, United Nations Department of Economic and Social Affairs, for her assistance in clarifying the structural arrangements contained in this section.

It is worth noting that IPF generated a number of Proposals for Action.[57] Of particular interest to the theme of this review is the proposal that acknowledges the importance of developing certification and labelling programmes for forest products, which should include '[p]articipation that seeks to involve all interested parties, including local communities'.[58] Here it is possible to see an expansion of the role of the citizen beyond that outlined in the legislation explored earlier in this section, according her/him an active role in the development of market-based regulatory initiatives. Interestingly, in the context of the material on market-based activities and timber certification, which shall be explored below, two sections also refer specifically to both timber bans and boycotts, urging that they cease.[59] UNFF has also developed a multi-stakeholder dialogue and participatory process for non-state actors, who may attend sessions as part of national delegations. Travel for funding is not provided[60] whilst the wording in the document submitted to ECOSOC regarding non-state participation is quite precise:

> *Decides* to establish the United Nations Forum on Forests as a subsidiary body of the Economic and Social Council composed of all States Members of the United Nations and States members of the specialized agencies with full and equal participation, including voting rights, with the following working modalities:
> (a) The United Nations Forum on Forests should be open to all States and operate in a transparent and participatory manner. Relevant international and regional organizations, including regional economic integration organizations, institutions and instruments, as well as major groups, as identified in the Agenda 21, should also be involved.[61]

However, the provisions and obligations on the states themselves as to how they select non-state participants, and the role they are accorded, are not specified. Previous NGO reports had been critical of the extent to which nation states allowed non-state participation in both domestic implementation of, and participation in, forest policy development.[62]

Beyond hard law: NGOs and environmental regulation via the market place

NGOs and other non-state players are not just participating in global environmental decision-making processes within, or inspired by, the UN, nor can their

57 Department of Economic and Social Affairs/Secretariat of the United Nations Forum on Forests, *United Nations Forum on Forests. Global Partnership: For Forests For People* Fact Sheet 1 (2004), www.un.org/esa/forests/pdf/factsheet.pdf.

58 Proposal 133(c)(v), IPF Proposals for Action, www.un.org/esa/forests/pdf/ipf-iff-proposalsforaction.pdf.

59 Proposal 130(b), IPF Proposals for Action, ***ibid***.

60 See www.un.org/esa/forests/faq.html.

61 Article 4, ECOSOC Resolution 2000/35, ***supra*** note 54.

62 H. Verolme et al., *Keeping the Promise? A review by NGOs and IPOs of the implementation of the UN IPF Proposals for Action in select countries* (Biodiversity Action Network, Global Forest Policy Project: Washington, D.C., 2000).

increasing global role be attributed solely to their roles within UN institutions. Courville attributes the growth of the NGO sector to the rise of globalization itself, the erosion of the welfare state, trade liberalization and privatization. She argues that this has been 'instrumental in shifting economic power from the national to the international level, from states to other actors'[63] and she includes corporations and civil society protagonists in this list of players.

Ruggie presents the historical rise of civil society as a result of what he terms embedded liberalism, by which he means a process whereby 'the capitalist countries learned to reconcile the efficiency of markets with the values of social community that markets themselves require in order to survive and thrive.'[64] The globalization of financial markets and production chains threatens to undermine the nation-based social contract, necessitating the development of globally embedded shared social values and institutions. Whilst organizations such as the United Nations are seeking to develop a similar social contract on the global level through various initiatives (Ruggie uses the Global Compact as an example), embedding global markets within shared social values faces a number of problems not faced by the nation state, particularly the lack of a global government as well as institutions that are strong enough to compensate for this absence. He argues that emergent social processes and movements are a response and that trigger more inclusive forms of global governance. They compensate for this lack of government and are based on the 'dynamic interplay between civil society, business and public sector over the issue of corporate social responsibility.'[65]

Held et al. argue that sovereignty, state power and territoriality stand today in a more complex relationship than in the epoch during which the modern nation state was being forged. Globalization is associated not only with a new sovereignty regime but also with the emergence of powerful new non-territorial forms of economic and political organization in the global domain, such as multinational corporations, transnational social movements, international regulatory agencies, etc. In this sense, the world order can no longer be conceived as purely state-centric or even primarily state-governed, as authority has become increasingly diffused among public and private agencies at the local, national, regional and global levels.[66] Held et al. also argue that for many of those studying the phenomenon of globalization 'the sheer density and scale of contemporary economic, social and political activity appear to make territorial forms of politics increasingly impotent', which in turn poses the question as to whether sovereignty is being 'displaced by

63 S. Courville, 'Understanding NGO-Based Social and Environmental Regulatory Systems: Why We Need New Models of Accountability', in C. Dowdle (ed.), *Rethinking Public Accountability* (Cambridge University Press, 2005) at 1.

64 Ruggie, 'Taking Embedded Liberalism Global', *supra* note 28, at 1.

65 *Ibid*., at 2-3.

66 D. Held et al., *Global transformations*, *supra* note 29, at 9.

forms of independent and/or "higher" legal or juridical authority which curtail the rightful basis of decision-making within a national polity.'[67] The globalization of politics has led to a commensurate growth of global governance, which is not solely represented within formal institutions and organizations for intergovernmental co-operation such as the United Nations and the World Trade Organization, but also within multinational corporations, transnational social movements and a multitude of non-governmental organizations. These latter all pursue global objectives 'which have a bearing on transnational rule and authority systems'[68] resulting in international regimes around which the relevant actors converge and through which they pursue international relations.

> They constitute forms of global governance, distinct from traditional notions of government conceived in terms of specific sites of sovereign political power. In the contemporary international system there is, of course, no single political authority above the state. But despite this, international regulatory regimes have developed rapidly, reflecting the patterns of global and regional enmeshment.[69]

The authors point to the growth of international non-governmental organizations from 176 in 1909 to 5,472 in 1996 to emphasize this point. This combination of international regimes and associated actors has spilled over into the nation state, which is taking up international legislation nationally, whilst non-state actors infiltrate areas of traditional state autonomy by 'organizing people and coordinating resources, information and sites of power across national borders for political, cultural purposes.'[70] Keck and Sikkink comment that environmental NGOs have grown the most dramatically of all the social change organizations and in combination with human rights and women's rights movements represent over half the NGOs involved in social change.[71]

The challenge for NGOs, according to Birnie, is that since 'assumptions that free market benefits social welfare and results in socially acceptable levels of consumption has been proved palpably wrong […] the problem now is how to use both market forces and regulatory mechanisms in optimal combination to achieve sustainable development.'[72] Haufler appears to support this assertion, arguing that self-regulation represents a new form of global governance, which she defines as 'mechanisms to reach collective decisions about transnational problems with or without government participation.'[73] However, she maintains that the UN still re-

67 *Ibid.*, at 29.

68 *Ibid.*, at 49-51.

69 *Ibid.*, at 51.

70 *Ibid.*, at 53-57.

71 M.E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy networks in international politics* (Cornell University Press: New York, 1998) at 10-12.

72 Birnie, 'The UN and the Environment', *supra* note 23, at 361.

73 Haufler, *A Public Role for the Private Sector*, *supra* note 30, at 1.

mains largely responsible for the development of private sector governance via a growing number of international institutions, particularly those that have either arisen within the UN, or via UN-sponsored initiatives, such as the Voluntary Code of Conduct on Transnational Corporations.[74] She links the rise of industry regulation through environmental codes, management systems and programmes to the post-UNCED context of *Agenda 21*, which sought to promote cleaner production and, in the words of UNCED, responsible entrepreneurship. Courville sees that since NGOs now wield significant power in their own right, concerns have arisen regarding their level of accountability and she implies a connection between the need to demonstrate accountability and the increasing efforts by NGOs to develop and codify certification initiatives.[75] She argues that such certification organizations are a structural solution to accusations of conflict of interest, essentially keeping at bay criticisms that arise from 'a democracy deficit caused by the dispersed nature of decision-making across international borders.'[76]

Ruggie attributes the rise of market-driven regulation 'to a range of factors, but above all [to] the sensitivity of their corporate brands to consumer attitudes.'[77] He identifies three phases of regulatory development: an initial wave that consisted largely of unilateral company codes, designed to demonstrate good conduct and not generally for public disclosure but intended to address industrialized consumers' concerns (such as child labour) but not deeper issues such as freedom of association. This was followed by the combination of social and financial reporting in order to demonstrate a company's commitments to its shareholders. Third, sector-wide certification arrangements, involving several businesses and/or associations, and including civil society participants were developed.[78]

For Ruggie, however, while these voluntary initiatives demonstrate great progress, they only represent a fraction of global business. Their significance lies rather in their second-order impacts, such as the stimulation of socially responsible investment, the promotion of the rights of labour in the face of diminishing national standards, and particularly the creation of business as an advocate for a more effective global public sector. Furthermore, there is a potential for these kinds of soft law to become hard law at some later time and by coming in on the ground floor, companies can gain advantages over others that join once standards have been set. He identifies certification institutions as 'an addition to the traditional machinery

74 *Ibid.*, at 13-15.

75 Courville, 'Understanding NGO-Based Social and Environmental Regulatory Systems', ***supra*** note 63, at 1-6.

76 *Ibid.*, at 2.

77 Ruggie, 'Taking Embedded Liberalism Global', ***supra*** note 28, at 17.

78 *Ibid.*, at 17-19.

of interstate governance'[79] and sees them as becoming an important element of global regulation, providing a partial solution but one that as it develops will offer the public sector an opportunity to assert itself back into globalization.

Cashore et al. focus specifically on forest management certification programmes and argue that they 'ushered in a new breed of sustainable development institutions outside of traditional government processes that would offer fundamentally different ways of creating policy and implementing policy choices.'[80] They refer to these systems as non-state market driven and argue that they are a departure from traditional models of state-centred sovereign authority, in that their authority is derived from companies along the forest product supply chain voluntarily choosing to adopt private governance systems. These systems are influenced by a range of non-state players, particularly environmental NGOs, who influence companies to choose one particular supply chain over another by offering market access or premiums through their support of one system over another, or via public and market campaigns to encourage them to support certification. Private governance systems may also improve environmental performance across the board in ways that traditional public command and compliance models have not. The extent to which such systems will succeed depends on the extent to which they can institutionalize themselves in developing nations and actually address global forest deterioration. Forest management-related governance systems have arisen within the context of increasing numbers of market-oriented governance institutions created to meet the concerns of global civil society around the negative impacts of globalization. They can also be seen as an attempt to reverse the downward trend, and were initially focussed around boycotts and similar actions to force governmental and corporate interests into an upward trend in the form of voluntary compliance market mechanisms aimed at domestic markets. These developments coincided with increased civil society demands at a time of reduced government spending, which sponsored a form of international liberal environmentalism seeking to avoid command-and-control responses and traditional business versus environment approaches. This also occurred in a period during which intense scrutiny was being paid to tropical forest destruction. A further significant contemporaneous event was the Rio Earth Summit, which created a policy environment that favoured private sector initiatives. In the case of business this followed a route of voluntary self-regulation programmes and, for environmental groups, certification institutions.[81] Cashore et al. conclude that non-state systems mark a radical departure from the traditional sovereign authority model of public policy and that relations between the two approaches are complex and hinge on both domestic and international conditions. The authors assert that non-state market-driven systems 'rep-

79 *Ibid.*, at 18-27.

80 Cashore, Auld and Newsom, *Governing Through Markets*, *supra* note 31, at 4.

81 *Ibid.*, at 4-11.

resent a grand new experiment in developing rules and procedures in ways quite foreign to traditional public policy approaches.'[82]

Two approaches to environmental certification: ISO 14000 and the Forest Stewardship Council

For Haufler, the proliferation and success of social and environmental pressure groups has forced big business to defend its reputation and avoid further risk by creating – either independently, or in co-operation with state and non-state actors – a range of organizations such as the World Business Council for Sustainable Development. These organizations have developed numerous voluntary programmes that report on, account for and, in some cases, certify corporate activities under a range of social, economic and environmental criteria.[83] In the forest sector, she identifies two strands of regulatory approaches post-*Agenda 21*. The first is an industry-dominated, technocratic, environmental management-system approach across industrialized and industrializing nations, exemplified by the International Standardization Organization 14000 (environmental management) series. The second approach is a contemporary programmatic approach to environmental regulation exemplified by initiatives created in partnership with NGOs and international organizations. Haufler cites the Forest Stewardship Council, 'a non-profit organization founded in 1993 through negotiations among multiple stakeholders, including the timber industry'[84] as an example. Ruggie also considers the latter approach to be the most transparent and also points to the Forest Stewardship Council as one such example.[85] Cashore, et al. point out that in the case of voluntary certification, civil society, particularly NGOs, is voting with its feet and whilst it may not be asserting that traditional public policy approaches should be ignored, it appears that in the context of forestry at least, 'FSC-style private authority is at present providing what they believe to be more opportunities for access to and influence over sustainable forestry management standards.'[86]

Forest certification has become the subject of numerous studies and a specific commentary on all its aspects cannot be undertaken here.[87] At this point it is important to stress, however, that the approaches taken by ISO 14000 and FSC are quite different, and a comparison is therefore not one of like with like, the former being clearly based on a company-level approach, the latter looking at operations on the forest floor. This distinction is sometimes referred to as a systems-based versus

82 *Ibid*., at 243-247.

83 Haufler, *A Public Role for the Private Sector*, *supra* note 30, at 20-28.

84 *Ibid*., at 31-38.

85 Ruggie, 'Taking Embedded Liberalism Global', ***supra*** note 28, at 24-25.

86 Cashore, Auld and Newsom, ***Governing Through Markets***, ***supra*** note 31, at 244.

87 See, for example, K. Vogt et al., *Forest Certification: Roots, issues, challenges and benefits* (CRC Press: London, 1999); R. Nussbaum and M. Simula, *Forest Certification Handbook* (2nd ed., James & James/Earthscan: London, 2005).

performance-based approach.[88] Furthermore, lack of space does not permit examining the broader governance structures of the two organizations, except to comment briefly that they are also quite different. On an international level, the former concentrates decision-making and representational powers within the nation state through standards bodies, and member organizations participate in a General Assembly. The FSC in turn has a multi-stakeholder structure of three chambers representing environmental, social and economic interests, with equal voting rights. On a national level, ISO's member organizations vary in the extent to which non-state players are involved in the development of national standards and decision-making, whilst the FSC replicates the chamber concept through national or regional initiatives and, where these are absent, through multi-stakeholder consultations. These consultations are undertaken as part of the process carried out by certifiers to assess a company's eligibility for certification against generic standards adapted regionally and consistent with the FSC's ten principles and criteria.[89] Both approaches are not without their critics.[90] In terms of global market penetration, anecdotal evidence suggests that as of April 2005 approximately 88,000 companies had been certified under the 14001 standard.[91] In terms of FSC certification, as of December 2005 nearly 4,500 forest management certificates had been issued.

Hortensius argues that *Agenda 21* and the Rio Forest Principles resulted in the development of a number of certification programmes and related standards, including the ISO 14000 series, although he also traces the programme's conceptual origins to the ISO's 9000 series (quality management).[92] While both focus on a company's management activities, the ISO 14000 series looks more specifically at those aspects of a company's activities that relate to the environment. Hortensius emphasizes the value of companies pursuing the series because by doing so they do not interfere with the environmental legislative and regulatory arrangements of the nation state, and because the 14000 series' standards are restricted to providing a framework under which a company systematizes its own internal environmental

88 See, for example, S. Ozinga, ***Footprints in the Forest: Current practice and future trends in forest certification*** (FERN: Moreton in Marsh, 2004) at 10, www.ecotimber.com/reports_downloads/Footprints.pdf.

89 P. Hauselmann, *ISO inside out: ISO and environmental management* (WWF International: Gland, 1997) at 4; Ozinga, ***Footprints in the Forest***, *supra* note 88, at 46.

90 For ISO see, for example, M. Morikawa and J. Morrison, *Who Develops ISO Standards? A Survey of Participation in ISO's International Standards Development Processes* (Pacific Institute: Oakland, 2004); S. Oberthür et al., *Participation of Non-Governmental Organizations in International Environmental Governance: Legal Basis and Practical Experience* (Ecologic: Berlin, 2002). For the FSC see, for example, S. Ozinga, ***Footprints in the Forest***, *supra* note 88, at 21 and 46-49; S. Counsell and K. Loraas (eds.), *Trading in Credibility: The Myth and Reality of the Forest Stewardship Council* (Rainforest Foundation: London, 2002).

91 See, for example, www.ecology.or.jp/isoworld/english/analy14k.htm.

92 D. Hortensius, 'ISO 14000 and Forestry Management: ISO develops 'bridging' document', ***ISO 9000-ISO 14000 NEWS***, 4/1999 at 12-20. At the time of writing his article, D. Hortensius was senior standardization consultant with the Netherlands Standardization Institute and closely involved in the development of the ISO 14000 series.

management priorities and do not specify absolute environmental performance requirements.[93] At the same time, however, he also acknowledges certification of forest management 'as an alternative to governmental regulation or in addition to them.'[94] He considers the FSC system as one of the most widely-known systems of certification of 'sustainable forest management',[95] a concept which is built on principles and criteria. However, Hortensius distinguishes between schemes that have been developed as a result of various post-Rio intergovernmental processes such as the Montreal[96] and Helsinki processes, and exemplified in the market by such schemes as that of the Canadian Standards Association and those that he terms non-governmental, which he typifies by citing the Forest Stewardship Council model.[97] He comments that the 14000 series and FSC approaches have been seen to be 'mutually exclusive or even being in opposition to each other'[98] and characterizes the publication of the 14 061 technical report, a term used for documents of an informational nature only, as a bridging mechanism for forest managers to apply principles and criteria of sustainable forest management to the management-systems approach of 14001, and other 14000 standards.[99]

Cashore, et al. provide a slightly differing perspective on the origins of certification and the FSC in particular, arguing that it was the failure of the Rio Summit to agree on a global forest convention that created an environment favouring the development of private sector initiatives. They imply that the FSC's multi-stakeholder structure was designed to avoid dominance in policy-making by any single interest as a direct result of concerns that the failed Rio forest convention would not be able to deliver equal participation. The FSC model was soon followed by forest industry and landowner programmes in markets where the FSC was most active, but with their several differences reinforcing the contention that industry oriented models would be less participatory, more discretionary and narrower in focus than civil society certification programmes. FSC competitors initially sought to develop models in which industry would strongly shape these non-state market driven governance systems, and left the NGO sector to act in an advisory and consultative capacity, emphasizing the industry contention that civil society perceptions of management practices were unwarranted and what was

93 *Ibid.*, at 12-14.

94 *Ibid.*, at 13.

95 *Ibid.*, at 12.

96 The Montreal Process Criteria are: 1) Conservation of biological diversity; 2) Maintenance of productive capacity of forest ecosystems; 3) Maintenance of forest ecosystem health and vitality; 4) Conservation and maintenance of soil and water resources; 5) Maintenance of forest contribution to global carbon cycles; 6) Maintenance and enhancement of long-term multiple socio-economic benefits to meet the needs of societies; 7) Legal, institutional and economic framework for forest conservation and sustainable management. See www.mpci.org/.

97 Hortensius, 'ISO 14000 and Forestry Management', *supra* note 92, at 12-14.

98 *Ibid.*, at 19.

99 *Ibid.*, at 16-20.

needed were certification systems that allowed companies to "educate" civil society. There are consequently some significant differences between the FSC model and its competitors, perhaps the most important of which for this study is the reliance of industry-oriented models on a national territorial focus.[100] In terms of process, FSC certification is undertaken at the forest level, with a certifier conducting an audit of existing operations determining their conformity to FSC standards. Certificates may be issued with conditions or corrective action requests, which require remedial action over a given timeframe.[101]

Of particular relevance to the present exploration of non-state involvement in decision-making, it is worth exploring the nature of participation in the process of certification of forest management in these two systems. With the 14000 series it is important to remember that, according to Hortensius, it is the companies themselves that determine the extent of their own management objectives, as 'ISO does not establish absolute environmental performance requirements.'[102] It does, however, set three general requirements: compliance with relevant legislation and regulations; continual improvement in overall environmental performance; prevention of pollution.[103] In terms of forest management, Hortensius indicates that a company can consider linking its objectives to principles and criteria for SFM[104] but the decision of which system – based on intergovernmental or non-governmental agreements – a company adopts, if it adopts one at all, is their own. Having said this, Hortensius does also indicate that, 'the views of interested parties have to be considered when establishing environmental objectives.' How this is implemented, at least according to Hortensius, appears vague, as he refers to both the possibility for forest managers to use SFM processes to develop a so-called public participation process or to fulfil the ISO 14001 requirement to consider views of interested parties by organizing a public consultation process. Furthermore, the development of specific performance targets is the responsibility of the company itself.[105] All of this taken together may result in a rather limited manner in which stakeholders can shape management activities and a rather limited scope under which they can have input.

As commented above, assessment of a forest manager's eligibility for certification is undertaken by a certification body accredited to the FSC which grants certifica-

100 Cashore, Auld and Newsom, *Governing Through Markets*, *supra* note 31, at 10-16.
101 Ozinga, *Footprints in the Forest*, *supra* note 88, at 48.
102 Hortensius, 'ISO 14000 and Forestry Management', *supra* note 92, at 15.
103 *Ibid.*, at 14.
104 *Ibid.*, at 16.
105 *Ibid.*, at 18.

tion if the FSC's ten principles and criteria are met.[106] Of these principles and criteria a number can be deemed to relate directly to aspects of stakeholder participation in operational issues: resolution of disputes over tenure claims and rights;[107] consent and compensation of indigenous peoples for use and management of forest resources on traditional lands;[108] consultation of people and groups directly affected by management operations;[109] and conflict resolution and compensation regarding loss or damage affecting legal or customary rights, property, resources or livelihoods of local people.[110] An FSC standards document, *Stakeholder consultation for forest evaluation*,[111] also provides details as to how certifiers should undertake consultations during full assessment, whilst also providing the requirements for consultation during pre-evaluation, i.e. before a forest manager determines to go through full certification assessment. Whilst this can be seen as providing more specific guidance, it is still restricted to giving stakeholders a role in certification assessments only within the confines of determining a forest manager's compliance with the FSC's principles and criteria. This again could be seen to limit the manner in which stakeholders can shape management activities and the scope under which they can have input.

Setting aside the larger issue of how interested parties are involved in the governance structures of both ISO and FSC and the broader standards development processes, which as indicated above differ in both systems and need to be analyzed further to fully identify their respective strengths and weaknesses, it could be concluded that the extent of participation in decision-making concerning forest management does not move much beyond the consultation rung on Arnstein's ladder. It certainly does not encompass partnership, delegated power or citizen control in forest management decision-making. In both types of decision-making (systems and performance related), it could be concluded that participation is restricted to the provision of information, a fairly passive form of consultation. There is clearly a need for more active and wide-reaching involvement of stakeholders beyond the forest managers themselves.

106 The ten Forest Stewardship Principles are: 1) Compliance with laws and FSC Principles; 2) Tenure and use rights and responsibilities; 3) Indigenous peoples' rights; 4) Community relations and workers' rights; 5) Benefits from the forest; 6) Environmental impact; 7) Management plan; 8) Monitoring and assessment; 9) Maintenance of high conservation value forests; 10) Plantations. See www.fsc.org.

107 Principle 2.3, FSC Principles.

108 Principle 3.4, FSC Principles.

109 Principle 4.4, FSC Principles.

110 Principle 4.5, FSC Principles.

111 Forest Stewardship Council, *Stakeholder Consultation for Forest Evaluation*, 30 November 2004, FSC-STD-20-006,www.fsc.org/keepout/en/content_areas/77/103/files/FSC_STD_20_006_Stakeholder_consultation_for_forest_evaluation_V2_1.PDF.

Conclusions

No analysis of participation is complete without at least some understanding of the nature of power, and the extent to which its exercise affects the way non-state actors are involved in decision-making. The ability for a participant to ascertain the extent to which he/she has control in any given decision-making process might provide a useful measure in determining whether participation will deliver an outcome that meets the needs of the participant. Understanding the extent of participation may even serve as a surrogate for determining a process's social, environmental and economic acceptability, one might even say sustainability. How can a process be sustainable if substantive contributions from a range of perspectives are excluded from the decisions made? In some cases, refusing to participate could be more productive than taking part. Second, genuine discourse and therefore negotiations are likely to be hampered if there is no clear understanding or acceptance amongst all participants of the constraints of institutional structures. Moreover, an understanding as to what these institutional structures are supposed to deliver is needed, as are steps to ensure that participation within those structures is equal amongst those involved.

The UN and its offshoots have played a significant role in shaping the nature of international, and national, environmental agreements. There is a historical relationship between such UN initiatives and the institutional, legal and regulatory arrangements undertaken at the nation state level to implement decisions made. This is today combined with the growing contribution of the NGO and other sectors to the discourse around sustainable development, and the growth of various supranational environmental agreements. The effectiveness of non-state participation has been limited by various institutional constraints, both structural and fiscal, and by institutional ambiguities, both between developed and less developed nations and between nation states and non-state actors. The UN has undoubtedly contributed significantly to the creation of a space for dialogue between state and non-state actors and this has had consequences that go beyond the various action-related agendas of the UN bodies themselves. Just as significant, however, is the response of industry to this growth in participation and the convergence of state and non-state interests around private sector and civil society initiatives for sustainable development. Also of importance is the development of private, voluntary regulatory frameworks, which focus around various forms of public monitoring, assessment, verification and reporting of corporate environmental, social and economic activities. These are exemplified by a growing number of certification schemes, which independently verify the claims made by business interests about their activities. These range from systems-based approaches to environmental management, such as the ISO 14000 Series in which the state has more decision-making powers than non-state interests (especially NGOs), to performance-based programmes such as the Forest Stewardship Council, in which the role of civil

society in decision-making is more pronounced. However, in all of these systems, we can see a marked growth in the cross-sectoral discourse that surrounds environmental diplomacy and law-making, and a validation of participatory decision-making.

Despite the views of some commentators, the UN remains one of the most influential international institutions for decision-making around environmental governance. However, its own internal shortcomings, particularly the tensions between North and South, and resource exploitation versus resource conservation, have hampered its effectiveness. These tensions are partly explained both by the fact that the UN is largely beholden to the political agendas of its member states, who can be hostile to the environment, and internal factionalism around conflicting programmes that reflect the exploitation/conservation dichotomy, which has only partially been resolved through the concept of sustainable development. From a research perspective, the UN provides an ideal institution against which some of the theories associated with participation discussed in this paper could be explored. The themes identified in this paper clearly point to the need for the development of a set of principles, criteria and indicators that outline the requirements for effective discourse around environmental decision-making. Such principles could form the basis for incorporating participatory governance around local, national and international environmental law and treaty negotiations. This area requires further research, which would have the potential to make an effective contribution towards increasing the effectiveness of environmental decision-making.

The United Nations Decade of Education for Sustainable Development (2005-2014)[1]

Akpezi Ogbuigwe[2]

Background

Ever since the publication of Rachel Carson's revolutionary book, *Silent Spring*,[3] on the effects of insecticides and pesticides on songbird populations throughout the United States, man has grappled with ways to harmoniously interact with the environment. This is evident through several programmes, special days and other schemes, such as Earth Day in 1970, the United Nations Conference on the Human Environment in 1972, the Rio Conference in 1992, the Millennium Summit in 2000 and the World Summit on Sustainable Development (WSSD) in 2002. In spite of all these agendas, the general consensus at the WSSD in Johannesburg was that achievement of sustainable development was too slow for the overwhelming majority of humankind. It was evident that there was a need for a type of education that would empower this generation of humankind to manage their environment in a more sustainable way, resulting in eradication of poverty, the equitable use of resources and sustainable livelihoods for present and future generations. The Decade of Education for Sustainable Development was conceived to meet this need.

At its 57th Session in December 2002, the United Nations General Assembly, following the recommendation found in the WSSD *Plan of Implementation*,[4] declared the decade 2005-2014 the United Nations Decade of Education for Sustainable De-

1 This paper is based on a lecture given by the author on 26 August 2005.

2 Head, Environmental Education and Training, UNEP.

3 Rachel Carson, *Silent Spring* (Hamish Hamilton: London, 1962).

4 World Summit on Sustainable Development, *Johannesburg Plan of Implementation*, www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

velopment (UNDESD).[5] The General Assembly designated UNESCO as the lead agency to promote and ensure the achievement of the goals set for the decade. UNDESD is a crystallization of the consensus among the international community that education is fundamental to the achievement of sustainable development. Education was given a prominent role in the Stockholm Conference's *Plan of Action* for addressing global environmental challenges. However, the central role of education was given particular prominence at the Rio Conference. Chapter 36 of *Agenda 21* states that 'Education, raising of public awareness and training are linked to virtually all areas in *Agenda 21*, and even more closely to the ones on meeting basic needs, capacity-building, data and information, science, and the role of major groups.'[6] Chapter 36 drew its principles from the Declaration and Recommendations of the Tbilisi Intergovernmental Conference on Environmental Education organized by UNESCO and UNEP in 1977. The UNESCO sponsored Jomtien World Conference on Education for All (1990), the UN Millennium Development Goals (MDGs),[7] the Dakar Framework for Action (2000)[8] and the NEPAD Environment Initiative (2001) are just some other examples of the international consensus on the central role of education for sustainable development.

Sustainable Development

Sustainable development is, by itself, a complex concept to define. The concept became popular after it was defined by the World Commission on Environment and Development, also known as the Brundtland Commission, in its report *Our Common Future*, as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[9] In 1991, United Nations Environment Programme (UNEP), the World Conservation Union (IUCN) and the World Wildlife Fund (WWF) published a document entitled *Caring for the Earth: A Strategy for Sustainable Living*.[10] In this document sustainable development was defined as 'improving the quality of human life while living within the carrying capacity of supporting ecosystems.'[11] The concept of sustainable development is continually evolving, but primarily it deals with a careful balancing of environ-

5 United Nations Decade of Education for Sustainable Development, GA Res. 57/254, 20 December 2002.

6 Chapter 36, *Agenda 21: Environment and Development Agenda*, UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

7 For more information on the Millennium Development Goals see www.un.org/millenniumgoals/.

8 World Education Forum, Dakar Framework for Action, Education for All: Meeting our Collective Commitments, Dakar, 26-28 April 2000, www.unesco.org/education/efa/ed_for_all/dakfram_eng.shtml.

9 World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987), UN Doc. A/42/47 (1987)(The Brundtland Report), at 43.

10 IUCN, UNEP, WWF, *Caring for the Earth: A Strategy for sustainable living* (IUCN: Gland, 1991).

11 Box 1, Sustainability: a question of definition, *ibid.*, at 10.

mental, social and economic issues with culture, values and respect playing an underlying role at all of these levels, in the pursuit of development and an improved quality of life.

Why Education?

The focus on education for sustainable development is important because education is essential in allowing people to make informed and wise choices. The bulk of a nation's future leaders shape their ideology and beliefs from the kind of education they receive. Aside from the word government, education appears more often than any other term in the Rio Conference's comprehensive plan for global sustainability.[12] A vigorous education is vital if a sustainable lifestyle is to become a reality. Although there is a general consensus on the relevance of education for sustainable development, there is no universal definition or model of what education for sustainable development is.[13] While from a theoretical point of view this may prove problematic, this in itself is not a disadvantage as it allows for education for sustainable development to be tailored to meet the peculiarities and demands of local circumstances. Chapter 36 of *Agenda 21* identifies four main focal areas of education for sustainable development. These are promoting access to and improvement of the quality of basic education, reorienting education towards sustainable development, increasing public awareness and promoting training. Education for sustainable development therefore 'is a dynamic concept that utilizes all aspects of public awareness, education and training to enhance an understanding of the linkages among issues of sustainable development and to develop the knowledge, skills, perspectives and values which will empower people of all ages to assume responsibility for creating and enjoying a sustainable future.'[14]

The Stockholm Conference highlighted that environmental and development problems are closely linked to people's decisions and actions.[15] Education is crucial in addressing this. As *Agenda 21* states,

12 Rosalyn McKeown, *Education for Sustainable Development Toolkit* (2nd version, University of Tennessee: Knoxville, 2002), www.esdtoolkit.org/default.htm.

13 See D. de Rebello, 'What is the role for Higher Education Institutions in the UN Decade of Education for Sustainable Development?', paper delivered at the International Conference on Education for a Sustainable Future: Shaping the Practical Role of Higher Education for Sustainable Development, held at Charles University, Karolinum, Prague, Czech Republic, 10-11 September, 2003, at 4. See also R. McKeown, *Toolkit*, *supra* note 12, at 13.

14 See D. de Rebello, 'Role for Higher Education Institutions', *supra* note 13, at 4.

15 See Preamble, Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, 11 *International Legal Materials* (1972) 1416, www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503.

> Both formal and non-formal education are indispensable to changing people's attitudes so that they have the capacity to assess and address their sustainable development concerns. It is also critical for achieving environmental and ethical awareness, values and attitudes, skills and behaviour consistent with sustainable development and for effective public participation in decision-making.[16]

Education and training play an important role in enabling the integration of the principles of sustainable development into international, national and local policies and programmes for the environment. They also influence how the three pillars of sustainable development are understood and implemented. This requires a reorientation of education systems, policies and practices to provide citizens with the appropriate knowledge, skills and ethical commitment to engage critically in decision-making and action on current and emerging environmental and development problems. Consequently, education not only encourages environmental conservation but also plays a significant role in social and economic aspects, particularly with respect to capacity-building for poverty alleviation, human rights and peace through appropriate development.[17]

The United Nations Decade of Education for Sustainable Development (UNDESD)

UNDESD is a decade set aside by the United Nations to educate, inform and encourage humans to, amongst others, respect, value and preserve the achievements of the past; appreciate the wonders and peoples of the earth; live in a world where all people have sufficient food for a healthy and productive life; assess, care for and restore the state of our planet; create and enjoy a better, safer and more just world; be caring citizens who exercise their rights and responsibilities locally, nationally and globally and reorient all forms of education to sustainable development, i.e. knowledge, skills, perspectives, values and issues. The UNDESD is a decade to teach people to speak and live the language of sustainable development (SD).

Education for Sustainable Development (ESD) envisages a new approach to education in all spheres of life that will simultaneously protect the environment and provide for economic and personal well-being, which together form the foundation for human and global security. ESD seeks to contribute to enabling citizens to

16 Chapter 36.3, *Agenda 21*, *supra* note 6.

17 See further, Recommendations 2-4, Declaration of the Tbilisi Intergovernmental Conference on Environmental Education, 14-26 October 1977, unesdoc.unesco.org/images/0003/000327/032763eo.pdf.

face the challenges of the present and future and produce leaders who will make relevant decisions for a viable world.[18] In a simplified mathematical construct:

SD – ESD	=	Business as usual
SD + Education	=	Business unlimited / unsustainable consumption
SD + ESD	=	Business unusual, future guaranteed

People cannot be expected to deliver the kind of world one hopes for if one does not properly train or equip them for the task. An analogy can be made with placing a city person in charge of a farm, leaving him with instructions for how to care for the farm. Even if he is given the best "How to do it" book in the world, it will still pose a great challenge! The vision of UNDESD is not utopia, but an ideal to work towards by promoting and improving quality education, reorienting educational programmes, building public understanding and awareness and providing practical training for all sectors of the workforce and in all disciplines.[19]

It must be emphasized that ESD is not a separate field of study, but rather an interdisciplinary approach to understanding that is integrated across the curriculum and all disciplines. In this light, ESD should not be seen as a course for schools only, and should be applied across all fields including professional, corporate, political and continuous education programmes such as the Joensuu – UNEP Course on International Environmental Law-making and Diplomacy. It should aim to infuse SD across the full range of life-long learning: formal, informal, continuous and professional learning.

International Implementation Scheme (IIS)

To ensure the proper implementation and achievement of the objectives of UNDESD, UNESCO, with inputs from other stakeholders, prepared a framework for the International Implementation Scheme (IIS) and shared it worldwide. This yielded more than 2000 contributions to help improve the IIS. The draft scheme was then widely circulated and reviewed by academics and experts in the field before it was submitted in July 2004 to the High-Level Panel on the Decade. It was presented at the 59th Session of the United Nations General Assembly and then at the 171st and 172nd Sessions of the UNESCO Executive Board.[20] From this IIS, each region and country is formulating its own domestic scheme for the implementation of UNDESD. The IIS identifies UNEP as a key partner in defining and promoting the environmental perspectives of UNDESD.

18 See www.unesco.org/education/desd.

19 *Ibid.*

20 See Draft Consolidated International Implementation Scheme for the United Nations Decade of Education for Sustainable Development, 11 August 2005, UNESCO/172/EX/11, unesdoc.unesco.org/images/0014/001403/140372e.pdf .

UNEP and UNDESD

UNEP's mission is to provide leadership and encourage partnerships in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of future generations. This mission and UNEP's motto, Environment and Development, ties in perfectly with the concept of sustainable development. In order to ensure the attainment of this mission and in line with the goals of UNDESD, UNEP has formulated strategies for environmental education which include advocacy and promotion of environment education and training within the bigger picture of sustainable development; professional training for people working in various fields of environment training and practice; development of environmental education learning support materials and promoting the mainstreaming of environment and sustainable development issues in universities; promoting networking and partnerships in communities and regions to advance environment and sustainability education; research into environment and sustainability education and use of information and communication technology; ensuring easy access to environment information through mass media and public education; and raising students as agents of change in the field of environment and development. These strategies guide UNEP's programmes during this decade to ensure that emphasis is placed on the attainment of the goals of UNDESD which are also core to achieving UNEP's mission.[21]

Sustainable Development and Law-making, Negotiation and Diplomacy

Two parallel tools which have been advocated and used by the international community to promote the attainment of sustainable development are law and education. There are over 240 multilateral environmental agreements and many more are being negotiated daily. Unanswered questions remain, however. Whose interest is served by these agreements? How committed are signatories to the implementation of the agreements? One thing that is clear in the face of growing environmental insecurity, poverty and other world challenges is the fact that the myriad of challenges faced by the world community, and particularly developing countries, have yet to be adequately addressed. UNDESD, apart from affirming education as the key to the achievement of sustainable development, is also an indictment of the shortcomings of the kinds of laws, education, politics and policies which have been engaged in during over three decades of activity in addressing the environment and development challenges of the world. The declaration of a

21 See United Nations Environment Programme, UNEP Strategy for Environmental Education and Training – A Strategy for Action Planning for the Decade 2005-2014; United Nations Environment Programme, *UNEP Programmes and Resources for Environmental Education and Training: An Introductory Guide* (UNEP: Nairobi, 2004).

Decade of Education for Sustainable Development infers that the problem is not with education as a tool for achieving sustainable development but rather with the need for a reinforcement of education activities contents and perhaps for a rethink of the delivery methods that will equip people to make the right decisions on the negotiating table and in other spheres of life.

UNDESD is therefore a call and an opportunity to build upon the achievements of the past and address identified gaps in current approaches, values and actions. Negotiations and laws should reflect the varied responsibilities that each nation bears and how these can be equitably shared. With Education for Sustainable Development, people come to the negotiating table with a bigger picture and not just from narrow perspectives. This ensures better negotiations and eventually, better MEAs and laws. With ESD the environment will always win and when the environment wins, people win. The well-being of the environment is the well-being of man. ESD is crucial because human and global security, economic opportunities and the quality of life of humans and other species depend upon the continued availability of a life-sustaining environment.

Implications for Law-making, Negotiation and Diplomacy

As part of efforts to ensure the success of UNDESD, law-makers and diplomats should review existing laws related to the environment to determine if they are consistent with sustainable development. Those that are not should be adapted to encourage sustainable development. ESD should also become a key and essential component in the promulgation and processes of future laws. All negotiations and agreements should integrate ESD values and thinking. UNDESD provides a vital opportunity to improve diplomacy and co-operation amongst nations and regions. As UN Secretary General Kofi Annan has stated, 'our biggest challenge in this new century is to take an idea that sounds abstract – sustainable development – and turn it […] into a daily reality for all the world's people.'[22] The international community has endorsed education for sustainable development as a key tool for transforming this idea, this goal, into a reality. Humanity is suffering. Both the developing and developed world face a myriad of challenges. Work must be carried out collectively to address these issues and this challenge must be met in order to leave a sustainable world for our future generations.

22 United Nation Information Service, 'Secretary General Calls for Break in Political Stalemate over Environmental Issues', 15 March 2001, UN Press Release SG/SM/7739, www.unis.unvienna.org/unis/pressrels/2001/sgsm7739.html.