

PART II

**INTERNATIONAL ENVIRONMENTAL
LAW-MAKING AND REGIMES**

THE TREATY-MAKING PROCESS AND BASIC CONCEPTS OF TREATY LAW¹

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Introduction

International treaties regulate interstate action and prescribe rights and obligations for states parties. The Statute of the International Court of Justice lists first among the sources of international law, which the Court shall apply when deciding disputes submitted to it, international conventions, whether general or particular, establishing rules expressly recognized by the contracting states. Treaties form a most important method of creating public international law. International environmental law as a rapidly developing field of law also relies heavily on the framework of treaties. It is essential for negotiators of multilateral environmental agreements (MEAs) to understand the basis and procedure of this system of interstate relations. With knowledge of how these building blocks of international law function, it is easier for negotiators to concentrate on the important substantial issues to be dealt with in multilateral environmental negotiations.³

¹ This paper is based on a lecture given by the author on 27 August 2004.

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³ Standard studies and commentaries on the subject matter of this paper, which are also commonly used by the author as a source of guidance, include inter alia, Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., Manchester University Press: Manchester, Dover, New Hampshire, 1984); Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000); Paul Reuter, *Introduction to the Law of Treaties* (2nd English ed., Kegan Paul International Ltd.: London, New York, 1995); I. Macleod, I.D. Hendry, and Stephen Hyett, *The External Relations of the European Communities* (Clarendon Press: Oxford, 1996); Dominic McGoldrick, *International Relations Law of the European Union* (Addison Wesley Longman Ltd.: London, New York, 1997). Constitutional procedures for the conclusion of treaties by Finland are recorded in a Treaty handbook published by the Ministry for Foreign Affairs of Finland, *Valtiosopimusopas* (Edita Publishing Oy: Helsinki, 2003).

Elements of the Definition of a Treaty

The Vienna Convention on the Law of Treaties⁴ provides a definition of a treaty in Article 2(1)(a):

“Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Several points need to be clarified here. A treaty is distinguishable due to its international character. Treaties are firmly in the domain of international law and do not include international agreements governed by domestic law, such as those related to the lease and purchase of goods.

A treaty under the definition of the Vienna Convention must be concluded between states. However, state representatives can be quite diverse. Although usually concluded by heads of state or by governments acting on behalf of states, treaties can be expressed to be concluded by ministries or other state agencies. However, although the Vienna Convention does not apply to agreements between states and other subjects of international law, this does not affect their legal force. Such agreements can be legally binding and rules of international law codified in the Vienna Convention may apply to them independently as the provision simply means that they do not fall within the definition of a treaty under the Vienna Convention..

The same is true if an agreement is not in written form. Such an agreement cannot be a treaty under the Vienna Convention but this again does not affect whether it is legally in force or not. There are certain instances in international law where agreements have been made orally. For example, the prime ministers of Finland and Denmark settled the *Great Belt case*⁵ over a telephone conversation.

Treaties are aimed at creating obligations under international law. Intention of states can be derived from and interpreted by examining the terms of the instrument and the particular circumstances at hand at the time of conclusion. Furthermore, the full provisions of a treaty do not have to be contained in one single instrument. An agreement will often be supplemented by annexes and protocols, for example. The exchanges of notes and the double exchanges of notes can also be mentioned here as a treaty in such cases is formed by the combination thereof. Finally, although it can be indicative, the specific designation of an agreement is not decisive as to its status as a treaty. Names of treaties are often based on state practice or on the practice of international organizations.

⁴ Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 8 *International Legal Materials* (1969) 689, www.un.org/law/ilc/texts/treaties.htm.

⁵ *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Order of 10 September 1992 (*Discontinuance*), ICJ Reports (1992) 348, www.icj-cij.org/icjwww/icasess/ifd/ifdframe.htm; Kari Hakapää, *Uusi kansainvälinen oikeus* (Lakimiesliiton kustannus: Helsinki, 1995), at 22.

Special Issues

States may agree on a Memorandum of Understanding (MOU). Although such an instrument is usually meant to be non-legally binding, it brings with it political obligations for the states signatories. It is important to distinguish between a treaty and a MOU through use of terminology specific to each instrument. Where a treaty uses the word “shall” drafters of MOUs should opt for use of “will” instead. Treaties have parties while MOUs have participants. Finally, treaties enter into force while MOUs come into effect. Contrary to many treaties, MOUs should not provide for compulsory, legally binding dispute settlement as it would be contrary to the nature of such an instrument. When negotiating a MOU, express provisions defining its status should be included for the sake of clarity. For example, negotiators could simply state that the agreement is not legally binding or that it does not qualify for registration under Article 102 of the Charter of the United Nations, which deals with the registration of treaties and international agreements with the UN Secretariat.⁶ Sometimes states choose to conclude a MOU instead of a full-fledged treaty as domestic procedures in the case of treaties may require more time than desired. An example of such case is the Memorandum of Understanding for the Global Biodiversity Information Facility (GBIF)⁷.

In negotiating an international agreement, parties may also wish to opt for an exchange of notes or exchange of letters. Using this mechanism is not free of complications, however, as an exchange of notes or of letters may constitute a treaty or MOU and it may happen that signatories hold differing views as to the status thereof. In the former case, one often finds language like “shall constitute an agreement” in the note or letter. In the latter case, when a note or letter merely “records the understanding” it is intended to take the form of a MOU.

While treaties in the meaning of the Vienna Convention can only be concluded between states, other provisions exist for the conclusion of agreements between other subjects of international law. In 1986 a convention on the law of treaties governing these subjects was concluded⁸. Moreover, as per the *Reparations case*,⁹ an international organization has the capacity to conclude treaties if this is provided in its constituent instrument or if it is indispensable for the fulfilment of its purposes. Multilateral treaties, including

⁶ For a more detailed discussion see Aust, *Modern Treaty Law*, *supra* note 3, at 26–46 and at 404; Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff, Brill Academic Publishers: Leiden, 1996)

⁷ Memorandum of Understanding for the Global Biodiversity Information Facility, www.gbif.org/GBIF_org/GBIF_Documents/mou_html.

⁸ Convention on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 21 March 1986, not yet in force, *International Legal Materials* (1986) 543, www.un.org/law/ilc/texts/trbtstat.htm.

⁹ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 1949, ICJ Reports (1949) 174, www.icj-cij.org/icjwww/idecisions/isummaries/iisunsummary490411.htm.

MEAs, have increasingly begun to provide for the possibility for certain international organizations to become parties. Within the European Community (EC), competence in the field of the environment is shared between the EC and its member states. Therefore, often both the EC and the various member states are parties to the same convention. Although the European Union (EU), unlike the EC, does not yet enjoy international legal personality, it is likely that in the future it will acquire this¹⁰ and consequently be able to become a party to an international agreement. For the reasons of shared competences there is a need to allow EC, or in the future EU, to become party to such international agreements, or to insert other kinds of clauses taking into account the competences of EC or EU.

Binding decisions of international organizations form yet another special type of international agreement. They are normally based on special provisions in the treaty establishing the organization or in a bilateral treaty, which provides that the body may take decisions binding upon the parties. As delegates to international organizations may be called upon to make such decisions, it must be ensured that they have the proper powers and competence. The nomenclature of decisions of international organizations may vary from decisions to recommendations and measures. As the binding nature of such decisions is not always self-evident, it is important to use clear terminology. Binding decisions of international organizations must go through the same mechanisms as treaties in relation to their adoption and implementation at the national level.

Conclusion and Entry into Force

Treaties are initiated by a state, a group of states or an international organization. In some cases, the ownership of the initiative behind a treaty may lie with other subjects of international law, such as non-governmental organizations (NGOs). In all of these cases, prior to formal negotiations, it is important to check the feasibility of an initiative through informal discussions.

The preparatory phase of negotiations may be carried out informally. If needed, negotiating directives can be produced laying out the mandate of each actor. For example, in the case of EC, negotiating directives is an established practice. As per Article 2(1)(c) of the Vienna Convention, negotiating powers may be delegated by the competent national authority in a document designating a person or persons to represent the state. These actors may have powers to negotiate, adopt or authenticate the text of a treaty and to express the consent of a state to be bound by a treaty. Article 7 of the Vienna Convention confirms that full powers to act on behalf of a state are assumed for heads of state or government or ministers of foreign affairs. Heads of diplomatic

¹⁰ Treaty establishing a Constitution for Europe, Article I-7, Rome, 29 October 2004, OJ No. C310, 16 December 2004, at 1-474, europa.eu.int/constitution/index_en.htm.

missions and accredited representatives can act without full powers in the adoption of the text of a treaty. For other persons, competence may be delegated through a document produced as evidence naming the person and confirming authorisation to represent the state. Such credentials must be signed by one of the Big Three, i.e. the head of state, the prime minister or the foreign minister.

The rules relating to the adoption and authentication of a treaty are governed by Articles 9 and 10 of the Vienna Convention. With regard to bilateral treaties, this is completed often by initialling the lower corners of each page. Today, bilateral treaties are often finalized through electronic correspondence and formal adoption and authentication takes place only at the time of signature. States may, however, suggest changes before signature takes place.¹¹ A bilateral treaty is concluded at the time of signature of both parties.

With multilateral treaties, decisions are made by each state to adopt and authenticate treaties. In international conferences, decisions are usually adopted by a two-thirds majority of the states present and voting, unless parties decide to apply a different rule. The use of consensus, which should not be confused with unanimity, has today become more common. Furthermore, international organizations may have specific rules concerning the adoption of treaties. Within the United Nations, for example, the authentication of texts takes the form of adoption of resolutions. The Food and Agriculture Organization (FAO), for its part, requires the certification of two copies, by the Chairman of the FAO Conference and by the FAO Director General. At the end of a conference, it is normal for negotiating states to sign the final act, which is an optional step and does not commit the state to sign or ratify the agreement in question. Multilateral treaties are normally deemed to be concluded with signature of the final act or at the date of opening for signature.

After a treaty is concluded, it is normally first signed but this is not compulsory. Treaties adopted by the FAO Conference, for example, are not signed. Some treaties are open for signature only for a specific time while others are open indefinitely. In either case, it is essential that the person signing the agreement enjoys the full powers addressed in Article 7 of the Vienna Convention. Full powers authorising the person to sign an agreement shall state the full name of the person concerned, and a full title of the treaty to be signed. Full powers are given by one of the Big Three. Full powers are furnished with a date and place and although an official seal is usually used, this is not compulsory. Once a treaty is signed, a state is under the obligation to refrain from acts that are contrary to the object and purpose of the treaty.¹²

¹¹ For correction of errors, see Article 79, Vienna Convention, *supra* note 4.

¹² Article 18, Vienna Convention, *ibid.*

The Vienna Convention provides for several alternatives of expressing consent to be bound by a treaty. This can be done by (definitive) signature, exchange of instruments, ratification, acceptance, approval, accession or by any other means.¹³ Resorting to these alternative means does not affect the legal implications of expressing consent. With each treaty, it is important to note any final provisions that define the ways in which to give consent.

Consent to be bound by signature is common in the case of bilateral treaties or of treaties with only a few parties. Giving consent to be bound by signature is normally only possible for treaties that do not require prior parliamentary approval. In rare cases, the procedure of *ad referendum* signature coupled with confirmation by the state may be used. Consent can be given through an exchange of instruments such as the notes or letters discussed above. Again, this is common with bilateral instruments but can also be used for agreements between more than two countries.

Ratification is an international act so named, whereby a state establishes on the international plane its consent to be bound by a treaty. It normally follows signature of a treaty. It is important to be aware of the common misconception that ratification means approval by a national parliament. Although in national legislation this may be the case, as a concept of international law this is not correct. The date of ratification is the date of deposit of the instrument of ratification, not the date of a national decision to ratify. Instruments of ratification must be signed by one of the Big Three.

Consent to a treaty can be given by acceptance or approval, which should be given under similar conditions as with ratification.¹⁴ The use of acceptance and approval was originally developed in order to enable some states to avoid constitutional requirements to obtain parliamentary authority to ratify. This was the case where the parliamentary process was described as ratification. States can also give consent to be bound by a treaty through accession.¹⁵ Accession is not preceded by signature and is used as a means for a state to become a party if it is unable for some reason to sign the treaty. This may be because the time for signature has lapsed or because the treaty is open for signature only for certain states. Today, accession is often possible even before the entry into force of a treaty. The other means of giving consent to be bound by a treaty as provided for in Article 11 of the Vienna Convention are not commonly used, except in cases of giving consent to be bound by amendments to treaties.

¹³ Article 11, Vienna Convention, *ibid.*

¹⁴ Article 14(2), Vienna Convention, *ibid.*

¹⁵ Article 15, Vienna Convention, *ibid.*

The entry into force of treaties is governed by Article 24 of the Vienna Convention.¹⁶ Modern treaties normally include explicit provisions on how they will enter into force and multilateral agreements often require a certain number of states to give their consent to be bound. It is often impractical to provide that a treaty enters into force immediately on the date of consenting to be bound by the treaty. Many states need to take certain implementing measures between giving consent and entry into force. To avoid confusion, established formulas are often used. Exceptions exist, however, as with the Kyoto Protocol¹⁷ which entered into force only after its ratification by at least 55 countries, which accounted for 55 percent of 1990 levels of carbon dioxide emissions in Annex I countries.¹⁸

Amendments and Reservations

Amendments to a treaty may be made by agreement between the parties.¹⁹ Explicit amendment clauses are often included in a treaty. Non-automatic amendment procedures require agreement between the parties and are often subject to constitutional procedures. Automatically binding amendment mechanisms facilitate the entry into force of amendments that may be necessary for the effective functioning of an agreement, but these may be problematic for constitutional reasons. Moreover, opting out and contracting out procedures exist. Review clauses are also common and review is often initially undertaken by the Conference of the Parties of an MEA.

The Vienna Convention makes provision for reservations to treaties.²⁰ Unless they are specifically prohibited, it is assumed that it is possible to make reservations. They can be entered into either at the time of signature and confirmed at the time of expressing consent to be bound by a treaty or at the time of expressing consent to be bound. Interpretative declarations or statements titled otherwise may constitute reservations. Although common in multilateral treaties, many MEAs specifically preclude reservations to guarantee their effectiveness. Furthermore, reservations have to be compatible with the object and purpose of the treaty. Reservations may be withdrawn but may not be reformulated in a manner that would amount to a new or wider reservation.

¹⁶ Article 24, Vienna Convention, *ibid.*

¹⁷ The 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.

¹⁸ Article 25(1), Kyoto Protocol, *ibid.*

¹⁹ Article 39, Vienna Convention, *supra* note 4.

²⁰ Articles 19-23, Vienna Convention, *ibid.*

Conclusion

This presentation has provided a mere overview of the treaty making-process and basic concepts of treaty law. The modern law of treaties is set out in the Vienna Convention. Although not even the Vienna Convention provides a complete or non-controversial collection of the law of treaties it does provide quite a comprehensive handbook and any study of the procedures and effects of treaties should begin there. In negotiating a multilateral environmental agreement, set procedures have to be followed and the rules relating to international treaty-making must be respected. By understanding and taking into consideration the regime applicable to international treaty-making, negotiators can guarantee an effective outcome to multilateral environmental negotiations.

AN INTRODUCTION TO THE SOURCES, PRINCIPLES AND REGIMES OF INTERNATIONAL ENVIRONMENTAL LAW¹

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Introduction

International environmental law is a dynamic construct which is constantly developing. This brief synopsis will look at some of the ways in which international environmental law is born and changes. This study must begin by addressing the different sources of international environmental law in order to understand the various forms in which this law takes shape. In the second part of this introductory overview, particular attention will be given to a number of general principles of international environmental law. The last section of this study will address the creation and growth of international environmental regimes. Developing from the various sources of law, not least the aforementioned principles of international environmental law, regimes are developed as a response to environmental problems in specific issue areas. Regimes bring forward the dynamic nature of law in this area as it emerges from the continuous interplay between principles, rules and institutions.

¹ This paper is based on a lecture given by the author on 24 August 2004. The author would like to thank Marko Berglund of the University of Joensuu for his help in preparing this written contribution to the present Review.

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Sources of International Environmental Law

Several sources of international environmental law exist. Since international environmental law is a particular branch of international law, the theory of its sources mirrors that of the sources of international law generally. Treaties, both bilateral and multilateral, are the source of international law *par excellence*. These are supplemented by binding decisions of international organizations or other intergovernmental bodies established by treaties. In the environmental sphere, some decisions of the conferences or meetings of the Parties (COP or MOP) of multilateral environmental agreements (MEAs) fall into this category. Customary international law has developed from state practice, while international judicial decisions form yet another source of international law. General principles of international law have been developed, often reflecting principles found in national legal systems. Soft law, in the form of non-binding decisions, declarations and resolutions of intergovernmental organizations and meetings, forms another important source of international environmental law. Though such instruments are, strictly speaking, legally non-binding, they are not devoid of normative content and help shape the expectations of the international community.

Treaties

Multilateral environmental treaties, conventions or agreements form the backbone of international environmental law.³ Prior to 1960, some 42 multilateral treaties which today are considered to be part of international environmental law already existed. They mainly related to the management of living natural resources. The first multilateral environmental agreement (MEA) on marine pollution was concluded in 1954. During the 1960s, MEAs began addressing emerging transboundary environmental risks. A few treaties concerning radioactive, marine and freshwater pollution were concluded. As the international community was incited to further normative efforts by the first United Nations environmental conference held in Stockholm in 1972, the 1970s saw the adoption of no less than 75 new MEAs, more than during the entire period before 1970. The development of MEAs clearly accelerated and both the substantive and geographical scope of these agreements expanded. In the 1980s, the growth of international environmental law slowed down somewhat, but 40 additional MEAs were nevertheless concluded during this decade. The scope of multilateral law-making was again extended, this time to start addressing not merely transboundary, but truly global environmental threats. In the 1990s, international environmental law-making again increased in speed as, exploiting the positive impetus generated by the 1992 Rio summit, the international community concluded another 75 MEAs.⁴

³ For a more in-depth discussion of treaty law see the article by Päivi Kaukoranta in the present Review.

⁴ These figures were derived by the author from the data in the ENTRI database of the Center for International Earth Science Information Network (CIESIN) at Columbia University, sedac.ciesin.columbia.edu/entri/treatySearch.jsp.

Several different motives underlie the development of international environmental law. An MEA can be designed for the management and conservation of environmental resources situated beyond the limits of national jurisdiction. This is apparent in treaties, such as fisheries agreements, which deal with the so-called global commons. Prevention and control of transboundary environmental interferences is another catalyst for international environmental law-making. This can lead to agreements to control various forms of cross-border pollution or to ensure co-operative management of environmental resources which are under the jurisdiction of several states, and are therefore sometimes referred to as shared natural resources. International environmental law can also be developed with a view to minimize or otherwise manage the transboundary economic effects, such as trade barriers and distortions of competition, resulting from unilateral, national environmental policies and laws. Finally, MEAs can be aimed at scientific, technological and financial co-operation to enhance the effectiveness of national environmental policies.

Soft Law

Within the overall process of international environmental law-making, soft law has emerged as an important source of law. Although not legally binding, soft law can have a direct influence on the behaviour of both states and non-state actors. In this respect, it can act either as a complement or as a substitute of hard law. Soft law often provides a consensual basis for the subsequent development of legally binding international norms. It then functions as a precursor of hard law and the gradual transformation of soft law into hard law can be seen as a process of juridification of international environmental policy.⁵ In this context, soft law has also been described as ‘the thin end of the normative wedge of international environmental law.’⁶

General Principles

The traditional theory of the sources of international law holds that general principles of law are derived by induction from the national legal systems of the so-called civilized nations.⁷ According to a more modern view, general principles are derived from positive rules of international law. They can be seen as a reflection of a general legal conviction of the international community or as a type of ‘formless interstate consent.’⁸ A synthetic view, bringing together these two approaches, would hold that general principles emerge from both national law, and soft and hard international law.

⁵ W. Lang, ‘Die Verrechtlichung des internationalen Umweltschutzes: vom “soft law” zum “hard law”’, *Archiv des Völkerrechts* 22 (1984) 283.

⁶ G. Handl, ‘Environmental Security and Global Change: The Challenge to International Law’, *Yearbook of International Environmental Law* 1 (1990) 3.

⁷ Article 38(1) of the Statute of the International Court of Justice refers to ‘the general principles of law recognized by civilized nations’ as one of the sources of international law; www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

⁸ See generally G.J.H. van Hoof, *Rethinking the Sources of International Law* (Kluwer: Deventer, 1983).

Principles are generally distinguished from *rules* of law. Rules are precise prescriptions for specific factual situations. They determine specific action by clearly identifiable subjects. Rules have a determinate content and provide a specific behavioural prescription, thus guaranteeing legal certainty. Principles, however, are flexible norms which help orient decision-making. There is a high degree of abstraction and a low measure of determinacy in principles and no automatic legal consequences can be derived from them. A principle can be seen as a kind of rule with indeterminate content, as addressees enjoy a wide margin of discretion in its implementation. The difference between rules and principles, in this view, appears more like a question of degree of determinacy rather than a clear-cut dichotomy.⁹

Principles of International Environmental Law

Several general principles of international environmental law have emerged from both national and international environmental law. In this overview, it is impossible to address all of them. Therefore, a few important examples will be focused on. These include the polluter pays principle and the precautionary principle, which were first developed at the regional level before gaining universal recognition. The principle of common but differentiated responsibilities addresses the differences in capacity to act between developed and developing countries. The participatory principle addresses the legal position of individuals and civil society organisations by affirming procedural rights of access to information, public participation and access to justice in environmental policy.

Polluter Pays Principle

The polluter pays principle (PPP) was developed in the 1970s as an economic principle within the frameworks of the Organization for Economic Co-operation and Development (OECD) and the then European Economic Community (EEC). Its aim was to internalize external costs in order to avoid distortions of trade and competition. It was initially recognized in regional soft law instrument of these two organizations. In 1972, the OECD Guiding Principles Concerning the International Economic Aspects of Environmental Policies¹⁰ first articulated PPP as a principle ‘to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment.’ The principle implies that ‘the polluter should bear the expenses of carrying

⁹ N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, 2002).

¹⁰ Guiding Principles Concerning International Economic Aspects of Environmental Policies, OECD Recommendation, 26 May 1972, sedac.ciesin.org/entri/texts/oecd/OECD-4.01.html.

out the measures decided by public authorities to ensure that the environment is in an acceptable state' and that 'the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.'¹¹ The EEC also advocated PPP in its 1st Environmental Action Programme of 1973, which included in its statement of the general principles of EEC environmental policy, *inter alia*, that 'the cost of preventing and eliminating nuisances must in principle be borne by the polluter.'¹² This principle was further elaborated in a Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, which stated that 'the European Communities at Community level and the Member States in their national legislation on environmental protection must apply the "polluter pays" principle.'¹³

After being developed in soft law instruments, PPP was subsequently recognized in regional hard law in 1986 with the Single European Act which amended the EEC Treaty and inserted in it specific provisions on environmental policy. One of those provisions, Article 130R(2) of the Treaty, listed the general principles of the Community's environmental policy, including PPP. In 1992, PPP was eventually recognized in a universal soft law instrument. Principle 16 of the Rio Declaration provides: 'National authorities *should endeavour* to promote the internalization of environmental costs and the use of economic instruments, *taking into account* the *approach* that the polluter should, *in principle*, bear the cost of pollution.'¹⁴ It is noteworthy that this universal formulation is weaker than that contained in the aforementioned European instruments.

So far, there has been scarce recognition of the principle in universal hard law instruments, as PPP has found its way mostly into the preambles of various MEA. For example, the 1990 IMO Convention on Oil Pollution Preparedness, Response and Co-operation refers to PPP in its preamble as 'a general principle of international environmental law.'¹⁵ One exception to this rather muted recognition is the 1992 OSPAR Convention, a regional MEA for the protection of the marine environment, which

¹¹ Article 4, *ibid.*

¹² Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ 1973 No. C112, 20 December 1973, at 1.

¹³ Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ 1975 No. L194, 25 July 1975, at 1.

¹⁴ Principle 16, 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 (emphasis added).

¹⁵ Preamble, International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, in force 13 May 1995, 30 *International Legal Materials* (1991) 735.

states in a straightforward way that ‘Contracting Parties shall apply the polluter pays principle.’¹⁶ Other instruments call on their parties to be ‘guided by’¹⁷ or to ‘take into account’¹⁸ the polluter pays principle.

Precautionary Principle

The precautionary principle evolved from the earlier principle of preventive action. It addresses problems of environmental decision-making under conditions of scientific uncertainty. Whereas the principle of preventive action was based on the recognition of the need to act to prevent certain harm, the precautionary principle is coupled with the idea of risk avoidance. The mere existence of a risk of harm is considered a sufficient basis for the adoption of preventive measures. While the principle is now widely referred to in national and international law and policy, it remains highly controversial in its interpretation and application. It is disputed, for example, whether the principle actually reverses the burden of proof, i.e. whether it puts actors under an obligation to prove that the activities which they are engaged in do not cause harm. Moreover, there has been much debate over terminology. The United States, for example, has preferred to refer to the precautionary approach, while other countries have opted to speak of the precautionary principle, a term which carries more normative weight. Also, the scope of application of the precautionary principle is unclear as well, as some states, most notably the members of the European Union, claim that it extends to issues of human health and consumer protection, whereas others maintain that it applies only to the prevention of environmental harm.

From national law, the principle made its way in Europe into regional soft law and regional MEAs in the late 1980s. However, the World Charter for Nature, a universal soft law instrument, already contained a precursor of the principle in 1982. It held that ‘where potential adverse effects are not fully understood, the activities should not proceed.’¹⁹ The principle was recognized more explicitly in the 1992 Rio Declaration. Principle 15 states that ‘In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities.’ The status of the principle in universal MEAs is disputed. Some conventions include hortatory provisions encouraging parties to take ‘precautionary measures’²⁰ while others require

¹⁶ Article 2(2)(b), Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, in force 25 March 1998, 32 *International Legal Materials* (1993) 1072, www.ospar.org/eng/html/convention/welcome.html.

¹⁷ Article 2(5), Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, in force 6 October 1996, www.unece.org/env/water/text/text.htm.

¹⁸ Preamble, Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, Kiev, 21 May 2003, not yet in force, www.unece.org/env/civil-liability/welcome.html.

¹⁹ Para. 11, World Charter for Nature, GA Res. 37/7, 28 October 1982, www.un.org/documents/ga/res/37/a37r007.htm.

²⁰ Article 3(3), UNFCCC, *infra* note 40.

their parties to be ‘guided by’²¹ the precautionary principle or even to apply it.²² Other instruments still refer to the precautionary approach in their preamble.²³ In a judicial context, the precautionary principle has been applied by the International Tribunal for the Law of the Sea in recent disputes concerning the management of fish stocks,²⁴ radioactive pollution of the marine environment²⁵ and land reclamation works.²⁶

It should be noted that states are not always consistent in their positions with respect to the precautionary principle. In the latter case, for instance, Malaysia, which in some multilateral negotiations has sided with the US in opposing recognition of precaution as a general principle, as a claimant state whose environmental interests were threatened by land reclamation activities carried out by its neighbour Singapore, argued in its request for provisional measures: ‘The rights of Malaysia . . . relating to the maintenance of the marine and coastal environment . . . are guaranteed by . . . *the precautionary principle, which, under international law, must direct any State party* [to UNCLOS] in the application and implementation of [its] obligations.’²⁷

Principle of Common but Differentiated Responsibilities

The influence of international development law and the New International Economic Order principles of the 1970s and 1980s advocating differential treatment of developing countries in economic matters, led to the advent of the principle of common but differentiated responsibilities in international environmental law in the late 1980s and early 1990s. The principle was first applied *avant la lettre* in an MEA in the late 1980s, namely in the Montreal Protocol’s provisions granting differential treatment to developing country parties with respect to the phase-out of ozone-depleting substances.²⁸ It was later formally recognized in general terms in Principle 7 of the Rio Declaration which states:

²¹ Article 2(5), Transboundary Watercourse Convention, *supra* note 17.

²² Article IV, African Convention on the Conservation of Nature and Natural Resources (Revised Version), Maputo, 11 July 2003, not yet in force, www.africa-union.org/home/Welcome.htm.

²³ Preamble, 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.

²⁴ International Tribunal for the Law of the Sea, Order of 27 August 1999, *Southern Bluefin Tuna Cases (New Zealand v. Japan, Australia v. Japan)*, www.itlos.org/start2_en.html, at para. 80.

²⁵ International Tribunal for the Law of the Sea, Order of 3 December 2001, *The MOX Plant Case (Ireland v. United Kingdom)*, www.itlos.org/start2_en.html, at para. 84.

²⁶ International Tribunal for the Law of the Sea, Order of 8 October 2003, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, www.itlos.org/start2_en.html, at paras. 95-99.

²⁷ International Tribunal for the Law of the Sea, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Request for provisional measures, 8 September 2003, www.itlos.org/start2_en.html, at para. 18 (emphasis added).

²⁸ 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.

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.²⁹

Since the Rio Declaration, the principle has been enshrined in a number of universal MEAs.

The principle of common but differentiated responsibilities is a two-pronged concept. It allocates responsibility differently between countries and at the same time provides for a universal duty of co-operation common to all states. Thus, its substantive content is based on the twin principles of partnership and of differential treatment. There is an economic as well as a temporal dimension to the principle, with reference, respectively, to the different economic capacities of developed and developing states and to their different historical and current contributions to the causes of environmental degradation. States should be held accountable in different measure according to their respective contributions to the creation of global environmental problems and to their respective financial and technological capabilities to address those problems.³⁰

However, the exact status and scope of application of the principle remain contested. Developed countries consider it relevant only to environmental issues that are truly global in nature, whereas developing countries argue that the principle of common but differentiated responsibilities should be applied in all areas of international environmental co-operation. The latter view made some headway at the Johannesburg World Summit on Sustainable Development (WSSD). The WSSD Plan of Implementation contains the following statement:

We commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international co-operation, taking into account the Rio principles, including, inter alia, the *principle of common but differentiated responsibilities* as set out in principle 7 of the Rio Declaration on Environment and Development.³¹

Participatory Principle

The increasing articulation of procedural environmental rights at the national and international level has gradually led to the emergence of what the author would refer to as the participatory principle. Access to information, public participation and access

²⁹ Principle 7, Rio Declaration, *supra* note 14.

³⁰ See generally Ph. Cullet, *Differential Treatment in International Environmental Law* (Ashgate Publishing: Aldershot, 2003).

³¹ Resolution 2, Annex, para. 2, World Summit on Sustainable Development, *Johannesburg Plan of Implementation*, UN Doc. A/CONF.199/20, www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm, (emphasis added).

to justice have long been recognized in many national legal systems. Moreover, such participatory rights have also been recognized in international soft law instruments such as the World Charter for Nature,³² the Rio Declaration³³ and the Malmö Ministerial Declaration.³⁴ The classic statement of the participatory principle at the universal level is to be found in Principle 10 of the Rio Declaration. An increasing number of hard law instruments of a regional nature also contain provisions based on this principle. The first was the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, which unfortunately has not entered into force twenty years after its adoption and signing. The most well-known instrument implementing the participatory principle is a pan-European MEA, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.³⁵ The most recent is the African Union's 2003 African Convention on the Conservation of Nature and Natural Resources.³⁶ The participatory principle essentially calls for environmental information to be made public and disseminated as widely as possible, for public participation to be guaranteed in decision-making on projects, plans and programmes with significant environmental implications, and for access to justice to be granted to the public in environmental matters.

International Environmental Regimes

States draw on these international environmental law principles and other sources of international environmental law in creating international environmental regimes. Such regimes are the response of an international community still composed of a multitude of sovereign states to the challenge of international environmental governance. International environmental governance is one of the many forms of emerging processes of global governance, which can generally be described as a process of interest accommodation and co-operative action to address global issues beyond the control of individual state and non-state actors and to cope with the absence of centralized authority in the international community. It is increasingly involving not only governments but also a variety of other, non-state actors or stakeholders. It includes both formal institutions and informal arrangements.

³² World Charter for Nature, *supra* note 19.

³³ Rio Declaration, *supra* note 14.

³⁴ Malmö Ministerial Declaration, 31 May 2000, www.unep.org/malmo/malmo_ministerial.htm

³⁵ For more detailed analysis, see M. Pallemerts, 'Proceduralizing Environmental Rights: The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context', *Human Rights and the Environment*, Proceedings of a Geneva Environment Network Roundtable (UNEP: Geneva, 2004) 14-22.

³⁶ African Conservation Convention, *supra* note 22.

International regimes are a means of organizing the international community for the collective pursuit of common interests and for the management of interdependence in specific issue areas, such as, inter alia, environmental issues. Regimes tend to establish stable patterns of relationships, permanent lines of communication, interaction and collective decision-making and governance mechanisms among state and non-state actors.

The notion of regimes was first conceptualized by international relations scholars. From an international relations theory perspective, international regimes have been defined as 'a set of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.'³⁷ According to another definition, international regimes are 'a form of collective action by states, based on shared principles, norms, rules and decision-making procedures which constrain the behaviour of individual states in specific issue areas.'³⁸ From a legal-institutionalist perspective, international regimes have been defined as 'a conglomerate of hard law rules, soft law instruments and institutions that are indispensable for the effective working of hard and soft law.'³⁹ The latter definition highlights the dynamic relationship between the various types of norms and institutions, as often the creation and development of international environmental regimes starts with soft law and eventually leads to hard law in the form of an MEA, for example. But even regimes based on a binding treaty framework continue to generate soft law, for example in the form of COP decisions. Regimes are also instrumental in entrenching and operationalizing principles of international environmental law.

An international regime is typically composed of several characteristic elements. Functional roles are attributed to state and non-state actors. Specific roles are associated with specific rights and entitlements and with specific behavioural norms and prescriptions. Social choice mechanisms and institutional frameworks and procedures for collective decision-making about the operation and transformation of the regime norms in question are also an indispensable component of any regime. These conceptualizations can easily be illustrated by reference to a typical global environmental regime.

³⁷ S. Krasner, 'Structural Causes and Regime Consequences', *International Organization* 36 (1982) 1785-205, at 186.

³⁸ M. List and V. Rittberger, 'Regime Theory and International Environmental Management', in A. Hurrell and B. Kingsbury, *The International Politics of the Environment: Actors, Interests and Institutions* (Clarendon Press: Oxford, 1992) 85-109.

³⁹ W. Lang 'Diplomacy and International Environmental Law-Making: Some Observations', *Yearbook of International Environmental Law* 3 (1992) 108-122.

The Climate Change Regime as an Illustration

The climate change regime provides an example of an international regime in the field of the environment. The regime unites several categories of actors. These are the contracting parties to the United Nations Framework Convention on Climate Change (UNFCCC)⁴⁰ which are divided into developed – referred to as Annex I Parties in UNFCCC jargon – and developing country parties, as well as regional economic integration organizations (REIOs) of which in actual fact there is only one in the regime: the European Community. Developed countries are further divided into member countries of the Organization for Economic Co-operation and Development (OECD) – referred to as Annex II Parties in UNFCCC jargon – and countries with economies in transition (CEITs). Other actors included in the climate change regime include intergovernmental organizations (IGOs), non-governmental organizations (NGOs) representing a wide variety of civil society and business interests, the various intergovernmental bodies established under the Convention itself (the COP and its subsidiary bodies), the Global Environment Facility (GEF), which acts as the operating entity of the Convention's financial mechanism, and the UNFCCC Secretariat.

The climate change regimes functions according to agreed principles, laid down in key provisions of the Framework Convention. The ultimate objective of the regime, as set out in Article 2 of the Convention, is to achieve 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.' The guiding principles of the Convention are laid down in Article 3 and include promoting sustainable development⁴¹ and the principle of common but differentiated responsibilities.⁴² Although worded in slightly different terms from those of the Rio Declaration, the precautionary principle also features in the Climate Change Convention.⁴³ Article 3 includes economic principles too, such as the principle that measures taken by the parties 'should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.'⁴⁴

The climate change regime lays down specific rules relating to the differentiated obligations and entitlements of the parties.⁴⁵ Reporting obligations exist for all parties but

⁴⁰ Article 3(3), 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

⁴¹ Article 3(4), *ibid.*

⁴² Article 3(1), *ibid.*

⁴³ Article 3(3), *ibid.*

⁴⁴ Article 3(5), *ibid.*

⁴⁵ For more detailed analysis, see M. Pallemerts, 'Le cadre international et européen des politiques de lutte contre les changements climatiques', *Courrier hebdomadaire du CRISP* (2004) n° 1858-1859.

the different groups of countries need to report with different frequencies and have different data requirements. The national programmes which need to be set up by all parties to address climate change require different levels of detail and purpose. In the Kyoto Protocol, an additional legally binding instrument which was developed pursuant to the Framework Convention and adopted in 1997, quantified emissions limitation and reduction commitments have been undertaken by developed countries only.

Developing country parties enjoy certain preferential rights. Their reporting obligations are conditioned on financial assistance. They are also entitled to benefit from technology transfer and the clean development mechanism (CDM), from which only developing countries are eligible to benefit as host parties, has been established under the Kyoto Protocol in part to further this goal. Financial assistance is provided to meet the incremental costs of certain national measures and special financial assistance is provided to meet the costs of adaptation to climate change of those developing countries, such as small island states, that are most vulnerable to its adverse effects.

Finally, the climate change regime includes elaborate decision-making procedures. Within the COP decisions are made by consensus, as parties did not manage to agree on any other decision-making rule. The specialized subsidiary bodies, the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA) have an advisory role. Other, more specialized regime bodies have been established under the Kyoto Protocol and the Marrakesh Accords, which lay down the detailed rules for the implementation of both the Protocol and certain provisions of the Framework Convention. The climate change regime is subject to continuous further development through decisions of the COP, which can also adopt additional protocols, such as the Kyoto Protocol, and formal amendments to the Convention itself.

Conclusion

This introduction has aimed to shed light on the dynamic and varied nature of the norms of international environmental law. Developed from a variety of sources, international environmental law has drawn on these different sources in the process of establishing complex regimes. In turn, these regimes, which deal with the governance of specific issue areas, play a central role in further developing the sources of international environmental law, from hard law MEAs to soft law decisions and resolutions. They also provide a fertile ground for the articulation and implementation of general principles of international environmental law.

MULTILATERAL ENVIRONMENTAL NEGOTIATION¹

*Brook Boyer*²

Introduction

There are presently over 500 multilateral environmental agreements (MEAs), approximately 60 percent of which date from the period after the 1972 Stockholm Conference on the Human Environment. Nearly 70 percent of MEAs are regional in scope.³ The United Nations Environment Programme (UNEP) and various convention secretariats have responded to the proliferation of MEAs by clustering the agreements into thematic issue-areas, such as regional seas, freshwater basins, the marine environment, biodiversity and species related conventions and the atmosphere. Clustering MEAs along these lines has facilitated identifying possible areas of overlap and synergy across agreements.

Multilateral environmental agreements are the product of complex and often lengthy negotiations. They are carried out in a number of institutional and organizational forums, ranging from ad hoc institutional arrangements, such as intergovernmental negotiating committees, to standing bodies and programmes. Although multilateral environmental negotiations focus for the most part on the development or revision of international legal instruments, including framework conventions and follow-up protocols, amendments and annexes, negotiations also produce a number of impor-

¹ This paper was drafted on the basis of a short presentation given by the author on 30 August 2004. The presentation aimed to provide an overview of some of the characteristics of multilateral environmental negotiation and introduced the participants to a simulation exercise on negotiating an international regime on access to genetic resources and benefit-sharing. The author gratefully acknowledges the assistance of Marko Berglund in drafting an earlier version of this text. The opinions in this paper do not necessarily represent those of UNITAR or the United Nations.

² Senior Programme Officer, United Nations Institute for Training and Research (UNITAR).

³ These figures were reported in *International Environmental Governance*, Report of the Executive Director, Global Ministerial Environment Forum, Governing Council of the United Nations Environment Programme, UNEP/CGSS.VII/2.

tant legally binding decisions in the scope of these agreements, as well as non-legally binding declarations, plans of action, guidelines and even negotiation mandates.

Complexity is by far the most distinct characteristic that captures the process of multilateral environmental negotiation.⁴ This complexity can best be defined by a range of interconnecting features, including the large number of actors from different sectors of society, the varying roles that these actors assume, formal and informal negotiating contexts, the nature of the issues under negotiation, procedural and decision-making aspects, an increasing tendency for overlapping negotiation processes and outcomes, and limited institutional, human resource and financial capacity of developing countries to meet the demands for effective participation in multilateral negotiations. This paper provides an overview of these various elements.

Social Complexity

The number of unlike actors involved in environmental negotiations is perhaps one of the most striking features to observe and forms one of the most striking challenges to manage. Negotiation among 16 monolithic parties, for example, produces 136 possible lines of communication. The resulting social and strategic complexities are, needless to say, immense. Now imagine the number of possible lines of communication among 190 non-monolithic parties. In Kyoto, over 10 000 participants took part in the two-week third session of the United Nations Framework Convention for Climate Change (UNFCCC) Conference of the Parties (COP), including 2211 state delegates, 3844 non-governmental organization (NGO) delegates, 3635 journalists and over 400 staff from the UNFCCC Secretariat.⁵ By comparison, the total participation at the 2002 World Summit on Sustainable Development (WSSD) rose to over 20 000, with some 5000 state delegates and nearly 15 000 NGO representatives.

The high level and diversity of participation is further complicated by the multiple roles that parties assume. Coalitions and groups form and position themselves to influence the outcome of negotiations, by for example driving, blocking, modifying, facilitating, etc. This phenomenon occurs not only among states, but also across different sets of actors, as can be witnessed in many negotiations, from climate change to endangered species. From a practitioner's perspective, identifying which actor(s) or set of actors will play a dominant role in the negotiation, and situating oneself strategically vis-à-vis the actor(s) or set of actors is of utmost importance.

⁴ This observation has been made by numerous scholars and practitioners. For two accounts, see Robert L. Friedheim, *Negotiating the New Ocean Regime*. (University of South Carolina Press: Columbia, 1993) and I. William Zartman (ed.), *International Multilateral Negotiation: Approaches to the Analysis of Complexity* (Jossey-Bass Publications: San Francisco, 1994).

⁵ These figures were communicated by the UNFCCC Secretariat during the COP.

However, multiple interactions and negotiations do not only take place on the inter-governmental level. At the trans-governmental level, this interaction is typified by work carried out by the MEA secretariats, international organisations and international NGOs. At the national level, interaction with country-level constituents takes place as parliaments, ministries and NGOs become increasingly involved in negotiation dynamics.⁶ Conference facilitators play instrumental roles in multilateral negotiations. The input and influence of presiding officers in preparing the consolidated and/or chairman's text, as well as the input of informal leaders, the MEA secretariats, the host government and the reporting services should be recognized.

Organizational Structures, Processes and Procedures

Multilateral environmental negotiations are sometimes conducted under the aegis of a permanent standing body, such as a general or specialized organ or programme of the UN system or another international organization. More frequently, however, environmental negotiations are conducted in the context of ad hoc conferences, convened by either a government or, in most cases, the United Nations or another international organization and preceded by preparatory committees.⁷ In both instances, formal and informal negotiating structures and procedures exist and condition the way in which negotiations move forward.

Formal Structures

Formal negotiating structures/forums closely reflect the characteristics of parliamentary organization and procedure. The supreme government body of a convention, the Conference of the Parties (COP), is the top of this hierarchy and along with the other formal structures forms the tip of the so-called negotiation iceberg. The COP often allocates its work to subsidiary bodies, such as the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI), as is the case in the context of the UNFCCC.⁸ In certain cases, committees have been set up to aid the work of the COP. Within the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES),⁹ the Standing Committee, the

⁶ See the article by Heidi Hautala in the present Review.

⁷ For further discussion, see Winfried Lang, *International Environmental Negotiation* (UNITAR: Geneva, 1997).

⁸ For a thorough overview of the institutional and procedural features of the UNFCCC, see Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Institute of Development Studies: Sussex, 2003) and Joyeeta Gupta, "On Behalf of My Delegation..." (Centre for Sustainable Development in the Americas: Washington, 2000).

⁹ 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.

Animals Committee, the Plants Committee and the Nomenclature Committee have been established to facilitate the work of the convention. Moreover, working groups and expert groups have been created under various MEAs. Within the Convention on Biological Diversity,¹⁰ the Working Group on Access and Benefit-sharing (ABS) was created to address questions raised by Article 8(j) and negotiate an international regime.

Within these formal structures, the rules of procedure of the convention or the negotiating forum or body apply. Following opening and introductory statements, a number of issues related to the organizational, strategic and administrative matters of the meeting are addressed, such as the election of the meeting's presiding officers, adoption of the rules of procedure, the admittance of other organizations and observers, the organization of work and establishment of committees, and reports from subsidiary bodies.

The rules of procedure provide provisions for the taking of decisions in the formal negotiating structures. While decision-making on procedural matters continues to be taken in most instances by a simple majority vote, substantive matters are increasingly decided by consensus, which is defined as the taking of a decision in the absence of voting and in the absence of formal objection.¹¹ In some conferences, such as the CITES COP, procedures provide rules for voting on substantive matters in the event parties fail to reach consensus, although this observation is more an exception than the rule.

Informal Structures

Informal structures and forums constitute the majority of the multilateral negotiation process and include informal working groups, contact groups, non-groups, drafting groups, inter-session meetings, the Vienna Setting and the Friends of the Chair. Informal working groups are generally established by the chairman, the co-chairmen or at the request of an individual delegate, and are designed to allow representatives of different caucuses or individual delegates to meet to discuss specific issues, bridge differences and achieve compromises. The conference rules of procedure do not apply. Agreements are normally submitted in the form of written texts. In certain negotiating forums, such as the UNFCCC, observers may participate in informal working groups given their open-ended nature.¹² Although this increases transparency, observers may be excluded in informal groups when decisions are taken or drafted. A special mention should be made of the Friends of the Chair and the Vienna Setting. Established by the chairman, the Friends of the Chair comprise small groups of delegates

¹⁰ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *ILM* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf.

¹¹ For further discussion see Patrick Széll, 'Decision Making under Multilateral Environmental Agreements', 25(5) *Environmental Policy and Law* (1996), 210- 214, and, in the context of the UNFCCC, see Yamin and Depledge, *International Climate Change Regime*, *supra* note 8.

¹² See discussion in Yamin and Depledge, *International Climate Change Regime*, *supra* note 8.

who assist the chairman in carrying out specific tasks and seeking to find consensus among the various interests. In 1987, the main results of the Montreal Protocol negotiation were achieved in a group named Informal consultations with the chair/president. The Vienna Setting is a term given to an informal negotiating format that was established to accelerate consensus during the final Cartagena Protocol¹³ negotiations on biosafety and consisted of the spokespersons of the major negotiating groups. The Vienna Setting format has been used in other conferences, such as the fourth preparatory committee for the WSSD.

There are several important benefits of informal groups.¹⁴ First, they help restore confidence in negotiation processes when plenary sessions or committees of the whole (COW) are confronted with difficult and contentious issues. Second, informal groups also promote constructive dialogue by providing an informal and flexible negotiation context where warring parties can engage in de-politicized diplomacy, and engage in reframing and other integrative negotiating techniques. Third, the results of informal working groups and other informal negotiating contexts may provide important inputs into plenary processes, including written drafts that can be incorporated into the single negotiating text or the chairman's draft text.

Issues, Information and Time

The agenda items and issues subject to negotiation are complex, multifaceted and almost always crosscut the interests and mandates of multiple institutions and organizations. The negotiation of an international regime on access to genetic resources and benefit-sharing provides a fine illustration of this phenomenon. From an environmental angle, Access and Benefit-sharing (ABS) was one of the three objectives of the Convention on Biological Diversity which was adopted in 1992 and entered into force in 1993.¹⁵ Genetic resources, and Article 8(j) in particular, raise questions on a number of legal instruments, such as the World Trade Organization's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)¹⁶ and the Food and Agriculture Organization's International Treaty on Plant Genetic Resources for Food and Agriculture,¹⁷ and to the on-going work of the World Intellectual Property Organiza-

¹³ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 December 2003, www.biodiv.org/doc/legal/cartagena-protocol-en.pdf.

¹⁴ See discussion in Barry Buzan, 'Negotiating by Consensus: Developments in Technique at the Third United Nations Conference on the Law of the Sea', 75 *American Journal of International Law* (1981), 324-348.

¹⁵ Biodiversity Convention, *supra* note 10.

¹⁶ Agreement on Trade-related Aspects of Intellectual Property Rights, Marrakesh, 15 April 1994, in force 1 January 1995, www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

¹⁷ International Treaty for Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, <ftp://ext-ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf>.

tion's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Coordination among these organizations and regional ABS policies and programmes is essential.

Important questions related to the quantity and quality of information need to be addressed since it is not always clear how much and what type of information exists among the principal actors, and the information that does exist is often asymmetrically distributed among parties. The time at the disposal of negotiators to prepare and complete negotiations is another important issue that merits discussion. Relatively little time pressure was placed on delegates to complete negotiations initiated in the early 1970s and 1980s, as witnessed by the lengthy negotiation process of the Third United Nations Convention on the Law of the Sea (UNCLOS III).¹⁸ With the accelerated loss of natural resources and growing pressure on the environment, this trend has been changing since the early 1990s. In 1990, a UN General Assembly resolution¹⁹ required states to negotiate and complete a framework agreement on climate change for adoption at the 1992 UN Conference on Environment and Development. Given the scientific uncertainties and the complexities of negotiation processes, it is clear that more time is needed to prepare negotiations, to reduce uncertainties, to manage negotiations and to resolve deadlocks. To put it simply, more time is needed to reach an agreement. At the same time, however, there is increased political pressure to conclude negotiations more quickly. This has led to many "rushed" negotiations and has placed considerable stress on current capacity, even among some of the most developed countries.

Challenges Facing Developing Countries

Unfavourable economic conditions and insufficient funding have placed developing countries and particularly the least-developed countries at a negotiating disadvantage.²⁰ The most noteworthy constraints include weak human resources, the lack of scientific and technical knowledge, as well as skills, and weak or absent convention focal points to manage negotiation preparations and the implementation of commitments. Moreover, developing countries face institutional deficiencies with weak or no co-ordination at the national level. Communication failures can be an issue due to the decision-making culture in some countries.

¹⁸ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982), www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm; see observations in Friedheim, *New Ocean Regime*, *supra* note 4.

¹⁹ Protection of global climate for present and future generations of mankind, GA Res. 45/212, 21 December 1990.

²⁰ For detailed discussions on the constraints of developing countries see Sheila Page, *Developing Countries: Victims or Participants* (Overseas Development Institute: London, 2003).

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GLOBAL AND REGIONAL ENVIRONMENTAL ISSUES AND DYNAMICS¹

Frits Schlingemann²

Global and regional dynamics of environmental law and conventions

The first part of this article addresses global and regional dynamics of international environmental law. The second part presents some of the dynamics of global and regional institutions. The last part of the article provides a practical example of the role which regional institutions play in establishing regional environmental agreements.

Several trends relating to international environmental law and conventions can be distinguished. First, there are a few areas where no global convention seems possible. In 1982, when deciding on the agenda for the first Montevideo Programme for the Development and Periodic Review of Environmental Law, countries could not agree on the proposal for a global legal instrument in the field of water.³ Elsewhere, the United Nations Conference on Environment and Development could not agree on a forest convention and negotiations in this area culminated only in non-legally binding principles.⁴

Second, in certain areas of international environmental law, global conventions or commitments have triggered regional and subregional agreements and commitments.

¹ This paper is based on lectures given by the author on 23 and 24 August 2004.

² Director, Regional Office for Europe, United Nations Environment Programme.

³ It should be noted that under the auspices of the International Law Commission, a Convention in the field of water was agreed in 1997. See Convention on the Law of the Non-navigational Uses of International Watercourse, New York, 21 May 1997, not yet in force, 36 *International Legal Materials* (1997) 700, www.un.org/law/ilc/texts/nonnav.htm.

⁴ 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.

Such global initiatives include the Convention on Biological Diversity⁵ and the World Summit on Sustainable Development (WSSD) targets to halt or reduce biodiversity loss by 2010. These have translated into the Kyiv Resolution on Biodiversity,⁶ specifying seven sub-targets for European countries. The Kyoto Protocol⁷ has also translated into an EU-wide emissions reduction commitment with consequent country specific reduction targets.

Third, in some areas regional initiatives and commitments have triggered global conventions and commitments or have at least inspired efforts in that direction. The United Nations Environment Programme (UNEP) – the global environment organization – has suggested to its Governing Council (GC) the globalization of the Aarhus Convention,⁸ negotiated under the aegis of the United Nations Economic Commission for Europe (UNECE). However, the GC has up until now only been able to agree to undertake efforts towards building capacity for the improved implementation of Principle 10 of the Rio Declaration,⁹ which deals with public participation in environmental issues. Several other UNECE Conventions and Protocols such as the Convention on Long-range Transboundary Air Pollution¹⁰ or the Convention on Environmental Impact in a Transboundary Context¹¹ have triggered and/or helped the development and adoption of global instruments and guidelines.

Fourth, certain areas, which are subject to regional or subregional agreements, were never envisaged as global commitments until specific events triggered such a globalization. The 2002 International Year of the Mountains, culminating in a global summit in Bishkek, Kyrgistan, translated into the global Bishkek Mountain Platform¹² - a political

⁵ 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.

⁶ Kyiv Resolution on Biodiversity, Kiev, 23 May 2003, www.unece.org/env/proceedings/files.pdf/Item%209/9Documents/ece.cep.108.e.pdf.

⁷ The 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.

⁸ 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.

⁹ 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.

¹⁰ 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.

¹¹ Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802, www.unece.org/env/eia/eia.htm.

¹² Bishkek Mountain Platform, Bishkek, 1 November 2002, <http://mountains.unep.ch/mtn/platformtext.html#top>.

declaration. This was followed by the creation of the International Mountain Partnership, launched at the WSSD, and in the adoption in 2004, of the Cusco Framework for Action, a global programme for the protection and sustainable development of mountain regions.¹³ This in turn may lead to additional regional and subregional mountain conventions such as the Alpine Convention¹⁴ or the Carpathian Convention.¹⁵ In general, many subregional and regional agreements contain and have borrowed or included pertinent provisions of global guidelines and conventions, and vice versa.

Global and regional dynamics of international environmental institutions

Global and regional dynamics within international environmental governance can also be distinguished. To ensure its global interests in the various regions of the world, the UNEP started supporting and financing staff in the United Nations' Regional Economic Commissions. In Europe, for example, this took place within UNECE.

As UNEP grew larger and solicited more attention to its work in the regions, it established its own regional offices. The offices were supposed to be UNEP's eyes and ears in the region, with a remit to ensure integration of regional priorities in UNEP's global programme and to assist Headquarters in delivering UNEP's global programme in the regions. UNEP's Regional Offices translate UNEP's programme in the regions, trying to co-operate with and complement the work of UNEP Headquarters and of partners in the region, in particular the UN Regional Economic Commissions.

In Europe, UNEP's Regional Office for Europe (UNEP/ROE) ensured, inter alia, the integration of global environmental concerns and/or attention thereto in UNECE's work on environment and security, for example. UNEP/ROE also participates in and co-ordinates the sections on global environmental agreements in the Environmental Performance Reviews conducted by UNECE, and has joined hands with UNECE in capacity-building and training work related to the implementation of regional and global MEAs.

Despite close collaboration with UNECE, some disadvantages remain for UNEP for being a separate entity. Where UNECE has its Committee for Environmental Policy,

¹³ Cusco Framework for Action for the Mountain Partnership, 29 October 2004, www.mountainpartnership.org/news/stories/2005/cusco_framework.html.

¹⁴ Convention Concerning the Protection of the Alps, Salzburg, 7 November 1991, in force 6 March 1995, 31 *International Legal Materials* (1992) 767, www.ecolex.org/ecolex/en/treaties/treaties_fulltext.php?docnr=3047&language=en.

¹⁵ Framework Convention on the Protection and Sustainable Development of the Carpathians, Kiev, 22 May 2003, not yet in force, www.unep.ch/roe/assets/programme_activities/environmental_law/04_emi/documents/final_carpathian_convention.pdf.

UNEP has no such regional governing body. Where UNECE is the principal body for discussions on Europe's economic development in a pan-European context, UNEP lacks integrated access to data and discussions on these matters. Furthermore, there will continue to be a certain competition for donor support between UNECE and UNEP.

Against this background, with the gradually increasing powers and environmental scope and coverage of the EU, and in light of ongoing financial constraints, the idea of opting for a closer institutional co-operative arrangement and even merger of UNEP/ROE and its work with the Environment and Human Settlements Department of UNECE, becomes again welcome food for thought. Elsewhere, UNEP/ROE has also played a role in developing specific regional agreements and regimes. This is illustrated by the work of UNEP/ROE with the Caspian Sea Framework Convention.

Framework Convention for the Protection of the Marine Environment of the Caspian Sea

The Caspian Sea, surrounded by the five coastal countries of Azerbaijan, the Islamic Republic of Iran, Kazakhstan, the Russian Federation and Turkmenistan, is the largest land-locked body of water on earth. Situated in a natural depression, below mean sea level, it receives water from the Volga, the Ural and the Kura rivers and numerous other freshwater inputs, but has no outlet to the world's oceans. The Volga River, the largest in Europe, is the source of 80 percent of the Caspian's freshwater inflow.

The isolation of the Caspian basin together with its climatic and salinity gradients has created a unique ecological system with some 400 species endemic to the Caspian waters. Today, much of the Caspian biota is threatened by over-exploitation, habitat destruction and pollution. Recognizing the seriousness of the growing environmental problems in the Caspian Sea region, the Caspian states approached the international community for assistance. As one of the responses, a joint mission by the United Nations Development Programme (UNDP), the World Bank and UNEP visited the region in April 1995.

The mission reconfirmed the severity of the environmental problems of the region, the social and economic impacts of these problems, and the commitment of the Caspian Sea coastal countries to co-operate, with the assistance of the international community, in protecting the environment of the Caspian region. The report of the mission, cleared by the governments of the Caspian Sea coastal states, recommended the development and implementation of a Caspian Environment Programme (CEP)¹⁶ as a comprehensive long-term strategy for the protection and management of the Caspian environment. It also stressed the need for strengthening relevant national and regional

¹⁶ See www.caspianenvironment.org.

institutional, legal and regulatory frameworks, and encouraged the development of a framework convention with related sectoral protocols. CEP was agreed in 1995 and officially launched in 1998. To date, the main financial support for the programme has been provided by the Global Environment Facility (GEF) with UNDP, UNEP and the World Bank as implementing agencies, the EU, and the private sector.

CEP has been successful in engaging the five littoral states and the international partners in a constructive dialogue towards improved environmental management of the Caspian Sea. One important output is the formulation of the Transboundary Diagnostic Analysis (TDA) and the Strategic Action Programme (SAP) identifying a number of pending environmental problems requiring immediate action. As most of them are of a transboundary nature, they cannot be overcome unilaterally but rather require an appropriate co-operation regime among all Caspian littoral states.

The most significant outcome to date of CEP has been the adoption of the Caspian Framework Convention in early November 2003. The signing of the Framework Convention for the Protection of the Marine Environment of the Caspian Sea¹⁷ by the five Caspian littoral states marked the culmination of an eight year negotiation process driven under the auspices of UNEP, within the framework of CEP. Several meetings were organized in Moscow with the support of the Center of International Projects, and two of the total eight meetings were organized under the umbrella of the project on Integrated Environmental Management in the Volga/Caspian region.

As the first agreement signed by all five Caspian littoral states, the Caspian Framework Convention will serve as an overarching legal instrument laying down the general requirements and the institutional mechanism for environmental protection in the region. It is based on a number of underlying principles including the precautionary principle,¹⁸ the polluter pays principle¹⁹ and the principle of access to and exchange of information.²⁰ The two major areas of concern are prevention, reduction and control of pollution;²¹ and protection, preservation and restoration of the marine environment.²² The Convention also includes provisions on Environmental Impact Assessment²³ as well as general obligations on environmental monitoring²⁴ and research and development.²⁵

¹⁷ Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Teheran, 4 November 2003, not yet in force, www.caspianenvironment.org/report_technical.htm#frameconv.

¹⁸ Article 5(a), *ibid.*

¹⁹ Article 5(b), *ibid.*

²⁰ Article 5(c), *ibid.*

²¹ Part III, *ibid.*

²² Part IV, *ibid.*

²³ Article 17, *ibid.*

²⁴ Article 19, *ibid.*

²⁵ Article 20, *ibid.*

By signing the Caspian Framework Convention the Caspian Governments signalled their readiness to sign up to concrete environmental action, encouraging the international community to provide further financial and technical assistance to the region. Shortly after the signing ceremony, the GEF Secretariat approved a second phase of support to CEP to the total amount of \$6 million. The GEF project, Towards a Convention and Action Programme for the Protection of the Caspian Sea Environment, will focus on the preliminary implementation of CEP's SAP in the priority areas of Biodiversity, Invasive Species and Persistent Toxic Substances, and the continuance of the Convention process. The EU has also extended its support to CEP giving particular attention to fisheries issues and coastal zone management. Further EU support to the Convention process is under consideration.

Within the framework of the GEF project, and further to the request of the Caspian Governments, UNEP/ROE will continue servicing the Convention process pending the Convention's entry into force. The signing of the Caspian Framework Convention is only the beginning of the process of tackling environmental problems in the Caspian region and key areas of concern will need to be regulated in separate protocols. Further assistance by UNEP will therefore focus on the development of protocols addressing priority areas. The Convention itself envisages seven protocols linked to the general provisions of the Convention's articles. Four of these will, respectively, be related to the prevention, reduction and control of pollution: from land-based sources;²⁶ from seabed activities;²⁷ from vessels;²⁸ and caused by dumping.²⁹ The other three protocols will, respectively, relate to protection, preservation, restoration and rational use of marine living resources;³⁰ sea-level fluctuations;³¹ and environmental impact assessment.³²

A draft work plan for the further development and implementation of the Caspian Framework Convention has been elaborated by UNEP and was discussed at the first Meeting of the Representatives of the States-Signatories to the Convention, held in Teheran on 19 and 20 July 2004. The meeting recommended that priority will be given to the development of protocols on biodiversity, pollution from land-based sources and activities, and environmental impact assessment. The meeting also suggested that the Protocol concerning Regional Co-operation in Cases of Emergency,³³ which had

²⁶ Article 7, *ibid.*

²⁷ Article 8, *ibid.*

²⁸ Article 9, *ibid.*

²⁹ Article 10, *ibid.*

³⁰ Article 14, *ibid.*

³¹ Article 16, *ibid.*

³² Article 17, *ibid.*

³³ Draft Protocol Concerning Regional Co-operation in Combating Oil Pollution in Cases of Emergency, *Report on the Third Regional Workshop on the Development of a Draft Caspian Sea Plan on Regional Co-operation in cases of major oil spills*, Annex 3, www.caspianenvironment.org/report_project.htm.

already been drafted, be circulated to the governments of the Caspian Sea littoral states with the recommendation that the countries prepare for signing of the Protocol at the first meeting of the Conference of Parties (COP).

The draft work plan also indicated that UNEP's assistance will include support to raise awareness and to facilitate implementation of relevant multilateral environmental agreements in the Caspian region. UNEP will also have a role in promoting the use of economic instruments to improve the national and regional environmental management regimes.

Soon, preparations will start for the first meeting of the COP in the hope and expectation that all five Caspian littoral states will be able to ratify the Convention in the foreseeable future. These preparations will include the development of Rules of Procedure and Financial Rules for the COP, and will explore options for the arrangements for the Permanent Secretariat of the Convention.

Conclusion

The aim of this article was to introduce some of the global and regional dynamics within international environmental conventions and institutions. It outlined some of the current trends in these areas. By providing a practical example of the work and influence of regional environmental institutions, it aimed to give a clearer picture of these actors and roles.

INTERNATIONAL LEGAL REGIMES FOR THE ENVIRONMENTALLY SOUND MANAGEMENT OF HAZARDOUS CHEMICALS AND WASTE

A Practitioner's Perspective¹

*Sachiko Kuwabara-Yamamoto*²

Introduction

International concern over pollutants transported across national boundaries has been a major force behind the remarkable development of international environmental law which we have borne witness to in the last century. A large number of multilateral environmental agreements (MEAs) thus concluded include the 1979 UNECE Convention on Long-range Transboundary Air Pollution and its Protocols,³ the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,⁴ the 1973 International Convention for the Prevention of Pollution of Ships⁵

¹ This paper is based on a lecture given by the author on 23 August 2004.

² Executive-Secretary of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

³ 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. The texts of the eight protocols to the CLRTAP are available at www.unece.org/env/lrtap/status/lrtap_s.htm.

⁴ 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. The Convention has been amended five times and supplemented by the Protocol to Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, 7 November 1996, not yet in force, 36 *International Legal Materials* (1997) 7, www.londonconvention.org/main.htm.

⁵ 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.

and its 1978 Protocol,⁶ the 1994 IAEA Convention on Nuclear Safety,⁷ the 1985 Vienna Convention on the Protection of the Ozone Layer and its Protocol,⁸ the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,⁹ the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,¹⁰ and the 2001 Stockholm Convention on Persistent Organic Pollutants.¹¹

In the 21st century, governments, particularly those from developing countries, are faced with a new challenge in meeting their obligations under the numerous MEAs, which are increasingly complex and inter-linked or in some cases even incoherent. Thus, coordinated implementation of MEAs has become one of the main items on the agenda of the Open-ended Intergovernmental Group of Ministers or their Representatives on International Environmental Governance established pursuant to United Nations Environment Programme (UNEP) Governing Council Decision 21/21 in February 2001.¹² In its final report, it was recommended, inter alia, that a pilot programmatic clustering of MEAs in the area of hazardous chemicals and wastes, with a view to enhancing coherence and effectiveness in their implementation, be established. UNEP Governing Council at its seventh special session in Cartagena, Colombia subsequently endorsed the recommendation in February 2002.¹³ The Governing Council also adopted the Strategic Approach to International Chemical Management (SAICM).¹⁴ The World Summit on Sustainable Development (WSSD) held in Johannesburg later that year

⁶ 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) 546

⁷ Convention on Nuclear Safety, Vienna, 17 June 1994, in force 24 October 1996, 33 *International Legal Materials* (1994) 1518, www.iaea.org/Publications/Documents/Infcircs/Others/inf449.shtml.

⁸ The 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. The Convention was supplemented by the 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, and has been amended four times.

⁹ 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.

¹⁰ 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.

¹¹ Stockholm Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, www.pops.int/.

¹² UNEP Governing Council Decision 21/21: International Environmental Governance, 9 February 2001, www.unep.org/gc/gc21/.

¹³ *Report of the GC on the Work of Its Seventh Special Session*, UNEP/GCSS.VII/6, www.unep.org/gc/GCSS-VII/.

¹⁴ UNEP Governing Council Decision SS.VII/3: Strategic Approach to International Chemicals Management, *ibid.*

endorsed the Governing Council's recommendation and further agreed to the strengthening of co-ordination and co-operation between the chemicals and hazardous waste regimes, calling for the development of SAICM by 2005.

Evolution of the Hazardous Chemicals and Waste Regimes

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

The Basel Convention was adopted in 1989 and entered into force on 5 May 1992.¹⁵ As of 7 February 2005, there were 163 parties to the Convention. Its main goal is to protect human health and the environment from the adverse effects of hazardous wastes and other wastes. Wastes subject to the application of the Convention are "hazardous wastes", which are mostly by-products of a broad spectrum of industrial and manufacturing processes, and "other wastes" collected from households and fly ash from incineration.¹⁶ The primary high-volume generators of industrial hazardous wastes include the chemical, petroleum, metals, wood treatment, paper, leather, textiles and transportation industry. Household wastes may contain hazardous components such as lead batteries, household acids and solvents, pesticide residues, plastics, medical and clinical wastes and paint sludge. Electronic wastes including mobile phones and computing equipment, and electrical wastes such as television sets are also examples of industrial hazardous wastes often found mixed with household wastes or municipal wastes. The Convention also covers wastes defined as hazardous under the national legislation of a state party. The two categories of hazardous wastes not covered under the Convention are radioactive wastes and wastes generated from normal operation of ships which are covered by instruments which come under the auspices IAEA and IMO.

The objectives of the Convention are two-fold: the control of the transboundary movements of hazardous wastes and other wastes, and environmentally sound management (ESM) of hazardous wastes and other wastes generated or located in the territory of the state parties. ESM also includes the disposal of such wastes. The regulatory system controlling the transboundary movements of hazardous wastes and other wastes under the Basel Convention is built on a procedure of notification based on prior informed consent (PIC).¹⁷ The exporting state must notify, or require the generator or exporter of the waste to notify, through its national competent authority, the competent author-

¹⁵ Basel Convention, *supra* note 9. Since the adoption of the Basel Convention, additional instruments have been developed. These include the 1995 Ban Amendment adopted by COP 3 and the 1999 Protocol on Liability and Compensation adopted by COP 5. Neither instrument is yet in force.

¹⁶ Annex I and II, Basel Convention *supra* note 9.

¹⁷ Article 6, *ibid.*

ities of the importing and transit states of any proposed transboundary movements of hazardous wastes or other wastes, and provide any other relevant information including the contract between the exporter and the disposer. The exporting state has the obligation not to permit the said export before it has received written consent from the import and transit states. Other obligations include the creation of a movement document and a duty to re-import if transport and treatment of the exported wastes cannot be completed in accordance with the contract or in the case of illegal traffic.¹⁸

The ESM obligations prescribed under the Basel Convention aim to reduce the generation of hazardous wastes and other wastes at source.¹⁹ It also aims to keep the transboundary movements of hazardous wastes and other wastes to a minimum, thus consistent with their ESM.²⁰ These obligations call for the treatment and disposal of hazardous wastes to take place as close as possible to the generation source. The ESM obligations are thus linked to life-cycle management of hazardous materials.

The Open-ended Working Group (OEWG) established under the Convention is mandated to review and revise, as appropriate, the technical annexes to the Convention, including the list of wastes defined as hazardous under the control of the Convention.²¹ Its regional centres established in this regard in selected developing countries worldwide support the implementation of the Convention and technical assistance to parties.²² There are currently thirteen Basel Convention Regional Centres, with Iran due to host the fourteenth centre in the near future. The core functions of the centres are to provide training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation.

On compliance measures, the Conference of the Parties (COP) at its sixth meeting in 2002 established a Committee for Administering the Mechanism for Promoting the Implementation and Compliance.²³ The committee consisting of 15 regionally elected members is mandated to review general issues as well as cases submitted to the committee by parties and in certain cases by the secretariat, relating to the implementation of the Convention. The Convention does not provide for a financial mechanism. Activities relating to its implementation, such as capacity-building, are financed through voluntary contribution from interested states and institutions.

¹⁸ Article 6-9, *ibid.*

¹⁹ Article 2(2)(a), *ibid.*

²⁰ Article 4, *ibid.*

²¹ Annexes I,II, VIII and IX, *ibid.*

²² Article 14(a), *ibid.*

²³ Decision VI/12 of the Sixth Meeting of the Conference of the Parties to the Basel Convention.

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was adopted in 1998 and entered into force on 24 February 2004. As of 7 February 2005, there were 82 parties to the Convention. The main goals of the Convention are to promote shared responsibility and co-operative efforts among parties in the international trade of certain hazardous chemicals, in order to protect human health and the environment from potential harm; and to contribute to their environmentally sound use by facilitating information exchange about their characteristics, through a national decision-making process on their import and export which is then disseminated to the parties.²⁴

Hazardous chemicals subject to the application of the Convention are pesticides and industrial chemicals that are banned or severely restricted for health or environmental reasons by parties to the Convention.²⁵ Certain groups of chemicals - such as narcotic drugs, radioactive materials, pharmaceuticals, food and food additives, wastes or, chemical weapons are excluded from the scope of application of the Convention.

Under the Convention, an international control system is established whereby the export of certain chemicals is permitted only with the prior informed consent (PIC) of the importing state,²⁶ or on notification by the exporting state party. Each party must ensure that a chemical listed in Annex III is not exported from its territory to any importing party without explicit consent to the importing party. When a chemical that is banned or severely restricted in a state party is exported from its territory, the exporting state party must provide notification to the importing state party, prior to the first export, and thereafter, before the first export of the calendar year.

The Rotterdam Convention envisages a nomination procedure whereby parties may seek to include banned or severely restricted chemicals within the scope of the Convention. The procedure for doing so provides that a state party that bans or severely restricts a chemical or pesticide must make such a nomination after which notification of the chemical must be received from at least two of the geographical regions specified under the Convention. Severely hazardous pesticide formulations that present a hazard under the conditions of use in developing countries, or countries with economies in transition may also be nominated. The Chemical Review Committee of the Convention will review the information and recommend to the Conference of the Parties (COP) on whether the chemical in question should be subject to the PIC procedure.²⁷

²⁴ Article 1, Rotterdam Convention, *supra* note 10.

²⁵ Annex III, *ibid.*

²⁶ Article 11, *ibid.*

²⁷ Article 6, *ibid.*

With regard to measures to promote compliance with the Convention, the COP is charged with the task of developing procedures and institutional mechanisms for non-compliance.²⁸ The Convention does not provide for a special financial mechanism. Members must co-operate in promoting technical assistance for the development of infrastructure. Parties with more advanced programmes for regulating chemicals should provide technical assistance, such as training, to other member countries in developing their infrastructure and capacity to manage chemicals.²⁹

Stockholm Convention on Persistent Organic Pollutants

The Stockholm Convention on Persistent Organic Pollutants was adopted in 2001 and entered into force on 17 May 2004. As of 7 February 2005, there were 94 parties to the Convention. The main goal of the Convention is to protect human health and the environment from persistent organic pollutants (POPs). Its main objective is the elimination or the continuous minimization of releases of POPs. The Convention covers 12 POPs: eight pesticides, two industrial chemicals and two unintentionally produced by-products.

Under the Convention, parties have the obligation to introduce measures to eliminate or reduce releases from intentional production and use,³⁰ and from unintentional production³¹ of such pollutants. Such measures include the elimination of the production and the use of chemicals listed in Annex A and the restriction of the production and use of chemicals listed in Annex B, as well as to regulate, with the aim of preventing the production and use of new pesticides or industrial chemicals that exhibit characteristics of POPs. Production and use of eight pesticide POPs, not including DDT, was banned upon the Convention's entry into force. DDT production and use is allowed for some countries that do not have safe, locally situated, affordable alternatives in place to fight vector-borne diseases; PCBs in electrical equipment will have to be phased out by 2025.³²

Parties are also under the obligation to develop strategies for the identification and management of stockpiles in an environmentally sound manner, to dispose of wastes in such a way that their POPs content is destroyed or irreversibly transformed so that they do not exhibit the characteristics of POPs, and to co-operate with the Basel Convention to determine methods that amount to environmentally sound disposal.³³

²⁸ Article 17, *ibid.*

²⁹ Article 16, *ibid.*

³⁰ Article 3, Stockholm Convention, *supra* note 11.

³¹ Article 5, *ibid.*

³² Annex A, Part II, *ibid.*

³³ Article 6, *ibid.*

The trade of chemicals in both annexes is allowed only for the environmentally sound disposal of POPs, to members with exemptions under the Convention. Export to non-members is allowed only with the provision of annual certifications of environmental and health commitments and compliance with the waste disposal provisions of the Convention.³⁴ The Convention specifies exemptions to its control measures for certain purposes such as laboratory research or when they occur as unintentional trace contaminants in products. The secretariat is to maintain a register of parties that have specific exemptions to Annex A and B and the COP will decide the review process by which parties can seek exemptions.

National Implementation Plans (NIPs), which will identify, characterize and address the release of POPs, must be developed within two years of the entry into force of the Convention. Parties should promote the best available techniques (BATs) and environmental practices for existing and new sources.³⁵ Listings of chemicals in Annexes A, B and C³⁶ are decided upon on the basis of a party's submission and in accordance with the risk profile and evaluation prepared by the Review Committee. The COP may decide to list new chemicals and specify its relative control according to the three annexes. Lack of full scientific certainty does not prevent the proposal from proceeding, on grounds of the precautionary principle. The Convention provides for information exchange,³⁷ public information, awareness and education,³⁸ research and development, and monitoring.³⁹

With regard to technical assistance, industrialized countries are required to provide technical assistance for capacity-building activities relating to the implementation of obligations under the Convention. Parties will make the appropriate arrangements to provide technical assistance and promote technology transfer to developing country parties or to those with economies in transition.⁴⁰ Concerning measures on non-compliance the COP will, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Convention and the appropriate response for such instances of non-compliance.⁴¹ Under the Convention, industrialized countries are to provide new and additional financial resources to enable developing country parties and parties with economies in transition to meet the full incremental costs of implementing measures to fulfil

³⁴ Article 4, *ibid.*

³⁵ Article 7, *ibid.*

³⁶ Article 8, *ibid.*

³⁷ Article 9, *ibid.*

³⁸ Article 10, *ibid.*

³⁹ Article 11, *ibid.*

⁴⁰ Article 12, *ibid.*

⁴¹ Article 17, *ibid.*

their obligations under the Convention. It also defines a mechanism for the provision of adequate and sustainable financial resources to such countries. The Global Environment Facility is acting as interim financial mechanism of the Convention.⁴² With regard to new chemicals, the Stockholm Convention requires parties with regulatory and assessment schemes to prevent the production and use of new pesticides or new industrial chemicals that exhibit characteristics of POPs covered under the Convention.

Synergies

The Stockholm, Rotterdam and Basel Conventions are interlinked in a number of ways. The common unifying thread is POPs. Together, they promote life-cycle management of hazardous chemicals and wastes. The scope and coverage of the three conventions are inextricably linked, and contain certain bridging elements. Co-ordinated implementation is therefore essential for the effective functioning of these conventions.

Coverage and scope

The Basel Convention covers all hazardous wastes, whether chemical wastes or other wastes, which are explosive, flammable, poisonous, infectious, corrosive, toxic or ecotoxic. The Rotterdam Convention covers twenty-two pesticides and certain formulations of other pesticides, as well as five industrial chemicals. The Stockholm Convention covers eight pesticides, two industrial chemicals and two unintentionally produced by-products. Between the three conventions, most POPs are covered. The Stockholm Convention alone addresses the issue of replacement with alternative substances. The Basel, Rotterdam and Stockholm Conventions all deal with evaluating and regulating new and existing chemicals or wastes for inclusion.

The Basel and Stockholm Conventions regulate waste management and environmental releases. Under the Stockholm Convention, parties must develop strategies to identify wastes created by POPs, to manage them in an environmentally sound manner and to take measures to dispose of wastes in such a way that the content of POPs is destroyed or irreversibly transformed.⁴³ Parties must develop an action plan to prevent the creation of POPs in waste management practices, placing a particular focus on source categories in Annex C. Parties must apply Best Available Techniques (BAT) and Best Environmental Practices (BEP) to minimize generation and later release of unintentionally produced POPs (PCB, PCDD/F). Waste management must be included in the activities implementing the NIPs. The Basel Convention requires each party to minimize the generation of waste.⁴⁴ Further, it calls for parties to ensure availability of

⁴² Article 14, *ibid.*

⁴³ Article 6, *ibid.*

⁴⁴ Article 4(2), Basel Convention, *supra* note 9.

disposal facilities, to the extent possible, within their own territory. The OEWG has developed guidelines on the ESM of POPs as wastes. These include general guidelines for POPs as waste and a specific guideline on PCB, HCB, PCDD/F and pesticides.

With regard to environmental releases, the principal articles of the Stockholm Convention aim to reduce or eliminate releases of POPs from intentional production and use, unintentional production and stockpiles and wastes. The Basel Convention for its part aims at the prevention of releases⁴⁵ and provides technical guidelines on wastes created by POPs.

All three conventions deal with import and export controls as well as hazard communication through a PIC procedure. The Stockholm Convention allows import and export for environmentally sound disposal or for an exempted use or accepted purpose that is permitted for the importing party.⁴⁶ The Rotterdam Convention establishes a compulsory PIC procedure and prevents unwanted imports and avoids future stockpiles. For its part, the Basel Convention sets strict requirements for the transboundary movement of hazardous waste and other wastes, based on a compulsory PIC procedure.⁴⁷ It too prevents unwanted imports and avoids future stockpiles and controls illegal trade. All three conventions require parties to communicate hazard information to their respective Secretariats, parties as well as the public.⁴⁸ The Stockholm Convention requires information exchange and research on alternatives to POPs.⁴⁹ An example of this is the development of alternatives for DDT.

On going co-operation and co-ordination

The Basel, Stockholm and Rotterdam Conventions are working together to promote co-ordinated training and awareness-raising activities for their parties. Co-operation in this area is expected to grow in the future as a result of the entry into force of the Rotterdam and Stockholm Conventions. A series of workshops on co-ordinated implementation of the three conventions are being conducted with the support of the three secretariats. The Basel and Stockholm Conventions are working on joint regional projects on PCBs, for example, in Sub-Saharan Africa, Central America and the South Pacific regions, which meet the Basel and Stockholm objectives. In accordance with Article 6 of the Stockholm Convention the interim secretariat of the Stockholm Convention is co-operating with the Basel Convention's OEWG in the preparation of a set of technical guidelines on POPs wastes, which could serve as a joint instrument for implementing the two conventions. The guidelines were submitted to COP

⁴⁵ Article 2(c) and Article 4, *ibid.*

⁴⁶ Article 3(2), Stockholm Convention, *supra* note 11.

⁴⁷ Article 6, Basel Convention, *supra* note 9.

⁴⁸ Articles 9-10, Stockholm Convention, *supra* note 11; Articles 13-14, Rotterdam Convention, *supra* note 10; Article 13, Basel Convention, *supra* note 9.

⁴⁹ Articles 9-11, Stockholm Convention, *supra* note 11.

7 of the Basel Convention in October 2004 for adoption, and will later be submitted to COP 1 of the Stockholm Convention in May 2005 for its consideration. UNEP Chemicals – acting also as the interim secretariat of the Stockholm Convention and, together with FAO, as the interim secretariat for the Rotterdam Convention – and the Basel Convention are participating, along with the World Bank, in the Africa Stockpile Project for the disposal of obsolete pesticides and other unwanted chemicals.

On institutional co-operation, the Basel Convention Regional Centres established under the Convention are being utilized for workshops on issues relating to the Stockholm and Rotterdam Conventions. As mentioned above, there are currently 13 Basel Convention Regional Centres – four in Africa,⁵⁰ three in the Asia-Pacific region,⁵¹ two in Central and Eastern Europe⁵² and four in Latin America and the Caribbean.⁵³ Iran is soon to host the 14th Regional Centre. They are entrusted with the implementation of priority activities of the Strategic Plan of the Convention⁵⁴ and thus they play an important role in the implementation of the Basel Convention.

The Stockholm Convention also envisages the establishment of its own Regional Centres once a decision is taken by a future COP. To this end, the Stockholm Convention Secretariat will submit to COP 1 of the Convention in May 2005 case studies and a feasibility study, which will identify the need for the establishment of Regional Centres for the Stockholm Convention. In view of the need for continued co-operation between the Basel and Stockholm Conventions and the increasing level of involvement of the Basel Convention Regional Centres in joint activities, the potential for the Centres to serve the Stockholm and Rotterdam Conventions should not be overlooked. The three conventions are also co-operating in developing a co-ordinated policy for the management of hazardous chemicals within the framework of the on-going negotiations on the SAICM, which is being developed to apply a co-ordinated and coherent approach to the control of hazardous chemicals and wastes, including both organic and inorganic pollutants.

⁵⁰ In Egypt, Nigeria, Senegal and South Africa.

⁵¹ In China, Indonesia, and as part of the South Pacific Regional Environment Programme in Samoa.

⁵² In the Russian Federation and Slovakia

⁵³ In Argentina, El Salvador, Trinidad and Tobago, and Uruguay

⁵⁴ Decision VI/I of the Sixth Meeting of the Conference of the Parties of the Basel Convention: The Strategic Plan for the Implementation of the Basel Convention.

Challenges for the Future

In the short to medium term, co-operation between the three conventions is likely to focus on enhanced programmatic and scientific co-operation. In addition to the work already underway, increased focus should be placed on joint workshops that cover all aspects of chemicals and wastes. More substantive programme integration could be made in the preparation and implementation of the Stockholm National Implementation Plans with respect to the area of waste management, using the Basel technical guidelines on POPs wastes. There is also potential for the technical expert bodies of the three conventions to co-operate in scientific and technical reviews and the provision of technical guidance. The OEWG of the Basel Convention, the POPs Review Committee of the Stockholm Convention, to be established by COP 1 of the Convention and the Chemical Review Committee created by COP 1 of the Rotterdam Convention in September 2004 could serve as standing mechanisms for such matters as the development of destruction technologies and alternatives, polling of information on health and environmental impacts and ESM of hazardous substances through their whole life-cycle.

In the area of capacity-building, the three conventions could strengthen a joint approach in channelling the requests for technical and financial assistance in POPs related issues, as well as joint fund-raising for projects serving the objectives of more than one convention. On pesticides, integration of the Stockholm, Rotterdam and Basel Conventions' training and assistance requirements could be integrated into the FAO capacity-building for pesticides management. The Basel and Rotterdam Conventions could co-operate over training activities related to the PIC procedure. Joint assistance could be provided to countries experiencing difficulties in fulfilling their reporting obligations, including assistance with the organization of data at the national level so that it may be drawn upon for reporting requirements of each convention. The three conventions should also promote joint co-ordination at the national level among focal points and authorities for each convention.

There is further potential for co-operation. On legal issues, the three conventions could work together to develop legal and administrative instruments and aid in the drafting of national legislation co-ordinating training activities at both the national and regional levels. They could supply joint assistance in the review of existing legislation and in the identification of lacunae and inconsistencies. In this regard, the three conventions should work closely with FAO on the provision of technical assistance on pesticide legislation. With regard to compliance and enforcement, the three conventions could work together.

For matters relating to compliance, the three conventions have established or will establish procedures and institutional mechanisms for determining non-compliance. The Basel Convention's 15 member Compliance Committee, which is mandated to review general issues and submissions on compliance and implementation, could serve as a model for the Rotterdam and Stockholm Conventions. Regarding liability, the

convention regimes differ somewhat. Under the Basel Convention, a separate Protocol on Liability and Compensation has been adopted. Its objective is to provide for a comprehensive regime for liability and compensation for damage. The Stockholm and Rotterdam Conventions do not, however, call for a liability and compensation regime and synergies may be more difficult to find here. Other areas of future co-operation include co-ordination of work with the World Trade Organization on the harmonization of trade and environmental rules, implementation of dispute settlement mechanisms under the respective conventions, promotion of human rights and the development of a harmonized customs code in co-operation with the World Customs Organization.

Promotion of co-ordinated implementation of the three conventions, however, cannot be assured without proper regard to the need for a sustainable financial mechanism for implementing those legal instruments. Under the Stockholm Convention, industrialized countries have the obligation to provide new and additional financial resources to enable parties from developing countries, and countries with economies in transition to meet the full incremental costs of implementing measures to fulfill their obligations under the Convention, which the Global Environment Facility (GEF) is currently enabling. No similar provisions are made in respect of the Basel and the Rotterdam Conventions. Provision of a sustainable financial mechanism for promoting the implementation of the Basel and Rotterdam Conventions will be a key to future co-operation for promoting synergies between the three conventions.

Conclusion

The Basel, Rotterdam and Stockholm Conventions form a group of conventions that complement and reinforce each other. Together they provide an internationally agreed framework for the life-cycle management of hazardous chemicals and wastes and are essential components of a global architecture for international chemical management being created through the SAICM process in response to the call of the Johannesburg Plan of Implementation,⁵⁵ GEF and legal instruments such as the Montreal Protocol.⁵⁶ Furthermore, there is a need for co-operation with wider stakeholders, including partnerships with industry, civil society and local governments.

Continued effort in this area is important in making international environmental law more effective. More needs to be done in carrying out a periodic review of MEAs to ensure that they respond adequately to the changing and increasingly complex demands of sustainable development. Furthermore, more needs to be done in promoting an inte-

⁵⁵ World Summit on Sustainable Development (WSSD), *Johannesburg Plan of Implementation*, www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

⁵⁶ Montreal Protocol, *supra* note 8.

grated and comprehensive approach to hazardous chemicals management, including their waste, based on the precautionary principle as reflected in the Johannesburg Plan of Implementation.

There are constraints in promoting a coherent international regime governing hazardous chemicals and wastes. MEAs negotiations are always issue specific, responding to specific situations or crises, and thus co-ordination among related instruments depend on country initiative and co-ordination at the national level as well as the international level. Tension between national and international controls will always be high; hence agreement on international controls tends to come about in response to crises and tends to be reactive rather than proactive. Economic interests and considerations also influence the outcome of environmental negotiations.

The Global Environment Governance issue will again posit itself on the agenda of the UNEP Governing Council in February 2005 where, among other issues, progress made in co-ordinated implementation of the Basel, Rotterdam and Stockholm Conventions will be reviewed. To the extent that individual measures under the MEAs require the endorsement of respective governing bodies, the joint implementation of the Basel, Rotterdam and Stockholm Conventions would necessarily be an incremental process. The issue of different memberships and meeting cycles of the respective conventions and the further question of more equitable funding mechanisms should also be addressed in this context.

THE ROLE OF NGOS AND NATIONAL PARLIAMENTS IN INTERNATIONAL ENVIRONMENTAL LAW-MAKING¹

*Heidi Hautala*²

Introduction

In international environmental law-making today, there is a need to engage new, non-state actors. This is especially true in the case of civil society but can be applied to the business sector as well. There is also the opportunity to increase the role of directly elected representatives in the form of members of national parliaments, supranational parliaments such as the European Parliament, etc. Participation of these actors is needed to compensate for the lack of legitimacy in international environmental law-making which to date has been largely confined with to intergovernmental structures. Common to all the abovementioned actors is that they work outside of the executive bodies and branches of government which are responsible for the negotiation of multilateral environmental agreements (MEAs). While national parliaments are usually limited to ratifying a MEA, there is scope for including them also at an earlier stage of international environmental law-making.

As non-governmental organizations (NGOs) – in the meaning of actual civil society organizations and economic or other interest organizations – and parliaments find themselves on the sidelines of negotiations, both have shown that they want to be more engaged in this process. Governments should take note of this and work to use them as partners and allies, and not as antagonists. This, however, may not be easy. Although

¹ This paper is based on a lecture given by the author on 24 August 2004.

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these actors can often be very vocal in their demands and in expressing their opinions, they have not always proved to be correctly informed. It is also quite natural that any interest organization – whether working for a public or private interest – has to exaggerate their point of view. In our present media dominated society, no one would otherwise get their voice heard. It is left for decision-makers to judge, preferably in the open, how they balance the various interests against one another in the relevant decision. This of course does not always happen, and the influence and power of the various interest groups remain invisible.

There is also a manifest lack of transparency within international environmental law-making. The wider participation of both NGOs and parliaments would serve to increase openness in this area. Surprisingly, elected bodies and citizens have a common interest in defending the widest possible public access to information. Parliaments can, in addition to general and public rights on access to information, demand from the executive privileged access to non-public and even classified information. This is justified by their supremacy from the viewpoint of democratic legitimacy.

This is not to say that international negotiation processes should be completely in the hands of parliaments or non-state actors. In many cases negotiations have to be carried out cautiously and avoiding publicity, ensuring non-disclosure of opinions or revelations to the media, especially at sensitive stages and before decisions are taken. The great potential for increased openness and dialogue should still be emphasized.

International Environmental Law-making Today

Some significant advances have been achieved. The Aarhus Convention³ is a milestone as it recognizes that citizens need to be engaged in international environmental law-making. Not only that, the Convention actually creates certain fundamental rights for the citizen in decision-making in the environmental domain. This could serve as a model for other domains as well, but it is beyond the scope of this paper to develop this issue further. The Convention's importance is twofold as it places domestic obligations on states but extends them beyond national borders. The three pillars of the Aarhus Convention relate to access to information, public participation in decision-making and access to justice in environmental matters. As such, it is an important instrument for both civil society and, indirectly, for parliaments in their function of representing citizens. The Aarhus Convention has been signed and ratified by a limited number of countries and deserves more attention in international environmental discourse.⁴

³ 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.

⁴ As of 24 January 2005, there were 40 signatories and 30 parties to the Convention. Although in theory not limited to United Nations Economic Commission for Europe (UNECE) countries, the Convention was negotiated under the aegis of UNECE, which in part answers for the limited number of signatories.

Direct participation has also been helped by the World Wide Web which makes networking easier and increases dramatically the opportunities to access documents, decisions, information, etc. The possibilities presented by this tool are limited, however, by the fact that large groups of people have no access to it valuable.

Responsibility between the state and private enterprise is being shared under the auspices of public-private partnerships (PPPs) and voluntary agreements. Work still needs to be completed in this area and although there are examples of this type of scheme working successfully, questions still remain unanswered. Some of the concerns surrounding PPPs relate to poor implementation and lack of transparency and accountability. Despite setbacks, these schemes should not be dismissed out of hand and can serve a purpose. Where these types of instruments do not suffice, hard law is needed to achieve results.

The increased pressures of globalization have led to a situation where competitiveness has increasingly become a key factor in any economy. In diverse ways, states in the South and in the North face a sharp dichotomy between economic and social aspects on one hand, and environmental aspects on the other hand. In real life, these three factors of sustainable development do not meet in an ecologically sound manner. The South fears environmental agreements because of loss of access to markets in the North, and the North fears them because of re-localization of jobs to the South, to China and India for example. These questions have led to major deadlocks in international environmental politics, and new mechanisms and solutions should be identified. In this instance, increased and improved networking and engaging new non-state actors may prove to be the key to solving this issue as well.

The Roles of CSOs

The analysis in this section relates mainly to civil society non-state actors, often called civil society organizations (CSOs). Some of the conclusions drawn may be applicable to business and other economic interest organizations as well. At the outset, it should be noted that like all NGOs, CSOs are extremely heterogenic. They can be big or small, local, national or international, professional or voluntary. Moreover, many CSOs have built up alliances at local, national and international levels. As many state and business actors can undermine the legitimacy of CSOs claiming that their background and real interests are obscure, there are processes under way, by Transparency International, for example, aimed at increasing CSO transparency and accountability.

In a critical situation, CSOs have the ability to serve information and provide counter-expertise in their given area of interest. Although every interest group has a tendency to exaggerate their position, with this in mind one can carve out the bias and present a balanced view. With regard to CSOs, mobilization is crucial. CSOs can spread information and perhaps more importantly can help form public opinion which, although negotiations may be carried out behind closed doors, is still needed to provide support

and legitimacy to government positions. Of course the same is also true in an antagonistic situation. CSOs can make a difference in negotiations with their vocal criticism. In international environmental politics, however, the classical situation is that an environment minister can draw a lot of support from them against other sectoral interests, such as industry, agriculture or transport.

An important role can also be played by NGOs acting as messengers between governments or as grassroots diplomats. This role of go-between can be crucial, especially when an issue involves matters which are difficult and challenging for governments to address directly. An example of this can be found with old nuclear installations on the Kola Peninsula in north-west Russia in the 1990s. The area is renowned for its aging and uncared for nuclear reactors, for example in submarines lying in harbours or even at the bottom of the arctic seas. As this case involved the ever-sensitive issue of military and state secrets, concerned governments felt that they could not intervene. The Finnish Government, for example, chose not to intervene in any way due to its more reserved foreign policy traditions. To resolve this deadlock, the Norwegian Government used the native Bellona Foundation as a sort of messenger and a preparatory actor to solve the problem of nuclear waste. The Bellona Foundation was able to act as facilitator for the Russian government, including its military and regional administrations. From this initial position, an agreement which deals with liability and customs issues has later been reached between the concerned governments. This has made international participation and support finally possible.

An obvious task of CSOs is the monitoring and enforcement of existing legislation. To again take a Russian example, several small NGOs are tackling the issue of environmental crime within the forest industry. Illegal logging is a persistent problem and has been brought to the attention of the authorities on numerous occasions. In developing countries a similar situation exists with indigenous communities campaigning actively against illegal loggers. In this respect indigenous communities can and do work in the same way and for similar ends.

Environmental activism is often dangerous for individuals under authoritarian regimes. The international community should give much more attention and support to courageous people who have faced accusations and punishment on the grounds of endangering national security interests, for example by disclosing sensitive information, which sometimes has proven to already be public. Russia and former Commonwealth of Independent States (CIS) countries unfortunately provide examples of this kind. Corruption and crime are common in the exploitation of natural resources all over the world, but where the rule of law is not sufficiently upheld, individuals face many dangers when defending the environment.

Non-governmental organizations also have a role to play in actual international negotiations. Some governments have realized the merits of engaging both CSOs and other NGOs in their delegations to international treaty negotiations. Finland, Sweden, the United Kingdom and the Netherlands are such countries, as is South Africa. Finland

may have been one of the very first countries to include NGOs in its delegations and since the Kyoto Protocol,⁵ this has become standard, not only in environmental matters but for example in other UN summits as well. The risks of such a practice to both sides are clear, however, as governments are not automatically protected from the criticism of the participating NGOs. On the other side of the fence, NGOs need to be wary about becoming associated with governments and being criticized for lack of independence.

The negotiating blocs in MEAs have long been divided into North and South camps, which view each other as fierce opposition, and often see environmental measures as trade barriers or barriers to economic development. Civil society, on the other hand, has witnessed some South-North consensus-building. There is a growing awareness of the need for solidarity across this divide, and of mutual interests. The World Social Forum reflects such consensus-building within civil society under the challenging title: Another world is possible.

The Roles of Parliaments

Traditionally, the role of national parliaments has been the ratification of conventions. Many elected representatives feel that it is not adequate that they should only be able to simply accept or reject international treaties. Including members of parliaments in delegations to treaty negotiations is one way of increasing parliaments' participation, but the real question is how to involve parliaments at an even earlier stage. The emphasis of reform is shifting towards the negotiation mandate. This can be seen very clearly in the European Union where, under the new Constitution that is still in the process of ratification, the European Parliament is succeeding in securing a say in forming that mandate.⁶ This in turn will prove to be helpful for national parliaments within the EU which also want to have a say vis-à-vis their own governments and should have a right to do so. Parliamentary bodies should have access to confidential information relating to MEA negotiations, respecting the obligation of confidentiality, of course.

An increased role for parliaments can be seen as adding legitimacy to the process of negotiating an MEA. More generally, parliamentary participation is becoming an issue in a large number of international organizations. Stronger inter-parliamentary cooperation is already taking place today. Inter-parliamentary bodies and fora are being formed, for instance with the World Bank and World Trade Organization. Members of parliaments presently have annual meetings with the leaders of the World Bank and

⁵The 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.

⁶Treaty Establishing a Constitution for Europe, OJ 2004 No. C310, 16 December 2004, europa.eu.int/constitution/index_en.htm.

the International Monetary Fund on issues relating to development. WTO has parliamentary meetings. This is only an informal beginning. As a consequence, international issues will be given more visibility in national political debates.

One of the shortcomings of international processes is the lack of coherence between competing sectoral interests. Each institution and organization has a tendency to defend only its own interests. Very often the environment is a loser. Parliamentary involvement should be exploited to enhance the coherence of international decision-making, and in particular for strengthening environmental aspects of the decisions taken.

THE NEGOTIATIONS ON THE RELATIONSHIP BETWEEN WTO RULES AND MEAs: THE STORY SO FAR¹

*Tuula Varis*²

Introduction

There are some 10-15 multilateral environmental agreements (MEAs) containing trade measures which the Parties have considered essential or necessary for the achievement of the objectives of the agreement. These include CITES,³ the Basel Convention,⁴ the Montreal Protocol,⁵ the Stockholm POPs Convention,⁶ the Rotterdam PIC Convention⁷ and the Cartagena Biosafety Protocol.⁸ Examples of trade measures provided for in the agreements vary from import and export restrictions to total trade bans, and notification and labelling requirements. The number of MEAs containing trade provisions has grown in pace with the need to address environmental problems related to cross-border production and consumption patterns, which often have a bearing on international trade.

¹ This paper is based on a lecture given by the author on 25 August 2004.

² Counsellor, Ministry of the Environment of Finland.

³ 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.

⁴ 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.

⁵ 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.

⁶ Stockholm Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, www.pops.int/.

⁷ 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.

⁸ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 December 2003, www.biodiv.org/doc/legal/cartagena-protocol-en.pdf.

The increasing importance of clarifying the relationship between the rules of the World Trade Organization (WTO) and the trade obligations set out in the numerous MEAs is widely recognized. Some trade officials are concerned that MEA-based trade measures could contradict or even contravene WTO rules and give leeway to arbitrary or unjustifiable discrimination or disguised restrictions on trade. Conversely, environmental officials are worried that WTO rules may undermine the efforts to address serious and shared environmental problems, and affect the negotiation, implementation and development of MEAs.

The two systems of international law, trade and environment, have evolved and co-existed for decades in a quiet status quo. There have been no MEA-WTO dispute cases. Nevertheless, this does not mean that such conflicts could not arise in the future. In addition, some claim that the present somewhat unclear relationship between the two regimes has had a freezing effect on MEAs by prolonging and complicating their negotiation. Trade aspects have undoubtedly been a significant and often conflictive dimension in recent environmental negotiations. This is true of the Biosafety Protocol as well as of the PIC and POPs Conventions.

To avoid working at cross-purposes, in 2001 the WTO Ministerial Meeting agreed on the Doha Declaration⁹ which included in its scope negotiations aimed at bridging the gap between trade and environment. The first part of Paragraph 31 of the Doha Mandate reads as follows:

With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudicing their outcome, on:

- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and criteria for the granting of observer status.

The WTO Committee on Trade and Environment Special Session (CTESS) was given the remit to explore the issues brought forth in Paragraph 31.

⁹ Doha Ministerial Declaration, 14 November 2001, WT/MIN/(01)/DEC/1, www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

Differing Views on Definitions

The first years of negotiations in the CTESS have concentrated more or less on debating the content of the mandate and clarifying what was actually agreed to in Doha.¹⁰ Questions have remained as to how precisely or loosely an MEA should be defined. Discussions have evolved around issues such as how many Parties are needed to make an agreement multilateral and whether the mandate refers only to global agreements or also to regional ones. There has also been uncertainty as to what makes an agreement environmental as fisheries agreements, for instance, could either be primarily environmental or economic.

Differing views have also been expressed on what an agreement is. Does the Doha mandate refer only to MEAs in force or also to MEAs which are in the process of coming into force? Might MEAs to be negotiated in the future also be included? Furthermore, does the mandate refer only to general or framework agreements or also to the several protocols and other binding decisions of the Conferences of the Parties amending the various MEAs? The latter has also raised questions as to who is a party to an MEA since not all Parties to MEAs have agreed to and ratified all the amendments.

Finally, CTESS has been debating on what a specific trade obligation (STO) is. Some WTO Members have opted for a strict interpretation whereby STOs must be measures which are explicitly provided for and mandatory under MEAs, while other Members have been more willing to include also other types of trade measures, such as those which are explicitly provided for by the MEAs but are not mandatory.

From an environmental point of view, one can question to what extent the trade community and the WTO have competence or expertise on these kinds of definitional issues regarding international environmental law. Very few CTESS delegations seem to include environmental officials and it is not always clear to what extent the Geneva-based trade negotiators communicate with and seek environmental guidance from their respective capitals.

Two Approaches

Within the CTESS there has also been disagreement as to the approach to be taken in the negotiations under the Doha Paragraph 31(i). Two schools of thought have emerged with the EU, Switzerland and Norway, for example, favouring the so-called conceptual, top-down approach, while Australia, the USA, New Zealand and a number of developing countries, for example, favour the so called matrix, bottom-up approach.

¹⁰ See *Report of the Chairperson of the CTE Special Session to the Trade Negotiations Committee*, TN/TE/7 and Suppl. 1 (WTO, 2003), available in part at www.wto.org/english/tratop_e/envir_e/rep_chair_cte_spec_e.htm; and *Report of the Chairperson of the CTE Special Session to the Trade Negotiations Committee*, TN/TE/8 (WTO 2004).

The conceptual approach is based on the will to seek political consensus on the general principles that should govern the WTO-MEA relationship. These principles should include at least the following: multilateralism is better than unilateralism; MEAs and the WTO are equal parts of international law and neither takes precedence over the other; when carrying out trade or environmental negotiations, the need to take into account each regime and the need for mutual supportiveness must be recognized; the competence of the different branches should be respected and consequently environmental policy should be made within the MEAs and not within the WTO; dispute resolution should be carried out between MEA parties primarily within the MEA in question; WTO rules should not be interpreted in clinical isolation but take into consideration also the international environmental obligations of the Members.

The matrix school, for its part, considers it premature to discuss the general governing principles of the WTO-MEA relationship and advocates instead an in-depth analysis of the relationship. Members should go through, article by article, the trade provisions of the MEAs in an attempt to define which are STOs and which are not, and assess them against the WTO rules. Suggestions have also been made to continue the work by assessing the national implementation of these measures.

In principle, the CTESS is proceeding on two parallel tracks using both of the approaches. In practice, the matrix camp has more or less advocated using only its own approach and has not accepted the top-down approach. The conceptual camp, for its part, claims that the piecemeal bottom-up matrix method does not, as such, give the political solutions needed to clarify the MEA-WTO relationship in general.

From an environmental point of view, the matrix approach may contain the risk that the CTESS will turn into a kind of shadow dispute body that determines, from the trade perspective, those MEAs or MEA obligations which are WTO-consistent and those which are not. When analysing national implementation, it is feared that such a body will assess, solely from the trade perspective, the respective performance of individual countries instead of looking at the relationship between the two sets of rules and enhancing their mutual supportiveness.

In addition to the WTO negotiations under Paragraph 31(i) a special mention needs to be made of the relationship between the Convention on Biological Diversity (CBD)¹¹ and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).¹² Due to provisions in TRIPS which relate to plants and animals and the protection of plant varieties, the Doha Declaration instructed the TRIPS Council to examine this relationship. One of the avenues to explore is the review of TRIPS Article 27(3)(b) which deals with the patentability and non-patentability of plants, animals and biological processes. The debate so far has surrounded the question of access to genetic

¹¹ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *ILM* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf.

¹² Agreement on Trade-related Aspects of Intellectual Property Rights, Marrakesh, 15 April 1994, in force 1 January 1995, www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

resources, mostly in developing countries, and benefit-sharing mechanisms which would guarantee a return for the communities and/or countries which are the source of those resources.

One of the central questions has been whether a patent applicant should have an obligation to declare the country of origin or specific source of the genetic resource, or the source of knowledge of indigenous and local communities on which the invention is based. Some of the ideas which have been put forward include application of the principle of prior informed consent, obtained from the source community, and a certificate of origin for the genetic resources. As developing countries are the source of most genetic resources used in biotechnological inventions and patents, they have been active in promoting the introduction of such obligations. To look into these issues alongside the WTO, the Convention on Biological Diversity established the Working Group on Access and Benefit-Sharing as well as the Working Group on Traditional Knowledge, Innovations and Practices while the World Intellectual Property Organization established the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.

Information Exchange and Observer Status

The position of the CTESS on Paragraph 31(ii) relating to regular information exchange between the WTO and MEA secretariats and granting observer status to the latter has been less controversial than the debate surrounding the interpretation of Paragraph 31(i). This is not to say, however, that consensus has been reached on the matter. Relating to information exchange, there have been several proposals to improve and enhance this aspect of the co-ordination and co-operation between the WTO and MEA secretariats. These include formalizing and focusing the WTO-MEA information sessions, organizing joint WTO, United Nations Environment Programme (UNEP) and MEA technical assistance and capacity-building projects, organizing WTO parallel or side events at Conferences of the Parties of MEAs, exchanging documents and establishing electronic databases on trade and environment.

The issue of observer status has also been advanced although not solved. In February 2003, the CTESS took a decision to invite UNEP and certain MEA secretariats on an ad hoc basis to its meetings based on a separate decision to be taken by consensus at the end of each CTESS meeting. So far, invitations to attend have been extended to the secretariats of the Basel Convention, the Convention on Biological Diversity, CITES, the Montreal Protocol, the UN Framework Convention on Climate Change,¹³ the

¹³ 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

Convention on Persistent Organic Pollutants and the Convention on Prior Informed Consent, the International Commission for the Conservation of Atlantic Tuna, and previously the International Tropical Timber Organization as well.

Regular information exchange and secured permanent observer status are key instruments for enhancing the mutual supportiveness of the two regimes. It is essential that the MEA secretariats are allowed to follow up the work and negotiations that is relevant to their respective agreements and is taking place in the CTESS and other WTO bodies. It is also important that they are allowed to participate in the discussions and to bring in their expertise. When talking about mutuality, it is worth noting that the WTO Secretariat for its part can obtain observer status to any MEA simply by applying for it.

Conclusion

The perceived conflict of interest between trade and environment has seemed to lead to a situation where trade and environment are seen to be fighting against each other rather than working together. UNEP and the MEA secretariats have emphasized that in order to enhance sustainable development it would be much more useful to seek synergies between MEAs and the WTO and to avoid potential conflicts. There are several common areas of interest which could be explored and developed. These include technical assistance, technology transfer, capacity-building, environmental services and products, environmentally harmful subsidies in relation to agriculture and fisheries, for example, trade-related environmental and strategic impact assessments and improved national and international co-ordination.

To achieve these synergies and a more harmonious relationship between trade and the environment, it becomes ever more important that international environmental law-makers are familiar with and have expertise on the relevant parts of international trade law. It would enable them to follow up better and to contribute to the negotiations and discussion on the relationship between the MEAs and the WTO rules. At the same time, it would be desirable that trade specialists deepen their knowledge and understanding of international environmental law and its principles and obligations.