



International Environmental Law-making and Diplomacy Review 2013

Tuula Honkonen, Melissa Lewis and Ed Couzens (editors)

UNIVERSITY OF EASTERN FINLAND – UNEP COURSE SERIES 13

University of Eastern Finland
Joensuu, Finland, 2014

University of Eastern Finland – UNEP Course Series 13

Publisher	Law School University of Eastern Finland Joensuu Campus P.O. Box 111, FI-80101 JOENSUU, FINLAND
Editors	Tuula Honkonen, Melissa Lewis and Ed Couzens
Editorial Board	Sylvia Bankobeza, Michael Kidd, Tuomas Kuokkanen, Elizabeth Maruma Mrema, Barbara Ruis
Contact	University of Eastern Finland Joensuu Campus Library/Publications sales P.O. Box 107, FI-80101 JOENSUU, FINLAND Tel.: +358 294 45 8145 E-mail: lending.services@uef.fi Website: http://www.uef.fi/kirjasto/ United Nations Environment Programme (UNEP) Division of Environmental Policy Implementation (DEPI) Nairobi, Kenya E-mail: env.edu@unep.org Website: http://www.unep.org/training
Sales and Exchanges	University of Eastern Finland Joensuu Campus Library/Exchanges/Publication Sales P.O. Box 107, FIN-80101 JOENSUU, FINLAND Tel.: +358 294 45 8145 E-mail: publication.sales@uef.fi
ISSN	1795-6706
ISSN	1799-3008 (electronic version)
ISBN	978-952-61-1586-3
ISBN	978-952-61-1587-0 (electronic version)
ISSNL	1795-6706
Cover Design	Leea Wasenius
Layout	Saarijärven Offset Saarijärven Offset Oy Saarijärvi 2014

Contents

Foreword.....	v
Editorial Preface	vii

Part I

General Issues related to International Environmental Diplomacy and Governance of Natural Resources	xvii
--	-------------

The Relationship between the Exploitation of Natural Resources and the Protection of the Environment	1
<i>Tuomas Kuokkanen</i>	

International Agreements on Transboundary Natural Resources	13
<i>Sylvia Bankobeza</i>	

Part II

Sustainable Future of Natural Resources Governance	31
---	-----------

Reactions to the Rio+20 Outcome Document ‘The Future We Want’..	33
<i>Elizabeth Maruma Mrema</i>	

Future Prospects for Enhancing Sustainable Use of Natural Resources: The Role of International Environmental Governance and Finland’s Priorities after Rio+20	51
<i>Ville Niinistö and Niko Urho</i>	

Strengthening and Upgrading of the United Nations Environment Programme.....	73
<i>Sylvia Bankobeza</i>	

Part III

Specific Issues related to the Governance of Natural Resources	85
---	-----------

Understanding the Nagoya Protocol on Access and Benefit-Sharing	87
<i>Sonia Peña Moreno</i>	

Compliance Negotiations within the Intergovernmental Committee for the Nagoya Protocol.....	109
<i>Melissa Lewis and Katileena Lohtander-Buckbee</i>	

Promotion of Renewable Energy for Climate Change and the 'Facilitative' Function of IRENA	137
<i>Seita Romppanen</i>	

Part IV

Interactive Negotiation Skills in the Area of Natural Resources

Governance	157
-------------------------	-----

The Joensuu Negotiation: A Multilateral Simulation Exercise – Compliance Negotiations in the Intergovernmental Committee for the Nagoya Protocol	159
<i>Cam Carruthers, Tuula Honkonen and Sonia Peña Moreno</i>	

Fighting for Sanctuary: A Multilateral Simulation Exercise Based on the International Whaling Commission.....	183
<i>Ed Couzens</i>	

FOREWORD

The compilation of papers in the present Review is based on lectures presented during the tenth University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements (MEAs), held from 4 to 16 August 2013 in Joensuu, Finland.

The publication is aimed at equipping present and future negotiators of MEAs with information and experiences of others in the area of international environmental law-making in order to improve the impact and implementation of these key treaties. The ultimate aim is to strengthen and build environmental negotiation capacity and governance worldwide.

For the past ten years the University of Eastern Finland (previously, the University of Joensuu) has partnered with the United Nations Environment Programme to conduct a training course on MEAs annually, with each Course focusing on a specific theme. From each Course, selected papers written by lecturers and participants have, after a rigorous editing process, been published in the *Course Review* (2004–2012), for the benefit of both course participants and a wider audience, who are able to access these publications through the internet.¹ The present *Review* publication marks the tenth anniversary of the Course.

Since each MEA course has a distinct thematic focus, the *Reviews* addresses a range of specific environmental issues, in addition to providing more general observations regarding international environmental law-making and diplomacy. The focus of the 2013 course was ‘Natural Resources’, and the current *Review* builds upon the existing body of knowledge in this area.

The material presented in this *Review* is intended to expose readers to a variety of issues regarding the international management of natural resources. This compilation informs negotiators of options available to them when developing key natural resources related agreements which in turn inform policy choices that can enhance bilateral and multilateral cooperation in addressing these issues.

We are grateful to all the contributors for the successful outcome of the tenth Course, including the lecturers and authors who transcribed their presentations to compile the *Review*. We would also like to thank Tuula Honkonen, Melissa Lewis and Ed Couzens for their skilful and dedicated editing of the *Review*, as well as the members of the Editorial Board for providing guidance and oversight throughout this process.

Professor Perttu Vartiainen
Rector of the University of
Eastern Finland

Achim Steiner
Under Secretary-General of the United Nations
and Executive Director, United Nations
Environment Programme

¹ For an electronic version of this volume, and of the 2004–2012 *Reviews*, please see the University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements website, <<http://www.uef.fi/unep>>.

EDITORIAL PREFACE

1.1 General introduction

The lectures given on the tenth annual University of Eastern Finland² – United Nations Environment Programme (UNEP) Course on Multilateral Environmental Agreements, from which most of the papers in the present *Review* originate, were delivered by experienced diplomats, members of government and senior academics.³ One of the Course's principal objectives is to educate participants by imparting the practical experiences of experts involved in international environmental law-making and diplomacy – both to benefit the participants on each Course and to make a wider contribution to knowledge and research through publication in the present *Review*. The papers in this *Review* and the different approaches taken by the authors therefore reflect the professional backgrounds of the lecturers, resource persons and participants (some of whom are already experienced diplomats). The papers in the various *Reviews*, although usually having particular thematic focuses, present various aspects of the increasingly complicated field of international environmental law-making and diplomacy.

It is intended that the current *Review* will provide practical guidance, professional perspective and historical background for decision-makers, diplomats, negotiators, practitioners, researchers, role-players, stakeholders, students and teachers who work with international environmental law-making and diplomacy. The *Review* encompasses different approaches, doctrines, techniques and theories in the field, including international environmental compliance and enforcement, international environmental governance, international environmental law-making, environmental empowerment, and the enhancement of sustainable development generally. The papers in the *Review* are thoroughly edited, with this process being guided by rigorous academic standards.

The first and second Courses were hosted by the University of Eastern Finland, in Joensuu, Finland where the landscape is dominated by forests, lakes and rivers. The special themes of the first two Courses were, respectively, 'Water' and 'Forests'. An aim of the organizers of the Course is to move the Course occasionally to different parts of the world. In South Africa the coastal province of KwaZulu-Natal is an extremely biodiversity-rich area, both in natural and cultural terms, and the chosen special themes for the 2006 and 2008 Courses were therefore 'Biodiversity' and

² The University of Joensuu merged with the University of Kuopio on 1 January 2010 to constitute the University of Eastern Finland. Consequently, the University of Joensuu – UNEP Course was renamed the University of Eastern Finland – UNEP Course. The Course activities concentrate on the Joensuu campus of the new university.

³ General information on the University of Eastern Finland – UNEP Course on International Environmental Law-making and Diplomacy is available at <<http://www.uef.fi/unep>>.

‘Oceans’. These two Courses were hosted by the University of KwaZulu-Natal, on its Pietermaritzburg campus. The fourth Course, held in Finland, had ‘Chemicals’ as its special theme – Finland having played an important role in the creation of international governance structures for chemicals management. The sixth Course was hosted by UNEP in Kenya in 2009, in Nairobi and at Lake Naivasha, with the special theme being ‘Environmental Governance’. The theme for the seventh Course, which returned to Finland in 2010, was ‘Climate Change’. The eighth Course was held in Bangkok, Thailand in 2011 with the theme being ‘Synergies Among the Biodiversity-Related Conventions’. The ninth Course was held in 2012 on the island of Grenada, near the capital St George’s, with the special theme being ‘Ocean Governance’. The tenth Course, which in 2013 returned to its original venue in Joensuu, Finland, had ‘Natural Resources’ as its special theme – and this is therefore the special theme of the present volume of the *Review*.

The Course organizers, the Editorial Board and the editors of this *Review* believe that the ultimate value of the *Review* lies in the contribution which it can make, and hopefully is making, to knowledge, learning and understanding in the field of international environmental negotiation and diplomacy. Although only limited numbers of diplomats and scholars are able to participate in the Courses themselves, it is hoped that through the *Review* many more are reached. The papers contained in the *Review* are generally based on lectures or presentations given during the Course, but have enhanced value as their authors explore their ideas, and provide further evidence for their contentions.

All involved with the *Review* have been particularly grateful to receive ongoing contributions through the various editions by the same writers who have thereby been able to develop coherent bodies of work. Many of the people who have contributed papers have been involved in some of the most important environmental negotiations the world has seen. Publication of these contributions means that their experiences, insights and reflections are recorded and disseminated, where they might not otherwise have been committed to print. The value of these contributions cannot be overstated. To complement this, an ongoing feature of the *Review* has been the publication of papers by Course participants who have brought many fresh ideas to the *Review*.

Before publication in the *Review*, all papers undergo a rigorous editorial process (which process includes careful scrutiny and research by the editors, numerous rewrites, and approval for publication only after consideration by, and approval of, the Editorial Board). Each paper is read and commented on several times by each of the editors, and returned several times to the authors for rewriting and the addressing of queries. All references are considered. By the time a paper is published in the *Review*, the editors and the Editorial Board are satisfied that it meets the expectations of formal academic presentation and high scholarly standards, and that it makes a genuine contribution both to the special theme and to knowledge generally.

While convinced of the quality of all of the papers in the *Review*, the editors introduced for the 2012 volume an anonymous peer-review process⁴ where authors request this for their papers. This process was followed again in 2013.

Inclusive of the present volume, in the first ten volumes of the *Review* (spanning the years 2004 to 2013 of the Course) 108 authors have contributed to 151 papers – in all, approximately 2 600 pages of text.

1.2 International governance of natural resources

Natural resources can probably be easily understood as things found in, or produced from, nature that have a useful function in the eyes of humans – be this function a role in supporting human life or comfort, or a role in supporting systems of biological diversity. In one sense, everything created by humankind is a ‘natural resource’ at base level, such as the materials used to create plastic items. Natural oils are subjected to polymerization reactions, and then processed into polymer resins, which are then shaped into plastic objects. Probably, however, the plastic keys on a computer keyboard on which an Editorial Preface is typed would not usually be thought of as a ‘natural resource’ – it is the original materials which would be so considered, and it is the management of, governance over, and protection of such materials which is the substance of this *Review*.

An attempt was made early in the 21st Century⁵ to convince people generally of the value of preserving natural resources by explaining the value of such resources in economic language – ascribing economic value to natural functions and materials which might otherwise be taken for granted. To achieve this, the term ‘ecosystem services’ was defined as meaning ‘the benefits people obtain from ecosystems’⁶ and including ‘provisioning services such as food and water; regulating services such as flood and disease control; cultural services such as spiritual, recreational, and cultural benefits; and supporting services, such as nutrient cycling, that maintain the conditions for life on Earth’.⁷

⁴ Per generally accepted academic practice, the peer-review process followed involves the sending of the first version of the paper, with the identity of the author/s concealed, to at least two experts (selected for their experience and expertise) to consider and comment on. The editors then relay the comments of the reviewers, whose identities are not disclosed unless with their consent, to the authors. Where a paper is specifically so peer-reviewed successfully, this is indicated in the first footnote of that paper. A paper may be sent to a third reviewer in appropriate circumstances. As part of the peer-review process, the editors work with the authors to ensure that any concerns raised or suggestions made by the reviewers are addressed.

⁵ Largely through the Millenium Ecosystem Assessment, initiated by the then UN Secretary-General in 2001 – see <<http://www.unep.org/maweb/en/About.aspx>>.

⁶ ‘Ecosystem’ being defined as ‘a dynamic complex of plant, animal, and microorganism communities and the non-living environment, interacting as a functional unit. Humans are an integral part of ecosystems’. ‘Ecosystems and Their Services’ in *Ecosystems and Human Well-being. A Framework for Assessment* (Island Press, 2005), available at, <<http://www.unep.org/maweb/documents/document.300.aspx.pdf>> (visited 14 October 2014).

⁷ *Ibid.*

One useful way to explain the thinking behind the ecosystem services concept is by considering the definitions provided by the TEEB initiative. TEEB stands for ‘The Economics of Ecosystems and Biodiversity’.⁸ Hosted by UNEP, this global initiative aims to draw attention to the ‘economic benefits of biodiversity including the growing cost of biodiversity loss and ecosystem degradation’ by presenting ‘an approach that can help decision-makers recognize, demonstrate and capture the values of ecosystem services and biodiversity’.⁹ TEEB divides ecosystem services into four components: provisioning services; regulating services; habitat or supporting services; and cultural services.¹⁰ Under ‘provisioning services’ are listed food,¹¹ raw materials,¹² fresh water¹³ and medicinal resources.¹⁴ Under ‘regulating services’ are listed benefits provided by ecosystems acting as ‘regulators’: local climate and air quality,¹⁵ carbon sequestration and storage,¹⁶ moderation of extreme events,¹⁷ waste water treatment,¹⁸ erosion prevention and maintenance of soil fertility,¹⁹ pollination,²⁰ and biological control.²¹ Under ‘habitat or supporting services’ are listed habitats for species²² and maintenance of genetic diversity.²³ Finally, under ‘cultural services’ are listed: recrea-

⁸ See, generally, <<http://www.teebweb.org/>>.

⁹ *Ibid.*

¹⁰ See <<http://www.teebweb.org/resources/ecosystem-services/>>.

¹¹ The idea being that ecosystems provide the conditions in which food is grown. Mainly, these are managed agro-ecosystems, but aquatic and forest systems play roles too.

¹² Many materials used for construction, energy, fuel and manufacture are derived from ecosystems.

¹³ Ecosystems assist with the regulation and supply of water in hydrological cycles.

¹⁴ Many of the plants which provide the raw materials for the manufacture of industrial pharmaceuticals, as well as plants used directly in traditional medicines, are derived from ecosystems.

¹⁵ Forests and individual trees influence rainfall and water availability, and assist with the regulation of air quality by removing pollutants from the air.

¹⁶ The global climate is partly regulated by ecosystems sequestering and storing carbon dioxide, which is removed from the atmosphere by plants and trees. Ecosystems also have an impact on the ability of the earth to adapt to the impacts of climate change.

¹⁷ Ecosystems, such as forests and wetlands, create buffers against natural disasters – such as floods, landslides and storms.

¹⁸ Waste is filtered and purified through ecosystems such as wetlands, and the impacts of pollution are thereby mitigated.

¹⁹ Vegetation is one of the most significant preventive barriers against soil erosion, land degradation and desertification. Vegetated cover requires high levels of soil fertility, which it in turn regulates by feeding back into the fertility cycle.

²⁰ Many plants and trees, and consequently many fruits, seeds and vegetables, are pollinated through the media of animals, birds, insects and natural phenomena such as wind action.

²¹ Many ‘pests’ and diseases have their populations regulated through the actions of parasites and predators present in healthy ecosystems.

²² Habitats provide the nutrients, shelter and other essentials for animals and plants to survive. Each ecosystem will provide different necessary habitats for such species, be these species migratory or sedentary.

²³ Far more genetic diversity, the variety of genes between and within species, is to be found in richer and more complex ecosystems than in denuded ecosystems. We do not yet understand the full value of genetic diversity, but understand enough to know that it is essential for the maintenance of healthy life.

tion and mental and physical health,²⁴ tourism,²⁵ aesthetic appreciation and inspiration for culture, art and design,²⁶ and spiritual experience and sense of place.²⁷

The Convention on Biological Diversity (CBD) of 1992²⁸ does not define ‘natural resources’, but does define ‘biological resources’ as including ‘genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use of value for humanity’.²⁹ That natural resources and the relationships that comprise biological diversity are in trouble generally is acknowledged in the Preamble to the Convention, where the Parties express their concern that ‘biological diversity is being significantly reduced by certain human activities’.³⁰ In 2002, Parties to the CBD thus committed to achieving, by 2010, ‘a significant reduction in the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth’,³¹ and this target was subsequently endorsed by both the World Summit on Sustainable Development³² and the United Nations General Assembly.³³ Unfortunately, the *Global Biodiversity Outlook 3*³⁴ concluded that neither the 2010 biodiversity target, nor any of its accompanying sub-targets have been met.³⁵ Instead, all components of biodiversity are continuing to decline and the principal drivers of biodiversity loss (these being habitat change, overexploitation, pollution, invasive alien species, and climate change) have either remained constant or are increasing in intensity.³⁶ In addition, the *Outlook* highlighted the high risk of dramatic loss of biodiversity and degradation of ecosystem services if certain ecological ‘tipping points’ are reached.³⁷

The loss of biodiversity obviously has significant implications for human well-being, given our reliance on the myriad of services which biodiversity provides.³⁸ The CBD’s Strategic Plan for the period 2011 to 2020 consequently recognizes the need to ‘take effective and urgent action to halt the loss of biodiversity in order to ensure that by

²⁴ Although it is difficult to measure, the importance to the well-being of humans of being able to have access to the natural world is increasingly recognized.

²⁵ Cultural and ecological tourism are increasingly recognized as having great value to the economies of many countries, and to depend on healthy ecosystems.

²⁶ Ecosystems provide much of the inspiration for, and understanding of, different cultures and artistic and design efforts.

²⁷ It is increasingly understood that healthy natural environments are a common element to many religions and cultural knowledge systems.

²⁸ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>.

²⁹ *Ibid.* Art. 2.

³⁰ *Ibid.* Preamble.

³¹ ‘Strategic Plan for the Convention on Biological Diversity’, CBD Decision VI/26 (2002).

³² Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), para. 44.

³³ ‘Convention on Biological Diversity’, UNGA Res. 57/260, para. 7.

³⁴ Secretariat of the CBD, *Global Biodiversity Outlook 3* (2010), available at <<http://www.cbd.int/doc/publications/gbo/gbo3-final-en.pdf>>.

³⁵ *Ibid.* at 17–19.

³⁶ *Ibid.* at 9.

³⁷ *Ibid.* at 71–81.

³⁸ *Ibid.*

2020 ecosystems are resilient and continue to provide essential services, thereby securing the planet's variety of life, and contributing to human well-being, and poverty eradication'.³⁹ To this end, the Plan identifies five strategic goals and 20 targets (the Aichi Biodiversity Targets) to be achieved by 2020.⁴⁰

Very recently, the CBD's *Global Biodiversity Outlook 4*⁴¹ suggests that the majority of the Plan's targets are still possible to achieve, albeit challenging. Achieving these targets will, per *Outlook 4*, require 'innovative and bold action in many areas, and a sustained focus on biodiversity in a wide range of policy areas for the second half of this decade'.⁴² Success stories, it is suggested by *Outlook 4*:

have demonstrated that effective action comes from simultaneously addressing multiple causes of biodiversity loss through monitoring and data analysis, changing economic incentives, applying market pressures, enforcing rules and regulations, involving indigenous and local communities and stakeholders and targeting conservation of threatened species and ecosystems – among many other routes to biodiversity conservation and sustainable use.⁴³

That is the challenge, but it needs to be appreciated just how difficult it is to envision effective international governance over so wide a set of concepts, ideas and materials – many of which will interact with, and affect, each other in ways which at this stage of human development range from the poorly understood to the completely unimaginable. The papers in the present *Review*, and indeed many of the papers in previous volumes of the *Review*, address various problems related to diminishing biodiversity and natural resources, various governance initiatives and structures, and posit various possible solutions where international governance appears to be failing. While the challenges are vast, there is encouragement to be found in the willingness of people to work toward solutions – and the efforts of the contributors to the present *Review* demonstrate that willingness.

1.3 The papers in the 2013 Review

In the papers collected in this volume of the *Review*, the writers evaluate natural resources governance at both the global and regional levels, and make suggestions as to how various challenges in natural resources governance might be addressed. It is the hope of the editors, the Editorial Board, and all involved with this *Review* that its publication will contribute to the body of research in the area of natural resource-

³⁹ CBD Decision X/2, Annex, para. 12.

⁴⁰ *Ibid.* at para. 13.

⁴¹ Secretariat of the CBD, *Global Biodiversity Outlook 4: A mid-term assessment of progress toward the implementation of the Strategic Plan for Biodiversity 2011-2020* (2014), available at <<http://www.cbd.int/gbo4/>> and <<http://apps.unep.org/publications/pmtdocuments/gbo4-en.pdf>>.

⁴² *Ibid.* at 17.

⁴³ *Ibid.*

es governance; and, indeed, to the development of international environmental law and diplomacy generally.

The present *Review* is divided into four Parts. Part I contains two papers, each of which addresses general issues relating to international environmental diplomacy and the governance of natural resources. The first, by Tuomas Kuokkanen, explains that the development of international law's relationship with the environment has historically been driven by both the desire to exploit natural resources and the desire for environmental protection. The author examines the manner in which international law has addressed these seemingly opposing objectives and identifies three approaches (the 'undifferentiated approach', 'separated approach' and 'integrated approach') which, although dominating different periods of history, nevertheless all remain applicable today. The second paper, by Sylvia Bankobeza, provides a broad overview of international agreements regarding transboundary natural resources. The paper explains why there is a need for international frameworks for the conservation and management of transboundary resources, describes the various international principles that have influenced states when drafting agreements regarding such resources, and provides examples of relevant global, regional and sub-regional instruments. The relevance of the UNEP Environmental Law Guidelines and Principles on Shared Natural Resources⁴⁴ is also considered.

Part II of the *Review* focuses on the future of natural resources governance in the wake of the 2012 United Nations Conference on Sustainable Development (UNCSD or Rio+20). First, a paper by Elizabeth Maruma Mrema examines the reactions of various stakeholder groups to the Rio+20 Outcome Document, 'The Future We Want'.⁴⁵ The paper explains that, while UNEP (the status of which has been strengthened as a result of the Rio+20 Conference) was delighted with the Conference's outcomes, many other stakeholders have reacted either negatively or with mixed emotions. It is followed by a paper by Ville Niinistö and Niko Urho, who, in their discussion of the follow-up to the Rio+20 Conference, take a positive stance regarding the Conference's outcomes and demonstrate that the Conference initiated several important processes aimed at achieving a more balanced relationship between the three dimensions of sustainable development. Key follow-up areas discussed by the authors include the strengthening of the international environmental governance system; the bringing together of agendas concerning poverty eradication and the eradication of overconsumption of natural resources in the Post-2015 Development Agenda; and the integration of the environment into economic decision-making by means of green economy. While all of the papers in Part II touch upon the Rio+20 Conference's impacts on UNEP, this issue is the specific focus of a paper by Sylvia Bankobeza. After explaining why there was a need to strengthen and upgrade the role of

⁴⁴ UN Doc. A/33/25 (1979).

⁴⁵ Rio+20 Outcome Document 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014).

UNEP and providing a brief history of decisions on this issue, the paper explains the significance of paragraph 88 of ‘The Future We Want’ (which paragraph addresses the strengthening of UNEP) and describes the measures that have been taken in response to this paragraph.

The papers in Part III address a selection of specific issues relating to natural resources governance. Part III starts with a paper by Sonia Peña Moreno, which examines the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol).⁴⁶ After providing an overview of the Convention on Biological Diversity’s access and benefit-sharing (ABS) provisions and the controversies that have plagued ABS discussions under the Convention, the paper discusses the Nagoya Protocol’s negotiation, adoption and key provisions, and comments on the way forward following the Protocol’s adoption. The second paper in Part III is authored by Course participants Melissa Lewis and Katileena Lohtander-Buckbee. The paper presents a critical appraisal of negotiations towards the establishment of a compliance mechanism for the Nagoya Protocol, focusing on the most contentious points of divergence within the negotiations and possibilities for resolving these. This contribution is followed by a paper by Seita Romppanen on the governance of renewable energy. In this paper, the author provides an overview of renewable energy governance, both globally and within the European Union. She then proceeds to examine the potential of the International Renewable Energy Agency (IRENA) to facilitate the transition to renewable energy, concluding that IRENA can contribute by, *inter alia*, serving as a central hub for information on renewables, providing policy advice, and promoting international cooperation on renewable energy approaches.

Part IV of the *Review* reflects the interactive nature of the Course – and that education and dissemination of knowledge are at the core of the Course and of the publishing of this *Review*. During the Course international negotiation simulation exercises were organized to introduce the participants to the real-life challenges facing negotiators of international environmental agreements on natural resources. In the two main simulation exercises, participants were given individual instructions and a hypothetical, country-specific, negotiating mandate and were guided by international environmental negotiators. Excerpts from, explanations of, and consideration of the pedagogical value of, the exercises are included in Part IV. The issues dealt with are topical and of international importance.

In 2013 there were two main negotiation exercises, each involving issues of both procedure and substance. The first paper in Part IV explains the second simulation exercise, which was devised and run by Cam Carruthers, who was assisted by Tuula Honkonen and Sonia Peña Moreno in preparing the exercise. The scenario for the ne-

⁴⁶ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 12 October 2014, <<http://www.cbd.int/abs/>>.

gotiation simulation focused on compliance-related issues under the Nagoya Protocol, and involved both substantive and structural/procedural issues. The exercise was based on compliance negotiations within the Intergovernmental Committee for the Nagoya Protocol, and the adoption of the Committee's outcomes at a subsequent High Level Segment of the first Conference of the Parties serving as the Meeting of the Parties to the Protocol. Although the simulation scenario was hypothetical, it drew on issues at play in the actual compliance negotiations within the Intergovernmental Committee for the Nagoya Protocol. The theme was intended to provide participants with an opportunity to gain perspective on the complexity of international environmental law-making in the current international environmental governance system.

The second paper in Part IV, by Ed Couzens, explains how the first negotiation exercise was devised and run. The International Whaling Commission (IWC), the managing body created under the 1946 International Convention for the Regulation of Whaling,⁴⁷ provides a useful subject for a negotiation simulation as its atmosphere is renowned for its hostility, in contrast to many more recent MEAs where parties strive to achieve consensus and the atmosphere is usually calmer. This exercise was thus designed to give participants experience in negotiating over an issue regarding the management of natural resources, in an atmosphere of potential conflict. The issue chosen for the exercise was the proposal to establish a whale sanctuary in the South Atlantic, which proposal occasions regular disagreement in the IWC.

While the majority of the papers in the present *Review* deal with specific environmental issues, or aspects of specific multilateral environmental agreements, and thereby provide a written memorial for the future; the negotiation exercises provide, in a sense, the core of each Course. This is because each Course is structured around the practical negotiation exercises which the participants undertake; and it is suggested that the papers explaining the exercises provide insights into the international law-making process. The inclusion of the simulation exercises has been a feature of every *Review* published to date, and the editorial board, editors and Course organizers believe that the collection of these exercises has significant potential value as a teaching tool for the reader or student seeking to understand international environmental negotiation. It does need to be understood, of course, that not all of the material used in each negotiation exercise is distributed in the *Review*. This is indeed a downside, but the material is often so large in volume that it cannot be reproduced in the Course publication.

Generally, it is the hope of the editors that the various papers in the present *Review* will not be considered in isolation. Rather, it is suggested that the reader should make use of all of the *Reviews* (currently spanning the years 2004 to 2013, with writing al-

⁴⁷ International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

ready underway on the 2014 volume which will have the theme of ‘Environmental Security’), all of which are easily accessible on the internet through a website provided by the University of Eastern Finland,⁴⁸ to gain a broad understanding of international environmental law-making and diplomacy.

*Tuula Honkonen*⁴⁹

*Melissa Lewis*⁵⁰

*Ed Couzens*⁵¹

⁴⁸ See <<http://www.uef.fi/en/unep/publications-and-materials>>.

⁴⁹ LLM (London School of Economics and Political Science) D.Sc Environmental Law (University of Joensuu); e-mail: tuula.h.honkonen@gmail.com.

⁵⁰ LLB LLM (Rhodes) LLM Environmental and Natural Resources Law (Lewis and Clark); Honorary Research Fellow, University of KwaZulu-Natal, South Africa; PhD Researcher, Tilburg University, the Netherlands; email: M.G.Lewis@uvt.nl.

⁵¹ BA Hons LLB (Wits) LLM Environmental Law (Natal & Nottingham) PhD (KwaZulu-Natal); Attorney, RSA; Associate Professor, School of Law, University of KwaZulu-Natal, Durban, South Africa; e-mail: couzens.ed@gmail.com. (From 2015, Associate Professor, Sydney Law School, University of Sydney, Australia.)

PART I

GENERAL ISSUES RELATED TO
INTERNATIONAL ENVIRONMENTAL
DIPLOMACY AND GOVERNANCE OF
NATURAL RESOURCES

THE RELATIONSHIP BETWEEN THE EXPLOITATION OF NATURAL RESOURCES AND THE PROTECTION OF THE ENVIRONMENT

*Tuomas Kuokkanen*¹

1 Introduction

Rosalyn Higgins notes that '[t]o study the international law of natural resources is rapidly to discover that it is not a single, monolithic topic'.² In her view, '[a]lmost everything depends, if not on the specific resource, on the category of natural resource that one is studying'.³ In the same vein, the relationship between the exploitation of natural resources and the protection of the environment is not a monolithic but rather a complex, polynomial topic.

At first sight, the distinction between natural resources and the environment might seem to be artificial, as natural resources can be regarded as part of the environment.⁴ Yet, this distinction illustrates two aspects of the human relationship to nature: the exploitation of natural resources and the protection of the environment. While the former tends to underline the economic or beneficial side of nature, the latter em-

¹ PhD (University of Helsinki); Professor of International Environmental Law (part time), University of Eastern Finland; Counsellor, Ministry of the Environment of Finland; e-mail: Tuomas.Kuokkanen@uef.fi. The author has participated in the research project 'Legal framework to promote water security' (WATSEC), financed by the Academy of Finland. The paper is partly based on the work: Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme* (Kluwer Law International, 2002).

² Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford University Press, 1994) 129.

³ *Ibid.*

⁴ See, for example, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, 32 *International Legal Materials* (1993) 1228, Art. 2(10), which defines 'Environment' in the following way: "Environment" includes: ... natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and their interaction between the same factors ...'.

phasizes conservation and protection. It is precisely this relationship, which might often be better termed a tension, between the exploitation of natural resources and the protection of the environment that international law has sought to solve or manage over the last century or so. Depending on context, international law has been able to produce different solutions.

This paper will distinguish three main approaches taken in international law to the relationship between the exploitation of natural resources and the protection of the environment. Firstly, the paper examines the approach of simply applying general international law and thus not giving a specific legal meaning to the relationship between the two. Secondly, the paper explores an approach according to which a differentiation is made between substantive regulation dealing with the exploitation of natural resources and that dealing with the protection of the environment. Thirdly, the paper considers the approach of dealing with the relationship in an integrated manner, recognizing that the issues are interlinked. Even though the three approaches have dominated different periods in history,⁵ they all remain applicable today. Indeed, the three approaches are reflected in the manner in which the international community addresses many current environmental issues.

2 The undifferentiated approach

From the perspective of general international law, a distinction between exploitation of natural resources and protection of the environment is not relevant. Indeed, general doctrines and techniques are neutral in the sense that they apply to both.

For instance, state sovereignty, abuse of rights, good faith, and dispute settlement are neutral doctrines and techniques as they can be applied in a general way.⁶ This does not mean that from the factual point of view there would not be any difference between the exploitation of natural resources and the protection of the environment. The point is rather that, legally, such issues can be addressed without drawing a distinction between the two. Thus, general doctrines are neither pro- nor anti-doctrines per se. Depending on the specific factual scenario and the applicable law, they can, however, lead to either a pro- or anti- result from the point of view of exploitation of natural resources or protection of the environment.

At the time when environmental and natural resources related issues were marginal, it was sufficient to deal with such issues by applying general international law. Take, for example, some of the seminal cases relating to natural resources and the environment.

⁵ The three approaches can be roughly separated in time as follows: the undifferentiated approach from 1850 to 1939, the separated approach between 1950 and 1980 and the integrated approach from 1980 onwards.

⁶ See Kuokkanen, *International Law and the Environment*, *supra* note 1, at 52–67 and 93–97.

The *Bering Sea Fur Seals* arbitration⁷ concerned, on the one hand, the utilization of seals; and, on the other hand, the protection of seals. In the same vein, the *North Atlantic Coast Fisheries* case⁸ related both to a right to fish and to a right to issue protective measures. However, from a legal point of view, those cases did not concern utilization or protection of a natural resource but rather the limits of state jurisdiction.

As issues relating to the environment and natural resources became increasingly relevant, it became necessary to begin to develop substantive regulations to deal with both protection and utilization. These new rules did not altogether replace general rules. Rather, general rules were gradually pushed into the background. They remained, nevertheless, relevant and applicable.

3 The separated approach

The law of natural resources and international environmental law are based on different starting points. The law of natural resources tends to view natural resources as property subject to national sovereignty; while international environmental law appears to regard the environment as a common good and concern and thus subject to international regulation.

The principle of permanent sovereignty over natural resources is one of the cornerstones of the law of natural resources. The principle emphasizes states' right to exploit their own resources pursuant to their own environmental policies. The original purpose of the principle was to transfer issues relating to natural resources from international to national jurisdiction. The principle began to develop in the context of expropriation of foreign property after the Second World War when a number of colonies became independent.⁹

⁷ *Bering Sea Fur Seals Arbitration*, in John Basset Moore, *A Digest of International Law* (1906), Vol. I, 910–919. In order to control sealing in the Bering Sea, the United States adopted a series of Acts between 1868 and 1973. Because pelagic sealing by foreigners occurred outside the ordinary three-mile limit, the legal problem was whether the United States was entitled to exercise jurisdiction in order to control sealing. Great Britain and the United States submitted the dispute to arbitration in 1892. The arbitration tribunal submitted its award on 15 August 1893 in which it found that 'the United States [had] not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals [were] found outside the ordinary three-mile limit'.

⁸ *Award of the Tribunal of Arbitration in Question Relating to the North Atlantic Coast Fisheries*, The Hague, 7 September 1910, *e XI United Nations Reports of International Arbitral Awards*, 68. The case relates to fishing rights. In their peace treaty of 1783, the United States and Great Britain agreed that the United States' inhabitants would continue to have fishing rights along the North Atlantic Coast. In the 1818 treaty, the American rights were redefined. As there were several conflicts on the scope of American fishing privileges between 1820 and the early 20th century, the two governments submitted the dispute to the Permanent Court of Arbitration which gave its decision in 1910. With regard to the regulative rights, the arbitral tribunal held that the right of Great Britain to make domestic regulations without the consent of the United States was inherent to her sovereignty. However, that right to regulate was limited by the 1818 treaty.

⁹ See further, for instance, Tuomas Kuokkanen, 'Background and Evolution of the Principle of Permanent Sovereignty over Natural Resources', in Marko Berglund (ed.), *International Environmental Law-making*

While the colonization process was largely driven by the desire of the colonial powers to take over the colonies' natural resources, the underlying theme of the process of decolonization was the desire to return sovereignty over natural resources to the newly independent states.¹⁰ The question of the right of each country to exploit freely its natural wealth arose in the General Assembly of the United Nations for the first time in 1952 when Resolution 626(VII)¹¹ was adopted. In the course of the preparation of the draft international covenants on human rights, a Commission on Permanent Sovereignty over Natural Resources was established to conduct a full survey of the matter. On the basis of a draft prepared by the Commission, the General Assembly adopted Resolution 1803(XVII)¹² on Permanent Sovereignty over Natural Resources on 14 December 1962.¹³ According to principle 1 of this Resolution, 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'.¹⁴

The process was extended further by the New International Economic Order (NIEO).¹⁵ On 12 December 1974, the General Assembly adopted, by Resolution 3281(XXIX), the Charter of Economic Rights and Duties of States.¹⁶ The Charter, together with a Declaration on the Establishment of a New International Economic Order¹⁷ and a Programme of Action on the Establishment of a New International Economic Order,¹⁸ form the three basic pillars of the NIEO. The underlying theme of the NIEO was to strengthen the economic independence of developing countries. With regard to states' full permanent sovereignty over their natural resources, paragraph 1 of Article 2 of the Charter of the Economic Rights and Duties of States reads as follows:

and Diplomacy Review, 2 University of Joensuu – UNEP Course Series (University of Joensuu, 2006) 97–108.

¹⁰ Broms notes that the fact that the colonial powers felt no obligation to grant control over natural resources to the local population led to deep dissatisfaction among the local leaders, who understood the value of natural resources. See Bengt Broms, 'Natural Resources, Sovereignty over', III *Encyclopedia of Public International Law* (1997) 520–524, at 520.

¹¹ 'Right to exploit freely natural wealth and resources', UNGA Res. 626(VII) of 21 December 1952.

¹² 'Permanent sovereignty over natural resources', UNGA Res. 1803(XVII) of 14 December 1962.

¹³ For the development of the principle of permanent sovereignty over natural resources through the political organs of the United Nations in the period up to 1962, see Karol N. Gess, 'Permanent Sovereignty over Natural Resources. An Analytical Review of the United Nations Declaration and Its Genesis', 13 *International and Comparative Law Quarterly* (1964) 398–449; James N. Hyde, 'Permanent Sovereignty over Natural Wealth and Resources', 50 *American Journal of International Law* (1956) 854–867; George Elian, *The Principle of Sovereignty over Natural Resources* (1979) 83–100; and Nico Schrijver, *Sovereignty over Natural Resources. Balancing Rights and Duties* (Cambridge University Press, 1997) 36–81.

¹⁴ *Supra* note 12.

¹⁵ In the 1960s, developing countries began to criticize traditional trade principles and international economic institutions. From their point of view, international economic order favoured strong western countries and multinational companies and did not sufficiently take into account the special circumstances of developing countries. NIEO was an initiative in 1970s of developing countries to establish from their point of view a more just economic order.

¹⁶ *Yearbook of United Nations* (1974) 403–404.

¹⁷ UNGA Res. 3201 (S-VI) of 1 May 1974.

¹⁸ UNGA Res. 3202 (S-VI) of 1 May 1974.

[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.¹⁹

However, the significance of the NIEO was reduced by the fact that many developed states were reluctant to recognize its legal authority. Therefore, in view of the divergence mentioned above, the Charter of Economic Rights and Duties remained a political rather than a legal document, containing mainly *de lege ferenda* or policy considerations.²⁰ In contrast, the 1962 Resolution on the Permanent Sovereignty over Natural Resources appeared to be generally accepted. In fact, the principle was integrated into principle 21 of the 1972 Stockholm Declaration²¹ and later into a number of international environmental instruments.²²

Turning to the development of international environmental regulation, there are numerous regulations relating to natural resources such as forests, marine living resources and water. International environmental regulation developed gradually. Reacting to certain problems relating to the use of natural resources, states began to adopt international regulations. Thereby, international jurisdiction started to grow. Early agreements were made to conserve useful species, such as birds and wildlife, for hunting, agriculture, commerce and other similar needs.²³ In addition, states started to introduce regulations on the use of boundary waters and on the conservation of useful species of marine living resources.

¹⁹ See also the Declaration on the Establishment of the NIEO, Paragraph 4(e) ('Full permanent sovereignty of every State over its natural resources and all economic activities.').

²⁰ See Ian Brownlie, 'Legal Status of Natural Resources in International Law (Some Aspects)', 162 *Recueil des Cours de l'Académie de Droit International* (1979-I) 245–318, at 255.

²¹ Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416), Principle 21 ('States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies ...').

²² See, for example, Preamble, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 29 December 1972, in force 30 August 1975, 11 *International Legal Materials* (1972) 1294, <<http://www.londonconvention.org/main.htm>>; Preamble, Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <<http://www.unece.org/env/lrtap>>; United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261, <http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm>; Preamble, Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1987) 1529, <<http://www.unep.org/ozone>>; Preamble, United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://www.unfccc.int/>>; Article 3, Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>; UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

²³ For example, in 1902, 11 European states concluded the Convention on the Conservation of Birds Useful to Agriculture (Paris, 19 March 1902, into force 6 December 1905, available at <<http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE-000067.txt>> (visited 21 August 2014).

As boundary waters are by definition shared waters,²⁴ states concerned have had an interest in regulating such waters in order to avoid disputes. Regulations can be divided into those addressing navigational and those addressing non-navigational uses of boundary waters. While the former group of treaties seeks to safeguard the freedom of navigation, the latter regulates, *inter alia*, fishing, irrigation and use of hydro-electric power. With regard to areas beyond national jurisdiction, states had an interest to conserve particular marine living resources in respect of which no state was allowed to exercise exclusive jurisdiction.²⁵ In the beginning, it was exploitation interests, rather than conservation, which motivated states to introduce regulations in particular to avoid overfishing or overutilization. These agreements concerned, for instance, fishing, sealing and whaling.²⁶

As pollution and other environmental problems began to intensify in the 1960s and 1970s, a need arose to emphasize protection. International regulation was extended to deal with transboundary effects in order to protect the human environment. The purpose of this regulation was to protect the air, the terrestrial environment, and water. For instance, a number of agreements were concluded to protect air, freshwater, habitats, the marine environment, and wetlands.

Gradually, the law of natural resources and international environmental law developed in opposite directions. On the one hand, the law of natural resources appeared to deregulate the exploitation of natural resources; on the other, international environmental law appeared to regulate the protection of the environment. While the former sought to maximize national jurisdiction, the latter strove to maximize international jurisdiction. Yet, both areas of law concerned both the exploitation of natural resources and the protection of the environment.

4 The integrated approach

Optimization of short-term and long-term economic interests and environmental concerns began to develop, in a limited form, in connection with early environmental agreements on the use of boundary waters and the conservation of marine living resources.

In relation to international watercourses, the principle of reasonable and equitable utilization reflects the integration of the exploitation of water resources and the protection of such watercourses. This approach began to develop in the early 20th cen-

²⁴ States have often drawn boundaries by using rivers or lakes for easy recognition.

²⁵ In the Bering Sea seals case, the arbitration tribunal recommended, pursuant to Article VI of the *compromise*, specific control measures. Although those measures were recommendatory, they led to bilateral arrangements between Great Britain and the United States and later on, in 1911, to a multilateral treaty. See Convention between Great Britain, Japan, Russia and the United States respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, Washington, 7 July 1911.

²⁶ For discussion, see Kuokkanen, *International Law and the Environment*, *supra* note 1, at 107–132.

ture in connection with bilateral and regional agreements. In 1966, the International Law Association adopted the Helsinki Rules on the Use of the Waters of International Rivers²⁷ as a reflection of customary international law. According to Article IV of the Rules, each basin state is entitled to ‘a reasonable and equitable share in the beneficial waters’.²⁸ The principle was subsequently codified into the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.²⁹ According to Article 5 of the Convention:

[w]atercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.³⁰

With regard to marine living resources, the 1911 Fur Seals Convention³¹ represents an early agreement reflecting reconciliation between economic and conservation interests.³² The optimization approach was also used in regulating fishing and whaling. For instance, the 1946 International Convention for the Regulation of Whaling³³ refers to the ‘optimum level of whale stocks’³⁴ while many fishing agreements used the concept of ‘maximum sustainable yield’.³⁵ The approach, with slight variations, was extended to marine living resources in general. The 1958 Convention on the Living Resources of the High Seas³⁶ was based on the concept of ‘the optimum

²⁷ See *International Law Association Reports* (1966) 477–532.

²⁸ *Ibid.* at 486.

²⁹ Convention on the Law of Non-Navigational Uses of International Watercourses, New York, 21 May 1997, in force 17 August 2014, 36 *International Legal Materials* (1997) 713.

³⁰ In its commentary, the ILC noted as follows:

Attaining optimal utilization and benefits does not mean achieving the ‘maximum’ use, the most technologically efficient use, or the most monetarily valuable use much less short-term gain at the cost of long-term loss. Nor does it imply that the State capable of making the most efficient use of a watercourse - whether economically, in terms of avoiding waste, or in any other sense - should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of each.

See ‘Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, adopted on the Second Reading by the International Law Commission at its Forty-Sixth Session’, UN Doc. A/CN.4/L.493 (1994) 26. The word ‘sustainable’ was added to the Article during the negotiations in the Sixth Committee.

³¹ See Convention between Great Britain, Japan, Russia and the United States Respecting Measures for the Preservation and Protection of Fur Seals in the North Pacific Ocean, Washington, D.C., 7 July 1911, 214 *Consolidated Treaty Series* 80.

³² See, for instance, Lynton K. Caldwell, *International Environmental Policy* (1990) 37 (‘Each of the four treaty states benefited more from long-term conservation than from short-term exploitation’).

³³ International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

³⁴ *Ibid.* Preamble.

³⁵ See, for instance, Intentional Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, 9 May 1952, 205 *United Nations Treaty Series* 65, article IV (‘...for the purpose of maintaining or increasing its maximum sustained productivity’).

³⁶ Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, 559 *United Nations Treaty Series* 285.

sustainable yield'. Finally, optimal utilization was extended to the 1982 UN Convention on the Law of the Sea³⁷ and to the 1995 Convention on Straddling and Highly Migratory Fish.³⁸ As a consequence, the optimization approach replaced the freedom of exploitation. Referring to this evolution, the International Court of Justice stated in the *Fisheries Jurisdiction* case that 'the former *laissez faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other states and the need of conservation for the benefits of all'.³⁹

Next, the optimization process was extended to natural resources in general. In 1982, the UN General Assembly adopted the World Charter for Nature⁴⁰ according to which 'ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity'.⁴¹ Furthermore, the 1992 Convention on Biological Diversity⁴² covers both biological diversity and biological resources. The Convention requires that biological diversity is conserved and biological resources are used in a sustainable manner.⁴³ The concepts of green economy⁴⁴ and ecosystem services⁴⁵ also reflect the integrated approach.

The reconciliation between the environment and economy was by the emergence of the doctrine of sustainable development to the global level to bridge the gap between developed and developing countries. The World Commission on Environment and

³⁷ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 21 *International Legal Materials* (1982) 1261.

³⁸ Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 34 *International Legal Materials* (1995) 1542, <http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm> (visited 7 April 2014).

³⁹ See *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (Merits), Judgement of 25 July 1974, ICJ Reports (1974) 3, para. 72 at 31; *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland) (Merits), Judgement of 25 July 1974, ICJ Reports (1974) 175, para. 64 at 200.

⁴⁰ See 'World Charter for Nature', UNGA Res. 37/17 of 28 October 1982. In 1980, the International Union for Conservation of Nature and Natural Resources (IUCN) published the World Conservation Strategy. The strategy defines the concept of sustainable utilization by noting that '[s]ustainable utilization is somewhat analogous to spending the interest while keeping the capital'. *Ibid.* section 10.

⁴¹ World Charter for Nature, para. 1(4).

⁴² Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.www.biodiv.org>>.

⁴³ Sustainable use is defined in Art. 2 of the Convention as follows: 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the need and aspirations of present and future generations'.

⁴⁴ See, for instance, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011), available at <http://www.unep.org/greeneconomy/Portals/88/documents/get/ger_final_dec_2011/Green%20EconomyReport_Final_Dec2011.pdf> (visited 2 October 2014).

⁴⁵ The Millennium Ecosystem Assessment brought the concept of ecosystem services into the policy discussion. See *Millennium Ecosystem Assessment: Ecosystems and Human Well-being. Synthesis* (Island Press, 2005). For discussion, see, for instance, Leila Suvantola, 'Ecosystem Services and Climate Change' in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy*, 10 University of Eastern Finland – UNEP Course Series (University of Eastern Finland, 2011) 245–254.

Development,⁴⁶ chaired by Gro Harlem Brundtland, focused on the reconciliation of the environment and development in its report, which was titled *Our Common Future*.⁴⁷ The report stated that ‘the “environment” is where we all live; and “development” is what we all do in attempting to improve our lot within that abode. The two are inseparable’.⁴⁸

Through the 1992 United Nations Conference on Environment and Development, convened in Rio de Janeiro, Brazil, sustainable development became the dominant doctrine. Sustainable utilization was extended to cover different forms of utilization of natural resources, such as sustainable agriculture, sustainable land use, sustainable mountain development, sustainable use of biological resources, sustainable use of marine living resources, sustainable water utilization, and so on. Twenty years later, in the 2012 United Nations Conference on Sustainable Development⁴⁹ (the Rio+20 Conference), the same approach continued. The final Outcome Document, ‘The Future We Want’, reaffirmed the need to achieve sustainable development by, *inter alia*:

promoting integrated and sustainable management of natural resources and ecosystems that supports *inter alia* economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.⁵⁰

Consequently, environmental concerns and exploitation interests were finally integrated. However, this does not mean that the doctrine of sustainable development has produced a harmonious outcome. Rather it has provided a framework under which the tension between the two can potentially be coordinated and managed.

5 Conclusion

In light of the above, it is arguable that two opposing approaches have driven the development of the relationship between international law and the environment: protection of the environment and exploitation of natural resources. In the undifferentiated approach, the methods and techniques of general international law were applied to environmental problems as opposed to developing substantial environmental norms. Those methods and techniques were undifferentiated also in the sense that there was no clear-cut separation between issues concerning the protection of the

⁴⁶ See ‘Report of the World Commission on Environment and Development’ UNGA Res. 42/187 of 11 December 1987.

⁴⁷ Gro Harlem Brundtland, *Our Common Future* (Oxford University Press, 1987).

⁴⁸ *Ibid.* at 20.

⁴⁹ ‘Institutional arrangements to follow up the United Nations Conference on Environment and Development’, UNGA Res. 47/191 of 29 January 1993.

⁵⁰ See Rio +20 Outcome Document ‘Future We Want’, UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014).

environment and the utilization of natural resources. Conversely, during the separated approach the two sides did not have much in common with each other. While the law of natural resources focused on deregulation, international environmental law involved international regulations. Finally, through the development of the integrated approach, the two found each other and began to fuse.

Even though the integrated approach is able to reconcile protection and exploitation at the level of legal principle, the tension between them remains. Indeed, the question of how the tension between internationalization and nationalization, between exploitation and protection, between man and nature, and between the environment and economy is resolved and reconciled in any particular instance is left open.

Moreover, even though the doctrines were discussed separately above, this does not mean that the doctrines are also functionally separate. Take, for instance, the *Case Concerning the Gabčíkovo-Nagymaros Project*⁵¹ in the International Court of Justice. The case concerned a dispute between Hungary and Slovakia over the construction and operation of dams on the River Danube. When one Party withdrew from the agreement and the other proceeded, the Court found both states to be in breach of their legal obligations.⁵² With regard to the three approaches discussed in this paper, the case reflects *prima facie* the undifferentiated approach because Hungary and Slovakia had recourse to classical dispute settlement in order to solve their bilateral dispute retrospectively. Looking at the case more closely, one can, however, also discern themes relating to natural resources and the environment. For example, the case concerned, *inter alia*, a 1977 boundary waters treaty between the two parties. That agreement was concluded for the development of ‘water resources, energy, transport, agriculture and other sectors of the national economy’.⁵³ Furthermore, the parties committed themselves ‘to ensure that the quality of water in the Danube was not impaired as a result of the Project’.⁵⁴ However, it seems that exploitation interests and environmental concerns were not fully integrated; but, rather, dealt with separately. Nevertheless, one can label many arguments by the parties as reflecting the integrated approach. For instance, parties referred to ecological risks, scientific evidence and the precautionary principle. Moreover, the Court noted that the need to reconcile economic development with the protection of the environment ‘is aptly expressed in the concept of sustainable development’.⁵⁵

⁵¹ *Case Concerning the Gabčíkovo–Nagymaros Project* (Hungary/Slovakia), Judgement of 25 September 1997, ICJ Reports (1997) 7.

⁵² See, for instance, Philippe Sands and Jacqueline Peel with Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (3rd ed., Cambridge University Press, 2012) 313–319.

⁵³ *Case Concerning the Gabčíkovo–Nagymaros Project*, *supra* note 51, para. 15.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* para. 140.

Thus, the *Case Concerning the Gabčíkovo-Nagymaros Project* illustrated that the three approaches are interlinked. This is the case also in a number of other instances. Indeed, the three approaches reflect three contextually different but interlinked ways to construe the relationship between the exploitation of natural resources and the protection of the environment.

INTERNATIONAL AGREEMENTS ON TRANSBOUNDARY NATURAL RESOURCES

*Sylvia Bankobeza*¹

1 Introduction

A transboundary natural resource is a resource that is located across the border of two or more states. An international agreement on a particular transboundary natural resource is an instrument that is negotiated by states that are sharing this natural resource. Collaboration among states in respect of transboundary natural resources is achieved through both legally binding and non-binding agreements as well as through bilateral or multilateral agreements. These international agreements on transboundary natural resources, regardless of their structure, form, status in international law or duration, provide an opportunity for states that share natural resources to consider each other's needs and take measures not to cause harm to areas beyond national jurisdiction.

Most agreements are designed to promote international cooperation and collaboration among states in the equitable utilization and sustainable management of transboundary natural resources. In particular, the agreements provide a framework for consultations, notification, dialogue and other cooperative approaches and mechanisms for state cooperation to address transboundary issues of mutual concern. International transboundary natural resources agreements can enhance environmental protection and ecosystem management by harmonizing cross-border standards, plans and management approaches, and by removing barriers that can hinder sustainable use of resources and conservation efforts.

Much has been written about individual agreements on shared natural resources, in particular as they relate to shared freshwater resources. The scope of the present pa-

¹ LLB (UDSM) LLM (Hull) Post Graduate Diploma in International Relations and Conference Diplomacy (DSM); Environmental Lawyer, United Nations Environment Programme (UNEP); e-mail: sylvia.bankobeza@unep.org.

per is broad, covering all types of natural resources that are shared – such as transboundary rivers, lakes, wetlands, mountains, national parks, and related ecosystems, as well as migratory species, and transboundary oil and gas. It provides a broad overview of global and regional agreements that call for joint cooperative action among states with transboundary natural resources. The need for transnational cooperation and collaboration in the management of transboundary natural resources and the role of international agreements in facilitating such cooperation is also highlighted. The paper then proceeds to discuss the relevance of the 1979 UNEP Environmental Law Guidelines and Principles on Shared Natural Resources² and other international principles in guiding the development of legal agreements on transboundary resources; to provide examples of global, regional and sub-regional treaties which encourage cooperative action (including through transboundary natural resources agreements); and to comment on recent innovations in cooperative agreements.

2 The rationale for international agreements on transboundary natural resources

The transboundary natural resources which are subject to international cooperation include rivers,³ lakes,⁴ seas, wetlands,⁵ aquifers,⁶ mountains,⁷ protected areas (also re-

² 'Environmental Law Guidelines and Principles on Shared Natural Resources', UN Doc. A/33/25 (1979).

³ Convention on the Law of Non-Navigational Uses of International Watercourses, New York, 21 May 1997, 36 *International Legal Materials* (1997) 713.

⁴ For instance, the North America Great Lakes shared by the United States of America (USA) and Canada: Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, Washington, 11 January 1909, in force 5 May 1910, 36 *Stat.* 2448 (hereinafter Boundary Waters Treaty); Great Lakes-Saint Lawrence River Basin Sustainable Water Resources Agreement, 13 December 2005; Great Lakes-St. Lawrence River Basin Water Resources Compact, 13 December 2005 (hereinafter Compact). See also UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (the Water Convention), Helsinki 17 March 1992, in force 6 October 1996, 31 *International Legal Materials* (1992) 1312; and UNECE Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention), Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802; and UNECE Convention on Long range Transboundary Air Pollution, Geneva, November 13 1979, in force 16 March 1983, 18 *International Legal Materials* (1979) 1442, <<http://www.unece.org/env/lrtap/>>.

⁵ Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <<http://www.ramsar.org>>.

⁶ The United Nations Conventions on the Law of Non-navigational Uses of International Watercourses covers ground water, but applies only to aquifers directly related to a body of surface water (see Art. 2(a), definition of 'watercourse'). The 1977 Agreement signed between the French Prefect de Haute-Savoie and Swiss Canton of Geneva concerning ground water resources in the Lake Geneva Basin is a good example of an international agreement in this area. Arrangement Relating to the Protection, Utilization and Re-charging of the Franco-Swiss Genevese Aquifer, 6 September 1977, Council of State of the Republic and Canton of Geneva and the Prefet of Haute-Savoie.

⁷ See, for instance, Framework Convention on the Protection and Sustainable Development of the Carpathians, Kiev, 22 May 2003, in force 4 January 2006, <<http://www.carpathianconvention.org>>; and its Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity, Kiev, 22 May 2003, in force 28 April 2010. An example of state cooperation within a mountain range and between ranges is the Himalayas International Centre for Integrated Mountain Development. It is an independent inter-governmental organization, under the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO), that was established in 1983 by Nepal; other countries within the

ferred to as transfrontier parks)⁸ – including national parks, private game sanctuaries and nature reserves –, and mineral resources, such as oil and gas.⁹ In addition, migratory species, including animals, birds and fish, have been subjected to cooperation agreements.¹⁰ Overall, states sharing such resources have mutual concerns regarding the shared natural resource, area, ecosystem or migratory species. These mutual concerns arise mainly because the use of the resource by one state without regard to other states' sovereign rights to use resources occurring within their territories can affect the quality and/or quantity (for instance, in rivers and lakes) of the natural resource and the equitable sharing of resources.

There is always a potential for conflicts to arise when an environmental problem spills over from one country into another or when concerns are raised on management or apportioning of the shared transboundary natural resources.¹¹ There is, therefore, a need to engage in negotiations and to provide agreements/frameworks that can serve as platforms to settle any transboundary conflicts/issues in a peaceful manner.

Although states have a sovereign right to exploit their own natural resources, where there is a transboundary natural resource a state cannot act unilaterally without regard to other states sharing that resource. This is because in the event that an action of one state harms other states, their ability to secure the full benefits of such resources can be affected. This can raise concerns over the equitable apportioning of the resource, the management of the same, as well as the degradation and change of such resources.

region that are participating in this cooperation are Afghanistan, Bangladesh, Bhutan, China, India, Myanmar and Pakistan.

⁸ For instance, transboundary collaboration between Tanzania and Kenya on the Mara; Transboundary collaboration between Democratic Republic of Congo on Virunga Park and Queen Elizabeth Rwenzori and Semuliki Parks in Uganda. Report of the Transboundary meeting 20–21 June 2003. Another example is the 1999 bilateral agreement between South Africa and Botswana on the Kgalagadi Transfrontier Park to manage the two countries' adjacent national parks (Gemsbok National Park in Botswana and Kalahari Gemsbok National Park in South Africa) as a single ecological unit now referred to as the Kgalagadi Transfrontier Park.

⁹ For instance, the US–Mexico Trans-boundary Hydrocarbons agreement, Los Cabos, 20 February 2012, in force 2013. The agreement develops a framework for American and Mexican companies to cooperate in oil and gas development and to jointly develop transboundary reservoirs in the maritime boundary in the Gulf of Mexico.

¹⁰ See, in particular, the Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int>>, and the various daughter agreements (available at <<http://www.cms.int/en/cms-instruments/agreements>>) and memoranda of understanding (<<http://www.cms.int/en/cms-instruments/mou>>) which have been adopted under the framework of this Convention.

¹¹ The *Trail Smelter* arbitration (*Trail Smelter Arbitration (USA v Canada)*, 35 *American Journal of International Law* (1941), 684) provides a good example of how one state's activities can transcend national borders and cause damage, in this case transboundary pollution, in another state. In this regard, Canada and the United States, the main parties to the *Trail Smelter* arbitration, later entered into an international agreement to address transboundary pollution concerns that were affecting areas beyond national jurisdiction. US-Canada Air Quality Agreement (Agreement between the Governments of Canada and the United States of America on Air Quality, signed and entered into force 13 March 1991). An ozone annex was added to the Agreement in 2000. See <<https://www.ec.gc.ca/air/>>.

The impact on people, species and livelihoods is normally the main underlying concern which brings countries to the negotiation table to deliberate on issues regarding transboundary resources and/or to conclude agreements. In a situation where states share transboundary water resources, for example, the riparian state that is located downstream can be affected by pollution or flooding from an upstream state.¹² In this regard, state cooperation plays an important role when it opens dialogue and develops agreements to resolve any concerns.

To facilitate cooperation and consultations, and continuously engage states, some international agreements on transboundary resources establish institutions and schedule meetings to address issues of common interest. The main areas in which countries seek to cooperate with one another include management of particular transboundary natural resources, exploitation of natural resources in a sustainable manner taking into account surrounding ecosystems, and the need to ensure that areas beyond national jurisdiction are not affected by national activities and plans.

State cooperation can be complicated by the fact that the transboundary natural resource is located across national jurisdictional boundaries, and is thus managed by more than one country. This can present unique challenges because of the different laws and regulations being applied by states to manage the resource and related institutions with different mandates. This also means that unless national laws are harmonized across the states that share natural resources, these resources can be managed by different standards in the national laws and institutions of different states.¹³

3 The importance of international legal frameworks for transboundary natural resources

Although national laws and policies can regulate the use, protection and conservation of natural resources within a state, international law is necessary to regulate cooperation among states in the utilization of transboundary natural resources.¹⁴ National laws that regulate the use, protection and conservation of natural resources are limited because they do not extend beyond areas of national jurisdiction in order to cater for transboundary resources. International agreements on transboundary natural resources in the form of bilateral or multilateral agreements are therefore necessary frameworks for international cooperation and serve as instruments that articulate the scope and areas of cooperation. In addition, the shared natural resources agreements often provide specific obligations to be implemented by states.

¹² For instance, a country such as Mozambique shares nine transboundary rivers with its neighbors and is downstream in most of them.

¹³ For instance, Kenya and Tanzania share an ecosystem and have national parks which transcend borders. Kenya prohibits game hunting by law while Tanzania permits game hunting and allocates hunting blocks.

¹⁴ See examples of various types of transboundary agreements given above.

States can enter into bilateral or multilateral agreements depending on the resource and the states that are involved and their willingness to cooperate in a transboundary legal context.¹⁵ The types of agreements that states enter into depend on the resource and the issues of concern. States can enter into transboundary rivers agreements, or lakes agreements; transboundary wetlands and/or aquifers agreements;¹⁶ transboundary protected areas and ecosystems agreements (where national parks or game reserves located across national boundaries require corridors and buffer zones to protect biodiversity);¹⁷ transboundary mountains agreements; regional seas agreements; transboundary minerals, including oil and gas, agreements; as well as agreements concerning migratory species.

The purpose of entering into such agreements also differs from one agreement to another with some agreements on transboundary natural resources aimed at promoting joint and equitable sharing of natural resources and ecosystems for improved livelihoods while others focus more on joint planning and management of these common transboundary resources. In addition, some provide for taking joint initiatives to ensure equitable sharing of water – for instance when sharing transboundary water resources; to establish corridors, buffer zones, and fencing for wildlife protection in transboundary conservation areas; to achieve sustainable use of natural resources (for instance, fish-stocks). Other issues covered include promoting research, monitoring, information sharing and uptake of innovations, designating focal points, jurisdiction of courts, harmonization of laws and policy frameworks, promoting tourism, combating poaching, and the areas of cooperation that have been negotiated by Parties.

It is important to note that not all countries have established formal transboundary agreements and institutions to guide the management of particular natural resources. There are countries that rely on loose joint communiqués, which are entered into when a head of state or government visits a friendly country. Joint communiqués do provide for areas of cooperation and can be effective when they schedule regular meetings to address areas of cooperation, but they are not formal treaties among states and consequently are not legally binding.

Not all states that have transboundary natural resources have agreements on their governance with other states. Where an agreement does exist, the following factors should be considered:

¹⁵ UNEP, Oregon State University and FAO, *Atlas of International Freshwater Agreements* (UNEP, 2002).

¹⁶ Examples of transboundary Ramsar sites designated according to Article 5 of the Ramsar Convention include the Domica–Baradla Cave system and related wetlands which were designated on 14 August 2001 by Hungary and on 2 February 2001 by the Slovak Republic (Domica Cave); and the Kotra Ramsar Site in Belarus and Cepkeliai in Lithuania, both designated in 2010.

¹⁷ There are several transfrontier park agreements in Southern Africa and East and Central Africa that have been concluded between countries in Africa to foster state cooperation and collaboration and to conserve natural resources and protect parks as a single ecosystem. States such as Tanzania and Kenya cooperate to protect the Mara ecosystem. Thousands of wildebeests and other animals and birds migrate across these countries' borders in different seasons in search of pasture and food. Other examples are given above in *supra* note 8.

- Does the transboundary agreement relate to the entire ecosystem?
- Does it create any institutional framework, or require regular meetings of the parties?
- Does it provide for joint scientific studies, research, planning and programming?
- How effective are these agreements at averting conflicts and managing or sharing resources equitably?

In most instances, areas of cooperation include efforts to ensure that transboundary resources are used sustainably (through, *inter alia*, initiating natural resources conservation). An institutional framework for such cooperation or any other mechanisms that can provide a format or platform for states to meet or communicate is also required to facilitate collaboration between countries.

Apart from bilateral or multilateral agreements that are designed to manage specific transboundary natural resources (for instance, a particular watercourse or species), there are framework international agreements that address transboundary natural resources (or categories thereof) more generally. There are global or regional agreements such as the United Nations Convention on the Law on Non-Navigational Uses of International Watercourses;¹⁸ the Southern African Development Community (SADC) Shared Watercourses Protocol;¹⁹ and the East African Community (EAC) Protocol on Environment and Natural Resources Management²⁰ (Article 9). These general framework agreements articulate broad requirements for the protection of transboundary natural resources and call on countries to manage transboundary natural resources through cooperation and collaboration, including through entering into additional, more specific transboundary natural resources agreements for the management of particular resources. (Examples of framework agreements at the global and regional level that encourage states to enter into more specific bilateral or multilateral arrangements/agreements to manage particular shared resources are provided in sections 4.4 and 4.5 of this paper.)

Soft law instruments, such as the Helsinki rules²¹ of 1966, have for years guided countries in developing shared water agreements. The UNEP Guidelines and Principles on Shared Natural Resources adopted by the United Nations General Assem-

¹⁸ Convention on the Law of Non-Navigational Uses of International Watercourses, New York, 21 May 1997, in force 17 August 2014, 36 *International Legal Materials* (1997) 713.

¹⁹ Protocol on Shared Watercourse Systems in the Southern African Development Community, Johannesburg, 28 August 1995, in force 29 September 1998, available at <http://www.sadcwscu.org.ls/protocol/protocol_tab.htm>, revised by the Protocol on Shared Watercourse Systems in the SADC Region, Windhoek, 7 August 2000, in force 22 September 2003, <<http://www.sadc.int>>.

²⁰ Protocol on Environment and Natural Resources Management, Arusha, 2005; <http://www.eac.int/environment/index.php?option=com_docman&task=doc_download&gid=101&Itemid=163>.

²¹ The Helsinki Rules on the Use of the Waters of International Rivers, adopted by the International Law Association at the fifty-second conference, Helsinki, in 1966; available at <http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/internationalregion-conventions/helsinkirules.pdf> (visited 1 April 2014).

bly in 1979,²² have also served as important tools to guide governments in the formulation of bilateral and multilateral conventions regarding natural resources shared by two or more states.

4 Principles and frameworks for cooperation

4.1 Introduction

To be effective, existing agreements concerning transboundary natural resources establish both full-time and *ad hoc*, formal and informal, bodies or institutions to facilitate cooperation, and joint commissions with both technical experts formats and ministerial segments to provide policy guidance. Furthermore, there are regional integration bodies; river and lake basin organizations; focal points designated from relevant government departments; and steering committees. Institutions are established to jointly manage the resource based on the mandate given by the agreement. The structure, coordination mechanisms and funding of the bodies are normally determined by the treaty. For instance, a body of technical experts may be constituted to handle technical matters, giving policy recommendations to *ad hoc* ministerial meetings. Reasons for the effectiveness or inadequacy of these institutional frameworks vary.

Alternative approaches to management can include:

- joint management agreements that can consider the entire natural resource across the border as a unit/ecosystem;
- cooperation and collaboration agreements; or
- relying on global and regional agreements to consult, notify and manage a transboundary natural resource.

There are transboundary natural resources that are not governed by natural resources agreements. The lack of agreements can result in political conflicts between states that can have serious consequences.

4.2 Principles for international cooperation between states when they enter into agreements on transboundary natural resources

In entering into agreements concerning transboundary natural resources, countries have been guided by various international principles relevant to the transboundary natural resources, as well as the values and guiding principles of the United Nations. The latter stress the importance of peaceful co-existence and achieving international cooperation in solving international problems.²³ Another basis for cooperation

²² See *supra* note 2.

²³ Charter of the United Nations, 26 June 1945, available at <<http://www.un.org/en/documents/charter/index.shtml>>. See also Principle 24 of the Stockholm Declaration (Declaration of the United Nations

between states with transboundary natural resources are the principles of sovereign equality of states, good neighborliness and cooperation in good faith, which are found in both the 1972 Stockholm Declaration²⁴ and the 1992 Rio Declaration on Environment and Development.²⁵

Under the auspices of the Charter of the United Nations²⁶ and according to the principles of international law, states have the sovereign right to exploit their own resources pursuant to their own policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.²⁷ This principle, which is provided in Principle 21 of the 1972 Stockholm Declaration, is a cardinal rule and practice that has been reiterated in several international legal instruments, both legally binding and soft law, including Principle 2 of the 1992 Rio Declaration.

Other principles that have been reiterated in international agreements on transboundary natural resources include the principle that countries with transboundary natural resources are to cooperate and fulfill in good faith the obligations arising from the agreements of cooperation. In cooperating in the context of transboundary natural resources, states are also expected to recognize the sovereign equality of all parties involved in any cooperation and to open channels of communication to secure areas of cooperation agreed upon by all parties.²⁸ Other principles that are frequently found in agreements on transboundary natural resources include the precautionary principle and the polluter pays principle.²⁹

In adopting the UNEP Principles on transboundary natural resources,³⁰ the United Nations General Assembly requested all states to use the Principles as guidelines and recommendations in the formulation of bilateral and multilateral conventions regarding natural resources shared by two or more states. This was to happen on the basis of the principle of good faith and in the spirit of good neighborliness and in

Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416) and Principle 19 of the Rio Declaration (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876).

²⁴ Principles 21–22, as well as Principles 2–7 of the Stockholm Declaration.

²⁵ Principles 2, 26, and 27 of the Rio Declaration.

²⁶ Article 2 of the UN Charter. The UN as an organization is based on the sovereign equality of states.

²⁷ See Art. 3 of the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>; Principle 2 of the Rio Declaration 1992; and Principle 21 of the Stockholm Declaration.

²⁸ Principle 2 ('state sovereignty over natural resources') and Principle 19 ('a state shall consult, notify and inform other states who are likely to be affected in case of an activity that can have a transboundary environmental effect') of the Rio Declaration.

²⁹ See Principle 15 ('the precautionary approach') and Principle 16 ('the polluter pays principle') of the Rio Declaration.

³⁰ 'Co-operation in the field of the environment concerning natural resources shared by two or more States', UNGA Res. 34/186 of 18 December 1979.

such a way as to enhance, and not to affect adversely, development and the interests of all countries (in particular, developing countries).³¹

Apart from cooperation, states also need to prevent environmental damage/harm in their territories and in areas beyond national jurisdiction. Also important is the need to communicate (notify) and harmonize programs, plans and measures as they relate to the resource that is cutting across the national boundary of two or more states.

As states promote cooperation and collaboration in managing transboundary natural resources, they can take individual and, where appropriate, collective or joint initiatives and cooperate to implement joint plans for mutual benefits.

4.3 The UNEP Principles and their relevance in the 21st century

The UNEP Principles were developed to guide states with respect to the conservation and harmonious utilization of shared natural resources. These Principles have provided guidance to states since 1979, when they were adopted by the United Nations General Assembly. In understanding the Principles and assessing their relevance for the 21st century, in light of the developments that took place from the 1980s to date, it is assumed for purposes of this paper that Principles 1 to 15 are still relevant in guiding cooperative action in the context of transboundary natural resources. The Principles provide a set of options that states can apply in the course of designing cooperative agreements.

When one reviews Principles 1 to 15, issues such as the need for state cooperation in the conservation and harmonious utilization of resources arise, as does the need to conclude bilateral and multilateral agreements to regulate transboundary resources and the activities that may affect such resources. The Annex to this paper describes these UNEP Principles and guidelines.

In summary, the UNEP Principles recognize the sovereign right of states to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environments of other states or of areas beyond the limits of national jurisdiction. They also contain principles on Environmental Impact Assessment; engaging in consultations; exchange of information; notification; good faith and good neighborliness; avoiding unreasonable delays; the need for joint scientific studies; in an emergency, the duty to inform other states that may be affected; making remedies available; and on equivalent access to judicial and administrative services across the border.

³¹ *Ibid.*

4.4 Global legal frameworks and transboundary natural resources agreements

At the global level, there are several international treaties, including multilateral environmental agreements (MEAs), which encourage cooperative action among states that share transboundary natural resources. These provide general standards that can be adopted by states when they are entering into specific transboundary agreements. The rules so far developed and adopted by many states as they cooperate with one another at the international level seek to promote fairness and principles of equitable utilization or distribution of resources and avoidance of harm in areas beyond national jurisdiction.

The main added value of having global instruments on shared natural resources, regardless of the instruments' status in international law, is to reduce issue areas that could have taken time to be negotiated on specific natural resources by setting the agreed standards for managing shared resources and articulating the responsibility expected of each country to take into account the mutual concerns and interests of other parties. Provisions requiring states to consult and notify each other where activities are likely to affect other states sharing the resource, as well as provisions on joint management or development of the resource, can also be found in some of the global frameworks on transboundary natural resources.

The relevant global agreements include the 1997 Convention on the Law on Non-Navigational Uses of International Watercourses which, in Articles 3 and 4(h), requires states to cooperate when they share transboundary freshwater resources.³² Articles 5 and 6 are also of key importance as they refer to the equitable and reasonable utilization of shared water resources and call for participation. Article 7 provides an obligation not to cause significant harm. This Convention was preceded by the 1966 Helsinki Rules on the Uses of the Waters of International Rivers, which were adopted by the International Law Association.³³ The general rules of international law as set forth in the Helsinki Rules are applicable to the use of the waters of international drainage basins, except as may be provided otherwise by the Convention, agreement or binding custom among the basin states. The Helsinki Rules and UNEP guidelines and principles on shared natural resources have, over the years, been available for use by states to guide them when entering into specific international agreements on transboundary natural resources.³⁴ Historically, one of the most important prin-

³² The Convention applies to uses of international watercourses, with a 'watercourse' being defined to mean 'a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus' (Art. 2(a)).

³³ The Helsinki Rules on the Uses of the Waters of International Rivers Adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966, available at <http://www.unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_II_Helsinki_Rules_ILA.pdf> (visited 27 August 2014). The International Law Commission has played an important role in the development of rules and international law in this area.

³⁴ A good example is the SADC Protocol on Shared Watercourses of 1995, which came into force in 1998. It was designed along the lines of the Helsinki Rules; but later, in 2000, after the UN Watercourses Con-

ciples in the management of international watercourses has been that of reasonable and equitable utilization; although, in recent years, the emphasis has begun to shift more towards joint management.

Other global MEAs that encourage state cooperation, including by states entering into international agreements on transboundary natural resources, include the Convention on Biological Diversity, which calls on contracting parties to cooperate with other states in respect of areas beyond national jurisdiction and on other matters of mutual interest for the conservation and sustainable use of biological diversity;³⁵ and the 1971 Convention on Wetlands of International Importance (Ramsar Convention), which provides in Article 5 that the contracting parties consult with each other about implementing obligations arising from the Convention, especially in the case of a wetland extending over the territories of more than one contracting party or where a water system is shared by contracting parties.

In respect of migratory species, the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS)³⁶ provides a global legal framework and calls on countries to cooperate and enter into agreements for the conservation of specific migratory species (or groups of species) if necessary and appropriate. One such ancillary agreement is the African Eurasian Migratory Water Birds Agreement (AEWA),³⁷ which is dedicated to the conservation of migratory waterbirds and their habitats across Africa, Europe, the Middle East, Central Asia, Greenland and the Canadian Archipelago. AEWA brings together states and the wider international conservation community in an effort to establish coordinated conservation and management of migratory waterbirds throughout their entire migratory range. AEWA is the largest binding agreement yet to have been adopted under the CMS framework. Not all of the agreements developed under this framework are binding in nature, with some taking the form of non-binding memoranda of understanding or action plans.

The United Nations Convention on the Law of the Sea (UNCLOS)³⁸ was adopted with due regard to the sovereignty of all states. It established a legal order for the seas and oceans to facilitate international communication, and to promote peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment. Calls to encourage state cooperation in the case of shared

vention was created, the Protocol was revised to reflect the changes effected by the Convention. The Protocol came into force in 2003.

³⁵ Arts 3, 4 and 5 of the CBD.

³⁶ See Arts II, III, IV, V and VI.

³⁷ Agreement on the Conservation of African-Eurasian Migratory Waterbirds, The Hague, 16 June 1995, in force 1 November 1999, <<http://www.unep-aewa.org>>.

³⁸ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

natural resources are made by both Article 63³⁹ and 64⁴⁰ of UNCLOS. There are also other relevant articles in UNCLOS that call for cooperative action among States.⁴¹ The Straddling Fish Stocks Agreement⁴² is also relevant in this regard. Through both UNCLOS and the Straddling Stocks Agreements, states are encouraged to cooperate through Regional Fisheries Management Organizations (RFMOs)

4.5 Regional and sub-regional agreements on natural resources

At the regional and sub-regional levels, the following are examples of agreements that encourage countries to engage in cooperative action, including shared transboundary natural resources agreements:

- Convention on the Protection and Use of Transboundary Watercourses and International Lakes;⁴³
- Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes;⁴⁴
- Protocol on Civil Liability and Compensation for Damage Caused by the Trans-boundary Effects of Industrial Accidents on Transboundary Waters;⁴⁵

³⁹ On stocks occurring within the exclusive economic zones of two or more states or both within the exclusive economic zones and in an area beyond and adjacent to it.

⁴⁰ Which calls for cooperation between coastal states and other states whose nationals fish for highly migratory species listed in Annex 1 of the Convention.

⁴¹ See Arts 65 (cooperation in respect of marine mammals); 66(4) (cooperation in respect of anadromous stocks); 67(3) (cooperation in respect of catadromous species); 123 (cooperation of states bordering enclosed or semi-enclosed seas); 197 (cooperation on a global or regional basis); 198 (notification of imminent or actual damage); 199 (cooperation in eliminating effects of, and preventing/minimizing damage from, pollution); and 200 (cooperation in studies, research programmes and exchange of information and data).

⁴² Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 34 *International Legal Materials* (1995) 1542, <http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm> (visited 7 April 2014).

⁴³ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki 17 March 1992, in force 6 October 1996, 31 *International Legal Materials* (1992) 1312. See Arts 2(6), 9(1) and 9(2).

⁴⁴ Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, London, 17 June 1999, in force 4 August 2005, <http://www.unece.org/env/water/pwh_text/text_protocol.html> (visited 8 April 2014). This Protocol applies to surface freshwater, groundwater, coastal waters which are used for recreation or for the production of fish by aquaculture or for the production or harvesting of shellfish; enclosed waters generally available for bathing, water in the course of abstraction, transport, treatment or supply; and waste water through the course of collection, transport, treatment and discharge of reuse.

⁴⁵ Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992, in force 19 April 2000; <<http://www.unece.org/env/teia.html>>), Kiev, 21 May 2003, in force 4 August 2005, <http://www.unece.org/env/water/pwh_text/text_protocol.html> (visited 8 April 2014). The objective of the Protocol is to provide for a comprehensive regime for civil liability and for adequate and prompt compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters.

- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention);⁴⁶
- Regional Convention for the Management and Conservation of the Natural Forest Ecosystems and the Development of Forest Plantations in Central America;⁴⁷
- Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness areas in Central America;⁴⁸
- Revised Protocol on Shared Watercourse Systems in the Southern African Development Community SADC region;⁴⁹
- Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora;⁵⁰
- Protocol for the Sustainable Development of Lake Victoria Basin;⁵¹ and
- Protocol on Environment and Natural Resources.⁵²

These regional and sub-regional agreements, some of which have been negotiated under the frameworks of regional or sub-regional integration institutions, have over the years played an important role in encouraging, engaging and supporting states as they cooperate and enter into different kinds of cooperation agreements on transboundary natural resources. The mutual concerns of states relating to particular transboundary resources have also been a driving force behind the negotiations of these regional or sub-regional agreements.

4.6 Innovations in cooperation agreements

In 1986 the governments of the Kingdom of Lesotho and the Republic of South Africa entered into a creative and innovative agreement to transfer water from Lesotho to South Africa by harnessing water from the Senqu River through building of dams

⁴⁶ Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802.

⁴⁷ Regional Convention for the Management and Conservation of the Natural Forest Ecosystems and the Development of Forest Plantations in Central America, Guatemala City, 29 October 1993, in force 15 October 1999. See Arts 3 and 7.

⁴⁸ Convention for the Conservation of the Biodiversity and Protection of Priority Wilderness areas in Central America, Managua, 5 June 1992, in force 20 December 1994. See Arts 2 and 3.

⁴⁹ *Supra* note 19.

⁵⁰ Lusaka Agreement on Co-operative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora, Lusaka, 8 September 1994, in force 10 December 1996; <<http://www.lusakaagreement.org/>>. This agreement brings together Eastern, Central and Southern African countries, operating through law enforcement agencies, to fight illegal trade in wild fauna and flora.

⁵¹ Protocol for the Sustainable Development of Lake Victoria Basin, Tarragona, 12 December 1985, in force 6 November 1987, 801 *United Nations Treaty Series* 101; superseded by the Protocol for Sustainable Development of Lake Victoria Basin, Arusha, 29 November 2003, in force December 2004, <<http://www.eac.int/>>. This Protocol was negotiated under the framework of East African countries. It provides a coordinated system for the sustainable development of the Lake Victoria Basin. The Basin was established as an economic growth zone, and the Lake Victoria Basin Commission was established as an apex body for the management of Lake Victoria.

⁵² *Supra* note 20. The Protocol aims at harmonization of the participating states' environment and natural resources' management policies and practices. The Protocol has been ratified by Kenya and Uganda alone.

and transferring water through engineered tunnels and pipes to South Africa.⁵³ To the extent that water is a natural resource that was being transferred across the border of the two states, it does fall into the scope of this paper as an example of the shared use of a transboundary natural resource. The signing of the bilateral treaty and the water transfer through the Lesotho Highlands Water Development Project marked the culmination of decades of dedicated effort to harness the water of Lesotho for transfer to Gauteng Province, South Africa. Through engineering ingenuity, water is transferred from Lesotho to South Africa at a cost.

The Lesotho Water Highlands Development Project is an innovation of transfer of water that may not have been envisaged by the drafters of traditional shared water agreements, which are usually designed to address resources that cut across boundaries without any man-made developments being put in place to effect the sharing. This bilateral water transfer and sharing arrangement by Lesotho and South Africa serves to advance co-operation and collaboration in the transboundary natural resources context.

5 Conclusion

It is clear that there are instruments at the global, regional and sub-regional levels that call for states to cooperate among each other. In the field of transboundary natural resources, these agreements have facilitated cooperation and collaboration among states for many years, reducing areas that would have otherwise taken time and effort to articulate in negotiations in a transboundary natural resources context.

A review of the 1979 UNEP Principles and guidelines on shared natural resources shows that they are still relevant to guide countries today. The Rio Declaration Principles are also relevant and can guide and be used by states in this context. Global, regional and sub-regional instruments complement these efforts by guiding country action. This is important because the agreements and principles of cooperation are not 'one size fits all' solutions as states are expected to consider the areas that are peculiar to their resources. As for the listing or analyzing of existing bilateral and multilateral transboundary natural resources agreements, it suffices to give references knowing that there are agreements that are more formalized than others and that various institutions and formats are used in meetings.

Current bilateral and multilateral agreements on transboundary natural resources can provide lessons on international environmental law making and diplomacy; and can serve to guide negotiators on the areas of negotiation and the kinds of agreements that can foster transnational cooperation and collaboration while protecting and managing environments shared by two or more countries.

⁵³ The Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, 24 October 1986.

Annex

The box below provides a summarized version of principles from the 1979 UNEP Environmental Law Guidelines and Principles on Shared Natural Resources.⁵⁴ Underlined words and phrases indicate emphasis added by the present writer.

The 1979 UNEP Environmental Law Guidelines and Principles on Shared Natural Resources

Principle 1 States should co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more states. Consistent with the concept of equitable utilization of shared natural resources, states should co-operate with a view to control, prevent, reduce or eliminate adverse environmental effects which may result from the utilization of such resources. Co-operation should occur on equal footing, considering sovereignty, rights and interests of the states concerned.

Principle 2 States sharing natural resources should endeavor to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct, through binding or non-binding arrangements. When entering such agreements, states should consider establishing institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.

Principle 3 States have (in accordance with the UN Charter and principles of international law) the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. Because this principle applies in respect of shared natural resources, states should avoid and reduce the adverse environmental effects beyond their jurisdictions of the utilization of shared resources, particularly when such utilization might:-

- cause damage to the environment which could have repercussions on the utilization of the resource by another sharing state;
- threaten the conservation of a shared renewable resource; or
- endanger the health of the population of another state.

This principle is to be interpreted in light of the capabilities of the states sharing the resource.

⁵⁴ This does not include the explanatory note, explaining the background of the instrument, that can be read at <http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/Enviro_Law_Guidelines_Principles_rev2.pdf>. Emphasis by the author.

Principle 4 States should conduct environmental assessment before engaging in an activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another state or states sharing that resource.

Principle 5 States sharing a resource should exchange information and engage in consultations to the extent practicable.

Principle 6 States sharing a natural resource with another state/s should notify in advance the other state/s of the pertinent details of plans to initiate, or make change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment of other state/s. When requested by the other state/s, a state should further enter into consultations concerning the abovementioned plans; and provide any other information concerning sub-plans. States should co-operate on the basis of the principle of good faith and in the spirit of good neighborliness in cases where the transmission of particular information is prevented by national legislation or international conventions.

Principle 7 Exchange of information, notification, consultation, and other forms of co-operation regarding shared natural resources should be carried out on the basis of the principle of good faith and in the spirit of good neighborliness, and in such a way as to avoid any unreasonable delays either in the form of co-operation or in carrying out development or conservation projects.

Principle 8 To enhance understanding of environmental problems, states should engage in joint scientific studies and assessments, with a view to finding solutions based on data.

Principle 9 States have a duty urgently to inform other states which may be affected of any emergency situation arising from the utilization of a shared natural resource which might cause sudden harmful effects on their environment; and of any sudden grave natural events related to a shared natural resource which may affect the environment of such states. When appropriate, the competent international organizations should also be informed of any such situation or event. States should further co-operate by agreed contingency plans, when appropriate, and mutual assistance in order to avert grave situations, and to eliminate, reduce or correct the effects of such situations and events.

Principle 10 States sharing a natural resource should, when appropriate, consider the possibilities of jointly seeking the services of any competent international organization in clarifying the environmental problems relating to the conservation or utilization of such natural resource.

Principle 11 This principle provides guidance on the settlement of disputes regarding the conservation and utilization of shared natural resources. When non-binding means fail to settle a dispute within a reasonable time, states should submit the dispute to a mutually agreed procedure (which should be speedy, effective and binding). The states involved should refrain from actions which create obstacles for the amicable settling of the dispute.

Principle 12 States should co-operation to develop further international law in relation to liability and compensation for the victims of environmental damage arising out of the utilization of a shared natural resource and caused to areas beyond national jurisdiction.

Principle 13 In considering the permissibility of domestic activities regarding a shared natural resource, it is necessary for states to take due regard of the potential adverse environmental effects arising out of the utilization of the resource, without discrimination as to whether the effects will occur within or outside their jurisdiction.

Principle 14 States should endeavor, in accordance with their legal systems, and, where appropriate, on a basis agreed by them, to provide persons in other states who have been or may be affected by environmental damage with equivalent access to administrative and judicial proceedings, and make available to them the same remedies available to their citizens.

Principle 15 These principles should be interpreted and applied in such a way as to enhance and not to affect adversely development and the interests of all countries, and in particular of developing countries.

PART II

**SUSTAINABLE FUTURE OF NATURAL
RESOURCES GOVERNANCE**

REACTIONS TO THE RIO+20 OUTCOME DOCUMENT ‘THE FUTURE WE WANT’

*Elizabeth Maruma Mrema*¹

1 Introduction

The United Nations Conference on Sustainable Development (UNCSD, or Rio+20) took place in Rio de Janeiro, Brazil, from 20 to 22 June 2012. It was one of the biggest environment-related international conferences to have been held in recent years, with over 45 000 participants, which included delegations from 192 United Nations (UN) member states, including 57 Heads of States and 31 Heads of Government,² three observer countries, as well as over 20 000 registered observers from, *inter alia*, business, non-governmental organizations (NGOs) and major groups, civil society, academics, journalists, and the general public.³ By the end of the Conference, over US\$500-billion had been mobilized for the implementation of the Rio+20 Outcome Document, popularly known as ‘The Future We Want’.⁴ In addition, different stakeholders registered over 600 voluntary commitments for sustainable development.⁵

Rio+20 was the third international conference on sustainable development, taking place 20 years after the 1992 Rio Earth Summit, the United Nations Conference on Environment and Development (UNCED), which adopted the landmark blueprint

¹ LLB (UDSM) LLM (Dalhousie) Post Graduate Diploma in International Relations and Conference Diplomacy (UDSM); former Deputy Director and Acting Director, Division of Environmental Policy Implementation (DEPI) at the United Nations Environment Programme (UNEP); currently Director, Division of Environmental Law and Conventions (DELIC) at UNEP. The author is sincerely thankful to Pablo Fuentenebro for the research work undertaken during the preparation of this paper.

² See Rio+20, ‘Rio+20 in Numbers’, available at <<http://www.uncsd2012.org/index.php?page=view&nr=1304&type=230&menu=38>> (visited 28 October 2014).

³ ‘Rio+20 in numbers’, Rio+20 Fact Sheet (UN, 2012), available at <http://www.uncsd2012.org/content/documents/784rio20in%20numbers_final2.pdf> (visited 18 August 2014).

⁴ Rio+20 Outcome Document ‘The Future We Want’, UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014).

⁵ *Ibid.*

for sustainable development, Agenda 21,⁶ with specific action plans for sustainable development. Ten years later, the 2002 World Summit on Sustainable Development (WSSD) adopted the Johannesburg Plan of Implementation,⁷ which built upon the progress made and lessons learned since 1992. Clearly, each of these Conferences had a specific focus, evolving from ‘environment and development’ in 1992, to ‘sustainable development’ in 2002 and the same guiding theme in 2012 – demonstrating the emerging focus and themes of environmental management over the years.

The Rio+20 Conference had three key goals, aimed at reinforcing the link between the social, economic and environmental concerns of the international community.⁸ These were:

1. Renewed political commitment to sustainable development.
2. Assessing the progress made to date and the remaining gaps, if any, in the implementation of the outcomes of the major summits on sustainable development (such as those mentioned above), as well as other already agreed commitments.
3. Addressing new and emerging challenges.

The Rio+20 Outcome Document, ‘The Future We Want’, was the joint response and commitment from governments and high-level representatives participating in the Conference. The document reflected the renewed political commitment towards achieving sustainable development, following the lessons learned from Agenda 21 (which was a ‘blueprint to rethink economic growth, advance social equity and ensure environmental protection’).⁹

This paper focuses on Rio+20, the United Nations Conference on Sustainable Development; charting briefly the history behind the Rio+20 Conference, which history includes the UN Conference on Environment and Development in 1992, and the World Summit on Sustainable Development in 2002. It reviews specific implications of the Rio+20 Conference for the United Nations Environment Programme (UNEP),¹⁰ in terms of a strengthened role as global environmental authority. This paper also highlights reactions from different stakeholders to the outcome of the Rio+20 Conference, and provides specific examples of reactions from governments and major groups (including women, civil society and ‘the Elders’¹¹). Finally, the

⁶ Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992), available at <<http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>>.

⁷ Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002).

⁸ UNGA, President of the 65th Session, ‘Sustainable Development. Background’, available at <<http://www.un.org/en/ga/president/65/issues/sustdev.shtml>> (visited 19 August 2014).

⁹ UN Sustainable Development Knowledge Platform, ‘About Rio+20’, available at <<http://sustainabledevelopment.un.org/rio20.html>> (visited 19 August 2014).

¹⁰ See <<http://www.unep.org>>.

¹¹ The Elders are an independent group of global leaders (established by Nelson Mandela in 2007), who

paper maps a way forward from the Rio+20 Conference to the development of the Post-2015 Development Agenda and the transition from the Millennium Development Goals (MDGs)¹² to the Sustainable Development Goals (SDGs).¹³

2 The Long Road to the Rio+20 Conference

2.1 1992 Rio Earth Summit: the United Nations Conference on Environment and Development

The 1992 Rio Earth Summit (UNCED) was held in Rio de Janeiro from 3 to 14 June 1992. At Rio, 'the UN sought to help Governments rethink economic development and find ways to halt the destruction of irreplaceable natural resources and pollution of the planet'.¹⁴ Governments recognized that there was a necessity for them to transform their attitudes and behaviour, and for national and international plans and policies to be redirected so as to ensure that economic decisions consider and take into account environmental impacts. The Rio Earth Summit thus called for:

1. Change in patterns of production, especially with reference to the production of toxic components.
2. Promotion of alternative sources of energy to replace the use of fossil fuels which are linked to global climate change.
3. New reliance on public transportation systems in order to reduce vehicle emissions, congestion in cities and the health problems caused by polluted air and smog.
4. Increased awareness of, and concern over, the growing scarcity of water.¹⁵

Amongst other achievements, the Rio Earth Summit resulted in the creation of the Convention on Biological Diversity (CBD),¹⁶ the United Nations Framework Convention on Climate Change (UNFCCC)¹⁷ and the United Nations Convention on Combating Desertification (UNCCD)¹⁸ – the three treaties popularly re-

work together for peace and human rights. They use their collective influence and experience to galvanize support for peace building, to help address major causes of human suffering, and to promote shared interests of humanity. See <<http://www.theelders.org>> (visited 23 August 2014).

¹² See <<http://www.un.org/millenniumgoals/>>.

¹³ See UN Sustainable Development Knowledge Platform, 'Sustainable development goals', available at <<http://sustainabledevelopment.un.org/?menu=1300>> (visited 20 September 2014).

¹⁴ 'United Nations Conference on Environment and Development (1992)', UN Briefing papers: Earth Summit (UN, 1997), available at <<http://www.un.org/geninfo/bp/enviro.html>> (visited 19 August 2014).

¹⁵ *Ibid.*

¹⁶ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>.

¹⁷ United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>.

¹⁸ UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <<http://www.unccd.int>>.

ferred to as the 'Rio Conventions'.¹⁹ The Summit also sought to establish novel and fair global partnerships through increased cooperation among states, key sectors of societies and people, in working towards attaining international agreements which consider the interests of all and protect the integrity of the global environmental and developmental system. In addition, the Summit reaffirmed the importance of the Declaration of the United Nations Conference on the Human Environment,²⁰ which had been adopted at the Stockholm Conference on the Human Environment on 16 June 1972. Among the Stockholm Conference's major achievements had been the proposal to establish the United Nations Environment Programme, with a small secretariat to serve as a focal point for environmental action and coordination within the UN system, headed by an Executive Director.²¹ This proposal was considered and approved by the United Nations General Assembly (UNGA) in December 1972.²²

2.2 2002 World Summit on Sustainable Development

The World Summit on Sustainable Development, which was held in Johannesburg, South Africa, in September 2002, aimed at addressing failures in the implementation of the outcome of the 1992 Earth Summit. Since 1992, poverty had further deepened as a result of rapid population growth and worsening environmental degradation, amongst other factors. Hence, further tangible priorities for actions were needed to reverse the then ongoing negative trends. The Summit thus adopted the Johannesburg Plan of Implementation, which set specific targets to be achieved over a period of time aimed at, *inter alia*, expanding access to water and sanitation, energy, improvement of agricultural yields (including maintaining and restoring fish stocks), sustainable management of toxic chemicals, further reduction of the rate of biodiversity loss, and improving ecosystem management.²³

In an attempt to ensure that adopted actions would indeed be implemented, the Summit also launched over 300 voluntary partnerships. These involved not only governments and intergovernmental organizations, but also civil society and the private sector, with each expected to bring in additional resources to implement the actions for sustainable development. The Summit's Secretary-General, Nitin Desai, commented that, in many ways, the Summit was more targeted than Rio, with indi-

¹⁹ *The Rio Conventions. Action on Adaptation* (CBD, UNCCD and UNFCCC, 2012), available at <http://unfccc.int/resource/docs/publications/rio_20_adaptation_brochure.pdf> (visited 19 August 2014).

²⁰ Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973), 11 *International Legal Materials* (1972) 1416.

²¹ Report of the United Nations Conference on the Human Environment, Stockholm, June 1972, Report on Resolution on Institutional and Financial Arrangements, Chapter III, available at <<http://www.un-documents.net/unche-if.htm>> (visited 21 September 2014).

²² 'Institutional and financial arrangements for international environmental co-operation' UNGA Res. 2997 of 15 December 1972.

²³ For the feature story on the Summit, see UN Johannesburg Summit 2012, 'The Johannesburg Summit Test: What Will Change?', available at <http://www.johannesburgsummit.org/html/whats_new/feature_story41.html> (visited 23 August 2014).

cators to address poverty and deteriorating natural environment, and more focused than Agenda 21, since the Summit was able to agree on priority areas for action and committed to support their implementation through the launched partnerships.²⁴

2.3 2012 United Nations Conference on Sustainable Development (Rio+20)

The Rio+20 Conference (United Nations Conference on Sustainable Development – UNSD) was held twenty years after the 1992 Earth Summit in Rio. The Conference brought together governments, international institutions, major groups, to mention but a few participants, with the objective of achieving consensus ‘on a range of smart measures that could reduce poverty while promoting decent jobs, clean energy and sustainable and fair use of resources’.²⁵

It was clear once again that both the 1992 and 2002 Summits had been followed by limited progress in the implementation of their agreed outcomes, commitments and actions. Hence, it was hoped that Rio+20 would respond to this, taking a different approach to those taken by the previous Summits to commitments and actions, and avoiding repetition of the past shortcomings. In response to the implementation gap thus far hampering the achievement of sustainable development, the Conference decided to focus its deliberations on two themes as a possible solution, namely:

1. Promoting green economy in the context of sustainable development and poverty eradication.
2. Strengthening the institutional framework for sustainable development.²⁶

These two themes were seen as possible means to a cleaner and greener path to development to be achieved principally through seven priority areas, i.e. decent jobs, energy, sustainable cities, food security and sustainable agriculture, water, oceans and disaster readiness.²⁷ The success of this path would provide the world with long term sustainable development through its three pillars, i.e. economic development, social development and environmental protection or sustainability.

3 Significance of Rio+20 for UNEP

Rio+20 marked a turning point in the life of the UNEP (established over forty years ago in 1972) insofar as the Conference brought about a complete departure

²⁴ *Ibid.*

²⁵ This statement was given in response to frequently asked questions to the UNCSD Secretariat during the preparation for the Rio+20 Summit, available at <<http://www.uncsd2012.org/about.html>> (visited 23 August 2014).

²⁶ For details, see UN Rio+20, ‘Objectives and Themes’, available at <<http://www.uncsd2012.org/objective-andthemes.html>> (visited 19 August 2014).

²⁷ For the seven critical issues discussed at Rio+20, see UN Rio+20, ‘7 Critical Issues at Rio+20’, available at <<http://www.uncsd2012.org/7issues.html>> (visited 19 August 2014).

from UNEP's historic status. The Conference strengthened and upgraded the status of UNEP as a universal body by calling for adequate and increased resources, and strengthened its role in the coordination of the UN system. Furthermore, UNEP's strategic regional presence to assist countries upon request was enhanced, and UNEP was formally acknowledged as the leading global environmental authority to set the global environmental agenda. Paragraph 88 of 'The Future We Want' Document (see Box 1 below) is critical in the newly reinforced UNEP, which is expected to set the future environmental agenda as well as promote coherent implementation of the environmental dimension of sustainable development within the UN system. A UN General Assembly Resolution later endorsed the content of this paragraph.²⁸

Member states agreed to open up the membership of the UNEP governing body (which has historically been a 58 member Governing Council) to universal membership through the creation of the United Nations Environment Assembly (UNEA)²⁹ as the highest global policy decision-making body on matters related to environmental protection and management. In February 2013 (at its 27th session and first universal session), the UNEP Governing Council adopted Decision 27/2 on the change of the designation of the then Governing Council of UNEP to the United Nations Environment Assembly.³⁰ In March 2013, the United Nations General Assembly (at its 67th session) decided to take note of this decision and to change the designation of the Governing Council of UNEP to the UNEA of UNEP.³¹ The UNEA was thus convened for the first time at its first session for one week in June 2014. This first ever UNEA was attended by 1 065 participants from 163 countries, 113 at full ministerial level.³² In addition, 168 major groups and stakeholders as well as 340 international and national journalists attended and covered the UNEA events. A wide range of key environmental challenges were identified and decisions geared towards finding solutions to these challenges were adopted at the first UNEA. These covered a range of issues, such as illegal trade in wildlife, science – policy interface, chemicals and waste, air quality, ecosystem based adaptation and marine plastic debris and micro plastics. Other pertinent issues included, *inter alia*, coordination across the UN system in the field of environment through the development of a UN system-wide strategy, implementation of Principle 10 of the Rio Declaration on Environment and

²⁸ 'Report of the Governing Council of the United Nations Environment Programme on its twelfth special session and on the implementation of section IV.C, entitled "Environmental pillar in the context of sustainable development", of the outcome document of the United Nations Conference on Sustainable Development', UNGA Res. 67/213 of 21 December 2012.

²⁹ See <<http://www.unep.org/unea/>>.

³⁰ Annex to decision 27/2: 'Draft resolution for adoption by the General Assembly: Change of the designation of the Governing Council of the UNEP, Proceedings of the Governing Council/Global Ministerial Environment Forum at its first universal session Governing Council of the UNEP, Twenty-seventh session of the Governing Council/ Global Ministerial Environment Forum', UN Doc. UNEP/GC.27/17 (2013).

³¹ 'Change of the designation of the Governing Council of the United Nations Environment Programme', UNGA Res. 67/251 of 25 July 2013.

³² See the UNEA website at <<http://www.unep.org/unea/en/>> (visited 24 August 2014).

Development,³³ and tools and approaches to achieve environmental sustainability in the context of sustainable development.³⁴

Furthermore, the Rio+20 Conference recognized the significant contributions made by multilateral environmental agreements (MEAs) in the implementation of the three pillars of sustainable development. The secretariats of a number of MEAs are administered by UNEP.³⁵ Through them, UNEP thus continues to play a major role

³³ UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

³⁴ See texts of all the adopted Resolutions and Decisions available at the UNEA website, *supra* note 32.

³⁵ UNEP administers and/or provides secretariat service to the following global environmental conventions: Convention on Biological Diversity and its related Protocols (Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027, <<http://www.cbd.int/biosafety>>; and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 12 October 2014, <<http://www.cbd.int/abs/>>); Bonn Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int>>) as well as its related Agreements, such as AEWa (Agreement on the Conservation of African-Eurasian Migratory Waterbirds, The Hague, 16 June 1995, in force 1 November 1999, <<http://www.unep-awa.org>>), EUROBATS (Agreement on the Conservation of European Bats, London, 4 December 1991, in force 16 January 1994, <<http://www.eurobats.org/>>), ASCOBANS (Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas, New York, 17 March 1992, in force 29 March 1994, <<http://www.ascobans.org/>>) and the Gorilla Agreement (Agreement on the Conservation of Gorillas and their Habitats, Paris, 26 October 2007, in force 1 June 2008, <<http://www.cms.int/en/legalinstrument/gorilla-agreement>>); Convention on International Trade of Endangered Species of Wild Fauna and Flora (Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>>); Convention on the Protection of the Ozone Layer (Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1985) 1529) and its related Protocol (Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <<http://www.unep.org/ozone/>>); Basel Convention on the Movement of Hazardous Chemicals and Wastes (Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>); Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <<http://www.pic.int>>); Stockholm Convention on Protecting Human Health and the Environment from Persistent Organic Pollutants (Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://www.pops.int>>) and currently on interim basis the Minamata Convention on Mercury (Geneva, 19 January 2013, not yet in force, <<http://www.mercuryconvention.org/>>). In addition, UNEP provides similar services to six regional seas conventions and action plans, as well as their related Protocols for the conservation of the marine environment; these are the Barcelona Convention (Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976, in force 12 February 1978, 15 *International Legal Materials* (1976) 290, amended to be the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995, in force 9 July 2007, available at <http://www.unep.ch/regionalseas/regions/med/t_barcel.htm> (visited 27 September 2014)); Nairobi Convention (Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985, in force 30 May 1996, available at <http://www.unep.org/NairobiConvention/The_Convention/Protocols/Convention_Text.asp> (visited 27 September 2014)); Abidjan Convention (Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Abidjan, 23 March 1981, in force 5 August 1984, 20 *International Legal Materials* (1981) 746); Cartagena Convention (Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena, 24 March 1983, in force 11 October 1986, <<http://www.cep.unep.org/cartagena-convention/text-of-the-cartagena-convention>>); Northwest Pacific Action Plan (The Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region, Seoul, 14 September 1994, <[39](http://www.</p>
</div>
<div data-bbox=)

in the achievement of sustainable development. With this recognition, Paragraph 89 of the Rio+20 Outcome Document has further acknowledged the work already undertaken in the field of international environmental governance to create synergies and policy coherence through the chemical and waste cluster of MEAs³⁶ – which are also administered by UNEP but with one, the Rotterdam Convention, administered jointly with FAO.³⁷

Box 1: Paragraph 88 of 'The Future We Want'

We are committed to strengthening the role of the United Nations Environment Programme as the leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and that serves as an authoritative advocate for the global environment. We reaffirm resolution 2997 (XXVII) of 15 December 1972 which established UNEP and other relevant resolutions that reinforce its mandate, as well as the 1997 Nairobi and 2000 Malmö Ministerial Declarations. In this regard, we invite the United Nations General Assembly, in its 67th Session, to adopt a Resolution strengthening and upgrading UNEP in the following manner:

- a) Establish universal membership in the Governing Council of UNEP, as well as other measures to strengthen its governance as well its responsiveness and accountability to Member States;
- b) Have secure, stable, adequate and increased financial resources from the regular budget of the UN and voluntary contributions to fulfill its mandate;
- c) Enhance UNEP's voice and ability to fulfill its coordination mandate within the UN system by strengthening UNEP engagement in key UN coordination bodies and empowering UNEP to lead efforts to formulate UN system-wide strategies on the environment;
- d) Promote a strong science-policy interface, building on existing international instruments, assessments, panels and information networks, including the Global Environmental Outlook, as one of the processes aimed at bringing together information and assessment to support informed decision-making;
- e) Disseminate and share evidence-based environmental information and raise public awareness on critical as well as emerging environmental issues;

nowpap.org/>) and East Asian Seas (The Action Plan for the Protection and development of the Marine and coastal areas of the East Asian Region, Bangkok, 11 December 1981, <<http://www.cobsea.org/>). For more information, see <<http://www.unep.org/regionalseas/programmes/conventions/default.asp>>.

³⁶ The chemical and waste cluster of MEAs includes the Basel, Rotterdam and Stockholm Conventions, which have merged their earlier three independent secretariats into one Secretariat. This merging or synergies arrangement enhances cooperation and coordination among the three Conventions and promotes a more effective and coherent decision-making on policy and enhances efficiency in supporting their Parties as well as enhances the implementation of these Conventions at national, regional and global levels. See <<http://www.synergies.pops.int>>.

³⁷ UN Sustainable Development Knowledge Platform, 'The Future We Want', *supra* note 9.

- f) Provide capacity building to countries as well as support and facilitate access to technology;
- g) Progressively consolidate headquarters functions in Nairobi, as well as strengthen its regional presence, in order to assist countries, upon request, in the implementation of their national environmental policies, collaborating closely with other relevant entities of the UN system;
- h) Ensure the active participation of all relevant stakeholders drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society.

Additionally, ‘The Future We Want’ highlighted a number of issues relevant to UNEP’s work and mandate: the promotion of a green economy in the context of sustainable development and poverty eradication;³⁸ a proposed Ten-Year Framework of Programmes on Sustainable Consumption and Production;³⁹ and the establishment of the process for the development of Sustainable Development Goals (SDGs)⁴⁰ (which will be a follow up to, and build upon, the Millennium Development Goals⁴¹ and will converge with the Post-2015 Development Agenda).⁴² Other issues covered in the Outcome Document’s 283 paragraphs include, *inter alia*, the urgent re-establishment of ocean fish stocks;⁴³ a call for nations to develop and implement science-based management plans to maintain or restore fish stocks to the maximum sustainable yield;⁴⁴ and the reaffirmation of all nations’ commitments to phase out fossil fuel subsidies.⁴⁵

In addition to the Outcome Document, 721 voluntary commitments regarding sustainable development were made by civil society, businesses, governments, universities and other stakeholders.⁴⁶ These all were intended to guarantee effective implementation of the aspirations of, and decisions taken at, the Conference.

The legally non-binding Outcome Document, ‘The Future We Want’, was endorsed by 192 governments, which re-affirmed their political commitment to sustainable development towards a sustainable future. Overall, UNEP came out of Rio+20 delighted, as the Summit was a milestone in the evolution of UNEP in terms of its central role as the global environmental authority, increased resources, enhanced mandate as a global environmental institution entrusted to coordinate the entire UN

³⁸ ‘The Future We Want’ Outcome Document, para. 62.

³⁹ *Ibid.* paras 224–226.

⁴⁰ See UN Sustainable Development Knowledge Platform, ‘Sustainable development goals’, available at <<http://sustainabledevelopment.un.org/?menu=1300>> (visited 20 September 2014).

⁴¹ See <<http://www.un.org/millenniumgoals/>>.

⁴² ‘The Future We Want’ Outcome Document, paras 245–251.

⁴³ *Ibid.* paras 168–175.

⁴⁴ *Ibid.* para. 168.

⁴⁵ *Ibid.* para. 225.

⁴⁶ For texts of Voluntary Commitments made, see UN Rio+20, ‘Voluntary Commitments’, available at <www.uncsd2012.org/allcommitments.html> (visited 23 August 2014).

system, and universal membership of its governing body through the establishment of the UNEA.

Box 2: 'The Future We Want': calls for action (among others)

- Detailing how the green economy can be used as a tool to achieve sustainable development.
- Strengthening UNEP and establishing a new forum for sustainable development.
- Promoting corporate sustainability reporting measures.
- Taking steps to go beyond GDP to assess the well-being of a country.
- Developing a strategy for sustainable development financing.
- Adopting a framework for tackling sustainable consumption and production.
- Launching a process to establish Sustainable Development Goals.
- Focusing on improving gender equality.
- Stressing the need to engage civil society and incorporate science into policy.
- Recognizing the importance of voluntary commitments on sustainable development.

Box 3: 'The Future We Want': Thematic Areas for Action

Poverty eradication	Oceans and seas
Energy	Small island developing states
Sustainable tourism	Least developed countries
Sustainable transport	Landlocked developing countries
Mining	Africa
Sustainable cities and human settlements	Forests
Full and productive employment, decent work for all and social protection	Biodiversity
Desertification, land degradation and drought	Mountains
Health and population	Regional efforts
Food security, nutrition and sustainable agriculture	Gender equality and women's empowerment
Water and sanitation	Disaster risk reduction
Sustainable consumption and production	Chemicals and waste
Education	

4 Reactions to Rio+20 outcomes from different stakeholders

4.1 Introduction

Despite the many achievements made at Rio+20, and the negotiated Outcome Document, the Conference has been criticized by several quarters, who were not fully satisfied with the results achieved or had expected more than what was finally agreed. The critics claimed that there were still important and crucial issues which were not addressed by the Conference, and that this could be an impediment in the formulation of the SDGs.⁴⁷ Some of the fears included, but were not limited to:

1. Lack of consensus for an international agreement on high seas biodiversity, which faced opposition from the United States (US), Russia, Canada and Venezuela.⁴⁸ As a result, negotiations for a new treaty on the high seas were postponed for at least two years.
2. Lack of agreement on eliminating environmentally harmful subsidies.
3. Lack of recognition of reproductive rights as essential to sustainable development.

As Dodds and Nayar point out,

while the outcome document reaffirmed the [International Conference on Population and Development] and the Beijing Platform for Action as well as their subsequent review outcomes, women worldwide were outraged that governments failed to recognize women's reproductive rights as a central aspect of gender equality and sustainable development in the Rio+20 Outcome Document.⁴⁹

While many delegates were very happy with the outcomes of the Rio+20 Conference, several quarters (NGOs, civil society, industry, governments etc.) criticized the Conference for either failing to take specific tangible actions on some of the important issues or leaving some issues pending or not addressed. A few examples of reactions received from stakeholders are summarized below.

4.2 The European Union

Overall, the European Union (EU) showed its support towards Rio+20 and 'The Future We Want'. It also reaffirmed its commitment towards poverty eradication, promoting sustainable patterns of consumption and production, and protecting and managing the natural resource base for sustainable development. The EU praised

⁴⁷ Felix Dodds and Anita Nayar, 'Rio+20: A New Beginning', 8 UNEP Perspectives (2012), available at <www.unep.org/civilsociety/Portals/24105/documents/perspectives/ENVIRONMENT_PAPERS_DISCUSSION_8.pdf> (visited 19 August 2014).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

the importance of an inclusive green economy for sustainable development and poverty eradication and welcomed the establishment of a High Level Political Forum (HLPF)⁵⁰ that will enhance the integration of the three dimensions of sustainable development in a holistic and cross-sectoral manner at all levels. In other words, the Union was fully committed to take part in the process to develop the SDGs. See Box 4 for the summary of the EU agreement with and support for the content of the Outcome Document.

*Box 4: Council of the European Union: Rio+20 Outcome and follow-up to the UNCSD 2012 Summit, Brussels, 25 October 2012 (excerpt).*⁵¹

1. WELCOMES the agreement reached by Heads of Governments and high-level representatives at the Rio+20 United Nations Conference on Sustainable Development in June 2012 and the agreed outcome document The ‘Future We Want’ which constitutes a sound basis for further work in the ongoing quest for achieving sustainable development, globally, regionally, nationally and locally;
2. WELCOMES that Rio+20 reaffirmed that poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development;
3. WELCOMES the agreement at Rio+20 that an inclusive green economy in the context of sustainable development and poverty eradication is one of the important tools available for achieving sustainable development, and that it will enhance our ability to manage natural resources sustainably, increase resource efficiency and reduce waste; REAFFIRMS its commitment to pursue a just, global transition to an inclusive green economy in collaboration with other international partners;
4. UNDERLINES the strong determination of the EU and its Member States to constructively take part in the process to develop global SDGs; such SDGs should be coherent with and integrated in the UN development agenda beyond 2015 with a view to an overarching framework for post-2015, without deviating efforts from the achievement of the Millennium Development Goals (MDGs) by 2015 (...);

4.3 Major Groups: Women’s Major Group (WMG)

The Women’s Major Group (WMG)⁵² vehemently criticized the Outcome Document for its failure to recognize women’s reproductive rights as a central aspect of

⁵⁰ ‘The Future We Want’ outcome document, paras 84–85. See <<http://sustainabledevelopment.un.org/index.php?menu=1556>> (visited 16 September 2014).

⁵¹ Source: ‘Rio+20: Outcome and follow-up to the UNCSD 2012 Summit – Council conclusions’, note from the Council of European Union, available at <<http://register.consilium.europa.eu/pdf/en/12/st15/st15477.en12.pdf>> (visited 23 August 2014).

⁵² The WMG is a Group which comprises over 200 civil society women’s organizations from around the world and which is facilitated by three organizing partners: Women in Europe for a Common Future (WECE, <<http://wece.eu>>), Voices of African Mothers (VAM, <<http://www.vamothers.org>>) and Development Alternatives with Women for a New Era (DAWN, <www.dawnnet.org>). See WECE, ‘Rio+20:

gender equality and sustainable development. The Group also criticized the Outcome Document's failure to recognize the risks posed by radioactive (nuclear) pollution, the high cost of nuclear energy, and its devastating impacts on human health and the environment. They equally criticized the document for highlighting mining interests and profits rather than advocating for a healthy environment for women, their communities and indigenous people.

Box 5: Criticism presented by the Women's Major Group (WMG).⁵³

The Women's Major Group (WMG), representing 200 civil society women's organizations from all around the world, is greatly disappointed in the results of the Rio+20 conference. We believe that the governments of the world have failed both women and future generations (...)

Women worldwide are outraged that governments failed to recognize women's reproductive rights as a central aspect of gender equality and sustainable development in the Rio+20 Outcome Document. Reproductive rights are universally recognized as human rights. The linkage between sustainable development and reproductive rights was recognized in Agenda 21 and subsequently in the 1994 International Conference on Population and Development (ICPD) Program of Action (...)

The Women's Major Group is dismayed and alarmed that there is no reference to radioactive pollution and its devastating impact on our health and our environment, including rivers, aquifers, food and air. The Rio+20 outcome document should have recognized the unacceptable risk of nuclear pollution and the high cost of nuclear energy. The Women's Major Group stands in solidarity with the women's organizations from Japan present here in Rio who are calling for an immediate shut down of nuclear power! We also note with dismay that the text on mining highlights the interests and profiteering of the mining companies rather than advocating for a healthy environment for women, their communities, and indigenous peoples.

Further, the critical connection between climate change and gender is not mentioned at all.

4.4 Non-governmental organizations

Non-governmental organizations (NGOs) Amnesty International,⁵⁴ Human Rights Watch⁵⁵ and the Center for International Environment Law (CIEL)⁵⁶ lamented, in a joint statement, the failure of participating governments to address their human

Women "Disappointed and Outraged", available at <<http://www.wecf.eu/english/press/releases/2012/06/womenstatement-outcomesRio.php>> (visited 27 September 2014).

⁵³ Source: 'Rio+20: From the "Future We Want" to the Future We Need. Women's Major Group Final Statement on the Outcomes of Rio+20' (2012), available at <<http://www.wedo.org/news/rio20-from-the-future-we-want-to-the-future-we-need>> (visited 19 August 2014).

⁵⁴ See <<http://www.amnestyinternational.org>>.

⁵⁵ See <<http://www.hrw.org>>.

⁵⁶ See <<http://www.ciel.org>>.

rights obligations in international financial institutions (IFIs). These NGOs criticized Canada, the G77, and the US for not reaffirming the responsibility of businesses to respect human rights; and equally criticized governments' omission of the rights of freedom of association and assembly. The three NGOs regretted that the right to freedom of expression was omitted in the Outcome Document; they further criticized some governments' attempt to exclude transboundary water issues from the scope of the right to water; and were also disappointed by the fact that environmental damage was not recognized as a cause of human rights violations.⁵⁷

*Box 6: Criticism presented by Amnesty International, Human Rights Watch and the Center for International Environmental Law (CIEL).*⁵⁸

Governments recognized that sustainable development requires the meaningful involvement and active participation of civil society and many marginalized groups, including persons with disabilities, amongst others.

World leaders reaffirmed the importance of respect for all human rights to development, the Universal Declaration of Human Rights and other rights instruments, and the UN Declaration on the Rights of Indigenous Peoples - Rio+20 outcome document undermined by human rights opponents.

Governments recognized the importance of select economic and social rights in the outcome document, including the rights to food, health, and education. The countries reaffirmed the right to safe drinking water and sanitation; and committed to work to progressively make access a reality for all.

On the other hand, these organizations expressed the following concerns on the Outcome document:

Some clauses on express reproductive rights language were erased.

Participating governments failed to address their human rights obligations in international financial institutions (IFIs).

Canada, the G77, and the US were against reaffirming the responsibility of businesses to respect human rights.

Governments struck out reference to the rights of freedom of association and assembly.

4.5 Civil society

Some civil society organizations saw 'The Future We Want' Outcome Document as a disappointment, with many calling it 'The Future We Don't Want' or 'Rio Minus 20'.⁵⁹ However, some of them, while agreeing with their counterparts on the weak-

⁵⁷ See Human Rights Watch, 'Rio+20: Outcome Document Undermined by Rights Opponents', available at <<http://www.hrw.org/news/2012/06/22/rio-20-outcome-document-undermined-rights-opponents>> (visited 21 August 2014).

⁵⁸ See *ibid.*

⁵⁹ For statements from different civil society groups showing their frustrations or disappointment with the

nesses of the Outcome Document, did acknowledge that the document had also introduced new concepts which provide a good basis for further work and that their (civil society's) role should be to keep up the momentum through pressure.⁶⁰

The World Alliance for Citizen Participation (CIVICUS)⁶¹ made a call to governments to bring environment into their decisions, and 'also lamented the asymmetric interests during inter-state negotiations, resulting into [*sic*] compromises'.^{62,63}

Box 7: Criticism presented by the World Alliance for Citizen Participation.

CIVICUS: World Alliance for Citizen Participation is a global movement of civil society dedicated to strengthening citizen action and civil society across the world.

The under-achievement of Rio raises serious questions about the ability of the inter-governmental system as currently constituted to achieve sustainable development, protection of human rights, and the full participation of people (...)

Rio+20 has demonstrated, vividly and yet again, the limit of inter-governmental processes where disparate and often competing state interests dominate the negotiations and resulting compromises.

4.6 The Elders

The Elders,⁶⁴ an independent group of global leaders working together for peace and human rights, welcomed the move toward the SDGs but stated that the 'glaring omissions' in the Outcome Document of issues such as reproductive rights would be an impediment toward sustainable development. Different Elders members, including Gro Harlem Brundtland and Mary Robinson, made individual declarations (see box 8 below).

Rio outcomes, see Open Forum for CSO Development Effectiveness, 'Rio+20 – The Future We Want? Civil society analysis and reactions', available at <http://cso-effectiveness.org/rio-20-the-future-we-want-civil,659> (visited 19 August 2014).

⁶⁰ See *ibid.*

⁶¹ See <http://www.civicus.org>.

⁶² See Open Forum for CSO Development Effectiveness, 'Rio+20 – The Future', *supra* note 59.

⁶³ See *ibid.*

⁶⁴ See <http://theelders.org>.

*Box 8. Criticism presented by the Elders.*⁶⁵

Gro Harlem Brundtland, former Prime Minister of Norway and Chair of the UN commission, lamented that

[t]he Rio+20 declaration does not do enough to set humanity on a sustainable path, decades after it was agreed that this is essential for both people and the planet. I understand the frustration in Rio today. We can no longer assume that our collective actions will not trigger tipping points, as environmental thresholds are breached, risking irreversible damage to both ecosystems and human communities. These are the facts – but they have been lost in the final document. Also regrettable is the omission of reproductive rights – which is a step backwards from previous agreements. However – with this imperfect text, we have to move forward. There is no alternative.

Mary Robinson, former President of Ireland and former UN High Commissioner for Human Rights, said:

This is a 'once in a generation' moment when the world needs vision, commitment and above all, leadership. Sadly, the current document is a failure of leadership. It sets some processes in train and we will have to work with them, but we should also expect and encourage new constituencies to emerge, demanding new thinking and change from the grassroots to the top.

5 The way forward: beyond 2015 – from MDGs to SDGs

One of the key decisions adopted at the Rio+20 Summit was to set in motion a process to follow up and build upon the Millennium Development Goals (MDGs) in the form of Sustainable Development Goals (SDGs) (see also box 9 below). Consequently, following the Rio+20 Summit, a 30-member Open Working Group (OWG) of the General Assembly⁶⁶ was created in January 2013⁶⁷ with the task to 'submit a report to the 68th session of the General Assembly containing a proposal for SDGs for consideration and appropriate action'. The SDGs are expected to 'build upon the MDGs and converge with the post 2015 development agenda'.⁶⁸

In addition to the OWG, it was decided to establish a series of high-level panel working groups, thematic consultations and mechanisms in order to move forward, and beyond 2015. Since then, the Co-Chairs of the OWG have issued, in June 2014, 16 SDG points of action proposals with 166 associated targets and one goal on means of implementation with 16 associated targets to be attained by 2030.⁶⁹ The propos-

⁶⁵ See The Elders, 'Rio+20 is not the response we need to safeguard people and the planet', available at <<http://theelders.org/article/rio-20-not-response-we-need-safeguard-people-and-planet>> (visited 27 September 2014).

⁶⁶ See <<http://sustainabledevelopment.un.org/owg.html>>.

⁶⁷ 'Open Working Group of the General Assembly on Sustainable Development Goals', UNGA Dec. 67/555 (2013).

⁶⁸ See UN Sustainable Development Knowledge Platform, 'Sustainable development goals', *supra* note 13.

⁶⁹ See UN Sustainable Development Knowledge Platform, 'Outcome Document - Open Working Group

als were issued for consultation with all governments and other stakeholders with the intention to further reduce the points, if at all possible. Consultations are currently on-going, with the UN system's various bodies being equally involved within their own mandates and adding value in reviewing the points of action proposals and submitting related background documents to support the consultation process.⁷⁰

Box 9: The Sustainable Development Goals – as stated in the Rio+20 Outcome Document.

The SDGs will:

- Be based on Agenda 21 and the Johannesburg Plan of Implementation.
- Fully respect all the Rio Principles.
- Be consistent with international law.
- Build upon commitments already made.
- Contribute to the full implementation of the outcomes of all major summits in the economic, social and environmental fields.
- Focus on priority areas for the achievement of sustainable development, being guided by the outcome document.
- Address and incorporate in a balanced way all three dimensions of sustainable development and their inter-linkages.
- Be coherent with and integrated into the UN development agenda beyond 2015.
- Not divert focus or effort from the achievement of the MDGs.
- Include active involvement of all stakeholders, as appropriate, in the process.

6 Conclusion

The Rio+20 Conference was indeed a landmark event. It was a culmination of a series of earlier conferences on sustainable development, taking place 20 years after the first Rio Summit and in a line of succession directly from the Stockholm Conference of 1972. The Rio+20 Conference was attended by representatives of 192 countries, with over 45 000 participants in attendance. It was the biggest conference on environment and sustainable development issues in recent years. Such a magnitude of participants from different constituencies explains in good part the mixed feelings on the Conference's outcomes, with several quarters viewing the Conference as a missed opportunity or failure in some respects. Stakeholders, be they representatives from governments or private sector, NGOs or civil society, came out of the Rio+20 Conference with different assessments and sentiments: some were delighted with the outcomes, while others were completely disappointed and yet others came out with mixed emotions.

on Sustainable Development Goals', available at <<http://sustainabledevelopment.un.org/focussdgs.html>> (visited 30 August 2014).

⁷⁰ Detailed discussion on the different processes for the development of the SDGs as well as those feeding into that process is beyond the coverage of this paper. However, more details can be obtained at *ibid.*

UNEP and its supporters, for instance, came out delighted with the achievements made at Rio+20 – namely, major recognition by the international community of the role that UNEP has so far played and is expected to continue to play in the future in the field of environmental management and protection for sustainability. In this regard, UNEP's status has been strengthened to become the leading global environmental authority, its standing upgraded with a universal membership of its governing body, and stable, adequate and increased funding for its programmes guaranteed. Equally, as a global institution on environment, it has been entrusted to coordinate the entire UN system on issues related to environmental management. UNEP is also expected to promote the coherent implementation of the environmental dimension of sustainable development within the UN system, including by strengthening its regional presence to enable it to assist countries, upon request, in the implementation of their environmental policies.

Many other stakeholders, especially the NGOs, were frustrated and vehemently criticized the outcome of the Rio+20 Conference as a number of their focused sectoral and thematic issues either had not been covered, or had received little attention in the outcomes. Some of those with mixed emotions, while criticizing the Rio+20 outcomes, took a positive attitude and called for a proactive approach in moving forward with the adopted outcomes, urging others to accept the outcomes and to implement them while keeping on the pressure.

Despite all of the criticisms leveled towards the Rio+20 outcomes, it is understandable that agreement on all issues could not be reached between such a large number of governments and participants (the priorities and interests of which inevitably differ). Now that decisions have been made, it is time for all stakeholders to be pragmatic, look ahead and take action to ensure that all of the achievements made and agreements reached are implemented for the betterment of present and future generations.

FUTURE PROSPECTS FOR ENHANCING SUSTAINABLE USE OF NATURAL RESOURCES: THE ROLE OF INTERNATIONAL ENVIRONMENTAL GOVERNANCE AND FINLAND'S PRIORITIES AFTER RIO+20¹

Ville Niinistö² and Niko Urho³

1 Introduction

The world is confronted with the twin challenge of achieving a high level of human development, while at the same time not exceeding earth's finite natural resources. Developed countries have achieved a satisfactory level of human development, but their ecological footprints exceed significantly the threshold for environmental sustainability. In contrast, most developing countries are not able to provide sufficient services and material well-being to their citizens, although their ecological footprints remain comparatively low. In essence, to date, not a single country has achieved sustainable development that both satisfies human needs and respects nature.⁴

Against this backdrop, the United Nations Conference on Sustainable Development (UNCSD), more commonly known as Rio+20, was organized in June 2012 in Rio de Janeiro, Brazil, where world leaders came together to tackle the twin challenge of eradicating poverty and achieving sustainable development. High expectations for the UNCSD attracted altogether 44 000 participants from 191 countries,

¹ This paper is based on the keynote lecture delivered on 5 August 2013 on the UEF–UNEP Course on Multilateral Environmental Agreements.

² M. Political Sc. (University of Turku); then Minister of the Environment, Finland.

³ M. Sc. Environmental Biology (University of Helsinki); Senior Officer, Ministry of the Environment of Finland; email: Niko.Urho@ymparisto.fi.

⁴ UNEP, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (2011), available at <<http://www.unep.org/greeneconomy>>, at 21.

making it the largest sustainability conference ever organized.⁵ The meeting resulted in a 53-paged Outcome Document entitled 'The Future We Want' that was, subsequently, adopted by the General Assembly in its 68th session.⁶

After the meeting, many environmental non-governmental organizations (ENGOS) expressed disappointment with the results of the Conference; whereas government representatives, including the writers of this paper, took a more positive stance and argue that Rio+20 represents a turning point for strengthened environmental governance structure, development of global sustainable development goals and growing interest in greening the economy. In addition, the birth of several new initiatives means that more time is needed to understand the long-term impacts of the Conference.

Now, two years after Rio+20, it is relevant to take stock of the follow-up to the Conference. To this end, we shall discuss the main achievements of the Conference, particularly in the context of sustainable use and the conservation of natural resources. This paper will show that Rio+20 initiated various significant processes that aim to spearhead a more balanced relationship between the three dimensions of sustainable development. The paper also outlines some major priorities to Finland in the follow-up to the Conference in order to improve human well-being within planetary boundaries.

2 Where is the world today in terms of natural resources use?

2.1 Humanity's impact on the earth

Since the 1970s, humanity's annual demand for natural resources has exceeded the earth's regenerative capacity, or 'biocapacity'. Today, the consumption of biological resources is one-and-a-half times higher than what the world can provide.⁷ This 'ecological overshoot' means that our current life-style is resulting in the depletion of the earth's life-supporting natural capital and a build-up of waste. Resource scarcity has already led to a series of energy, financial and food crises and poses an increasing threat to future economic growth.⁸

In the next 40 years, as the world population grows and consumption increases, the demand for natural resources is expected to double, if the current 'business as usu-

⁵ Harriet Bulkeley et al, 'Governing Sustainability: Rio+20 and The Road Beyond', 31 *Environment and Planning C: Government and Policy* (2013) 958–970 at 958.

⁶ Rio+20 Outcome Document 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014).

⁷ Global Footprint Network, *The National Footprint Accounts* (2012 ed., Global Footprint Network, 2013), available at <http://www.footprintnetwork.org/images/article_uploads/National_Footprint_Accounts_2012_Edition_Report.pdf> (visited 12 September 2014), at 6.

⁸ UNEP, *Towards a Green Economy*, *supra* note 4, at 255.

al' approach prevails.⁹ The current world population of 7.3 billion is projected to reach 9.6 billion in 2050 and eventually stabilize at around 11 billion only in 2100.¹⁰ Meanwhile, the overall global economic growth is estimated to increase on average three per cent per year over the next 50 years. China and India could see a seven-fold increase in their income per capita by 2060.¹¹

There are 870 million undernourished people in the world.¹² At the same time, 25–33 per cent of all food produced for human consumption is lost or wasted.¹³ Projections show that food production will need to increase 70 per cent by 2050, due to population growth and shifting diets.¹⁴ Water stress and scarcity provides an additional challenge to food security – the global water supply has been projected to satisfy only 60 per cent of the world demand in 2030.¹⁵

Already half of the world's population lives in cities. Due to the rapid urbanization in developing countries, cities will need to accommodate almost 3 billion more people in 2050 than today.¹⁶ Ensuring sustainable urban development is a tall order, considering that even today almost 900 million people still reside in slums.¹⁷ Urbanization will pose a huge pressure on natural areas, since existing urban areas will continue to expand and spread out, while completely new cities will be built from the ground up.

Environmental degradation is driven not only by pollution and contamination caused by our economic activities but, to a larger extent, by overuse of natural resources which derives ultimately from unsustainable consumption patterns. In 2008, people consumed 68 billion tonnes of material – that signifies a daily per capita consumption of 28 kilogrammes.¹⁸ However, consumption rates vary globally accord-

⁹ WWF, *Living Planet Report 2012 – Biodiversity, biocapacity and better choices* (WWF, 2012), available at <http://awsassets.panda.org/downloads/1_lpr_2012_online_full_size_single_pages_final_120516.pdf> (visited 12 September 2014), at 100.

¹⁰ UN, *World Population Prospects – The 2012 Revision. Volume I: Comprehensive Tables* (UN, 2013), available at <http://esa.un.org/unpd/wpp/Documentation/pdf/WPP2012_Volume-I_Comprehensive-Tables.pdf> (visited 12 September 2014) at 1.

¹¹ OECD, *Economic Policy Reforms. Looking to 2060: long-term global growth prospects* (OECD, 2012), available at <<http://www.oecd-ilibrary.org/docserver/download/5k8zxpjsggf0.pdf?expires=1400772796&id=id&accname=guest&checksum=1AF5206E0375B30970849E0F2746D9D1>> (visited 12 September 2014) at 8.

¹² UN, *The Millennium Development Goals Report 2013*, available at <<http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf>> (visited 12 September 2014) at 10.

¹³ World Bank, 4(16) *Food Price Watch* (2014), available at <<http://www.worldbank.org/content/dam/Worldbank/document/Poverty%20documents/FPW%20Feb%202014%20final.pdf>> (visited 12 September 2014), at 5.

¹⁴ World Resources Institute, *Creating a Sustainable Food Future: Interim Findings. A menu of solutions to sustainably feed more than 9 billion people by 2050* (WRI, 2013), available at <http://www.wri.org/sites/default/files/WRI13_Report_4c_WRR_online.pdf> (visited 12 September 2014), at 2.

¹⁵ 2030 Water Resources Group, *Charting our Water Future: Economic Frameworks to Inform Decision Making*. (2009), available at <http://commdev.org/userfiles/Charting_Our_Water_Future_Final.pdf> (visited 12 September 2014), at 6.

¹⁶ UN, *World Urbanization Prospects, the 2011 revision* (UN, 2012), available at <<http://esa.un.org/unup/Documentation/final-report.htm>> (visited 14 September 2014) at 1.

¹⁷ UN, *The Millennium Development Goals Report 2013*, *supra* note 12, at 50.

¹⁸ Monika Dittrich, Stefan Giljum, Stephan Lutter and Christine Polzin, *Green Economies around the*

ing to income levels. The wealthiest 20 per cent of the world consumes 80 percent of the world's natural resources; whereas the poorest 20 percent accounts for 1.3 per cent of the global resource use.¹⁹

Over-exploitation of natural resources is one of the main drivers for biodiversity loss.²⁰ The planet has already lost 35 per cent of its mangroves, 40 per cent of its forests and 50 per cent of its wetlands.²¹ Consequently, biodiversity is now disappearing approximately 1 000 times faster compared to the historical extinction rates.²² This means that many species, ecosystems and genetic resources that can benefit humanity in the form of food, fibres, medicines and construction materials are vanishing at an unprecedented rate. There are other, concomitant problems. Recently, for instance, biodiversity loss has also been linked to the raise of many social problems, including slave labour.²³

2.2 How much can the earth tolerate?

In 2009, a group of researchers at the Stockholm Resilience Centre (SRC)²⁴ developed the 'planetary boundaries concept' in order to illustrate the pressure of human activity on the planet. The concept comprises estimates of nine environmental thresholds that outline a safe operating space for humanity. Three of the identified thresholds have already been exceeded, including the rate of biodiversity loss, climate change and changes to the global nitrogen cycle. The researchers warn that exceeding the tipping points may result in a cascade of irreversible and unpredictable biophysical changes of the planet.²⁵

Recently, the planetary boundaries concept has been widely debated and there is emerging an understanding of humanity becoming a planetary-scale force, with potentially catastrophic consequences for the global environment and for human well-being. In March 2012, the Planet Under Pressure conference brought together 3 000 leading experts, who concluded that '... consensus is growing that we have driven the

World? Implications of resource use for development and the environment (SERI, 2012), available at <http://seri.at/wp-content/uploads/2012/06/green_economies_around_the_world.pdf>, (visited 9 October 2014), at 21.

¹⁹ Christian Aid, *The Rich, the Poor and the Future of the Earth. Equity in a Constrained World* (2012), available at <<http://www.christianaid.org.uk/images/constrained-world.pdf>> (visited 14 September 2014), at 5–6.

²⁰ Millennium Ecosystem Assessment 2005. *Ecosystems and Human Well-being: Biodiversity Synthesis* (World Resources Institute, 2005), available at <<http://www.unep.org/maweb/documents/document.354.aspx.pdf>> (visited 14 September 2014) at 8.

²¹ TEEB, *The Economics of Ecosystems and Biodiversity. TEEB for national and international policy makers* (2008), available at <<http://www.teebweb.org/wp-content/uploads/Study%20and%20Reports/Reports/National%20and%20International%20Policy%20Making/TEEB%20for%20National%20Policy%20Makers%20report/TEEB%20for%20National.pdf>> (visited 9 October 2014) at 2.

²² Millennium Ecosystem Assessment 2005, *supra* note 20, at 4.

²³ Justin S. Brashares et al, 'Wildlife Decline and Social Conflict', 345 *Science* (2014) 376–378, at 376.

²⁴ See <<http://www.stockholmresilience.org/>>.

²⁵ Johan Rockström et al, 'A Safe Operating Space for Humanity', 461 *Nature* (2009) 472–475, at 472.

planet into a new epoch, the Anthropocene, in which many earth-system processes and the living fabric of ecosystems are now dominated by human activities ...'.²⁶

In conclusion, an overall picture of the state of the environment is emerging as information is being synthesized and it shows that the pressure on the earth's resources is already unbearable. Population growth, urbanization and increasing per capita consumption rates are featured to put an additional pressure on the environment. The world cannot sustain this level of demand and development trend. Drastic changes are urgently needed to correct our relationship with the environment, if we aim to sustain the vitality of nature and human well-being.

3 The international environmental governance system - the institutional foundation for sustainable use of earth's natural resources

This section covers the role of the main entities involved in the international environmental governance (IEG) system and provides some information on recent developments in enhancing the efficiency and the effectiveness of this system. This is not an exhaustive description, but only a short introduction to how the IEG-system supports environmental agenda-setting for the sustainable use of natural resources.

3.1 UNEP – a catalyst organization for building the IEG system

The current IEG system has been largely created during the last four decades. In 1972, global environmental concerns received wide-spread attention through the United Nations Conference on the Human Environment (UNCHE), which resulted in the creation of the United Nations Environment Programme (UNEP).²⁷ UNEP was given a mandate to institutionalize environmental matters across existing UN agencies and to improve cooperation and communication amongst them.²⁸ The 1997 Nairobi Declaration²⁹ further redefined and strengthened UNEP's mandate as the '... leading global environmental authority that sets the global environmental agenda, that promotes the coherent implementation of the environmental dimension of

²⁶ State of the Planet Declaration, London, 29 March 2012, available at <http://www.planetunderpressure2012.net/pdf/state_of_planet_declaration.pdf> (visited 14 September 2014).

²⁷ See <<http://www.unep.org>>. On the creation of UNEP see, for instance, Donald Kaniaru, 'The Stockholm Conference and the Birth of the United Nations Environment Programme', in Marko Berglund (ed.), *International Environmental Law-making and Diplomacy Review* 2005, University of Joensuu – UNEP Course Series 2 (University of Joensuu, 2006) 3–22.

²⁸ Maria Ivanova, 'Financing International Environmental Governance: Lessons from the United Nations Environment Programme' (Center for Governance and Sustainability, University of Massachusetts, 2011) at 1.

²⁹ 'Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme', UNEP Governing Council Decision 19/1 (1997).

sustainable development within the UN system and that serves as an authoritative advocate for the global environment'.³⁰

Upon its establishment, it was envisaged by its founders that UNEP would gradually grow and achieve a more stable financial basis, so that it could fulfill its relatively broad mandate.³¹ However, UNEP's Environment Fund (EF) relies on voluntary contributions and its annual budget has, in contrast to expectations, remained minuscule in comparison to other UN counterparts.³² Despite its small annual budget, UNEP has been effective in catalyzing action and creating new instruments, in particular, multilateral environmental agreements (MEAs).

However, UNEP has faced considerable challenges in coordinating the various instruments that operate more or less independently with their own decision-making fora and secretariats.³³ In this sense, UNEP has not carried out the role of an 'anchor organization' for international environmental governance. To this end, enhancing the functions of UNEP and upgrading it to a specialized organization, with more authority and control over other environmental bodies, has been under debate for over a decade (see section 4.1 below).³⁴

3.2 MEAs – the legal backbone of international environmental cooperation

International environmental law is rooted primarily in multilateral environmental agreements. MEAs have been crafted in an *ad hoc* and piecemeal fashion in response to specific environmental problems. Consequently, today there exist 540 MEAs, 477 amendments and 220 protocols, bringing the total number above 1200.³⁵ However, a significantly smaller number of MEAs are considered globally significant, for instance the UN's Joint Inspection Unit (JIU)³⁶ lists eight thematic clusters that consist of 60 MEAs, including four on atmosphere, nine on biodiversity and five on chemicals and wastes.³⁷

³⁰ Para. 11.

³¹ Maria Ivanova, 'UNEP in Global Environmental Governance: Design, Leadership, Location', 10 *Global Environmental Politics* (2010) 30–59 at 33.

³² *Ibid.* at 49.

³³ Tadanori Inomata, 'Management Review of Environmental Governance within the United Nations System', Joint Inspection Unit (JIU) Report 2008/3, available at <https://www.unjiu.org/en/reports-notes/archive/JIU_REP_2008_3_English.pdf> (visited 15 August 2014) at 10–15.

³⁴ See Sylvia Bankobeza, 'Strengthening and Upgrading of the United Nations Environment Programme' in Part II of the present *Review*.

³⁵ Data from Ronald B. Mitchell., *International Environmental Agreements Database Project 2002–2014* (version 2013.2), available at <<http://iea.uoregon.edu/>> (visited 17 October 2014).

³⁶ See <<https://www.unjiu.org/>>.

³⁷ Tadanori Inomata and Jean Wesley Cazeau, 'Post Rio+20 Review of Environmental Governance within the United Nations System', Joint Inspection Unit (JIU) Report 2014/4, available at <https://www.unjiu.org/en/reports-notes/JIU%20Products/JIU_REP_2014_4_English.pdf> (visited 19 August 2014) at 62–65.

The vast array of MEAs and other instruments and entities active in the international environmental arena shows that environmental problems have been widely acknowledged and a high degree of action has been taken to overcome them. However, as a result largely of fragmentation, the UN system struggles with a blurred division of labor and unclear mandates resulting in duplication of work and unhealthy competition for funds.³⁸ In 2008, the JIU assessed that the cost for operating the current MEA-system is four times higher than in other sectors.³⁹

Due to treaty congestion, international focus has shifted from creating new agreements to enhancing implementation of existing commitments. At the same time, MEAs are experiencing a steep increase in the number of parties.⁴⁰ Many MEAs, including the Montreal Protocol⁴¹ and the three ‘Rio Conventions’,⁴² have, or almost have, achieved universal membership. This signifies that the IEG-system has entered into a new phase that is centered on implementation.⁴³

Enhancing synergies among MEAs is at the core of the IEG-reform, since it aims to strengthen implementation by tackling fragmentation where it is greatest. To date, the work done in the chemicals and waste cluster⁴⁴ is exemplary in the IEG-context. The reform started in 2006 and has resulted in a joint secretariat, with a joint head and functions, operated through a matrix management system. The reform has induced administrative cost savings of approximately 1.5 million USD by the end of biennium 2012–2013.⁴⁵ More importantly, the reform has arguably increased the political clout of the chemicals and waste MEAs, displayed by the sixth replenishment⁴⁶

³⁸ Council of the European Union, ‘International Environmental Governance: Preparations for the 2nd meeting of the Consultative Group of Ministers - Information from the Finnish delegation (Helsinki, 21–23 November 2010)’, available at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014634%202010%20INIT>> (visited 17 October 2014), at 2.

³⁹ Inomata, ‘Management Review of Environmental Governance’, *supra* note 33, at 11.

⁴⁰ UNEP, ‘“International Environmental Governance and United Nations Reform, IEG: Help or Hindrance?”’, international environmental governance from a country perspective’, a background information paper for the ministerial-level consultations, a discussion paper presented by the Executive Director, UN Doc. UNEP/GC.25/16/Add.1 (2009) at 5.

⁴¹ Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, <<http://www.unep.org/ozone/>>.

⁴² Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>; United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>; and UN Convention to Combat Desertification in Countries Experiencing Serious Drought and or Desertification, Particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <<http://www.unccd.int>>.

⁴³ UNEP, ‘International Environmental Governance’, *supra* note 40, at 5.

⁴⁴ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September, 1998, in force 24 February, 38 *International Legal Materials* (1999) 1, <<http://www.pic.int>>; Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 *International Legal Materials* (2001) 532, <<http://www.pops.int>>; and Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force 5 May 1992, 28 *International Legal Materials* (1989) 657, <<http://www.basel.int>>.

⁴⁵ Inomata, ‘Management Review of Environmental’, *supra* note 33, at 36.

⁴⁶ See GEF, ‘GEF replenishments’, available at <<http://www.thegef.org/gef/replenishment>> (visited 24 October 2014). GEF Trust Fund resources are replenished every four years through resources pledged by

of the Global Environment Facility (GEF),⁴⁷ which increased funding accorded to the chemicals and waste focal area by US\$130-million.

3.3 The role of the broader UN-system

Over the years, many other UN bodies have included environmental activities in their operations, thus significantly increasing the total number of UN bodies active in the environmental sphere. In 2001, the United Nations General Assembly (UNGA) established the Environment Management Group (EMG)⁴⁸ with 'the purpose of enhancing inter-agency coordination in the field of environment and human settlements'.⁴⁹ The secretariat of the Group is provided by UNEP and it is chaired by the Executive Director of UNEP. The EMG has 48 members, which include specialized agencies, programmes and organs of the UN and secretariats of MEAs. Over the years, the EMG has gradually gained authority in the UN on environmental matters and has established issue-management groups on various thematic topics, including biodiversity, green economy and sound management of chemicals and waste.

3.4 The contribution of the scientific community

In recent years, the flow of scientific information has significantly increased, yet its influence on decision-making has remained relatively modest due to underdeveloped mechanisms for connecting science to policy-making. To this end, enhancing the nexus between science and policy has been a crucial part of the IEG-reform.

The Intergovernmental Panel on Climate Change (IPCC)⁵⁰ has been a pioneer in this field as it has synthesized scientifically credible information for the UN Framework Convention on Climate Change (UNFCCC) for two decades. The intergovernmental nature of the Panel allows exchanges of information between scientists and decision-makers. In 2007, the IPCC was jointly awarded⁵¹ the Nobel Peace Prize for increasing understanding of the connection between human activities and human-induced climate change.

Consequently, this stimulated discussions on creating an 'IPCC for biodiversity' that culminated in April 2012 in the establishment of the Intergovernmental science-poli-

countries wishing to contribute through a 'GEF Replenishment' process. The GEF- 6 period will run from a July 2014 until 30 June 2018.

⁴⁷ See <<http://www.thegef.org>>.

⁴⁸ See <<http://www.unemg.org/>>.

⁴⁹ 'Report of the Secretary-General on environment and human settlements', UNGA Res. 53/242 of 10 August 1999, para. 5.

⁵⁰ See <<http://www.ipcc.ch/>>.

⁵¹ The prize was awarded jointly with former Vice-President of the United States, Albert Arnold Gore Jr. 'for their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to counteract such change'. See <http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/> (visited 1 November 2014).

cy Platform on Biodiversity and Ecosystem Services (IPBES).⁵² The first global assessment on biodiversity and ecosystem services will be launched in 2018. The Platform is also undertaking thematic assessments, starting with an assessment on global pollinator decline. The new Platform aids primarily the MEAs in the biodiversity cluster and, in the long run, it has potential to strengthen global biodiversity governance.

Furthermore, the International Resource Panel (IRP)⁵³ was established in 2007 to provide scientific support for the international community for enhancing sustainable use of natural resources. The Panel consists of 20 experts and is able to function as an agile mechanism capable of tackling emerging issues and rapidly compiling scientifically credible information. Decoupling economic growth and human well-being from the escalating use of natural resources has been a guiding goal of the panel.⁵⁴

4 Key areas in the follow-up to Rio+20

This section covers three key areas in the follow-up to Rio+20 with regard to natural resources. These include strengthening the IEG-system, developing a Post-2015 Agenda that satisfies human needs and respects nature, and enhancing sustainability of natural resources use by ‘green economy’ policies.

4.1 Enhancing international environmental governance and its coherence

As discussed above (see section 2), international status reports show little, if any, proof of improvements in the state of the global environment. To this end, several processes have been initiated to enhance the IEG-system so that it can more effectively respond to environmental challenges. These processes culminated at Rio+20 where significant decisions were made to strengthen and upgrade UNEP and to enhance synergies among MEAs.⁵⁵ ‘The Future We Want’ Outcome Document also covers many thematic governance gaps, including oceans and biodiversity, aiming to strengthen the sustainable use of natural resources.

4.1.1 From Cartagena to Rio

Consensus on the IEG-reform has evolved in a step-by-step manner since 2002, when UNEP’s Governing Council (GC) adopted the ‘Cartagena Package’.⁵⁶ In 2005, the need for IEG reform was covered in paragraph 169 in the World Summit Outcome Document,⁵⁷ which provided impetus to initiate an informal process in New

⁵² See <<http://www.ipbes.net/>>.

⁵³ See <<http://www.unep.org/resourcepanel>>.

⁵⁴ UNEP, ‘Sustainable consumption and production (SCP) – Targets and indicators and the SDGs’, UNEP Post-2015 discussion paper (2014), available at <http://www.iisd.org/sites/default/files/publications/scp_targets_indicators_unep.pdf> (visited 14 September 2014), at 16.

⁵⁵ ‘The Future We Want’, paras 88 and 89.

⁵⁶ ‘International Environmental Governance’, UNEP GC Dec. SS/7/1 (2002)

⁵⁷ ‘2005 World Summit Outcome’, UNGA Res. 60/1 of 24 October 2005.

York. This resulted, in 2007, in the 'Options Paper'⁵⁸ that identifies seven building blocks to strengthen IEG. In late 2008, an attempt to reach an IEG-resolution in the General Assembly failed, due to highly polarized views.

Consequently, UNEP's GC launched a political process to continue the IEG-debate: two formal ministerial groups were established in subsequent years to identify forms and functions to meet both incremental and fundamental needs for the IEG-reform. In 2009, the first group (also known as the 'Belgrade process'⁵⁹) identified a set of options to improve the IEG-system. These were further elaborated by the latter group culminating in 2010 in the 'Nairobi-Helsinki Outcome',⁶⁰ which points out six functions and system-wide responses and five institutional forms to address the challenges in the current IEG-system. The Outcome was transmitted by the request of UNEP's GC to the preparatory process of Rio+20.⁶¹

Careful preparation and consensus-building leveraged Rio+20 to agree on UNEP's reform. In fact, paragraph 88 of 'The Future We Want' not only responds to every functional element identified in the Nairobi-Helsinki Outcome,⁶² including the science-policy interface and stakeholder engagement, but also addresses form and funding. UNEP's reform has progressed through UNEP's GC decision on institutional arrangements (February 2013)⁶³ and subsequent UNGA resolutions.⁶⁴ These decisions significantly strengthen UNEP's 'three F's' – functions, funding and form – and, thereby, reinforce its leadership role in international environmental governance.

4.1.2 Strengthening UNEP's 'three F's' in response to Rio+20

As the global environment continues to deteriorate, it is important to build and reinforce the nexus between science and policy-making. There exist various large-scale assessment mechanisms, but these tend to address environmental issues in a piece-

⁵⁸ 'Co-chairs' Options Paper of the Informal Consultative Process on the Institutional Framework for the United Nations' Environmental Activities' (UN, 2007), available at <<http://www.un.org/ga/president/61/follow-up/environment/EG-OptionsPaper.PDF>> (visited 15 September 2014).

⁵⁹ 'Set of options for improving international environmental governance', Second meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, Rome, 26 – 29 October 2009, available at <<http://www.unep.org/environmental-governance/Portals/8/documents/IEG-Draft-Report-Rome-final-edited.pdf>> (visited 15 September 2014).

⁶⁰ Nairobi-Helsinki Outcome from the second meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance Espoo, Finland, 21–23 November 2010, available at <<http://www.unep.org/environmental-governance/Portals/8/documents/Events/NairobiHelsinkiFinalOutcomeEdited.pdf>> (visited 15 August 2014).

⁶¹ 'International environmental governance', UNEP GC Dec. 26/1 (2011), para. 4.

⁶² Steven Bernstein, 'Rio+20: Sustainable Development in a Time of Multilateral Decline', 13 *Global Environmental Politics* (2013) 12–21 at 17.

⁶³ 'Implementation of paragraph 88 of the outcome document of the United Nations Conference on Sustainable Development', UNEP GC Dec. 27/2 (2013).

⁶⁴ 'Report of the Governing Council of the United Nations Environment Programme on its twelfth special session and on the implementation of section IV.C, entitled "Environmental pillar in the context of sustainable development", of the outcome document of the United Nations Conference on Sustainable Development', UNGA Res. 67/213 of 21 December 2012; 'Change of the designation of the Governing Council of the United Nations Environment Programme', UNGA Res. 67/251 of 13 March 2013.

meal and fragmented fashion. In response to Rio+20, UNEP is developing an on-line portal named ‘UNEP-live’⁶⁵ that brings together environmental data, information and assessments to portray an up-to-date picture of the state and trends of the global environment. Furthermore, the first session of the United Nations Environment Assembly (UNEA)⁶⁶ decided to enhance collaboration between MEA secretariats, UN bodies and scientific panels in order to achieve a more integrated and holistic approach to environmental assessments.⁶⁷

In order adequately to tackle persistent global environmental problems, the entire UN system needs to be sufficiently mobilized for this purpose. To this end, ‘The Future We Want’ calls for enhancing UNEP’s environmental coordination function in the UN and to lead efforts in formulating UN system-wide strategies on the environment.⁶⁸ Subsequently, UNEP’s GC handed the main responsibility for elaborating these strategies over to the EMG, which has a strong track record in mainstreaming environmental issues in the UN system.⁶⁹

‘The Future We Want’ calls for strengthening UNEP’s stakeholder engagement.⁷⁰ In response, UNEP’s GC decided to take the following measures by 2014: to develop a process for stakeholder accreditation and participation; to establish mechanisms and rules for stakeholders’ expert input and advice; and to enhance working methods and processes for informed discussions and contributions by all relevant stakeholders.⁷¹ However, enhancing civil society participation and access to information has progressed slowly and much needs to be done in order to achieve a successful outcome in the 2nd session of UNEA.

Rio+20 strengthened UNEP’s financial position: paragraph 88 of ‘The Future We Want’ reaffirms the need to ‘... secure, stable, adequate and increased financial resources from the regular budget of the UN and voluntary contributions to fulfill its mandate’. In December 2013, the UNGA approved a US\$21-million increase for UNEP over 2014–2015 from the UN regular budget, including 24 new posts.⁷² As a sign of confidence in UNEP’s reform, Finland doubled its contribution to UNEP’s Environment Fund in 2014, totaling 6 million Euros. Since voluntary donations to UNEP’s trust fund today rely mainly on a small number of regularly contributing countries, it is important for non-traditional donors to step forward now and show financial as well as political commitment to UNEP.⁷³ Some donors have

⁶⁵ See <<http://www.uneplive.org>>.

⁶⁶ See <<http://www.unep.org/unea/en/>>.

⁶⁷ ‘Science-policy interface’, UNEA Res. 1/4 (2014).

⁶⁸ ‘The Future We Want’, para. 88(c).

⁶⁹ UNEP GC Dec. 27/2 (2013), para. 3.

⁷⁰ ‘The Future We Want’, para. 88(h).

⁷¹ UNEP GC Dec.27/2 (2013), para. 7.

⁷² UNGA Res. 68/248.

⁷³ See UNEP, ‘The Environment Fund contribution statistics 1973–2012’, available at <<http://www.unep.org/about/funding/portals/50199/documents/Environment%20Fund%20contribution%20statistics%201973-2012.xls>> (visited 10 November 2014).

already shown such willingness. During Rio+20, Brazil and China pledged US\$6-million each toward UNEP's Trust Fund.

The highlight of UNEP's reform was the decision taken at Rio+20 to expand UNEP's GC from 58 countries to universal membership. To this end, in February 2013, UNEP's GC decided to transform itself into the United Nations Environment Assembly (UNEA),⁷⁴ which concludes in a High-Level Segment (HLS) with actual political decision-making power. The transformation was approved a month later by the UNGA.⁷⁵ This makes UNEP the only UN subsidiary body with universal membership.⁷⁶ Since universal membership in UNEA will involve all UN member states in decision-making, the legitimacy of decisions should be greatly improved. Previously, UNEP GC, with only 58 members, lacked legitimacy to coordinate MEAs that had a significantly higher number of parties. Thus, the reform grants UNEP greater authority in relation to MEAs⁷⁷ and, thereby, facilitates UNEP's role in enhancing synergies among MEAs.

4.1.3 Enhancing synergies among MEAs in response to Rio+20

'The Future We Want' calls for enhancing synergies among MEAs by encouraging '... parties to MEAs to consider further measures, in these⁷⁸ and other clusters, as appropriate, to promote policy coherence at all relevant levels, improve efficiency, reduce unnecessary overlap and duplication, and enhance coordination and cooperation among MEAs...'.⁷⁹ Since Rio+20, synergies have progressed in two MEA clusters. In October 2013, the signatory meeting of the Minamata Convention,⁸⁰ the new convention on mercury, gave a positive signal for the co-location of its secretariat with the joint chemicals and waste secretariat,⁸¹ subject to final decision by the first COP of the Minamata Convention. Furthermore, in order to enhance synergies among six biodiversity-related MEAs,⁸² UNEP has recently initiated a project

⁷⁴ UNEP GC Dec. 27/2 (2013), para. 1.

⁷⁵ UNGA Res. 67/251.

⁷⁶ Maria Ivanova. 'Reforming the Institutional Framework for Environment and Sustainable Development: Rio+20's Subtle but Significant Impact', 12 *International Journal of Technology Management & Sustainable Development* (2013) 211–231, at 224.

⁷⁷ *Ibid.* at 224.

⁷⁸ The chemicals and waste cluster, *supra* note 44.

⁷⁹ 'The Future We Want', para. 89.

⁸⁰ Minamata Convention on Mercury, Geneva, 19 January 2013, not yet in force, <<http://www.mercury-convention.org/>>.

⁸¹ Final Act of the Conference of Plenipotentiaries on the Minamata Convention on Mercury, Resolution on arrangements in the interim period, UN Doc. UNEP(DTIE)/Hg/CONF/4 (2013), para. 9.

⁸² The biodiversity cluster includes the following six MEAs: Convention on Biological Diversity (CBD, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org/>>); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org/>>); the Convention on Migratory Species (CMS, Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 *International Legal Materials* (1980) 15, <<http://www.cms.int/>>); the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA, Rome, 3 November 2001, in force 29 June 2004, <<http://www.planttreaty.org/>>); the Ramsar Convention on Wetlands (Convention on Wetlands of International Importance, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials*

funded by the European Commission and Switzerland. The project explores options for further synergies at all levels with a view to improvements in efficiency and effectiveness through enhanced collaboration and cooperation. The output of the project is envisaged to provide a set of recommendations for the UNEP Executive Director to present to the second session of the UNEA in 2016. The initiative addresses programmatic, institutional and administrative issues at all levels aiming to provide recommendations for the 2nd session of UNEA in 2016 and the governing bodies of biodiversity-related MEAs.

4.1.4 Covering thematic governance gaps in response to Rio+20

The international community is becoming more aware of the magnitude of transnational organized environmental crime, which includes illegal action concerning logging, fisheries and other wildlife trade, mining and dumping of toxic waste.⁸³ Consequently, Rio+20 led to renewed commitment to halt biodiversity loss, including a strong call for action to halt illegal wildlife trade.⁸⁴ The value of transnational organized environmental crime is estimated to be between US\$70–213-billion annually.⁸⁵ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is widely considered to be among the most effective global environmental regimes, but it operates with a yearly budget of only US\$5-million, which does not correlate at all with the magnitude of the problem. To this end, the 1st session of UNEA decided to take decisive action against illegal trade in wildlife.⁸⁶

Oceans were high on the agenda at the Rio+20 Conference, since governments recognized that oceans are under growing pressure: overexploitation, pollution, climate change and ocean acidification are severely damaging marine biodiversity and food production capacity.⁸⁷ The oceans are poorly protected and there exists no international agreement to protect oceans in areas beyond national jurisdiction, including the Arctic region. To fill this gap, governments made an important decision at Rio+20 to develop an international instrument under the United Nations Conven-

(1972), 963, <<http://www.ramsar.org>>); and the World Heritage Convention (WHC, Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 *International Legal Materials* (1972) 1358, <<http://whc.unesco.org>>).

⁸³ UNEP, 'Illegal Trade in Wildlife: The Environmental, Social and Economic Consequences for Sustainable Development', information document to support discussions of the Ministerial Dialogue on Illegal Trade in Wildlife, UN Doc. UNEP/EA.1/INF/19 (2014), available at <http://www.unep.org/unea/information_documents.asp> (visited 16 September 2014), at 1.

⁸⁴ 'The Future We Want', paras 197–204.

⁸⁵ UNEP, 'Illegal Trade in Wildlife', *supra* note 83, at 1.

⁸⁶ 'Illegal trade in wildlife', UNEA Res. 1/3 (2014).

⁸⁷ For a description of various threats to the oceans, see Ed Couzens, 'International Law Relating to Climate Change and Marine Issues' in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy Review 2010*, University of Eastern Finland – UNEP Course Series 10 (University of Eastern Finland, 2012) 185–216 at 187–191.

tion on Law of Sea (UNCLOS)⁸⁸ to strengthen the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.⁸⁹

'The Future We Want' addresses marine debris and includes a time-bound target to achieve significant reductions in this form of pollution by 2025 to prevent harm to the coastal and marine environment.⁹⁰ In response, the 1st session of UNEA requested UNEP to carry out a study on marine plastic debris and marine microplastics in order to identify key sources of marine debris, effective measures to minimize debris and most urgent research needs.⁹¹ The study will be presented to the 2nd session of UNEA with recommendations for most urgent action.

4.1.5 Matters relating to the institutional form

The institutional reform of UNEP has provided it with some key attributes of a specialized agency: universality, more stable and predictable finances, and formal authority.⁹² However, the lack of actual discussion at Rio+20 on the organizational form left many unsatisfied. Over 100 countries, including those in the European Union (EU), were in favor of upgrading UNEP into an independent specialized agency. The host country's refusal to discuss the organizational form was surprising, as many relied on this issue being discussed once the functions had been agreed, in accordance with the 'form follows function' principle, known as the underlying precept of IEG-reform. Presumably, the resistance originated from the fear of creating an imbalance in favor of the environmental dimensions of sustainable development.⁹³ Nevertheless, Rio+20 forms a significant milestone towards the EU's ultimate goal to transform UNEP into a specialized agency.

Fortunately, the reform of the institutional framework for sustainable development (IFSD) made headway: the Commission on Sustainable Development (CSD) was abolished and replaced by the High-Level Political Forum (HLPF).⁹⁴ The HLPF has huge potential as it has universal membership and will meet every four years under the UNGA at head-of-state level, and in other years under the United Nations Economic and Social Commission (ECOSOC)⁹⁵ at the ministerial level. Nevertheless, to succeed the HLPF needs to reach out beyond the UN by providing high-level po-

⁸⁸ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

⁸⁹ 'The Future We Want', para. 162.

⁹⁰ *Ibid.* para. 163.

⁹¹ 'Marine plastic debris and microplastics', UNEA Res. 1/6 (2014), para. 14.

⁹² Ivanova, 'Reforming the Institutional Framework', *supra* note 76, at 224.

⁹³ Frank Biermann, 'Curtain Down and Nothing Settled: Global Sustainability Governance after the 'Rio+20' Earth Summit', 31 *Environment and Planning C. Government and Policy* (2013) 1099–1114, at 1102.

⁹⁴ 'The Future We Want', paras 84–85. See <<http://sustainabledevelopment.un.org/index.php?menu=1556>> (visited 16 September 2014).

⁹⁵ See <<http://www.un.org/en/ecosoc/>>.

litical direction and support for partnerships and transformative activities with the civil society and businesses.⁹⁶

4.2 Bringing together the agendas of poverty eradication and eradication of overconsumption of natural resources in the Post-2015 Agenda

4.2.1 Introduction

Despite significant progress made in reducing poverty since the 1990s, today 1.2 billion people still live below the poverty line.⁹⁷ Eradicating poverty must be seen as the underlying development quest of this era. However, in order to allow everybody to reach reasonable life expectancy and human development index (HDI),⁹⁸ global economic growth still needs to increase two- to four-fold.⁹⁹ This needs to happen without depleting earth's natural resources base – the foundation of well-being. 'The Future We Want' provides a strong basis for achieving this as it sets sustainable development at the heart of the process for developing the Post-2015 Agenda.

4.2.2 Towards a unified approach to human and planetary well-being

To date, policy-making has considered environmental and economic issues as contradictory objectives. Consequently, economic growth has been achieved at the expense of the environment. The weakened natural resources base has resulted, *inter alia*, in uncontrolled urbanization and poses a major threat to future food security. It is becoming ever more evident that environmental, social and economic issues need to be treated as intertwined goals.

The Millennium Declaration¹⁰⁰ and Millennium Development Goals (MDGs)¹⁰¹ have steered development efforts in the 21st century focusing on poverty eradication. The MDGs have underscored the power of global vision that has catalyzed action to meet the goals.¹⁰² Since the adoption of the Millennium Declaration, many developing countries have experienced significantly faster economic growth than have developed economies.¹⁰³ However, the Millennium Declaration does not propose sustainable development as the overarching paradigm for achieving development and poverty eradication.¹⁰⁴ Consequently, the MDGs cover only three environmental topics: water, biodiversity and urbanization – and do so in isolation from

⁹⁶ Bernstein, 'Rio+20: Sustainable Development', *supra* note 62, at 19.

⁹⁷ The Millennium Development Goals Report 2013, *supra* note 12, at 6.

⁹⁸ See <<http://hdr.undp.org/en/content/human-development-index-hdi>> (visited 20 September 2014).

⁹⁹ Arnold Tukker, 'Knowledge Collaboration and Learning by Aligning Global Sustainability Programs: Reflection in Context of Rio+20', 48 *Journal of Cleaner Production* (2013) 272–279, at 272.

¹⁰⁰ 'The United Nations Millennium Declaration', UNGA Res. 55/2 of 8 September 2000.

¹⁰¹ See <<http://www.un.org/millenniumgoals/>>.

¹⁰² Maria Ivanova, 'The Contested Legacy of Rio+20', 13 *Global Environmental Politics* (2013) 1–11, at 7.

¹⁰³ Pertti Majanen and Mansur Muhtar, Report of the Intergovernmental Committee of Experts on Sustainable Development Financing, final draft (2014), available at <http://www.un.org/en/ga/president/68/pdf/letters/8142014ICESDF%20Co-chairs_PGA_Final%20report%20-%202014%20August%202014.pdf> (visited 16 September 2014), at 8.

¹⁰⁴ Felix Dodds, Jorge Laguna-Celis and Elizabeth Thompson, *From Rio+20 to a New Development Agenda. Building a Bridge to a Sustainable Future* (Routledge, 2014), at chapter 1.

other goals. In other words, the MDGs are driven by a 'people-centred' approach, thus undermining the sustainable development approach which is inherently rooted in a 'planet-centred' approach.¹⁰⁵

Against this backdrop, one of the main achievements of Rio+20 is the strong call for integrating the three dimensions of sustainable development. 'The Future We Want' acknowledges, *inter alia*, 'the need to further mainstream sustainable development at all levels integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions'.¹⁰⁶ Consequently, Rio+20 represents a turning point – a rebirth of sustainable development that draws its essence from the two complementary approaches: a planet-centred approach and a people-centred approach.¹⁰⁷

4.2.3 Global sustainable development goals in the Post-2015 Agenda

The decision to create sustainable development goals (SDGs)¹⁰⁸ has the essential aim of creating a unified approach to human and planetary well-being. There are three main reasons. Firstly, the SDGs are intended to '... incorporate in a balanced way all three dimensions of sustainable development and their interlinkages' and, thereby, address the observed lack of integration between the three spheres of sustainable development in the MDGs. Secondly, the SDGs are broader in geographical scope, since they apply to all countries; whereas the MDGs concern primarily developing countries. Lastly, the SDGs are intended to be coherent with and integrated in the Post-2015 Development Agenda, signifying that the post-2015 MDGs and SDGs should, in fact, form a single uniform set of goals.¹⁰⁹

The proposed SDGs have been discussed in New York by the open-ended working group on SDGs (OWG on SDGs),¹¹⁰ co-Chaired by Kenya and Hungary. The OWG convened 13 times and consisted of 30 regionally representative members, but an innovative system of shared membership allowed a total of 70 countries to participate. In addition, the non-member countries and major groups could take part in the discussions. In July 2014, the co-Chairs submitted their proposal for the consideration of the UN Secretary-General. The proposal includes 17 SDGs and 169 time-bound targets to be achieved by 2020 or 2030.¹¹¹ The proposal aims to eliminate poverty and achieve sustainable development. There are few specific goals that are proposed to tackle the many pressing environmental concerns dismissed in the MDGs, including consumption and production patterns, oceans and terrestrial ecosystems.

¹⁰⁵ *Ibid.* at chapter 1.

¹⁰⁶ 'The Future We Want', para. 3.

¹⁰⁷ Dodds et al, *From Rio+20 to a New Development Agenda*, *supra* note 104, at chapter 1.

¹⁰⁸ See UN Sustainable Development Knowledge Platform, 'Sustainable development goals', available at <<http://sustainabledevelopment.un.org/?menu=1300>> (visited 20 September 2014).

¹⁰⁹ 'The Future We Want', para. 246.

¹¹⁰ See <<http://sustainabledevelopment.un.org/owg.html>>.

¹¹¹ Open Working Group on Sustainable Development Goals, Outcome Document, 19 July 2014, available at <<http://sustainabledevelopment.un.org/focussdgs.html>> (visited 16 September 2014).

To date, existing environmental goals have not mobilized the required action for meeting them: UNEP's Global Environmental Goals (GEG)¹¹² initiative has identified 34 major environmental goals, but significant progress is reported towards only three.¹¹³ Similarly, the latest UN progress report on MDGs points out that the MDG 7 for environmental sustainability lags far behind the other goals.¹¹⁴ To this end, the Post-2015 Agenda represents a unique opportunity to bring greater political support to existing environmental goals. In addition, new goals are needed to complement existing goals and better to incorporate the three dimensions of sustainable development.

It will be essential to ground the new goals firmly on science to ensure long-term sustainability. To this end, the planetary boundaries approach provides a highly useful scientific framework for the new goals to ensure that human action does not exceed environmental tipping points.¹¹⁵ In addition, the goals should be complemented by the concept of social boundaries for ensuring inclusive and sustainable economic development.¹¹⁶ In other words, the new goals should respect the carrying capacity of the earth and fulfill the basic needs of all.

It will be necessary to provide the most suitable institutional base to follow up on the implementation of the Post-2015 Agenda at all levels. In the UN system, the High-Level Political Forum would be the obvious choice, since it has been given the mandate to oversee sustainable development at the global level. At the national level, cross-sectoral national councils for sustainable development should oversee the implementation of the post-2015 framework. The national councils for sustainable development should convene regularly at the global level, preferably in conjunction with the HLPF, to review progress. By way of example, in Finland, the National Commission on Sustainable Development was established in 1993 and, since then, has promoted sustainable development and monitored its implementation in the Finnish society. The Finnish National Commission is chaired at the Ministerial level, usually by the Prime Minister or Finance Minister, to ensure sufficient political commitment to sustainable development.

During the second half of 2014, the UN Secretary-General will provide a synthesis report that will draw on the recommendations of the working groups and other outcomes of relevant UN processes, including reports provided by the High-level Panel

¹¹² See <<http://geg.informea.org/>>.

¹¹³ UNEP, *Measuring Progress. Environmental Goals and Gaps (2012)*, available at <http://www.unep.org/geo/pdfs/geo5/Measuring_progress.pdf> (visited 20 September 2014), at 3.

¹¹⁴ The Millennium Development Goals Report 2013, *supra* note 12, at 4.

¹¹⁵ Ministry of the Environment of Finland, 'Planetary boundaries and environmental tipping points: What do they mean for sustainable development and the global agenda?', Workshop report (2013), available at <<http://www.ym.fi/download/noname/%7BB7073CF3-2C48-4475-AABC-F58D1A4A87C4%7D/96005>> (visited 16 September 2014), at 1.

¹¹⁶ Kate Raworth, 'A safe and just space for humanity: Can we live within the doughnut?', Oxfam Discussion Paper (2012), at 4.

of Eminent Persons on the Post-2015 Development Agenda,¹¹⁷ the UN Global Compact¹¹⁸ and the Sustainable Development Solutions Network.¹¹⁹ Never before has the UN been so actively engaged in the elaboration of commitments for securing human and planetary well-being. It is expected that the intergovernmental negotiations will start in early 2015, at the latest, and conclude in the Post-2015 Summit in 2015¹²⁰ where the global post-2015 framework is to be adopted.

4.2.4 Financing

The Post-2015 Agenda will need sufficient funding, including mobilization of resources and capacity support, to ensure that the new goals and targets will be met. To this end, at Rio+20 it was agreed to establish an expert group on financing that will propose a Sustainable Development Financing Strategy to facilitate the mobilization of resources.¹²¹ The expert group, consisting of 30 regionally nominated experts, was established in June 2013 and was co-Chaired by Finland and Nigeria. The group convened five times and, in August 2014, it submitted its final report for the consideration of the UN Secretary-General.¹²² The report concludes that an array of policy measures will be necessary, encompassing a toolkit of policy options, regulations, institutions, programs and instruments.

Naturally, the official development assistance (ODA) commitment of 0.7 percent of gross national income (GNI)¹²³ is still valid and needs to be honored, but it will not be sufficient to achieve the required transformative change to sustainability. Thus, at the same time, new and innovative financial sources need to be deployed, including mobilization of domestic resources. Tackling illicit financial flows and tax avoidance by promoting transparency and accountability would provide an important new financial source. In addition, environmentally harmful subsidies, including fossil fuel subsidies, should be identified and channeled to incentivize domestic action to achieve sustainable development. Furthermore, mandatory corporate sustainability reporting would increase transparency and accountability of the private sector's contribution to promoting sustainable development (see section 4.3.2 below).¹²⁴

¹¹⁷ UN, 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development', a report of the high-level panel of eminent persons on the Post-2015 Development Agenda (UN, 2013), available at <http://www.un.org/sglmanagement/pdf/HLP_P2015_Report.pdf> (visited 16 September 2014).

¹¹⁸ See <<https://www.unglobalcompact.org/>>.

¹¹⁹ SDSN, *An Action Agenda for Sustainable Development* (2014), available at <<http://unsdsn.org/wp-content/uploads/2013/06/140505-An-Action-Agenda-for-Sustainable-Development.pdf>> (visited 16 September 2014).

¹²⁰ A Summit of UN member states is expected to be held in September 2015, at which progress toward the MDGs is expected to be discussed and a post-2015 sustainable development agenda adopted. See <<http://www.un.org/millenniumgoals/beyond2015-overview.shtml>> (visited 1 November 2014).

¹²¹ 'The Future We Want', para. 255.

¹²² Majanen and Muhtar, Report of the Intergovernmental Committee, *supra* note 103.

¹²³ This figure refers to a commitment first made in an UNGA Resolution in 1970, and repeated in many international agreements, in terms of which 'rich countries' would commit 0.7 per cent of their gross national products to Official Development Assistance. See <<http://www.unmillenniumproject.org/press/07.htm>> (visited 1 November 2014).

¹²⁴ Dodds et al, *From Rio+20 to a New Development Agenda*, *supra* note 104, at chapter 4.

4.3 Making the environment and natural resources a central part of economic decision-making by means of green economy

In the run up to Rio+20, it was recognized that existing economic models need to be restructured and that the full engagement of all sectors, including the private sector, is required to achieve sustainability and to increase human well-being. Against this backdrop, the green economy concept was accepted for the first time in a UN political document and has inspired action and development of new business models for green growth all around the globe. In addition, under the umbrella of green economy, many government-driven initiatives sprang up in Rio+20 that need to be urgently formalized into all walks of society. These include shaping new indicators for measuring progress beyond gross domestic product (GDP), eliminating fossil fuel subsidies, promoting sustainable consumption and production patterns, developing new models for corporate sustainability reporting and investing in clean technology development and innovation.

4.3.1 Eliminating fossil fuel subsidies

Transitioning to a green economy means essentially moving away from a brown economy that relies heavily on fossil fuels for energy production. The International Energy Agency (IEA) estimates that fossil fuels are subsidized by US\$544-billion annually;¹²⁵ whereas renewables are subsidized only by US\$101-billion annually. To this end, eliminating fossil fuel subsidies and channeling them to renewables and energy efficiency is key for greening the economy and meeting the target to limit the global temperature rise to 2 °C degrees.¹²⁶

At Rio+20, countries reaffirmed their commitment to phase out fossil fuel subsidies by removing market distortions, including restructuring taxation.¹²⁷ The Friends of Fossil Fuel Subsidy Reform,¹²⁸ a group of eight like-minded countries, including Finland, is committed to taking the lead in reforming inefficient fossil fuel subsidies. The European Commission has committed to a concrete target to phase out all environmentally harmful subsidies, including fossil fuel subsidies, by 2020.¹²⁹

¹²⁵ International Energy Agency (IEA), *World Energy Outlook 2013. Executive Summary* (IEA, 2013), available at <http://www.iea.org/publications/freepublications/publication/WEO2013_Executive_Summary_English.pdf> (visited 17 September 2014), at 3.

¹²⁶ International Energy Agency (IEA), *Redrawing the Energy-Climate Map. World Energy Outlook Special Report. Executive Summary* (IEA, 2013), available at <http://www.iea.org/media/freepublications/weo/WEO2013_Climate_Excerpt_ES_WEB.pdf> (visited 18 October 2014) at 2.

¹²⁷ 'The Future We Want', para. 225.

¹²⁸ This is a group of eight non-G20 countries formed to support reform in the area of inefficient fossil fuel subsidies. It was formed in June 2010 and includes Costa Rica, Denmark, Ethiopia, Finland, New Zealand, Norway, Sweden and Switzerland. See <<http://www.mfat.govt.nz/ffsr/>> (visited 20 September 2014) and <<http://www.mfat.govt.nz/ffsr/tabs/friends.php>> (visited 1 November 2014).

¹²⁹ Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Roadmap to a Resource Efficient Europe', available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0571>> (visited 16 September 2014), at 10.

4.3.2 Enhancing sustainability reporting

Businesses have a huge impact on the environment: a recent study estimates that the 100 main environmental externalities of businesses are costing the global economy almost US\$5-trillion annually.¹³⁰ Today, sustainability reporting is generally voluntary and many large companies do not report on their activities in this regard. Taking into account the magnitude of environmental externalities of businesses, it would seem fair that sustainability reporting becomes generally mandatory for large companies.

At Rio+20, sustainability reporting was a highly controversial issue and all that could be agreed was 'to develop models for best practice and facilitate action for the integration of sustainability reporting'.¹³¹ After Rio+20, a Group of Friends of Paragraph 47,¹³² an informal coalition, consisting of nine countries and supported by UNEP, was established to develop sustainability reporting. Sustainability reporting is highly topical given that the UN High Level Panel on the Post-2015 Development Agenda¹³³ has proposed that it should be made mandatory for large companies by 2030.¹³⁴

4.3.3 Promoting sustainable consumption and production

Minimizing the use of natural resources is essential for living within our planet's biophysical limits. Therefore, one of the highlights of Rio+20 was the adoption of the 10-Year Framework of Programmes on Sustainable Consumption and Production (10YFP on SCP).¹³⁵ The 10YFP aims to increase resource efficiency and decouple economic growth from environmental degradation, creating jobs and economic opportunities, contributing to poverty eradication and shared prosperity.

The report of the UN High Level Panel stressed that the MDGs have failed to integrate the three dimensions of sustainable development, especially due to their lack of emphasis on promoting sustainable consumption and production.¹³⁶ To this end, it is important that the Post-2015 Agenda addresses SCP, in particular, the need for decoupling resource use from economic growth. The 10YFP provides an existing implementation platform and financial mechanism for the possible goals and targets on SCP.

4.3.4 Developing new methods for measuring progress

There has long been criticism of a narrow focus on GDP for measuring progress. 'The Future We Want' recognizes the need to develop indicators to measure progress be-

¹³⁰ Trucost Plc, *Natural Capital at Risk. The top 100 externalities of business* (2013), available at <http://www.naturalcapitalcoalition.org/js/plugins/filemanager/files/TEEB_Final_Report_v5.pdf> (visited 17 September 2014), at 6.

¹³¹ 'The Future We Want', para. 47.

¹³² See <<http://www.unep.org/GoFParagraph47/>>. The group was formed initially by Brazil, Denmark, France and South Africa; with Austria, Chile, Colombia, Norway and Switzerland later joining.

¹³³ See <<http://www.post2015hlp.org/>>.

¹³⁴ UN, 'A New Global Partnership', *supra* note 117, at 17 and 48.

¹³⁵ See <<http://www.unep.org/10yfp/>>.

¹³⁶ UN, 'A New Global Partnership', *supra* note 117, at the Executive Summary.

yond GDP and assigns the UN Statistical Commission to develop the new measures for growth.¹³⁷ In response to Rio+20, the 45th session of the UN Statistical Commission¹³⁸ adopted a work program for developing broader measures of progress, emphasizing the need to link these to the Post-2015 Agenda.

Many new accounting systems have already been developed, although none of them are yet fully mature. One of the most evolved models includes the System of Environmental-Economic Accounting (SEEA)¹³⁹ that was approved in February 2012 by the UN Statistical Commission¹⁴⁰ as an international statistical standard. The SEEA goes far beyond GDP, since it covers natural resources like minerals and timber, as well as accounting for environmental protection expenditures, taxes, and subsidies.

4.3.5 Deploying clean technologies

The importance of creating enabling frameworks that foster environmentally sound technology and of investing in technology development and innovation for achieving the green economy transition is emphasized in ‘The Future We Want’.¹⁴¹ UNEP has estimated that the greening economies would require investing two per cent of the global GDP in the transition.¹⁴² For example, technologies exist to increase material-efficiency five-fold in several sectors, including agriculture, transport, building and construction sectors, but these technologies are still largely underutilized.¹⁴³ ‘The Future We Want’ acknowledges that developing countries have inadequate capacities and calls for a facilitation mechanism for the development, transfer and dissemination of clean and environmentally sound technologies.¹⁴⁴

5 Conclusions

In a time of human history in which almost all of the planet’s ecosystems bear the marks of our presence, the writers of this paper are convinced that it is not too late to turn a new leaf. Our optimism derives from Rio+20, which in our view represents a turning point for integrating environment into economic and social considerations, as well as for mobilizing greater action through means of green economy and the development of global sustainability goals. Two years after Rio+20, headway has been made on several processes. Most importantly, in respect of the institutional reform of UNEP. It will be essential for all nations, in cooperation with NGOs, academia,

¹³⁷ ‘The Future We Want’, para. 38.

¹³⁸ See <<http://unstats.un.org/unsd/statcom/commission.htm>>.

¹³⁹ See <<http://unstats.un.org/unsd/envaccounting/seea.asp>> (visited 20 September 2014).

¹⁴⁰ This body was established in 1947 and brings together Chief Statisticians from member states to act as the highest decision-making body for international statistical activities. See <<http://unstats.un.org/unsd/statcom/commission.htm>>.

¹⁴¹ ‘The Future We Want’, para. 73.

¹⁴² UNEP, *Towards a Green Economy*, *supra* note 4, at 6.

¹⁴³ Ernst Ulrich von Weizsäcker, et al, *Factor Five: Transforming the Global Economy through 80 % Improvements in Resource Productivity* (Earthscan, 2009)

¹⁴⁴ ‘The Future We Want’, para. 273.

the private sector and other relevant stakeholders, to continue fully to implement the commitments made in Rio+20. We should, in particular:

- 1) conclude the international environmental governance reform by strengthening UNEP's functions, ensuring sufficient financial support for UNEP and providing full support for enhancing synergies among MEAs in the biodiversity cluster and in the chemicals and waste cluster;
- 2) fill governance gaps concerning natural resources, *inter alia*, by supporting the development of a legally-binding instrument under the UNCLOS for the conservation and sustainable use of high seas, giving more attention to reducing marine debris and taking significantly greater action to halt illegal wildlife trade;
- 3) urgently formalize new measures for progress beyond GDP so that the full value of natural capital will be taken into consideration in decision-making;
- 4) adopt an ambitious Global Post-2015 Framework that respects both planetary boundaries and social boundaries and considers the outcome of the open-ended working group on sustainable development goals as an important basis for the Framework;
- 5) enhance sustainable consumption and production patterns in order to globally increase resource efficiency five-fold and decouple economic growth from environmental degradation;
- 6) agree on a sustainable development financial strategy with new innovative financial mechanisms aiming to tackle tax havens and environmentally harmful subsidies and ensure sufficient allocation of domestic resources;
- 7) enhance the development of corporate sustainability reporting and make such reporting mandatory for large companies; and
- 8) eliminate environmentally harmful subsidies, including fossil fuel subsidies, and provide greater support to deploying clean technologies.

These goals intend to match global action to the level of the threat facing the world's natural capital. The new epoch of human development, the Anthropocene, calls for taking such bold action to restore earth's vitality and to secure human well-being. Furthermore, in order to ensure that sustainability will be in the core of future policy-making, it will be essential to agree on the establishment of a United Nations High Commissioner for Future Generations. As envisaged in Rio, it would function as the UN's principal advocate for the interests and needs of future generations. We believe that it is our moral responsibility to secure the rights of generations to come to a clean, healthy, diverse and productive environment.

STRENGTHENING AND UPGRADING OF THE UNITED NATIONS ENVIRONMENT PROGRAMME

*Sylvia Bankobeza*¹

1 Introduction

The United Nations Environment Programme (UNEP)² was established in 1972 through United Nations General Assembly (UNGA) Resolution 2997.³ The establishment of UNEP occurred shortly after the United Nations Conference on the Human Environment (UNCHE), also of 1972, and was a direct result of UN member states' recognition at this Conference of an urgent need for a permanent institutional arrangement within the United Nations System for the protection and improvement of the environment.⁴

The main purpose of establishing UNEP was to promote international cooperation in the field of environment and to recommend, as appropriate, policies to that end, as well as to provide general policy guidance for the direction and coordination of the environmental programs within the United Nations system. It was at the United Nations Conference on Environment and Development (UNCED) in 1992,⁵ the Rio

¹ LLB (UDSM) LLM (Hull) Post Graduate Diploma in International Relations and Conference Diplomacy (DSM); Environmental Lawyer, United Nations Environment Programme (UNEP); e-mail: sylvia.bankobeza@unep.org.

² See <<http://www.unep.org>>.

³ 'Institutional and Financial Arrangements for International Environmental Cooperation', United Nations General Assembly (UNGA) Res. 2997 of 15 December 1972 established UNEP with 58 member Governing Council to be elected by the General Assembly.

⁴ See the UNCHE's Resolution on Financial and Institutional Arrangements (available in the Report of UNCHE, UN Doc. A.CONF.48/14/Rev.1 (1972) at 29–31) and UNGA Res. 2997 (1972). For more detail on the establishment of UNEP, see Donald Kaniaru, 'The Stockholm Conference and the Birth of the United Nations Environment Programme' in Marko Berglund (ed.), *International Environmental Lawmaking and Diplomacy Review 2005*, University of Joensuu – UNEP Course Series 3 (University of Joensuu, 2006) 3–22.

⁵ 1992 United Nations Conference on Environment and Development, Chapter 38 of Agenda 21 (UN

Earth Summit, that member states for the first time raised the issue of strengthening the role of UNEP. The first steps towards strengthening the role of UNEP were made in 1997 through a decision of the UNEP Governing Council (GC) and, subsequently, several meetings relating to international environmental governance (IEG) processes were held in that regard.⁶ The latest development in the strengthening and upgrading of UNEP as part of the Institutional Framework for Sustainable Development (IFSD)⁷ was a culmination of various international efforts that were initiated from 1997 to 2012 when the decision to strengthen UNEP was made.⁸

This paper will focus on the various evolving efforts and processes of strengthening UNEP and articulate the progress made, in particular, by the 2012 United Nations Conference on Sustainable Development (the Rio+20 Conference).⁹

2 Why strengthen and upgrade the role of UNEP?

The need to strengthen UNEP was initially raised by the 1992 UNCED where Chapter 38 of Agenda 21¹⁰ articulated the crucial role of UNEP in promoting sustainable development and the importance of strengthening and enhancing this role.

Doc. A/CONF.151/26/Rev.1 (1992), available at <<http://www.un.org/esa/dsd/agenda21/>>. The Conference was held in Rio de Janeiro, Brazil, in June 1992.

⁶ 'Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme', UNEP Governing Council Decision 19/1 (1997); and 'Governance of the United Nations Environment Programme', UNEP GC Dec. 19/32 (1997). See also 'International environmental governance: outcome of the work of the consultative group of ministers or high-level representatives: Note by the Executive Director', UN Doc. GCSS.XI/4 (2010), annex 2 ('The Belgrade Process'); and UNEP GC Dec. SSXI/1 (2010) on International Environmental Governance. See further 'International environmental governance: Outcome of the work of the consultative group of ministers or high-level representatives on international environmental governance: Note by the Executive Director', UN Doc. UNEP/GC26/18 (2010). The Belgrade Process was a Consultative Group of Ministers meeting in a high level meeting on international environmental governance with sessions convening between February 2009 and July 2010 in response to a UNEP GC decision. The main outcome was the Nairobi–Helsinki Outcome, available at <<http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/NairobiHelsinkiFinalOutcomeEdited.pdf>> (visited 15 August 2014), which was based on the principle of 'form follows function', proposing measures that could be implemented within the existing institutional structure.

⁷ See Rio+20, 'Institutional Framework for Sustainable Development', available at <<http://www.uncsd2012.org/isfd.html>> (visited 15 August 2014).

⁸ 1992 UNCED and Chapter 38 of Agenda 21; UNEP GC Dec. 19/1 (1997); UNEP GC Dec. 19/32 (1997); 'Report of the Secretary-General on environment and human settlements', UNGA Res. 53/242 of 28 July 1999; Malmö Ministerial Declaration (First Global Ministerial Environment Forum, 2000, available at <http://www.unep.org/malmo/malmo_ministerial.htm> (visited 15 August 2014)); 'International Environmental Governance', UNEP GC Dec. SS.VII/1 (2002); 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014, paras 87–90); and 'Report of the Governing Council of the United Nations Environment Programme on its Twelfth Special Session and on the Implementation of section IV.C, entitled "Environmental Pillar in the context Sustainable Development", of the outcome document of the United Nations Conference on Sustainable Development', UNGA Res. 67/213 (2012).

⁹ 'The Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014).

¹⁰ See, in particular, Chapter 38, paras 21–23. Agenda 21 is a global blueprint for implementing sustainable

The purpose of strengthening UNEP in the areas listed in Chapter 38 was to enable the institution to follow up on the implementation of Agenda 21 (which was the plan of action for sustainable development at that time). From then on, the issue of strengthening UNEP has been on the agenda, including in a series of inter-governmental meetings under the framework of the International Environmental Governance agenda. This agenda was later referred to as the Institutional Framework for Sustainable Development at the Rio+20 Conference,¹¹ where significant progress was made.

The upgrading and strengthening of the role of UNEP was necessitated by structural and institutional issues that were affecting UNEP's ability effectively to exercise its mandate as a global leader in the field of the environment. UNGA Resolution 2997 (1972) established UNEP with a limited membership in its governing body. The UNEP Governing Council was composed of 58 member states elected by the UNGA for a term of three years. Apart from the UNEP Governing Council, UNGA Resolution 2997 also established the Environment Secretariat, the Environment Fund, and the Environment Coordination Board and provided for the main functions and responsibilities of each of these bodies. The perceived exclusion of some member states in the main governing body and the discontinuation of the coordination bodies that were constituted at the establishment of UNEP¹² would become one of the primary weaknesses of the institutional structure of UNEP in terms of legitimately providing a universal voice.¹³

Over the years, important decisions, UNGA resolutions and declarations were made¹⁴ by member states to address some of UNEP's weaknesses by attempting to involve and enable non-members of the UNEP Governing Council. In this regard, developments which occurred before 2012 included, *inter alia*, establishing the annual Global Ministerial Environment Forum (GMEF);¹⁵ establishing the Environmental Management Group (EMG);¹⁶ and adopting the Bali Strategic Plan on Capacity Building and Technology Support.¹⁷ The mandate of UNEP evolved gradually, main-

development, intended to provide guidance for both governmental and non-governmental actors worldwide.

¹¹ 'The Future We Want', para. 87.

¹² Tadanori Inomata, 'Management Review of Environmental Governance within the United Nations System', Joint Inspection Unit (JIU) Report 2008/3, available at <https://www.unjiu.org/en/reports-notes/archive/JIU_REP_2008_3_English.pdf> (visited 15 August 2014), para. 12.

¹³ UNGA Res. 53/242 (1999).

¹⁴ UNEP GC Dec. 19/1 (1997); and UNEP GC Dec. 19/32 (1997). The UNEP Governing Council further adopted, at its sixth special session, the Malmö Ministerial Declaration of 31 May 2000. This was a ministerial declaration from the first Global Ministerial Environment Forum, which was held in pursuance of the UNGA Res. 53/242 (1999) to enable environment ministers to review emerging environment issues and to chart the course of the future 'International Environmental Governance', UNEP GC Dec. SS. VII/1 (2002).

¹⁵ UNGA Res. 53/242 (1999).

¹⁶ See <<http://www.unemg.org/>>.

¹⁷ 'International environmental governance: implementation of decisions of the seventh special session of the Governing Council/Global Ministerial Environment Forum and the World Summit on Sustainable Development on the report of the Intergovernmental Group of Ministers or Their Representatives on

ly through the adoption of UNEP Governing Council decisions and UNGA Resolutions, in what can be described as a step-by-step transformation of the institution.

Significant progress in the strengthening and upgrade of UNEP was made at the United Nations Conference on Sustainable Development (Rio+20) in 2012. Paragraphs 87–90 of the Rio+20 Outcome Document, which is also referred to as ‘The Future We Want’, and which will be analyzed below, made significant progress in addressing the institutional needs of UNEP and the concerns of member states, after years of deliberation on the form that the strengthening of UNEP should take.¹⁸

‘The Future We Want’ reaffirmed, among other things, the need to strengthen international environmental governance within the context of the institutional framework of sustainable development. This would be to promote a balanced integration of the economic, social and environmental dimensions of sustainable development as well as coordination within the UN system. The Conference also committed itself to strengthening the role of UNEP as the leading global environmental authority that sets the global environmental agenda; that promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system; and that serves as an authoritative advocate for the global environment.¹⁹ The conference reaffirmed UNGA Resolution 2997 (1972), which established UNEP, as well as other relevant resolutions that reinforce UNEP’s mandate and the Nairobi and Malmö Ministerial Declarations, before inviting the UNGA, in its 67th Session, to adopt a resolution for strengthening and upgrading UNEP in various ways.²⁰

3 Evolution of the relevant decisions that culminated in the strengthening of UNEP at the Rio+20 Conference

Relevant instruments on the governance or institutional structure of UNEP include:

- Chapter 38 of Agenda 21;
- UNEP Governing Council Decision 19/1 (1997);
- UNEP Governing Council Decision 19/32 (1997);
- UNGA Resolution 53/242 (1999);
- Malmö Ministerial Declaration (2000);
- UNEP Governing Council decision SS.VII (2002);
- UNGA Resolution 66/288 (2012), paragraphs 87–90; and
- UNGA Resolution 67/213 (2012).

International Environmental Governance. Bali Strategic Plan for Technology Support and Capacity-building’, UN Doc. UNEP/GC.23/6/Add.1 (2004), Annex.

¹⁸ In the debates on IEG there was a reference to the importance of form following function. ‘The Future We Want’, para. 88, under the heading ‘Environmental Pillar in the context of Sustainable Development’, articulated areas for strengthening and upgrading UNEP.

¹⁹ UNGA Res. 67/213 (2012); and ‘The Future We Want’, para. 88.

²⁰ ‘The Future We Want’, paras 87–88.

The following is a brief analysis of the decisions taken by the UNEP Governing Council and the UNGA that, over the years, called for the strengthening of UNEP.²¹

The first call for strengthening the role, mandate and capacity of UNEP was made at the 1992 United Nations Conference on Environment and Development, which was held in Rio de Janeiro Brazil, in June 1992. Chapter 38 of Agenda 21 articulated how UNEP should be strengthened to enable the institution to follow up effectively on the implementation of Agenda 21.²² In response to Chapter 38, UNEP reviewed and rationalized its work to take into account the areas of work identified in Chapter 38, in addition to other related Chapters of Agenda 21 as they relate to the work of UNEP. The programs within UNEP, which were initially sectorial in nature, were restructured in accordance with a functional approach to take into account the inter-linkages among sectors and the importance of managing the environment holistically. A number of studies were later commissioned and deliberated to define various ways that UNEP could be strengthened. These included deliberations regarding the form that UNEP could take to make it more effective to implement Agenda 21.

The next important milestone was the 1997 Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme.²³ This declaration declared UNEP to be the principal United Nations body in the field of the environment, and the leading global environmental authority that sets the global environment agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment. It was through the Nairobi Declaration²⁴ that a detailed mandate of UNEP was articulated by the participating countries' environmental Ministers for transmission to the Secretary General of the United Nations.

On the same occasion, the UNEP Governing Council adopted a decision (19/32) on the governance of UNEP.²⁵ This decision established a High Level Committee of Ministers and Officials as a subsidiary organ of the Governing Council, based on equitable geographical distribution. The decision also listed the Committee's functions and responsibility to the Executive Director, the Bureau and the Council of UNEP. Furthermore, a detailed mandate of the Committee of Permanent Representatives was provided.

²¹ To get a clear picture of the decisions and their recommendations (and thus a clear understanding of the proposed institutional reforms called for by member states over the years), it is important to consider the full text of the relevant decisions, accessible through proceedings of UNEP Governing Council at <<http://www.unep.org>>, or at <www.un.org> for decisions of the UN General Assembly.

²² See paras 21–22.

²³ See *supra* note 6.

²⁴ See *ibid.*

²⁵ See *ibid.*

The next relevant instrument was the UNGA Resolution 53/242,²⁶ which was adopted in 1999. Apart from its significance in requesting the Secretary-General to strengthen the United Nations office in Nairobi,²⁷ this decision is important for supporting the proposal of the Secretary-General regarding the establishment of the Environment Management Group²⁸ for the purpose of enhancing inter-agency coordination in the field of environment and human settlements. The mandate, terms of reference, appropriate criteria for membership and flexible, cost effective working methods of the Environmental Management Group were provided in the following session of the UNGA.²⁹

The 1999 UNGA resolution was also crucial in attempts to strengthen UNEP governance because it instituted an annual, ministerial level Global Environmental Forum for the purpose of including and enabling all countries to participate in environmental deliberations under the framework of UNEP. The Global Ministerial Environmental Forum (GMEF) constituted the forum in regular sessions of the UNEP Governing Council and, in alternate years, the forum took the form of a special session of the Governing Council, in which participants could gather to review important and emerging policy issues in the field of the environment. In this work, due consideration was paid to the need to ensure effective and efficient functioning of the governance mechanisms of UNEP, as well as possible financial implications, and the need to maintain the role of the Commission on Sustainable Development³⁰ as the main forum for high level policy debate on sustainable development.

In spite of these developments, UNEP's governing body still needed universal membership to increase its legitimacy and voice for the environment. This is important because there are many other UN institutions, including UN specialized agencies, such as the United Nations Development Programme (UNDP),³¹ Food and Agriculture Organization of the United Nations (FAO)³² and International Maritime Organization (IMO),³³ funds and programs and non-UN-organizations that are mandated in some areas to address environmental aspects. At the time of its creation, UNEP was constituted with a system-wide governing framework, which was backed by various coordination bodies³⁴ and a common planning instrument – the System-Wide Medium Term Environment Programme (SWMTEP). However, these mech-

²⁶ See *supra* note 8.

²⁷ The United Nations Office in Nairobi, also referred to as UNON, provides administrative services to UNEP and UNHabitat

²⁸ See <<http://www.unemg.org/>>.

²⁹ UNGA Res. 53/242 (1999).

³⁰ The United Nations Commission on Sustainable Development was established by the UNGA in 1993 with the purpose of ensuring effective follow up on the UN Conference on Environment and Development. At Rio+20, it was agreed that a high level political forum will be established to build upon the strengths, experiences and inclusive participation modalities of the Commission on Sustainable Development, and subsequently to replace the Commission. See 'The Future We Want', paras 84–86.

³¹ See <<http://www.undp.org/>>.

³² See <<http://www.fao.org/>>.

³³ See <<http://www.imo.org/>>.

³⁴ Environmental Coordination Board (see UNGA Res. 2997 (1972) that established UNEP) was super-

anisms were discontinued due to the subsequent evolution in the scope and nature of environmental issues.³⁵ There is still therefore a clear need for coordination and a clear leader in the field of the environment that the United Nations Environmental Assembly (UNEA)³⁶ needs to take up.³⁷

In addition, the 1999 UNGA decision supported the proposals for the facilitation of and support for enhancing linkages and coordination within and among environmental and environment related conventions, including by UNEP. This would be with full respect for the status of the respective convention secretariats, and for the autonomous decision-making prerogatives of the conferences of the parties to the conventions concerned. The decision also emphasized in this regard the need to provide UNEP with adequate resources to perform this task. The decision also welcomed the proposal for the involvement, participation and constructive engagement of major groups active in the field of the environment with due consideration for the relevant rules, regulations and procedures of the UN.

In 2000, the Malmö Ministerial Declaration³⁸ also called for a review of a strengthened institutional structure for international environmental governance. The review was to be based on an assessment of future needs for an institutional architecture that has the capacity to address wide ranging environmental threats effectively in a globalizing world. In this regard, the Malmö Ministerial Declaration called for UNEP's role to be strengthened; and for its financial base to be broadened and made more predictable. UNEP's financial base is drawn partially from the Regular Budget of the UN, in addition to the Environment Fund, which covers most of the staff costs and some activities, and earmarked contributions. Relying largely on voluntary contributions (which are a source of funding for the Environment Fund) and extra budgetary earmarked contributions has made UNEP's funding situation unpredictable. The Malmö Ministerial Declaration expressed the need for a UNEP with more inclusive country representation in its governing body, as well as the need for a better financial base to be responsive to environmental challenges.

In 2002, in its decision SS.VII/1 on International Environmental Governance³⁹ and the appendix thereto (known together as the 'Cartagena package'), the UNEP Governing Council called for strengthening the role, authority and financial situation of

seded by Designated Officials for Environmental Matters (DOEM), the Inter-Agency Environmental Coordination Group (IAECG), and the Inter-Agency Committee on Sustainable Development (IACSD).

³⁵ Inomata, 'Management Review', *supra* note 12.

³⁶ See <<http://www.unep.org/unea/>>.

³⁷ 'Enhancing the coordinating role of the UNEP in the UN system on environmental matters: A process to prepare a UN system-wide strategy on the environment, including EMG (Outcome of the open-ended meeting of the CPR, as of 28 March 2014)', UNEA 1 Resolution 3 (2014). Tadanori Inomata and Jean Wesley Cazeau, 'Post Rio+20 Review of Environmental Governance within the United Nations System', Joint Inspection Unit (JIU) Report 2014/4, available at <https://www.unjiu.org/en/reports-notes/JIU%20Products/JIU_REP_2014_4_English.pdf> (visited 19 August 2014).

³⁸ See *supra* note 8.

³⁹ *Ibid.*

UNEP; strengthening the science base of UNEP; improving coordination and coherence between multilateral environmental agreements; and for enhancing coordination and cooperation across the United Nations system, including through the Environment Management Group. This would be followed by a number of proposals focusing on reform of International Environmental Governance.⁴⁰ The 2012 UN Conference on Sustainable Development, through its Outcome Document ('The Future We Want'), made progress in this regard.

The Rio+20 Conference convened at a time when UNEP had been in existence for forty years. However, institutional issues of making the UNEP governing body more inclusive and thus legitimate in asserting its leadership role and the global voice, as well as exercising its coordination functions effectively among other institutions that are addressing some aspects of the environment, remained a challenge. The strengthening of UNEP therefore, though not aimed to be hierarchical when interacting with other institutions that have their own governing bodies, was for the purpose of enabling UNEP to lead efforts of coordinating work regarding the environment through UN system-wide bodies such as the Environment Management Group – which UNEP chairs to formulate UN system-wide environmental strategies.⁴¹

The Rio+20 Conference was held in June 2012. This conference deliberated on the issue of IEG in the context of the Institutional Framework for Sustainable Development, in particular under the framework of the environmental pillar for sustainable development.⁴² Clear decisions were made for strengthening and upgrading UNEP in paragraphs 87–90 ('Institutional Framework for Sustainable Development') of 'The Future We Want'. Through this Document, the Rio+20 Conference invited the UN General Assembly to adopt a resolution to strengthen and upgrade UNEP.⁴³

Paragraph 87 of 'The Future We Want' reaffirmed the need to strengthen international environmental governance within the context of the Institutional Framework for Sustainable Development. This was in order to promote a balanced integration of the economic, social and environmental dimensions of sustainable development, as well as general coordination within the United Nations system.

⁴⁰ The Belgrade Process, see *supra* note 6. See also UN Doc. GCSS.XI/4 (2010), annex 2; decision SXXI/1 (2010) on International Environmental Governance; and UN Doc. UNEP/GC26/18 (2010).

⁴¹ The governing body of UNEP, now referred to as the United Nations Environmental Assembly (UNEA), as presently constituted with a universal membership can also play an important role in coordinating the work of the environment.

⁴² See 'The Future We Want'. Apart from UNEP, United Nations institutions, such as the Commission of Sustainable Development (CSD), established after the Rio Conference, were disbanded and replaced.

⁴³ The strengthening of UNEP could not be effected by relying on 'The Future We Want' alone, but rather through a resolution of the UN General Assembly. That is why the United Nations General Assembly called upon the United Nations member states to take a decision to strengthen UNEP in December 2012.

Paragraph 88 of ‘The Future We Want’, and subsequent UNGA resolutions on strengthening UNEP,⁴⁴ lay out more specifically areas where UNEP is to be strengthened and upgraded. These areas include:

- (a) establish universal membership in the Governing Council of UNEP, as well as other measures to strengthen its governance and its responsiveness and accountability to member states;
- (b) have secure, stable, adequate and increased financial resources from the regular budget of the United Nations and voluntary contributions to fulfil its mandate;
- (c) enhance the voice of UNEP and its ability to fulfil its coordination mandate within the United Nations system by strengthening UNEP engagement in key United Nations coordination bodies and empowering UNEP to lead efforts to formulate United Nations system-wide strategies on the environment;
- (d) promote a strong science – policy interface, building on existing international instruments, assessments, panels and information networks, including the Global Environment Outlook,⁴⁵ as one of the processes aimed at bringing together information and assessment to support informed decision-making;
- (e) disseminate and share evidence-based environmental information and raise public awareness on critical as well as emerging environmental issues;
- (f) provide capacity-building to countries, as well as support and facilitate access to technology;
- (g) progressively consolidate headquarters functions in Nairobi, as well as strengthen its regional presence, in order to assist countries, upon request, in the implementation of their national environmental policies, collaborating closely with other relevant entities of the United Nations system; and
- (h) ensure the active participation of all relevant stakeholders drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society.

Paragraph 88 of ‘The Future We Want’ identifies these measures for strengthening and upgrading UNEP, and invites the UNGA to adopt a resolution which provides for these measures. The call in paragraph 88(a) for universal membership in the governing body of UNEP, as well as other measures to strengthen the Governing Coun-

⁴⁴ See UNGA Res. 67/213 (2012).

⁴⁵ See <<http://www.unep.org/geo/>>. The GEO is a global report that assesses the state of the environment after every five years. The report is prepared by UNEP in cooperation with national and regional institutions. It assesses the global environment, identifies emerging issues, and highlights hotspots and recommends areas where policy responses are needed.

cil's governance and its responsiveness and accountability to member states, was a very important recommendation for opening up the governing body of UNEP to all UN member states. This is because, before this development, the UNEP Governing Council had 58 member states, which were elected by the UNGA to serve for three-year terms. The universal membership that strengthened and upgraded UNEP was effected in December 2012 by a resolution of the UNGA.⁴⁶ Reports of the UNEP Governing Council⁴⁷ sessions will still be transmitted, as per established practice, through the UN Economic and Social Council (ECOSOC)⁴⁸ and will be brought for the consideration of the Second Committee of the UNGA at its regular sessions.

The progress made since 2012 has been to convene the first universal membership session of the UNEP Governing Council, which was held in February 2013. Other developments included, in March 2013, the change of designation of UNEP's governing body from the UNEP Governing Council to the United Nations Environmental Assembly (UNEA). This change of designation was achieved through a resolution of the UNGA,⁴⁹ and was intended to enable UNEP to plan better for subsequent meetings and sessions of the universal membership of its governing body. The UNGA resolution clearly indicated that the change of designation will not change the present mandate, aims and purposes of UNEP or the role and functions of its governing body. This also implied that the Special Sessions of the UNEP Governing Council that were being held in alternate years (and were referred to as the Global Ministerial Environment Forum) are no longer necessary because the UNEA is now open to all member states of the United Nations.

The first universal session of the GC/GMEF was an opportunity for UNEP to focus on implementation of the Rio+20 outcomes and to assume its new strengthened and upgraded role. The inaugural United Nations Environmental Assembly, held in June 2014, enabled member states to exercise this new role in the field of the environment. There is a need to finalize the rules of procedure of UNEA that are currently pending. The first universal membership Governing Council used the UNEP GC rules and was able to refer to applicable rules and practices of the UNGA pending the adoption of the new rules of procedure. The new features envisaged by the UNEA rules of procedure include the universal membership; an expanded and stronger Committee of Permanent Representatives; an expanded Bureau; and enhanced civil society engagement.

Another area in which UNEP was strengthened and upgraded is that of financial resources.⁵⁰ In this regard, 'The Future We Want' calls for increased financial resources, both from the regular budget of the United Nations and from voluntary and ear-

⁴⁶ UNGA Res. 67/213 (2012).

⁴⁷ Now referred to as the United Nations Environmental Assembly (UNEA).

⁴⁸ See <<http://www.un.org/en/ecosoc/>>.

⁴⁹ 'Change of the designation of the Governing Council of the United Nations Environment Programme', UNGA Res. 67/251 of 13 March 2013.

⁵⁰ *Ibid.* para. 88(b).

marked contributions, to fulfill its mandate. The significance of this decision for UNEP's strengthening and upgrading is in getting increased staff positions funded by the UN regular budget, with the result that money from the Environment Fund which was covering staff costs will now be available to fund programmed activities. The increase of posts from the regular budget will assist UNEP in implementing its programme of work effectively.

Another area of strengthening UNEP was in enhancing the voice of UNEP and its ability to fulfill its coordination mandate within the United Nations system. This relates to strengthening UNEP engagement with key United Nations coordination bodies and empowering UNEP to lead efforts to formulate UN system-wide strategies on the environment.⁵¹ Although UNEP is already engaged with key United Nations coordination bodies to formulate UN system-wide strategies,⁵² it still needs to step up its engagement gradually as it takes on more roles, including in leading efforts to formulate system-wide strategies on the environment.

Through promoting a strong science–policy interface, UNEP is further expected to build on existing international instruments, assessments, panels and information networks, including the Global Environment Outlook,⁵³ as one of the processes aimed at bringing together information and assessment to support informed decision-making.⁵⁴ UNEP will undertake this role through its approved biennial programme of work and its four-year Medium Term Strategy.⁵⁵

UNEP is expected to continue disseminating and sharing evidence-based environmental information and raising public awareness on critical and emerging environmental issues.⁵⁶ UNEP has much experience in awareness-raising, but it will have to continue enhancing its work in this area, as well as in building capacity within countries through various initiatives taken in response to needs in the field of the environment.

While most of these measures have been reiterated by governments in previous IEG related decisions, there were new areas that 'The Future We Want' brought forward. These included the need for UNEP progressively to consolidate its headquarters functions in Nairobi; as well as to strengthen its regional presence in order to assist countries, upon request, with the implementation of their national environmental policies. This is to be achieved through strong collaboration with other relevant entities of the United Nations system.⁵⁷

⁵¹ *Ibid.* para. 88(c). UNGA Res. 67/213 (2012), Although this Resolution says there are no budget or financial implications to the upgrade, it does refer to the increase of the UN regular budget.

⁵² For instance, on green economy.

⁵³ See, generally, <<http://www.unep.org/geo/>>.

⁵⁴ 'The Future We Want', para. 88(d).

⁵⁵ For the current UNEP programme of work and strategy, visit <<http://www.unep.org>>.

⁵⁶ 'The Future We Want', para. 88(e).

⁵⁷ *Ibid.* para. 88(g).

Paragraph 88(h) seeks to ensure the active participation of all relevant stakeholders in the UNEP governing body, drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society. The revised rules of procedure of UNEA, which are still pending, will review the participation of observers and civil society for the purpose of strengthening the engagement of major groups.

4 Conclusion

After 40 years of existence, the strengthened and upgraded UNEP occasioned by Rio+20 in the outcome document that was adopted by a UNGA resolution propelled UNEP to a better position to meet the challenges of the 21st century. The calls for and process of reform and strengthening and upgrading UNEP that began in 1992 considered many proposals made by countries on a suitable form, structure and format that culminated in the developments made at the Rio+20 Summit. The universal membership for the UNEP governing body, as well as the designation of the body as UNEA, increases the legitimacy, the voice and the profile of UNEP. These and other areas that are part of the strengthened and upgraded UNEP, when fully implemented, will enable UNEP to assume its new stature as a leader and coordinator in the field of environmental governance and understanding.

UNEP held the inaugural session of UNEA in Nairobi, Kenya in June 2014, where all member states as well as international organizations and representatives of civil society were invited to participate. The sheer size, structure and outcome of UNEA are evidence that UNEP is now in a better position to assume its leadership role. Going forward, future negotiators ought to find the next sessions of UNEA, to be held after every two years, to be the most appropriate forum and place for environment-related negotiations where they can deliberate on emerging environmental issues and make resolutions that have impacts on national, regional and global action in the field of the environment.

PART III

**SPECIFIC ISSUES RELATED TO THE
GOVERNANCE OF NATURAL RESOURCES**

UNDERSTANDING THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING¹

*Sonia Peña Moreno*²

1 Introduction

Access to genetic resources and the fair and equitable sharing of the benefits arising out of their utilization – in short, ‘access and benefit-sharing’ (ABS) – constitutes the third objective of the Convention on Biological Diversity (CBD).³ At the time the Convention was being negotiated, ABS was meant to take into account the need to share the costs, as well as the benefits, of biodiversity conservation between developed and developing countries; and to find ways and means of supporting practices and innovations by so called indigenous and local communities (ILCs).

During the negotiation of the CBD, and since its entry into force in December 1993, perhaps no other subject has been as controversial as the issue of ABS. Controversy has stemmed from, *inter alia*, the implications of ABS for state sovereignty, economic development, indigenous and local communities, scientific research, the industries dependent on genetic resources and traditional knowledge associated with genetic resources, and the conservation and sustainable use of biological diversity. Furthermore, lack of awareness regarding ABS, widespread misunderstandings about its scope and legal principles, as well as gaps in states’ policies and legislation have hampered the efficient and effective implementation of ABS in practice.

In order better to comprehend the concept of ABS, it is important to understand the context within which genetic resources are provided and utilized. Genetic resources

¹ This paper is based on Thomas Greiber and Sonia Peña Moreno et al, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN, 2012) at 3–42 and 273–294.

² MSc International Relations (Univ. of Geneva) BSc Political Science and Modern Languages (Univ. of Los Andes, Bogota, Colombia); Senior Policy Officer, Biodiversity at the Global Policy Unit of the International Union for Conservation of Nature (IUCN); email: Sonia.PenaMoreno@iucn.org.

³ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>, Art. 1.

– whether from plants, animals or micro-organisms⁴ – may be used for different purposes (for instance, basic research or commercialization of products). Users of genetic resources and/or traditional knowledge associated with genetic resources include research institutes, universities, *ex-situ* collections and private companies operating in a wide range of sectors, including the biotechnology, botanicals, cosmetic and personal care, crop protection, food and beverage, fragrance and flavour, horticulture, pharmaceutical, and seed industries.⁵ The importance of genetic resources in monetary terms cannot be neglected (see Table 1 below).

Providing users with international access to genetic resources for use in research and development, including commercialization, and sharing the benefits of such utilization has the potential to be beneficial for social and economic development. At the same time, it offers a concrete example for valuing biodiversity and its ecosystem services in practice and an economic tool to take proper account of this value. This again is considered to be a prerequisite for conservation and sustainable use.

Not always, but often, innovation based on genetic resources relies on having physical access to genetic material. While many states have historically controlled access to their biological resources through legislation or regulatory requirements, only few have also controlled access to genetic resources.⁶ It is important to note that there has been much discussion on what qualifies as a genetic resource; how to determine when it is a genetic resource being accessed or a biological resource; and whether it is the use that determines if a resource is accessed as a genetic resource or as a biological resource.

Table 1: Market sectors and the importance of genetic resources.^{7,8}

Sector	Size of total market	Importance of genetic resources
Pharmaceutical	US\$640-billion (in 2006)	20–25 per cent derived from genetic resources
Biotechnology	US\$70-billion (in 2006) from public companies alone	Many products derived from genetic resources (enzymes, micro-organisms)

⁴ As defined by the CBD, genetic resources include any material of plant, animal, microbial or other origin, which contains functional units of heredity and is of actual or potential value (see Art. 2: definition of ‘genetic resources’, read with definition of ‘genetic material’).

⁵ Sarah Laird and Rachel Wynberg, *Access and Benefits-Sharing in Practice: Trends in Partnerships Across Sectors* (Secretariat of the Convention on Biological Diversity, 2008) 8.

⁶ Lyle Glowka et al, *A Guide to Designing Legal Frameworks to Determine Access to Genetic Resources*. (IUCN, 1998) 1.

⁷ Source: Own illustration, based on Patricia ten Brink (ed.), *The Economics of Ecosystems and Biodiversity in National and International Policy Making* (Earthscan, 2011) 17.

⁸ Note: The figures in Table 1 provide ‘ballpark’ estimates for various categories of products derived from genetic resources. It is important to understand that the markets are not entirely based on genetic resources.

Agricultural seeds	US\$30-billion (in 2006)	All derived from genetic resources
Personal care, botanical, and food and beverage industries	US\$22-billion for herbal supplements US\$12-billion for personal care US\$31-billion for food products (all in 2006)	Some products derived from genetic resources: represents 'natural' component of the market

This paper will present a general overview about the third objective of the Convention on Biological Diversity, that is, 'the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources' and the controversies surrounding its practical application over the years before the adoption of a supplementary agreement under the Convention. It will further provide an overview of the negotiation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (the 'Nagoya Protocol'),⁹ its main elements and the way forward following the Protocol's adoption.

2 The relevance of the third objective of the Convention on Biological Diversity

The Convention on Biological Diversity was adopted on 22 May 1992 and opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (UNCED). On 29 December 1993, the CBD entered into force. As of November 2014, the CBD had 194 contracting parties¹⁰ making it an almost universally accepted international agreement.

The CBD is the first attempt by the international community to address biological diversity as a whole in a global legal instrument. It is based on a broad ecosystem approach rather than on a sectoral approach (focusing on specific species, ecosystems, or sites), which is characteristic of other international conservation agreements. Indeed, Article 2 of the CBD defines 'biological diversity' (biodiversity) as the variability among living organisms from all sources, occurring at three levels – diversity within species (genetic diversity),¹¹ between species and of ecosystems.

⁹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 12 October 2014, <<http://www.cbd.int/abs/>>.

¹⁰ See CBD, 'List of Parties', available at <<http://www.cbd.int/convention/parties/list/>> (visited 1 November 2014).

¹¹ Genetic diversity refers to the frequency and variability of the gene pool within a single species. It includes the variation both within a population and between populations.

The CBD does not only address conservation of biodiversity per se, but also related socio-economic aspects, which makes it a milestone instrument in the field of environment and development. According to its Article 1, the CBD has three main objectives: conservation of biological diversity; sustainable use of its components; and fair and equitable sharing of the benefits arising out of the utilization of genetic resources, or ABS, as mentioned above.

Before the CBD entered into force, access to genetic resources, as well as to traditional knowledge associated with genetic resources, was freely available in most parts of the world. This often led to the exploitation, utilization and/or monopolization of such resources and knowledge without sharing any benefits with the countries providing the resources, or the holders of the knowledge. As this situation was generally perceived to be inequitable, the CBD introduced the ABS concept, with Article 15 containing the Convention's main ABS obligations.

Article 15 of the CBD tries to balance the interests of the users of genetic resources, who want to have continued access to genetic resources, and the interests of the providers of such resources, who want to receive an equitable share of the benefits which may be derived from the use of such resources. In short, according to the ABS concept, the provider states shall facilitate access to their genetic resources, while user states shall share in a fair and equitable way the benefits arising from the access to and use of those resources. In effect, with the entry into force of the CBD, a change of paradigm was put in place as the conservation community moved from considering genetic resources as a common heritage¹² to recognizing the sovereign rights of states to those resources and to regulating their use.

Nevertheless, a clear distinction between providers and users cannot be drawn. In fact, most states can be considered both provider countries as well as user countries at the same time. Furthermore, the very different circumstances and situations surrounding the use of genetic resources makes it impossible for each state which could provide genetic resources to specify, *a priori*, what benefits should be shared and the modalities to be employed to facilitate sharing. What will be desired by the state providing access to genetic resources, and be acceptable to the party (governmental institution or private enterprise) seeking access, varies in each case. This can depend on, among other factors, the nature of the genetic resources provided (for instance, whether they stem from *ex-situ* – a collection; or *in-situ* – the genetic resources' natural habitat); the location where the genetic resources are found (for instance, on state or privately owned lands; protected areas, indigenous and community conserved areas, or areas under no conservation management regime); the types of subsequent use proposed (for instance, whether the genetic resources are used for scientific research, education and/or commercial development); whether genetic resources from multi-

¹² For instance, the International Undertaking on Plant Genetic Resources for Food and Agriculture (FAO Res. 8/83 of 1983), which was based on the principle that plant genetic resources were a heritage of mankind, and should thus be available without restriction.

ple providers shall be used to create a particular end-product; and whether the final product and/or final user have already been determined.

It is important to note that in the CBD context, genetic resources are biological resources needed or used for their genetic material and not for their other attributes. This means that, for example, access to a forest for ‘conventional’ timber extraction or hunting would not be covered under the scope of the third objective of the CBD. On the other hand, if the intention was to use the genetic material of such timber or prey, ABS obligations would come into play.

3 Key ABS notions

3.1 Access

Article 15(1) of the CBD reaffirms the authority of governments to regulate physical access to genetic resources (in areas within their jurisdiction). At the same time, Article 15(1) does not grant the state a property right over these resources.¹³ Actually, ownership of genetic resources is not addressed by the CBD but is subject to national and sub-national legislation, or law (including common law as well as customary law).

The authority of a government to determine access to genetic resources is qualified by Article 15(2) of the CBD, which requires that Parties endeavour to create conditions that facilitate access to their genetic resources for environmentally sound uses by other parties, on the one hand; and that Parties not impose restrictions that hinder achievement of the objectives of the CBD on the other. Facilitating access and eliminating or minimizing restrictions implies that potential users of genetic resources should be supported in obtaining access to these resources. This is based on the understanding that the most immediate indirect benefit of facilitating access and minimizing or eliminating restrictions will be to increase the probability that genetic resources within areas under a state’s jurisdiction will be used, which increases the likelihood that benefits will be created and then be shared. In other words, the logic behind Article 15(2) of the CBD is that fair and equitable sharing of benefits can only be realized after access to genetic resources has been actually granted.

Article 15(3) of the CBD limits the genetic resources covered by Article 15 (as well as Articles 16 and 19) to those that are provided by Parties that are countries of origin (‘country of origin’ of genetic resources is defined by Article 2 of the CBD as ‘[...] the country which possesses those genetic resources in in-situ conditions’); or those provided by Parties that have acquired the genetic resources in accordance with

¹³ Lyle Glowka et al, *A Guide to the Convention on Biological Diversity* (IUCN, 1994) 76.

the CBD. Only these two categories of genetic resources entitle a provider to benefits under the CBD.

3.2 Prior Informed Consent and Mutually Agreed Terms

Access to genetic resources is made conditional upon the prior informed consent (PIC) of the Party providing the genetic resources, unless otherwise determined by that Party (Article 15(5) of the CBD); and where access is granted, it is also made subject to the establishment of mutually agreed terms (MAT) between the Party providing the genetic resources and the potential user (Article 15(4) of the CBD). Here, it is important to note that Article 15(5) of the CBD qualifies the obligation to obtain PIC with the words ‘[...] unless otherwise determined by that Party’. This implies that Parties may decide to require or not to require PIC for access to their genetic resources. This understanding is also supported by Article 15(1) of the CBD, which states that ‘the authority to determine access to genetic resources rests with national governments and is subject to national legislation’.

PIC and MAT are thus the primary means to authorize access to genetic resources; control their subsequent use; and establish the fair and equitable sharing of benefits from their consequent use. The concept of PIC is based on the principle that, before obtaining access to genetic resources, those affected and those authorized to make decisions should be informed about the potential uses in order to be able to make a well-informed decision. Nevertheless, the exact manner, extent and procedure in which PIC should be obtained are governed by national access legislation. In its turn, MAT implies a negotiation between the Party granting access to genetic resources and an entity aiming to use those genetic resources. That entity could be an individual, a company, or an institution. In the case of a successful negotiation, this will lead to an access agreement (sometimes called a material transfer agreement, research agreement, or simply a contract).

3.3 Benefits

Article 15(7) of the CBD requires each Party to take legislative, administrative or policy measures whose goal is the fair and equitable sharing of benefits with the Party providing genetic resources. While the CBD does not give a definition of the term ‘benefits’, it foresees the sharing of different types of (monetary and non-monetary) benefits, including: research and development results; commercial or other benefits derived from utilizing the genetic resources provided; access to and transfer of technology using the genetic resources; participation in all types of scientific research based on the genetic resources; participation in biotechnological research activities based on the genetic resources; and priority access to the results and benefits arising from biotechnological use of the genetic resources. In sum, benefit-sharing has to be based on MAT (as identified in Articles 15(7), 16(3) and 19(2)) and negotiated for each individual case.

3.4 Traditional knowledge

While Article 15 of the CBD does not address the issue of traditional knowledge, Article 8(j) of the CBD requires each Party, as far as possible and as appropriate and subject to its national legislation, to respect, preserve and maintain knowledge, innovations and practices of ILCs embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity; promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices; and encourage equitable sharing of benefits derived from their utilization.

The link between genetic resources and traditional knowledge in the context of ABS is based on the second and third obligations under Article 8(j) of the CBD. Accordingly, the CBD acknowledges the value of traditional knowledge to modern society, and recognizes that holders of such knowledge, innovations and practices are to be involved and provide their approval, subject to national laws, when it comes to the wider application of such knowledge, innovations and practices. Furthermore, states are encouraged to equitably share the benefits arising out of the utilization of ILCs' knowledge, innovations and practices.

In this context it must not be forgotten that traditional knowledge, innovations and practices concerning animals, plants, insects or ecosystems can provide interesting leads to, and an initial screen for isolating particular properties of, genetic resources found in nature. Consequently, traditional knowledge has guided a number of companies in the development of new products from genetic resources, which makes it relevant for the ABS concept.¹⁴

4 Controversies and complexities surrounding ABS

It must be recalled that the concept of ABS in the CBD is founded on a bilateral relationship between a provider of a genetic resource, on the one hand, and a user of this resource, on the other hand. According to Article 15(3) of the CBD, a provider can be either a country which is in possession of a genetic resource in *in-situ* conditions, or a country that has acquired the genetic resource in accordance with the CBD.

In practice, the role of a provider is not limited to biodiversity rich countries alone. Indeed, certain genetic resources which could be provided (microbes, for instance) can be found universally regardless of the biodiversity found in a country. Furthermore, those countries which do not possess a specific genetic resource in *in-situ* conditions may hold the resource in an *ex-situ* collection after acquiring it in accordance with the CBD. At the same time, the role of a user is also not limited to industrial-

¹⁴ Laird and Wynberg, *Access and Benefits-Sharing*, *supra* note 5, at 20.

ized countries. In practice, every country has the potential to become a user country, since it has the possibility to build up the necessary infrastructure and capacity for research and development in relation to genetic resources.

Although every country has the potential to be both a provider and a user of genetic resources at the same time, the relationship between providers and users has often been controversial due to misinterpretation of the situation as a divide between developing countries (biodiversity rich) on the one side and developed countries (technology rich) on the other side. Such misinterpretation, in combination with alleged cases of misappropriation and/or misuse of genetic resources or traditional knowledge associated with genetic resources (sometimes referred to as cases of 'biopiracy') led to mistrust on both sides and influenced the ABS discussions.

'Misappropriation' can be understood as involving the acquisition of genetic resources in violation of domestic ABS legislation requiring PIC and MAT. In short, it could be understood as unlawful appropriation of genetic resources. 'Misuse', in contrast, arises more out of contractual obligations, as it captures those situations where genetic resources are used in violation of MAT which were set up between the provider and the user. In short, it could be understood as utilization of genetic resources in a non-agreed way, including without sharing any benefits. Nevertheless, it is important to note that there is no agreed definition of these terms and these are just common interpretations.

Apart from the fact that a definition of these terms has not been agreed to, the underlying problem is that the mere fear of being accused of 'biopiracy', misappropriation or misuse of genetic resources has already become a serious impediment to research and bioprospecting activities. Researchers as well as private industries fear damage to their image, which may lead to public outcries. Allegations of 'biopiracy' would make it difficult for such researchers and industries to negotiate legitimate ABS agreements with other parties and to access potential funding sources, likely causing significant loss of commercial opportunities that may be available to their competitors.¹⁵ They are also concerned over possible administrative appeals or formal lawsuits which have the potential to render their activities unprofitable, or at least unpredictable.

The situation becomes even more complicated when taking into account the lack of legal clarity, certainty and transparency in some domestic legal frameworks for ABS. This again discourages many researchers and companies from engaging in bioprospecting activities. Some people even see this situation as the underlying cause of the majority of alleged cases of misappropriation, which they consider to be unintentional.

¹⁵ 'Compilation of submissions by Parties on experiences in developing and implementing Article 15 of the Convention at the national level and measures taken to support compliance with prior informed consent and mutually agreed terms', UN Doc. UNEP/CBD/WG-ABS/5/INF/2/Add.1 (2007) para. 3.

It is also important to consider that when genetic resources/traditional knowledge associated with genetic resources are transferred from a provider to a user country, neither the provider nor the user state alone can take appropriate measures which ensure an efficient and effective ABS regime. While provider states have sovereign rights over their genetic resources, due to the territoriality principle they are unable to monitor and control the downstream process of utilization. The enforcement of ABS legislation of provider countries within user countries is generally not possible. The enforcement of ABS agreements in user state courts is possible, but very costly. User states can be obliged to monitor and control the utilization of genetic resources/traditional knowledge associated with genetic resources within their jurisdiction. However, tracing access back to provider countries is a great technical and administrative challenge, leading to high transaction costs.

All of this explains the complex relationship between providers and users, as well as the interrelationship between the issues of access, benefit-sharing and compliance. All three components appear to be essential for making ABS work in practice. They form the pillars of ABS, which can be summarized as follows: on the one hand, users need clear, transparent, predictable, equitable and efficient legal and administrative frameworks to secure legal clarity and certainty when accessing genetic resources and traditional knowledge associated with genetic resources. Without such legal certainty, researchers and industries will be less eager to invest in bioprospecting activities. This will lead to less access and, as a consequence, to less benefit-sharing in the end. Furthermore, lack of legal clarity will make it difficult for users to fully comply with the providers' ABS requirements, leading to controversy and allegations of misappropriation or misuse. On the other hand, the main interest of providers lies in the fair and equitable sharing of the benefits arising from the utilization of their genetic resources and traditional knowledge associated with genetic resources. Providers therefore need effective measures to ensure that users in their jurisdiction do not misappropriate or misuse their genetic resources and traditional knowledge associated with genetic resources. Thus, they aim for compliance with their domestic ABS regime in general, and the MAT for benefit-sharing in particular.

Apart from finding appropriate ways of regulating these three pillars of ABS, the international community has faced a number of other challenges in effectively and efficiently operationalizing ABS. Only a handful of states, in particular biodiversity rich countries, have adopted comprehensive ABS regimes at the national level since the entry into force of the CBD. Many countries, however, still lack any specific ABS legislation, regulation or administrative process. Out of those countries that have developed domestic ABS frameworks, many different ways of understanding biological resources, genetic resources, derivatives and products exist – which have led to a variety of definitions of scope in ABS legislation. Countries may choose to extend the scope of their ABS regime beyond that of the CBD to cover not only genetic resources, but all biological resources, or they can interpret the scope more narrowly. Furthermore, countries may take a very restrictive approach when regulating access

to their genetic resources, or provide for free access. Also, each country has its own legal system, national authorities and stakeholders. ABS procedures therefore differ from provider country to provider country, and sometimes involve long, confusing and cumbersome processes requiring permits from several regional and local agencies that administer the same resource.

Practical experience of the implementation of ABS has further shown that, in addition to an appropriate legislative framework, an enabling institutional framework is required. One common problem at the national level seems to be the competition between existing institutions and entities regarding the authority to grant access, and even more so to receive potential benefits. Unclear, overlapping or simply non-existent institutional competencies have also been highlighted as challenges to implementing ABS effectively.

Another difficulty relates to the lack of capacity on all sides to deal with the complexities of ABS. The resulting legal uncertainties, administrative deficiencies and delays, as well as high transaction costs may result in a considerable frustration among ABS stakeholders.

Finding an appropriate and fair approach in view of *ex-situ* collections has been another critical stumbling block in the implementation of ABS. *Ex-situ* conservation is defined by Article 2 of the CBD as ‘the conservation of components of biological diversity outside of their natural habitats’ and collections can take the form of gene banks, zoos, and botanic gardens, among others.

Research on *ex-situ* genetic resources can take a wide variety of forms and have different purposes. Most research is non-commercial, aiming to improve knowledge and understanding of genetic diversity for conservation purposes. There are also examples of applied commercial research, which ends up in a product which is the subject of a market transaction. Botanical gardens, in particular, have played an important role in medical and taxonomic research and the distribution of useful plants and their genetic resources worldwide, as well as in the conservation of biological diversity.¹⁶

Many, if not most, of the genetic resources collected *ex-situ* were accessed before the entry into force of the CBD; and a large amount of these resources were historically accessed from biodiversity-rich developing countries. As a result, another of the common claims surrounding ABS concerns the remediation of this so-called ‘historical injustice’ by recognizing the origins (and the rightful owners) of these resources and retroactively providing for the benefits to which the countries of origin feel they are entitled. Even though some botanic gardens and herbaria treat their collections as falling under the obligations of the CBD, in practice the unknown geographical

¹⁶ Kate Davis, *A CBD Manual for Botanic Gardens*. (Botanic Gardens Conservation International, 2008) 6.

origin of some genetic resources (let alone the rightful owners within each country) impedes appropriate benefit-sharing in practice.

Another challenge for the implementation of ABS is that of fully defining traditional knowledge in general, and traditional knowledge associated with genetic resources in particular. This may lead to confusion on both the provider and user sides, as well as to complications for regulation through legal instruments, such as intellectual property rights. Particular legal and practical problems may arise in cases when the holder of the knowledge is unknown or not identifiable; or when such knowledge has not been the object of any PIC of the relevant ILC group and enters the 'public domain', which means that it is not protected by an intellectual property right and therefore can be appropriated by anyone without liability for infringement. In addition, the discussions in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO IGC)¹⁷ add another layer of complexity to this issue as they touch on the relationship between ABS and intellectual property rights.

The differentiation between non-commercial and commercial research, as both are characterized by the intent of the research undertaken (as opposed to the form), also needs to be considered. Non-commercial research can be understood as non-profit research to generate new scientific insights and can be considered one of the fundamental preconditions for the conservation and sustainable use of biological diversity and of genetic resources. Countries that provide access to their biodiversity for non-commercial research may derive a range of non-monetary benefits, including training and technology, and thus it makes sense for national access modalities in provider countries to treat non-profit and commercial research differently. However, both research types can use the same methods and facilities and be pursued by the same researchers, and differentiating between non-commercial and commercial research can be controversial for many reasons, including possible changes of intent from non-commercial to commercial research; use of sample materials by third parties in ways that were not approved by a provider country in legal agreements; and commercial use of research that enters the public domain without sharing benefits with the provider country.

It is also important to note that ABS is not only addressed within the context of the CBD and, in fact, many agreements outside the realm of the Convention need to be taken into consideration when understanding ABS in general and its application (through the Nagoya Protocol) in particular. In this context, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA),¹⁸ the International Convention for the Protection of New Varieties of Plants (UPOV Convention),¹⁹

¹⁷ See <<http://www.wipo.int/tk/en/igc/>>.

¹⁸ International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004, <<http://www.planttreaty.org/>>.

¹⁹ International Convention for the Protection of New Varieties of Plants, Paris, 2 December 1961, in force

the United Nations Convention on the Law of the Sea (UNCLOS),²⁰ the Antarctic Treaty System (ATS),²¹ the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²² under the World Trade Organization (WTO),²³ the World Intellectual Property Organization (WIPO)²⁴ and its Intergovernmental Committee,²⁵ the World Health Organization (WHO)²⁶ and the Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and other Benefits (PIPF)²⁷ adopted by the World Health Assembly,²⁸ among others, have all to be considered when understanding ABS in a holistic way.

Finally, the implementation of ABS could become a challenge in transboundary situations. It has to be recalled that genetic resources, as well as traditional knowledge associated with genetic resources, often are not prevalent in only one specific country, or held by only one ILC. Indeed, the same genetic resources are often found in more than one country, or even in more than one geographical region; the same traditional knowledge is often held by different ILCs, which might even be located in different countries. In such situations, a bilateral ABS approach may be insufficient and may appear unjust, as it gives a single provider state/ILC the right to receive the benefits. Therefore, it is sometimes argued that a more detailed multilateral benefit-sharing approach could be more appropriate and fair to tackle such transboundary situations.

5 Negotiation and adoption of the Nagoya Protocol on ABS

From the adoption of the CBD in May 1992 until the adoption of the Nagoya Protocol in October 2010 in Nagoya, Japan, more than 18 years had passed during which the Parties to the CBD studied, discussed, elaborated and further negotiated the ABS concept. The way to Nagoya was a long road with different phases to be distinguished and important milestones to be recognized.

10 August 1968, revised in 1972, 1978 and 1991, 815 *United Nations Treaty Series* (1972) 89; <<http://www.upov.int/portal/index.html.en>>.

²⁰ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982) 1261.

²¹ Antarctic Treaty, Washington, 1 December 1959, in force 23 June 1961, 19 *International Legal Materials* (1980) 860; Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, 30 *International Legal Materials* (1991) 1461; Convention for the Conservation of Antarctic Seals, London, 16 January 1972, in force 11 March 1978, 11 *International Legal Materials* (1972) 251; and Convention on Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 7 April 1982, 19 *International Legal Materials* (1980) 841, <<http://www.ccamlr.org>>.

²² Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, 15 April 1994, <<http://www.wto.org>>.

²³ See <<http://www.wto.org>>.

²⁴ See <<http://www.wipo.orint>>.

²⁵ See <<http://www.wipo.int/tk/en/igc/>>.

²⁶ See <<http://www.who.int>>.

²⁷ See <<http://www.who.int/influenza/pip/en/>>.

²⁸ See <<http://www.who.int/mediacentre/events/governance/wha/en/>>.

The Convention's operationalization of ABS can be traced back to the fourth meeting of the Conference of the Parties (COP4) in 1998, when Parties established a regionally-balanced expert panel on ABS.²⁹ This expert panel developed recommendations on, *inter alia*, PIC and MAT, and discussed different avenues for stakeholder engagement.³⁰ Two years later, at COP5 in 2000, the Working Group on ABS was established.³¹ The Working Group held its first meeting one year later.³² An important step at this first meeting was the development of the draft Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising Out of Their Utilization, known as the Bonn Guidelines, which were later adopted at COP6 in 2002.³³ The Bonn Guidelines provided a series of voluntary measures identifying steps in the ABS process, focusing on the obligation for users to seek PIC from providers; identifying the basic requirements for MAT; defining the main roles and responsibilities of users and providers and stressing the importance of the involvement of all stakeholders; and providing an indicative list of both monetary and non-monetary benefits, among others.

In September 2002, at the UN World Summit on Sustainable Development (WSSD) the mandate for negotiating, within the CBD framework, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources was included in the Johannesburg Plan of Implementation³⁴ and the way towards the negotiation of an ABS agreement started. During its seventh meeting, in 2004, the COP mandated the ABS Working Group to elaborate and negotiate an international regime, and set out the terms of reference for the negotiations.³⁵ Subsequently, the COP at its eighth meeting, in 2006, instructed the ABS Working Group to complete its work with regard to the international ABS regime at the earliest possible time before COP 10 in 2010.³⁶

At its ninth meeting, the COP adopted a roadmap for the negotiation, established three expert groups (concepts, terms, working definitions and sectoral approaches; compliance; and traditional knowledge associated with genetic resources), and instructed the ABS Working Group to submit an instrument/instruments for consideration and adoption by the COP at its tenth meeting.³⁷ The subsequent meetings of

²⁹ 'Access and benefit-sharing', CBD Decision IV/8 (1998).

³⁰ See 'Report of the Panel of Experts on Access and Benefit-Sharing', UN Doc. UNEP/CBD/COP/5/8 (2000).

³¹ 'Access to genetic resources', CBD Decision V/26 (2000).

³² Meeting report and documents available at <<https://www.cbd.int/doc/default.shtml?mtg=ABSWG-01>>.

³³ 'Access and benefit-sharing as related to genetic resources', CBD Decision VI/24 and Annex I (2002).

³⁴ Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), para 44(o). At its fifty-seventh session, in December 2002, the UN General Assembly subsequently invited the CBD COP to negotiate an international ABS regime (see 'Convention on Biological Diversity', UNGA Res. 57/260).

³⁵ See 'Access and benefit-sharing as related to genetic resources (Article 15)', CBD Decision VII/19 (2004).

³⁶ 'Access and benefit-sharing', CBD Decision VIII/4 (2006).

³⁷ 'Access and benefit-sharing', CBD Decision IX/12 (2008).

the ABS Working Group³⁸ thus focused on the main components of the international regime on ABS and produced working drafts of what turned out to be the protocol.

The negotiations intensified as the deadline of 2010 approached. As a result, the ABS Working Group met four times in the period between April 2009 and July 2010 using an interregional negotiating group (ING) format to agree upon a draft protocol text and settle views on non-controversial provisions. Even though the ING made progress on certain difficult issues, including the relationship with other instruments and compliance with domestic ABS requirements, issues such as the temporal and geographical scope of the protocol, pathogens, derivatives, and the concept of utilization of genetic resources remained unresolved.

Just before the COP met at its tenth meeting, and during the two weeks of the COP in October 2010, the ING continued negotiations. When the COP was about to finalize without a conclusive result on the ABS front, informal ministerial consultations were called by the Japanese COP Presidency, which put forward a compromise proposal. This proposal enabled Parties to reach agreement, and the COP adopted the Nagoya Protocol as part of a ‘three-piece-package’ including the CBD Strategic Plan 2011–2020³⁹ and a decision on the implementation of the Strategy for Resource Mobilization.⁴⁰ This meant that effectively some Parties were willing to ‘let go of’ the adoption of either the Strategic Plan or the Strategy for Resource Mobilization if the Nagoya Protocol was not adopted then and there.

The Nagoya Protocol on ABS was adopted at CBD COP 10 on 29 October 2010, in Nagoya, Japan. Its adoption was not only an important achievement to facilitate the future implementation of ABS, but also a necessary step to safeguard COP10 in particular and the CBD process in general from failing. The agreement on the Nagoya Protocol sent an important signal to the international community, proving that despite ongoing failure in other political fora (such as the negotiation process under the United Nations Framework Convention on Climate Change – UNFCCC)⁴¹ international multilateralism can still work.

6 Overview of key aspects and articles in the Nagoya Protocol

The Nagoya Protocol is a legally binding, supplementary agreement (in the form of a protocol) to the Convention on Biological Diversity. The Nagoya Protocol is com-

³⁸ These being the Working Group’s seventh, eighth and ninth meetings (the last of which was resumed twice). Links to ABS Working Group meeting websites available at <<http://www.cbd.int/abs/pre-protocol/documentation/default.shtml>>.

³⁹ ‘Strategic Plan for Biodiversity 2011–2020’, CBD Decision X/2 (2010).

⁴⁰ ‘Strategy for resource mobilization in support of the achievement of the Convention’s three objectives’, CBD Decision X/3 (2010).

⁴¹ United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>.

posed of 27 preambular clauses, 36 articles containing operative provisions and one annex containing a non-exhaustive list of monetary and non-monetary benefits.

The Protocol establishes a framework for regulating how users of genetic resources and/or traditional knowledge associated with genetic resources (for example, researchers and commercial companies) may obtain access to such resources or knowledge. It provides for general obligations on sharing the benefits arising from the utilization of such resources/ knowledge. Furthermore, it also obliges Parties to ensure that users under their jurisdiction respect the domestic ABS legislation and regulatory requirements of those parties where the resources or knowledge have been acquired.

The objective of the Nagoya Protocol is addressed in Article 1 and refers to ‘the fair and equitable sharing of the benefits arising from the utilization of genetic resources’. Article 1 clarifies that such benefit-sharing includes appropriate access to genetic resources, appropriate transfer of relevant technologies and appropriate funding. Accordingly, benefit-sharing entails more than sharing a certain percentage of the profits when a product is developed on the basis of a genetic resource. Furthermore, it is re-stated that when sharing benefits, the rights over the accessed resources and to the transferred technologies have to be taken into account. Finally, it is highlighted that the Nagoya Protocol aims at contributing to the conservation of biodiversity and the sustainable use of its components, which connects ABS with the other two objectives of the CBD.

The scope of the Nagoya Protocol, one of the most controversial issues in the negotiation process, is addressed in Article 3 and deals with genetic resources for utilization within the definition of Article 2. Article 3 provides neither a positive list of what is included, nor a negative list of what is excluded, but contains a general provision which simply refers to ‘genetic resources within the scope of Article 15 of the Convention’, and to ‘traditional knowledge associated with genetic resources within the scope of the Convention’. Article 3 has thus to be read and interpreted in combination with all other provisions of the Nagoya Protocol, and in particular with the definitions spelled out in Article 2; the relationship with other ABS agreements as contained in Article 4; and the possible development of a global multilateral benefit-sharing mechanism under Article 10.

The issue of access to genetic resources and/or traditional knowledge associated with genetic resources forms a core part of the ABS concept as presented above and is addressed in different parts of the Nagoya Protocol. Article 6(1) reiterates the sovereign rights of states over their natural resources and clarifies that access is subject to PIC granted by the provider country, unless otherwise determined. In contrast to Article 6, Article 7 regulates access to traditional knowledge associated with genetic resources. Accordingly, states shall take measures, in accordance with their domestic law and as appropriate, aiming to ensure that such traditional knowledge held by ILCs is ac-

cessed either with their PIC, or with their approval and involvement. Furthermore, Article 7 clarifies that in such cases MAT have to be established with the ILCs.

The implementation of access provisions is supported by Articles 13 and 14, which provide for the necessary institutional frameworks at the national and international levels. Article 13 requires the designation of a national focal point and/or one or more competent national authorities that inform about national access requirements, grant PIC, and enter into MAT. Article 14 establishes an ABS Clearing-House that shall serve as a means for sharing ABS information which is relevant for the implementation of the Protocol and made available by each Party.

Like the issue of access, fair and equitable benefit-sharing is also addressed in different parts of the Nagoya Protocol. While Article 5 represents the main benefit-sharing provision, Articles 9, 10, 19, 20, 23, and the Annex address particular aspects of benefit-sharing.

Article 5(1) picks up on the fundamental notions already included in Article 15(3) and 15(7) of the CBD and clarifies that benefits to be shared shall include not only those arising from the utilization of genetic resources, but also the benefits arising from subsequent applications and commercialization. Benefits are to be shared only with the Party providing such resources, which is 'defined' as the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the CBD. Specific benefit-sharing arrangements will be established through MAT between the provider and the user of genetic resources on a contract basis. Article 5(2) addresses the specific case where ILCs have established rights over genetic resources in accordance with domestic legislation, and it requires Parties to take measures, as appropriate, aiming to ensure that benefits are shared with the ILCs concerned, based on MAT. According to Article 5(4), benefits may be monetary as well as non-monetary, as presented in the indicative and non-exhaustive list of potential monetary and non-monetary benefits in the Annex.

Article 9 suggests the direction in which shared benefits should flow. Parties are obliged to encourage their providers and users to direct the benefits arising from the utilization of genetic resources towards the conservation and sustainable use of biological diversity. This provision reaffirms the linkages between benefit-sharing and the other two objectives of the CBD (conservation and sustainable use).

Article 10 provides the legal basis for consideration of a potential global multilateral benefit-sharing mechanism, which could be established in the future in order to address fair and equitable benefit-sharing in specific cases where bilateral ABS on the basis of PIC and MAT is problematic. It must be clarified here that biodiversity is not limited by political borders. Plant and other species are often, if not regularly, distributed across multiple countries and regions. The bilateral approach to ABS established by the CBD and the Nagoya Protocol means that access to genetic resources for their

utilization is subject to the PIC of the country of origin that provides the genetic resources. But not all countries possess those genetic resources in *in-situ* conditions.

It would not be possible to obtain PIC for the utilization of genetic resources obtained from a country that has decided not to establish access requirements either. Furthermore, there could be cases in which there is utilization of genetic resources from *ex-situ* collections with no information on country or countries of origin.

Article 10 of the Protocol clarifies that, if established, the global multilateral benefit-sharing mechanism shall direct the benefits in a way that supports the conservation and sustainable use of biological diversity globally.

Articles 19 and 20 include obligations for Parties to encourage the development, update and use of sectoral and cross-sectoral model contractual clauses for MAT, as well as voluntary codes of conduct, guidelines and best practices and/or standards in relation to ABS. Article 23 completes the set of benefit-sharing articles and focuses on two specific types of non-monetary benefit-sharing: collaboration and cooperation in technical and scientific research and development programmes; as well as access to and transfer of technology.

It is fair to say that the compliance regime of the Nagoya Protocol builds the necessary backbone of the instrument. Its aim is to prevent and react to future cases of misappropriation of genetic resources or traditional knowledge associated with genetic resources (Articles 15–17), and to ensure the enforcement of benefit-sharing agreements (Article 18).

Article 15 refers to compliance of users of genetic resources with domestic ABS legislation or regulatory requirements of provider countries. Article 16 ‘mirrors’ the obligations of Parties under Article 15 but with a specific focus on traditional knowledge associated with genetic resources. It is important to note that Articles 15 and 16 provide user countries with flexibility in their implementation. They both give the discretion to choose between legislative, administrative or policy measures to provide compliance. Furthermore, they require Parties only to take those measures which are appropriate and proportionate. However, a certain ‘performance requirement’ is also established, as the measures finally taken have to be effective.

Article 17 aims to support the implementation of Article 15, but curiously does not relate to Article 16. Article 17(1) establishes an obligation for all Parties to the Protocol to monitor and to enhance transparency surrounding the utilization of genetic resources. Mandatory measures include, among others, the designation of one or more checkpoints whose role is to collect or receive information related to PIC, the source of the genetic resources, the establishment of MAT, and the utilization of genetic resources. Article 17 also defines the internationally recognized certificate of compliance, which is published through the ABS Clearing-House.

Article 18 refers to a different issue of compliance than Articles 15–17. Its objective is specifically to promote the enforcement of MAT between individual users and providers of genetic resources and/or traditional knowledge associated with genetic resources. In other words, it aims to support compliance with contractual obligations, but not with domestic ABS legislation or regulatory requirements.

Being a cross-cutting issue, traditional knowledge associated with genetic resources is addressed within several articles of the Nagoya Protocol (Articles 5(5), 10, 11(2), or 18(1)). However, due to its importance, traditional knowledge is also addressed in stand-alone provisions, such as Articles 7 and 16, or Article 12. Article 12 includes a number of obligations for Parties when implementing the Protocol, namely the duty to take into consideration, in accordance with domestic law, ILCs customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources and establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, among others.

In order effectively to implement the Nagoya Protocol at the national level, a variety of tools are provided for in the Protocol. Tools and mechanisms include model contractual clauses (Article 19), codes of conduct, guidelines and best practices and/or standards (Article 20), awareness raising measures (Article 21), capacity building (Article 22), financial resources and a financial mechanism, which is provided through the Global Environment Facility⁴² (Article 25).

Last but not least, Article 30 of the Nagoya Protocol provides for the Conference of the Parties serving as the meeting of the Parties to the Protocol at its first meeting to consider and approve cooperative procedures and institutional mechanisms to promote compliance with the Protocol and address cases of non-compliance. This provision addresses the need to develop a mechanism to promote compliance of Parties with their international obligations under the Protocol. Article 30 is a so-called ‘enabling provision’, which means that it does not yet establish a compliance mechanism, but provides a basis for its future development and establishment by the Conference of the Parties serving as the meeting of the Parties.⁴³

7 The way forward: paving the way for implementation

The adoption of the Nagoya Protocol after six years of negotiations was a significant step forward for the implementation of the Convention on Biological Diversity. It is of strategic importance in a number of ways. The Nagoya Protocol attracts the at-

⁴² See <<http://www.thegef.org/gef/>>.

⁴³ For a discussion of the progress in negotiating such a mechanism, see Melissa Lewis and Katileena Lohtander-Buckbee ‘Compliance Negotiations within the Intergovernmental Committee for the Nagoya Protocol’ in Part III of the current *Review*.

tion of the international community to the third objective of the CBD and significantly advances its implementation by providing a strong basis for greater legal certainty and transparency for both providers and users of genetic resources. Compared with the other two objectives (conservation of biological diversity and sustainable use of its components), ABS has often been treated as an 'orphan child' within the CBD framework and, consequently, also in CBD implementation at the country level. The Protocol entered into force (and its obligations thus became binding upon the Parties thereto) on 12 October 2014, 90 days after ratification by the 50th CBD Party.⁴⁴ Even though the entry into force is a key requirement for the implementation of the Nagoya Protocol at the international level, Parties also have to develop the necessary legislative, administrative, and policy measures at the regional, national, and/or local levels to be able to implement it on the ground.

It is important to recall that Aichi Target 16 of the Strategic Plan for Biodiversity 2011–2020 states that '[b]y 2015, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation'. This Target thus provided for an 'inspirational' deadline for Parties to look forward to. In turn, Aichi Target 17 envisages that '[b]y 2015 each Party has developed, adopted as a policy instrument, and has commenced implementing an effective, participatory and updated national biodiversity strategy and action plan'. The process of reviewing and updating national biodiversity strategies and action plans (NBSAPs) provides an enabling framework for the analysis and adaptation of national ABS policies and laws (when in place) or for the development of national ABS legal instruments and policy measures that will allow for the implementation of the Nagoya Protocol. NBSAPs also constitute a way of addressing and bringing together the three objectives of the CBD under one national policy framework, facilitating coherence and coordination in their implementation.

Bearing in mind that every state and its particular ABS situation are different, certain commonalities can be identified in view of appropriate ABS policies and strategies, legislation and regulatory requirements, as well as institutions that will facilitate putting the Nagoya Protocol into practice. There is no blueprint regarding the ideal format of such ABS policies, laws or measures, their specific content, or even the development process, but regardless of the approach taken by a country, it will be important to ensure that a country's ABS policies are mutually supportive with a broader set of policies, including those on science and technology, natural resources management, and indigenous and local communities.

The concrete process for the development of ABS policies will depend on the countries' existing legal and political frameworks (for instance, mandatory public infor-

⁴⁴ Article 33; See CBD ABS, 'Status of Signature, and ratification, acceptance, approval or accession', available at <<http://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>> (visited 18 October 2014).

mation and consultation processes) as well as their specific ABS landscape (for instance, the existence of ILCs in the countries or the interests of the countries' private sectors and scientific communities). However, some steps, tailored to each individual country, could be taken into consideration when drafting an integrated ABS policy or strategy.

In a first step, the ABS situation in the country should be analyzed in light of the principles and obligations included in the Nagoya Protocol. The impacts of different instruments that could be adopted to implement the Protocol should be assessed in view of their practicability and cost-effectiveness. As part of this situation analysis, a public consultation amongst all ABS stakeholders should be launched in order to explore the possible impacts of the Protocol and to gather concrete ideas on the practical challenges of implementation for different stakeholder groups. In parallel to the situation analysis and participatory process, all ABS stakeholders in the country, including ILCs (if applicable), research, industry, and different governmental sectors (for instance, health, agriculture, justice, trade, and science) should be informed about the Nagoya Protocol in general, its specific obligations, and particular proposals for implementation. Awareness raising and information sharing could take place through ABS roundtables facilitating multi-stakeholder dialogues. Such dialogues can be helpful, as they provide an opportunity to collect further ideas regarding possible options for the implementation of the Protocol.

Based on the results of a situation analysis, decisions taken have to strike a balance between fully implementing the Nagoya Protocol, on the one hand, and not imposing a disproportionate burden on any particular ABS stakeholder group, on the other hand. Furthermore, in order to ensure that ABS policies stay up to date and thus relevant, they should be monitored and reviewed on a regular basis. ABS policies should aim to create a coherent framework for the development of further legal, policy, and administrative measures. This would facilitate environmentally sound access to the genetic resources of the country, clarify access to traditional knowledge associated with these resources (if applicable), ensure the fair and equitable sharing of the benefits arising out of their utilization, and provide for compliance with ABS regimes of other countries.

In this context, policy-makers should consider the development of ABS policies not only as an instrument to 'protect' their natural resources. In addition, they should see this as an opportunity to become 'proactive' and to promote the socio-economic value of a country's biodiversity and its ecosystem services, build an enabling framework for attracting investment in biotechnologies, create strategic partnerships to maximize research and development, and so on.

8 Recent developments

At its tenth meeting, the COP decided to establish an Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ICNP) to undertake the preparations necessary for the first meeting of the Parties serving as the meeting of the Parties to the Protocol (COP-MOP), when it will cease to exist.⁴⁵ The COP also decided that the ICNP would meet twice and provided the Committee with a work plan. The first meeting of the ICNP was held in June 2011 in Montreal, Canada, and the second meeting of the ICNP was held in July 2012 in New Delhi, India.⁴⁶

Since there were issues still pending in the ICNP's work plan after these two sessions, the COP decided, at its eleventh meeting, to reconvene the Intergovernmental Committee for a third meeting to address outstanding issues in its work plan, in preparation for the first meeting of the COP-MOP.⁴⁷ The third meeting of the (ICNP3) was thus held in Pyeongchang, Republic of Korea, in February 2014.

ICNP3 adopted recommendations on: the rules of procedure for the COP-MOP; monitoring and reporting; capacity-building; the draft agenda for COP-MOP 1; the ABS Clearing-House; sectoral and cross-sectoral model contractual clauses, voluntary codes of conduct, guidelines, best practices and standards; a global multilateral benefit-sharing mechanism; and procedures and mechanisms on compliance. The meeting also exchanged views on the state of implementation of the Protocol, hearing from countries, regions and stakeholders on efforts to operationalize the Protocol.

This last ICNP was an opportunity to 'test the waters' and assess how close (or how far) the Protocol's entry into force was to materializing. In general, the week in Pyeongchang was encouraging for the Protocol's future application. Not only did a good number of CBD Parties report being well advanced in their national ratification processes, but those that were not as advanced, or did not envisage a ratification in the near future, were equally active in the discussions and negotiations. As hoped, the Protocol ultimately entered into force in time for its first COP-MOP to be concurrently held with CBD COP12 in October 2014 in the Republic of Korea.

The process of negotiation and the ongoing national processes towards the implementation of the Nagoya Protocol offer a good example of the complexities of international environmental law-making. Parties had to prioritize on the most relevant el-

⁴⁵ 'Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization', CBD Decision X/1 (2010).

⁴⁶ The reports and recommendations from these meetings are available at <<http://www.cbd.int/abs/icnp/default.shtml>>.

⁴⁷ 'Status of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization and related developments', CBD Decision XI/1 (2012).

ements to defend their national (and regional) positions throughout the negotiation. Undoubtedly, there were limits to what they could accept and commit to and the final text of the Protocol as adopted demonstrates just that. There are still many things that are not clear regarding the Nagoya Protocol, including the level and impact of its obligations for all Parties and stakeholders, the time it will take to make it fully 'operational' as well as the practical implications of its entry into force. Time will tell.

COMPLIANCE NEGOTIATIONS WITHIN THE INTERGOVERNMENTAL COMMITTEE FOR THE NAGOYA PROTOCOL

Melissa Lewis¹ and Katileena Lohtander-Buckbee²

1 Introduction

Article 26 of the Vienna Convention on the Law of Treaties³ (which codifies the customary international law rule of *pacta sunt servanda*⁴) provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Although the legally binding nature of treaties (including multilateral environmental agreements, or MEAs) is thus recognized, this alone is insufficient to secure compliance with a treaty's provisions. Theoretically, allegations of non-compliance can be addressed through dispute settlement procedures (for which most MEAs make provision); however, the dispute settlement requirements of MEAs are often weak,⁵ and have been criticized for failing to provide multilateral solutions to 'breaches that are essentially multilateral in nature'.⁶ As a result, it is becoming increasingly common for MEAs to contain provisions on, or for their governing bodies to develop,

¹ LLB LLM (Rhodes) LLM (Lewis & Clark); Honorary Research Fellow, University of KwaZulu-Natal, South Africa; PhD Researcher, Department of European and International Public Law, Tilburg University, the Netherlands; e-mail: M.G.Lewis@uvt.nl.

² PhD (Stockholm) Docent (Turku); Senior adviser, Finnish Environment Institute, Finland; e-mail: Katileena.lohtander-buckbee@ymparisto.fi.

³ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331, <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>.

⁴ 'Treaties are made to be kept' (Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (3rd ed., Oxford University Press, 2009) at 16).

⁵ While many MEAs require compulsory negotiation and, where this fails, some provide for compulsory conciliation and voluntary arbitration, very few provide for compulsory arbitration.

⁶ Patrick Széll, 'Introduction to the Discussion of Compliance' in Marko Berglund (ed.), *International Environmental Law-making and Diplomacy Review 2004* (University of Joensuu, 2005) 117–124 at 118–119 and 122. See also Birnie, Boyle and Redgwell, *supra* note 4, at 245–246 (on the differences between multilateral non-compliance procedures and litigation).

procedures and mechanisms aimed at facilitating and, in some instances, enforcing treaty compliance.⁷

One example of such a provision is Article 30 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (the 'Nagoya Protocol'),⁸ which instructs the Conference of the Parties to the Convention on Biological Diversity⁹ serving as the meeting of the Parties to the Nagoya Protocol (the COP-MOP), at its first meeting, to 'consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of [the] Protocol and to address cases of non-compliance'. Subsequent to the Nagoya Protocol's adoption,¹⁰ in October 2010, members of the Intergovernmental Committee for the Nagoya Protocol have engaged in negotiations on compliance procedures and mechanisms in preparation for the first COP-MOP. This paper provides a critical discussion of these negotiations and their relevance to international environmental law-making and diplomacy in general.

Part 2 of the paper provides a brief introduction to the establishment and administration of MEA compliance measures and the various issues that need to be determined when negotiating a compliance regime. Part 3 then outlines the history of the Nagoya Protocol's compliance negotiations (with a particular focus on the progress made at the third meeting of the Intergovernmental Committee for the Protocol¹¹); and Part 4 presents a critical discussion of the most contentious issues in these negotiations and makes suggestions about the future of the Protocol's compliance regime. Finally, conclusions are presented in Part 5.

2 The establishment and administration of compliance procedures and mechanisms for multilateral environmental agreements

Although it is possible for the negotiators of an MEA to establish compliance procedures and/or mechanisms in the text of the MEA itself,¹² the more common ap-

⁷ Note, however, that such procedures and mechanisms do not exclude, but rather complement dispute settlement provisions.

⁸ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force 12 October 2014, <<http://www.cbd.int/abs/>>.

⁹ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, <<http://www.biodiv.org>>.

¹⁰ The Protocol was adopted through CBD Decision X/1.

¹¹ At the time at which this paper was written, the third meeting of the Intergovernmental Committee for the Nagoya Protocol was the most recent development in the Protocol's compliance negotiations. It should, however, be noted that, by the time that this *Review* is published, the Nagoya Protocol will have entered into force and its first COP-MOP will have been held. It is thus possible that further advances will have been made towards the establishment of the Protocol's compliance mechanism.

¹² See, for instance, Art. XIII of the Convention on International Trade in Endangered Species of Wild

proach is for an MEA to call upon its Conference or Meeting of the Parties (COP or MOP) to consider and approve procedures and mechanisms to determine and address cases of non-compliance. The first MEA to include such a provision was the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,¹³ and it is this approach that is taken by the Nagoya Protocol.¹⁴ There are also instances in which compliance procedures have been developed by a treaty's COP or MOP on its own initiative, without this being called for by the treaty text.¹⁵

The compliance measures of some MEAs are administered by existing treaty bodies, such as the MEA's standing committee.¹⁶ However, since the development of the Montreal Protocol's compliance mechanism, the trend has been for MEA COPs and MOPs instead to establish special 'compliance' or 'implementation' committees, tasked with considering instances of alleged non-compliance and making decisions or recommendations concerning response measures.¹⁷ Indeed, this is the approach that is currently envisaged for the Nagoya Protocol.¹⁸ Where this route is taken, the negotiation of an MEA's compliance regime will need to determine such issues as:

Fauna and Flora, Washington DC, 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243, <<http://www.cites.org>> (CITES). This provision describes the procedure to be followed when the CITES Secretariat is satisfied that any Appendix I or II species is being adversely affected by trade or that the Convention's provisions are not being effectively implemented. It is, however, worth noting that Art. XIII does not lay out all of the procedural detail of CITES' compliance regime, and that the Convention's compliance procedures have been further elaborated through Resolution Conf. 11.3 (Rev. CoP16) and Resolution Conf. 14.3 (the latter of which includes a *Guide to CITES Compliance Procedures*). See also Resolution Conf. 11.17 (Rev.CoP14) (which discusses compliance measures in response to failures by Parties to submit annual reports), and Resolution Conf. 12.8 (Rev. CoP13) (which discusses compliance measures in response to failures by Parties to implement recommendations made in the context of Significant Trade Review).

¹³ Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 1522 *United Nations Treaty Series* 3, <http://ozone.unep.org/new_site/en/montreal_protocol.php>. Article 8 of the Protocol provides that '[t]he Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance'.

¹⁴ Széll (*supra* note 6, at 122) describes the benefit of this approach as being that 'in the early days of an MEA, the Parties and the MEA itself benefit from the Conference of the Parties having the possibility of adjusting the detail of the regime as and when necessary and in the light of experience'.

¹⁵ See, for instance, Resolution 4.6 of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, the Hague, 16 June 1995, in force 1 November 1999, <<http://www.unep-aewa.org/>>.

¹⁶ See, for instance, CITES' compliance procedures (Resolution Conf. 14.3, Annex (*Guide to CITES Compliance Procedures*), paras 9–14).

¹⁷ Most MEAs expressly provide their COP or MOP with the mandate to establish such subsidiary bodies as are necessary for the MEA's implementation (see, for instance, Art. 26(3)(b) of the Nagoya Protocol). Examples of MEAs for which compliance/implementation committees have been established include the Montreal Protocol (Decision IV/5, read with Annex IV of UN Doc. UNEP/OzL.Pro.4/15 (1992), para. 5); the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, in force 16 February 2005, 2303 *United Nations Treaty Series* 148, <http://unfccc.int/kyoto_protocol/items/2830.php> (Decision 27/CMP.1, Annex, Part II, para.1); the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, 2226 *United Nations Treaty Series* 208, <<http://bch.cbd.int/protocol>> (Decision BS-I/7, Annex, Part II); and the International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, into force 29 June 2004, 2400 *United Nations Treaty Series* 303, <<http://www.planttreaty.org/>> ('ITPGRFA') (Resolution 3/2006, Annex, para. 1).

¹⁸ See ICNP Recommendation 3/6, Annex, Part B, para. 1.

- the composition of the compliance committee;
- the period for which members sit on the committee and the capacity in which they serve (as Party representatives or objectively in their individual capacities);
- whether (or in what circumstances) the meetings of the committee will be open to the public;
- the functions of the committee (including the extent to which the committee is mandated to make final decisions on non-compliance response measures, as opposed to recommendations to the MEA's COP or MOP); and
- the procedures to be followed by the committee (including whether decisions are to be made by consensus or qualified majority).

Additional issues that will need to be determined in the negotiation of any compliance regime include:

- the question of who may 'trigger' the compliance procedures (by making a submission relating to issues of compliance or non-compliance);
- the procedure for triggering such procedures;
- the information that may be considered once compliance procedures have been triggered (as well as the sources of such information);
- the types of measures that may be taken to promote compliance and address cases of non-compliance; and
- the factors that must be taken into account in selecting appropriate response measures.

Because non-compliance often results from Parties' incapacity, rather than their lack of commitment,¹⁹ MEA compliance mechanisms tend to adopt a supportive approach, aimed at facilitating implementation (by, for instance, providing advice, capacity building, technology transfer, or financial assistance) rather than coercing it. That said, there are several MEAs that permit coercive measures (such as warnings, publication of non-compliance, trade sanctions, suspension of rights and privileges, and the imposition of more onerous obligations under the treaty) as responses to non-compliance – especially where non-compliance is persistent or repeated.²⁰

¹⁹ United Nations Environment Programme, *Manual on Compliance with and Enforcement of Multilateral Agreements* (2006) at 144; Birnie, Boyle and Redgwell, *supra* note 4, at 246; Széll, *supra* note 6, at 120. See also discussion in Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd ed., Cambridge University Press, 2010) at 113, in respect of biodiversity-related treaties specifically.

²⁰ See, for instance CITES Resolution Conf. 14.3, Annex, paras 29–30; Montreal Protocol Decision IV/5, read with Annex V to UN Doc. UNEP/OzL.Pro.4/15 (1992); Kyoto Protocol Decision 27/CMP.1, Annex, Part XV.

3 Negotiating a compliance regime for the Nagoya Protocol

3.1 Background: the adoption of the Nagoya Protocol²¹

The Nagoya Protocol was adopted at the tenth COP of the Convention on Biological Diversity (CBD) and aims to give effect to the CBD's third objective:

[t]he fair and equitable sharing of benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.²²

The CBD was the first international instrument to recognize that states have sovereign rights over their genetic resources,²³ and prescribes several requirements regarding access to genetic resources and the sharing of benefits arising from their utilization (ABS). These include the requirements that Parties endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Parties; that access occur on mutually agreed terms and be subject to the prior informed consent of the Party providing the resources (unless otherwise determined by that Party); and that Parties take measures with the aim of sharing benefits from the use of genetic resources with the Party that has provided such resources.²⁴ Parties are further required, as far as possible and as appropriate and subject to their national legislation, to encourage benefit-sharing with indigenous and local communities (ILCs) whose traditional knowledge (including knowledge concerning potential uses of genetic resources) has been utilized.²⁵

Although these provisions have been described as ushering in 'a new era concerning access to genetic resources',²⁶ they are (like most of the CBD's provisions) broadly phrased, and provide little guidance as to how Parties should go about meeting their obligations.²⁷ As a result, Parties have taken varied approaches to implement-

²¹ For a detailed description of the provisions of the Nagoya Protocol and the need for the Protocol's adoption, see Sonia Peña Moreno 'Understanding the Nagoya Protocol on Access and Benefit-Sharing', in Part III of the current *Review*.

²² CBD Art. 1; Nagoya Protocol Art. 1.

²³ CBD Art. 15.1. Prior to the Convention, genetic resources were considered to be part of the 'common heritage of human kind' and thus freely available to all countries for all purposes. See the 1983 United Nations Food and Agriculture Organization's International Undertaking on Plant Genetic Resources, which was based on the principle that 'plant genetic resources are a heritage of mankind and consequently should be available without restriction' (Lyle Glowka, Françoise Burhenne-Guilmin, Hugh Synge, Jeffrey A. McNeely and Lothar Gündling, *A Guide to the Convention on Biological Diversity*, IUCN Environmental Policy and Law Paper No. 30 (1998) at 78).

²⁴ CBD Art. 15. See also Arts 16 and 19.

²⁵ CBD Art. 8(j).

²⁶ Statement from the CBD's COP to the Commission on Sustainable Development at its Third Session (see CBD Decision I/8, Annex, para. 10).

²⁷ Morten Walloe Tvedt and Tomme Young, *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD*, IUCN Environmental Policy and Law Paper No. 67/2 (2007) at 5; Glowka *et al.*, *supra* note 23, at 1–2.

ing the CBD's ABS provisions, and many Parties have failed to adopt domestic ABS laws, which, on the one hand, clearly identify procedures and requirements for access to genetic resources (thereby providing legal certainty to both users and providers); and, on the other hand, ensure that, when foreign genetic resources are utilized within their jurisdictions, these have been accessed in accordance with the provider country's legislation and that benefit-sharing occurs.²⁸ The Nagoya Protocol seeks to remedy this situation by expanding upon the CBD's requirements regarding both access and benefit-sharing, and requiring user countries (i.e. countries with jurisdiction over the users of genetic resources and associated traditional knowledge) to take various measures to monitor the utilization of genetic resources and to ensure that users comply with provider country legislation.

The Protocol entered into force on 12 October 2014²⁹ and its first COP-MOP was held concurrently with the second week of CBD COP 12, on 13–17 October 2014³⁰ (unfortunately, too late for the meeting's outcomes to be included in this paper). Given the history of Parties' failure to develop domestic measures to implement their ABS commitments under the CBD, it stands to reason that the development of effective procedures and mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance is currently considered a high priority.³¹

3.2 History of the negotiation of compliance procedures and mechanisms for the Nagoya Protocol

Although compliance was one of the most contentious issues in the negotiation of the Nagoya Protocol, much of the debate prior to the Protocol's adoption surrounded measures to ensure compliance with: the national ABS laws of provider countries, the prior informed consent of provider countries and ILCs, and the mutually

²⁸ It was estimated by Tvedt and Young (*supra* note 27, at 1) that, ten years after the adoption of the CBD, less than 10 per cent of Parties had adopted ABS legislation.

²⁹ Article 33.1 provides that the Protocol 'shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the [CBD]'. The Protocol reached 51 ratifications on 14 July 2014 (for the current state of ratifications, see 'Status of signature, and ratification, acceptance, approval or accession', available at <<http://www.cbd.int/abs/nagoya-protocol/signatories/default.shtml>>).

³⁰ CBD Secretariat, *Governments fulfill their commitment: Access and benefit-sharing treaty receives required number of ratifications to enter into force*, press release (14 July 2014), available at <<http://www.cbd.int/doc/press/2014/pr-2014-07-14-Nagoya-Protocol-en.pdf>>; see also <<http://www.cbd.int/npmop1/>>.

³¹ See, for instance, the African Group's comment that 'an effective and legally binding compliance system lies at the very heart of the Nagoya Protocol and is indispensable for the successful implementation of the third objective of the CBD' ('African Group views on elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance', October 2011, available at <<http://www.cbd.int/abs/submissions-compliance/>>). The African Group is a regional negotiating bloc, which attempts to coordinate the positions of African states and to speak with one voice during treaty negotiations. For a discussion on the role of negotiating blocs in international environmental law-making and diplomacy, see Donald Kaniaru, 'International Environmental Negotiation Blocs' in Ed Couzens and Tuula Kolari (eds), *International Environmental Law-making and Diplomacy Review 2006* (University of Joensuu – UNEP Course Series 4, 2007) 3–15.

agreed terms subject to which access to genetic resources was granted.³² The question of measures to ensure compliance with the Nagoya Protocol (or CBD) *itself* did not receive as much attention during the negotiations,³³ and was ultimately addressed as follows in Article 30 of the Protocol:

[t]he Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate. They shall be separate from, and without prejudice to, the dispute settlement procedures and mechanisms established by Article 27 of the [CBD].

Thus, the Nagoya Protocol does not itself create compliance procedures or mechanisms, but instead requires that this be done by the COP-MOP. As noted in Part 2 above, this approach is by no means unusual. Indeed, the only other protocol thus far to have been adopted under the CBD (the Cartagena Protocol on Biosafety) contains a compliance provision identical to Article 30 of the Nagoya Protocol.³⁴ Pursuant to this provision, the Cartagena Protocol's COP-MOP established a Compliance Committee at its first meeting, in 2004,³⁵ following negotiations on draft compliance procedures and mechanisms within the Intergovernmental Committee for the Cartagena Protocol on Biosafety.³⁶ The negotiation of the Nagoya Protocol's compliance regime is being facilitated through a similar mechanism: in 2010, in its deci-

³² This has been a long-standing issue under the CBD. See, for instance, CBD Decision V/26, para. 4(c), through which the COP, in 2000, urged user countries to

adopt, appropriate to national circumstances, legislative, administrative or policy measures consistent with the objectives of the Convention that are supportive of efforts made by provider countries to ensure that access to their genetic resources for scientific, commercial and other uses, and associated knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, as appropriate, is subject to Articles 15, 16 and 19 of the Convention, unless otherwise determined by that provider country.

See also CBD Decision VI/24, para. 8(c), in which the COP decided to reconvene the recently-established Ad Hoc Open-ended Working Group on Access and Benefit-sharing to advise the COP on, *inter alia*, '[m]easures ... to support compliance with prior informed consent of the Contracting Party providing such resources and mutually agreed terms on which access was granted in Contracting Parties with users of genetic resources under their jurisdiction'.

³³ For instance, the group of technical and legal experts on compliance (which was established by the COP in 2008 with the purpose of further examining the issue of compliance and thereby assisting the negotiation of an international regime on ABS) considered issues of non-compliance by Parties with provisions of the CBD to fall outside its terms of reference (the group was established, and its terms of reference prescribed, through CBD Decision IX/12). Although such issues nevertheless received some attention at the group's meeting (with some experts suggesting that 'the international regime may result in international components that could require a full compliance mechanism'), the majority of the meeting's discussion focused on non-compliance with national ABS laws or mutually agreed terms reflected in ABS agreements (Report of the Meeting of the Group of Legal and Technical Experts on Compliance in the Context of the International Regime on Access and Benefit-sharing, UN Doc. UNEP/CBD/WG-ABS/7/3 (2009), see Annex).

³⁴ Cartagena Protocol Art. 34.

³⁵ Cartagena Protocol Decision BS-I/7.

³⁶ This Committee was established by the CBD COP with the purpose of making preparations for the first

sion adopting the Nagoya Protocol, the CBD COP established an Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol (the 'Intergovernmental Committee' or ICNP) to undertake the preparations necessary for the first COP-MOP (at which time the ICNP will cease to exist).³⁷ This decision further identified the Co-Chairs of the ICNP³⁸ and the dates for the Committee's first two meetings,³⁹ and endorsed an initial work plan for the Committee.⁴⁰ In terms of this work plan, Article 30 of the Nagoya Protocol was listed as an issue for consideration by the ICNP at its first meeting.⁴¹

At its first meeting (ICNP 1), in June 2011, the ICNP considered Article 30 of the Nagoya Protocol and adopted a recommendation on '[c]ooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance'.⁴² This recommendation invited Parties to the CBD, other governments, international organizations, ILCs, and relevant stakeholders to communicate to the Executive Secretary their 'views on elements and options' for the procedures and mechanisms referred to in Article 30, 'taking into account the experiences and lessons learned from other relevant multilateral agreements'.⁴³ Further, the Executive Secretary was requested to prepare a synthesis report on the submissions received; to 'draft elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Protocol', on the basis of such submissions; and to convene an expert meeting to review the synthesis report and further refine the draft elements and options.⁴⁴

Subsequent to the first meeting of the ICNP, submissions regarding Article 30 were received from the African Group,⁴⁵ Canada, China, the European Union (EU), Hon-

meeting of the Parties to the Cartagena Protocol (see Decision EM/II/3). Its recommendations on compliance are available at <http://bch.cbd.int/protocol/cpb_art34_info.shtml> (visited 22 June 2014).

³⁷ CBD Decision X/1, paras 7–8.

³⁸ Mr Fernando Casas (from Colombia) and Mr Timothy Hodges (from Canada), who had previously, in 2006, been designated as co-Chairs of the CBD's Ad Hoc Open-ended Working Group on Access and Benefit-sharing for the purposes of elaborating and negotiating the international ABS regime (see CBD Decision VIII/4, part A, para. 5).

³⁹ 6–10 June 2011 and 23–27 April 2012. Although the first meeting of the ICNP was arranged in line with these dates (being held on 5–10 June 2011), the second meeting was held later than originally anticipated, on 2–6 July 2012 (see <<http://www.cbd.int/abs/icnp/default.shtml>>).

⁴⁰ CBD COP Decision X/1, paras 10–12.

⁴¹ *Ibid.* at Annex II.

⁴² ICNP Recommendation 1/4. See also the following documents which the Executive Secretary of the CBD prepared to assist the ICNP in its consideration of Article 30: 'Cooperative procedures and institutional mechanisms to promote compliance with the Protocol and to address cases of non-compliance', UN Doc. UNEP/CBD/ICNP/1/6/rev/1 (2011) and 'Overview of compliance procedures and mechanisms established under other multilateral environmental agreements', UN Doc. UNEP/CBD/ICNP/1/INF/1 (2011).

⁴³ ICNP Recommendation 1/4, para. 1. See also notification 2011-135 (available at <<https://www.cbd.int/doc/notifications/2011/ntf-2011-135-np-en.pdf>> (visited 22 June 2014)), through which Parties, other governments, international organizations, indigenous and local communities and relevant stakeholders were notified to submit their views to the Executive Secretary by 1 September 2011 (as required by Recommendation 1/4).

⁴⁴ ICNP Recommendation 1/4, paras 2–3.

⁴⁵ The African Group is a negotiation bloc which represents the common positions of African countries.

duras, India, Japan, Mexico, the Philippines, the Republic of Korea, Thailand and Switzerland; as well as the Assembly of First Nations,⁴⁶ the International Union for the Conservation of Nature (IUCN)⁴⁷ and the Russian Association of Indigenous Peoples of the North (Rapion).^{48, 49} In line with the ICNP's recommendation, a synthesis of views and possible draft elements and options was then prepared by the Executive Secretary,⁵⁰ and an expert meeting to review this document was convened in February 2012. The report of this meeting⁵¹ was considered in July 2012 at the second meeting of the ICNP (ICNP 2), which adopted a recommendation including draft cooperative procedures and institutional mechanisms on compliance as the basis for future consideration of Article 30.⁵²

In October 2012, CBD COP 11 decided to reconvene the ICNP for a third meeting to address outstanding issues in its work plan, and forwarded the draft cooperative procedures and institutional mechanisms on compliance (as produced by ICNP 2) to this meeting.⁵³ The ICNP's third meeting (ICNP 3) was held in February 2014, and adopted a further recommendation on compliance.⁵⁴

3.3 Progress at ICNP 3

The version of the draft compliance procedures and mechanisms that was crafted at ICNP 2 was heavily bracketed, leaving many aspects of the Protocol's compliance regime for future negotiation. In the plenary of ICNP 3, the Chair invited general remarks on compliance and established a contact group on this issue. The goal of the contact group was to remove as many brackets as possible, so as to produce a text that is ready for further negotiation and (hopefully) approval at the Nagoya Protocol's first COP-MOP. Although the contact group's negotiations continued into the late hours in a crowded room, they were, for the most part, conducted in a spirit of cooperation. At the beginning of the session, the group's co-Chair announced that no new brackets or new text should be added to the document and that easily removable brackets (what the co-Chair described as 'low-hanging fruits') should be removed whenever possible. The discussion below provides an overview of the current draft compliance procedures and mechanisms (as annexed to ICNP Recommen-

⁴⁶ The Assembly of First Nations is a national organization, established by the chiefs of the Indian First Nations in Canada to protect and advance their peoples (see <<http://www.afn.ca/>>).

⁴⁷ The IUCN is a global environmental organization, the mission of which is to 'influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable' (see <<http://www.iucn.org/>>).

⁴⁸ Rapion is an umbrella organization, which represents (and seeks to protect the rights of) 41 groups of indigenous peoples (see <<http://www.rapion.info/>>).

⁴⁹ These submissions can be accessed at <<http://www.cbd.int/ans/submissions-compliance/>>.

⁵⁰ See UN Doc. UNEP/CBD/ABS/EM-COMP/1/2 (2012).

⁵¹ See UN Doc. UNEP/CBD/ICNP/2/12 (2012).

⁵² ICNP Recommendation 2/7.

⁵³ CBD COP Decision XI/1, Part F and Annex IV.

⁵⁴ ICNP Recommendation 3/6.

dation 3/6), describes the primary points of dispute that have arisen in the negotiation thereof,⁵⁵ and highlights the progress achieved at ICNP 3.

3.3.1 Objectives, nature and underlying principles

As is already established in Article 30 of the Nagoya Protocol, the objectives of the compliance procedures and mechanisms will be to promote compliance with the Protocol's provisions and to address cases of non-compliance (including through provisions to offer advice or assistance, where appropriate).⁵⁶

At ICNP 2, negotiators had been unable to reach agreement on the nature of, or the principles underlying, the compliance procedures and mechanisms. There had, for instance, been divergence on whether the procedures and mechanisms should be described as legally binding or legally non-binding, and whether their operation should be guided by the principle of common but differentiated responsibility.⁵⁷ At ICNP 3, however, the contact group encountered no fundamental difficulties with this part of the text, and was able to rid this section of all brackets. The text now states that the procedures and mechanisms shall be 'non-adversarial, cooperative, simple, expeditious, advisory, facilitative, flexible and cost-effective';⁵⁸ and that they shall be guided by the principles of 'fairness, due process, rule of law, non-discrimination, transparency, accountability, predictability, good faith and effectiveness'.⁵⁹ Although no explicit mention is made of the principle of common but differentiated responsibility, the text does provide for particular attention to be given to the special needs of

⁵⁵ Note that not all interventions in respect of each point have been described in the text below.

⁵⁶ The procedures and mechanisms shall also be separate from, and without prejudice to, the dispute settlement procedures and mechanisms provided for in Article 27 of the CBD. ICNP Recommendation 3/6, Annex, Part A, para. 1.

⁵⁷ See bracketed text in ICNP Recommendation 2/7. The principle of common but differentiated responsibility provides that, although all states are responsible for environmental protection and addressing environmental degradation, this responsibility is not borne equally by all states. See principle 7 of the Rio Declaration (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876), which provides:

[i]n 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.

On the principle generally, see also Tuula Kolari (Honkonen), 'The Principle of Common but Differentiated Responsibility in Multilateral Environmental Agreements' in Tuula Kolari (Honkonen) and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007* (University of Joensuu – UNEP Course Series 7, 2008) 21–54.

⁵⁸ ICNP Recommendation 3/6, Annex, Part A, para. 2. Bracketed terms deleted from this paragraph were: 'non-judicial', 'preventive', 'voluntary', 'positive', 'legally binding', and 'legally non-binding' (compare to ICNP Recommendation 2/7).

⁵⁹ ICNP Recommendation 3/6, Part A, para. 3. Bracketed wording deleted from this paragraph included: 'flexibility', 'non-confrontation', 'consistency', 'supportiveness', 'expeditiousness', 'recognizing the common but differentiated responsibilities of Parties', and 'recognizing that all obligations apply equally to all Parties' (compare to ICNP Recommendation 2/7).

developing country Parties⁶⁰ and Parties with economies in transition, taking into consideration the difficulties that such Parties face in implementing the Protocol.⁶¹

3.3.2 Institutional mechanisms

The draft procedures and mechanisms' provisions on institutional mechanisms provide for the establishment of a Compliance Committee⁶² and address a range of issues concerning the composition and operation of this Committee. At ICNP 2, negotiators had managed to agree on provisions regarding such issues as the frequency of Committee meetings,⁶³ the servicing of Committee meetings by the Secretariat,⁶⁴ the development of rules of procedure,⁶⁵ and requirements for the election of the Committee's Chair and Vice Chair.⁶⁶ Other provisions, however, remained heavily bracketed, thus requiring attention at ICNP 3.

One particularly contentious issue has been the composition of the Compliance Committee. Although negotiators at ICNP 2 had been able to agree that the Committee shall include 15 members nominated by Parties (on the basis of three members endorsed by each of the five regional groups of the United Nations),⁶⁷ the issue of ILC representation has been a long standing point of divergence, which continued to impede progress at ICNP 3.

In the meeting's plenary, the EU expressed its willingness to explore ways to involve ILCs in a future compliance mechanism, given the fact that the Protocol directly addresses ILCs. This sentiment was supported by Norway, which highlighted that ILCs have an important role in the building of the compliance mechanism and that the mechanism should make use of their expertise, with some kind of ILC representation on the Compliance Committee. The International Indigenous Forum on Biodiversity (IIFB)⁶⁸ supported these interventions and further proposed that the Committee should include one ILC representative from each UN region, and that regional

⁶⁰ Particularly least developed countries and small island developing states.

⁶¹ ICNP Recommendation 3/6, Annex, Part A, para. 3. As explained in Part 3.3.6 below, this is also a factor that must be taken into account by the Compliance Committee when selecting appropriate response measures.

⁶² *Ibid.* at Part B, para. 1.

⁶³ At least one meeting in each intersessional period, although at ICNP 3 it was agreed that additional meetings may be held subject to the availability financial resources (ICNP Recommendation 2/7, Annex, Part B, para. 6, read with ICNP Recommendation 3/6).

⁶⁴ ICNP Recommendation 2/7, Part B, para. 11.

⁶⁵ The Committee is required to develop its rules of procedure and submit these to the COP-MOP for its consideration and approval (*ibid.* at Part B, para. 7).

⁶⁶ The Committee is required to elect a Chair and a Vice-Chair, who will rotate amongst the five UN regional groups (*ibid.* at Part B, para. 8).

⁶⁷ *Ibid.* at Part B, para 2. See also paras 3 (on nomination of alternate members) and 4 (requiring that Committee members have 'recognized competence, including technical, legal or scientific expertise in the fields covered by the Protocol, such as genetic resources and traditional knowledge associated with genetic resources').

⁶⁸ The IIFB is a collection of representatives from indigenous governments, indigenous NGOs etc., which assists to coordinate indigenous strategies at international environmental meetings, with a particular emphasis on the CBD. See <<http://iifb.indigenousportal.com/>>.

advisory committees should be established, which could receive submissions independently from national authorities and could be summoned for hearings before the Compliance Committee.

Moving to the contact group, the options discussed for ILC involvement in the functioning of the Nagoya Protocol's Compliance Committee included:

- non-voting member(s);
- full member(s);
- observer(s); and
- ability to initiate compliance proceedings through a broad Secretariat trigger.

In the discussions, both Malaysia and the EU highlighted that, seeing as the Nagoya Protocol contains provisions on ILCs, they should be involved in the compliance mechanism. Uganda (on behalf of the African Group) supported the representation of ILCs in the Committee, and suggested that there could be ILC members who are additional to the 15 members already agreed upon, but that (if full members) ILC representatives should have the endorsement of Parties/regions. Both Uganda and Brazil additionally felt that ILCs could be appointed as observers. On this point, the ILC representatives suggested that seven observers might be sufficient, but that there should also be at least one permanent ILC advisor on the Committee. Norway advocated the appointment of ILC representatives as Committee members, and Peru was of the opinion that there should be an odd number of committee members (because an even number might be problematic when it comes to voting) and that two ILC members could thus be sufficient. Another option proposed by Peru was that ILCs could be non-voting Committee members. Ukraine raised the concern that the suggested additional ILC members could affect the balanced regional base of the Committee. As a compromise, the EU suggested a wide Secretariat trigger, which would allow compliance cases to be submitted by ILCs. Some delegates were ready to consider this option. Some negotiators further highlighted that the various UN regions would be free to choose an ILC representative as one of their three Committee members (of course, this possibility already exists under the agreed text, and the point thus failed to add any new options to the discussion).

Ultimately, negotiators were unable to reach consensus on ILC involvement in the functioning of the Compliance Committee, and the text on this issue remains bracketed.⁶⁹ This result did not come as a surprise to many negotiators, who had expected such a conclusion from the outset, given the contentious nature of ILC involvement. There were, however, several other issues regarding institutional mechanisms that were resolved at ICNP 3. These included the term for membership of the Com-

⁶⁹ See ICNP Recommendation 3/6, Annex, Part B, para. 2.

mittee (four years for a full term) and the maximum number of consecutive terms for which a member can remain on the Committee (two).⁷⁰

Another issue on which negotiators were eventually able to agree was the capacity in which members will serve on the Committee. Although some countries (such as Canada) were of the opinion that Committee members should serve as representatives of Parties, the majority of negotiators thought that members should serve in their personal (individual) capacities. Finally, Uganda suggested a compromise text, in which the members ‘serve objectively, in the best interests of the Protocol and in their individual expert capacity’. Other negotiators supported this text, and the brackets were lifted.⁷¹ This approach is quite common for MEA compliance mechanisms, the members of which often serve objectively and in their ‘personal’ or ‘individual’ capacities.⁷²

The question of whether meetings of the Compliance Committee should be open to the public was not resolved at ICNP 2. However, at ICNP 3, negotiators agreed that meetings will be open, unless the Committee decides otherwise; and that, when the Committee is dealing with individual cases of Parties whose compliance is under consideration, meetings will be open to Parties but closed to the public, unless the Party whose compliance is at issue agrees otherwise.⁷³ Negotiators further agreed that two-thirds of the members of the Committee shall constitute a quorum,⁷⁴ but were unable to reach agreement on whether the Committee’s decisions shall be made by consensus only, or whether decisions may be put to a vote (and adopted by qualified majority) when consensus fails. The text on this issue thus remains bracketed.⁷⁵ Whether compliance-related decisions can be made through voting is often a contentious point in the development of MEA compliance regimes. For instance, the Parties to the Cartagena Protocol have yet to reach agreement on this issue, with the result that the rules of procedure for the Protocol’s Compliance Committee (which were adopted in 2005) still contain bracketed text on voting.⁷⁶

3.3.3 Functions of the Committee

At ICNP 3, a bracketed list of functions of the Compliance Committee was deleted in favour of a general provision that the Committee ‘shall, with a view to promoting compliance with the provisions of the Protocol and addressing cases of non-compliance, perform the functions under these procedures and any other functions assigned to it by the COP-MOP’.⁷⁷ Further, brackets were lifted from text concerning

⁷⁰ *Ibid.* at Part B, para. 5.

⁷¹ *Ibid.* at Part B, para. 4.

⁷² See, for instance, Cartagena Protocol Decision BS-I/7, Annex, Part II, para. 3; ITPGREFA Resolution 2/2011, Annex, Part III, para. 3; Kyoto Protocol Decision 27/CMP.1, Annex, Part II, para. 6.

⁷³ ICNP Recommendation 3/6, Annex, Part B, para. 10, read with para. 10 *bis*. The benefit of open meetings is, of course, that this will enhance the transparency of the Committee’s work.

⁷⁴ *Ibid.* at Part B, para. 9.

⁷⁵ See *ibid.* at Part B, para. 9 *bis*.

⁷⁶ See Cartagena Protocol Decision BS-II/1, Annex, rule 18.

⁷⁷ ICNP Recommendation 3/6, Annex, Part C, para. 1. See, however, ‘footnote 12’, which indicates that there are certain functions which may still need to be addressed, depending on how section D, para. 10

consultation by the Committee with compliance committees of other agreements, and the submission of reports by the Committee to meetings of the COP-MOP for consideration and appropriate action.⁷⁸

Despite this progress in cleaning the text, there were intense debates within the ICNP 3 compliance contact group concerning whether it is appropriate for the Nagoya Protocol's compliance mechanism to address compliance by Parties only. According to some negotiators (for instance, those representing Canada, the EU and Japan), the focus of the mechanism provided for in Article 30 of the Protocol must be the compliance of Parties alone. However, others (such as the African Group) have argued that the Committee should also focus on non-compliance by individuals with national ABS laws and the mutually agreed terms subject to which access is granted. Within the contact group, Canada and Uganda were particularly vocal on this issue. Canada suggested that the following (new) paragraph be added to the text on 'Functions of the Committee': 'The Committee shall not consider any questions concerning the interpretation of, implementation of, or compliance with mutually agreed terms and or compliance with national law as such, unless those terms or laws entail cases of non-compliance with the Protocol'.⁷⁹ Clearly, such a provision would keep the focus on the Parties to the Nagoya Protocol and their compliance with the Protocol's provisions.⁸⁰ In response, Uganda wanted the text added by Canada to continue as follows: '... or non-compliance arising from failure to put in place national law by developing countries to the Protocol due to lack of capacity and resources'.⁸¹ Uganda added an additional new paragraph, which provides that '[t]he Committee shall not consider any questions or complaints related to the conservation, exploration, collection, characterization, evaluation and documentation of plant genetic resources'.⁸² These two additions were bracketed, as was the addition made by Canada. Although Uganda's first addition was clearly motivated by concerns (frequently expressed during the negotiations) that developing countries not be penalized under the compliance mechanism for failing to take measures for which they lack the capacity/resources, the purpose of Uganda's second addition, and its relevance to the overall document, remain unclear (at least to the authors of the present paper).

3.3.4 Procedures

Part D of the draft compliance procedures and mechanisms defines who may 'trigger' compliance procedures by making submissions to the Compliance Committee, and describes the procedures to be followed by the Secretariat, the Party/entity mak-

is resolved (note, though, that the reference to para. 10 is an error, and that 'footnote 12' is meant to refer to para. 9, which addresses the questions of compliance that may be examined by the Committee).

⁷⁸ *Ibid.* at Part C, paras 2–3.

⁷⁹ See *ibid.* at Part C, para. 4.

⁸⁰ Several countries (such as Malaysia) did not support this wording, and Peru suggested a sentence according to which '[t]he committee shall not consider MAT and national law as such', but this was not agreed upon.

⁸¹ ICNP Recommendation 3/6, Annex, Part C, para. 4.

⁸² *Ibid.* at Part C, para. 5.

ing the submission, the Party in respect of which the submission is made, and the Committee itself.⁸³

By the end of ICNP 3, it had been agreed that the Nagoya Protocol's compliance procedures can be triggered by any Party with respect to itself, any Party with respect to another Party,⁸⁴ and the COP-MOP.⁸⁵ On the other hand, negotiators were unable to agree on a broad Secretariat trigger, or on whether the Committee may receive submissions directly from members of the public or ILCs. As explained above (under 'Institutional mechanisms'), the debate on ILC involvement in the functioning of the Compliance Committee had led the EU to suggest a wide Secretariat trigger, which would allow the Secretariat to submit issues concerning compliance/non-compliance to the Committee on the basis of, *inter alia*, information submitted to the Secretariat by an ILC. While Norway expressed support for this suggestion, other countries (such as Egypt and India) did not approve, with India commenting that the compliance mechanisms of other treaties have demonstrated that this is not a functional solution. Canada raised the additional concern that a Secretariat trigger would place the Secretariat in a position in which it would have to make decisions about compliance. Little support was found for either a public trigger or an ILC trigger. With regard to the former, Uganda and Peru cautioned that such an approach would require a good filter, and Brazil (supported by Japan) stressed that the purpose of the Committee will be to consider the compliance of *Parties* and that a public trigger would thus be inappropriate. Negotiators were unable to reach consensus, with the result that text on the above three options (Secretariat trigger, public trigger, and ILC trigger) remains bracketed.⁸⁶

A further point of dispute concerned situations in which the Committee may decide *not* to consider a submission in respect of compliance or non-compliance. The bracketed text that was forwarded to the Committee by CBD COP 11 provided that this could occur if a submission is either '*de minimis*' or 'ill-founded'.⁸⁷ At ICNP 3, these terms (both of which are used in decisions establishing compliance procedures for several other MEAs⁸⁸) were debated, and Canada highlighted that they have different meanings in the legal sense. Peru thought that the expression 'ill-founded' was

⁸³ By the end of ICNP 2, negotiators had already agreed upon the required content of submissions, and that these must be submitted to the Secretariat, which will forward submissions to the Committee and the Party in respect of which the submission is made. This Party should submit a response and relevant information, which is also channeled to the Committee through the Secretariat (ICNP Recommendation 2/7, Annex, Part D, paras 3–7). At ICNP 3, these provisions were further clarified by removing brackets on the timeframes within which each step should be taken (see ICNP Recommendation 3/6, Annex, Part D, paras 3–6).

⁸⁴ Bracketed text specifying that submissions can only be made where the Party making the submission is *affected by* the alleged non-compliance, and that submissions may be made in respect of *non-Parties* was deleted (see ICNP Recommendation 2/7, Annex, Part D, para. 1(b)).

⁸⁵ ICNP Recommendation 3/6, Annex, Part D, para. 1(a)–(c).

⁸⁶ See *ibid.* at Part D, para. 1(d)–(f).

⁸⁷ CBD Decision XI/1, Annex IV, Part D para. 8.

⁸⁸ See, for instance, Kyoto Protocol Decision 27/CMP.1, Annex, Part VII para. 2; Cartagena Protocol Decision BS-I/7, Annex, Part IV, para. 1; ITPGRFA Resolution 2/2011, Annex, Part VI, para. 7.

problematic, and the EU suggested that ‘manifestly ill-founded’ might be more appropriate. Uganda, while acknowledging that this suggestion was an improvement, still considered ‘ill-founded’ to be inappropriate wording. Egypt wanted to add ‘is anonymous’ as a new ground for refusing to consider a submission, while Malaysia supported the text ‘does not meet the requirements set out in paragraph 3’ (i.e. the requirements prescribed for submissions on compliance/noncompliance). After lengthy discussion, all of these options were left bracketed.⁸⁹

Finally, provisions on the participation of the Party or entity that makes a submission in its consideration by the Committee, and the authority of the Committee to examine questions of compliance beyond those submitted to it through the triggering mechanisms described above⁹⁰ also remained bracketed.⁹¹

3.3.5 Information for and consultation by the Committee after the triggering of the procedures

This part of the Nagoya Protocol’s draft compliance procedures and mechanisms was considerably streamlined at ICNP 3, with much of the bracketed ICNP 2 text being deleted, and brackets being lifted from most of the remaining text. The text now provides that the Committee may ‘seek, receive and consider information from relevant sources’;⁹² ‘seek advice from independent experts’; and ‘undertake, upon invitation of the Party concerned, information gathering in the territory of that Party’.⁹³ The only bracketed wording that remains in this part of the document relates to whether ‘relevant sources’ includes ILCs.⁹⁴

3.3.6 Measures to promote compliance and address cases of non-compliance

The draft compliance procedures and mechanisms describe the measures that the Nagoya Protocol’s Compliance Committee and COP-MOP are authorized to take to promote compliance and to respond to cases of non-compliance, as well as the factors that must be taken into account when selecting appropriate measures. Such measures and factors are clearly central to the effectiveness of any treaty compliance mechanism, and their negotiation is thus invariably one of the more challenging aspects of developing an MEA’s compliance procedures.

At ICNP 3, the compliance contact group managed to delete, or to remove brackets from, much of the text on compliance measures, resulting in a far cleaner and shorter text than that which had been presented to CBD COP 11. It was agreed that the Compliance Committee will have the mandate not only to make recommendations

⁸⁹ ICNP Recommendation 3/6, Annex, Part D, para. 7.

⁹⁰ Such questions may arise from Parties’ national reports, or from other relevant information that becomes available to the Committee (for instance, information from the public or ILCs).

⁹¹ ICNP Recommendation 3/6, Annex, Part D, paras 8–9.

⁹² The reliability of such information must be ensured (*ibid.* at Part E, para. 1).

⁹³ *Ibid.* at Part E, paras 1–3.

⁹⁴ See *ibid.* at Part E, para. 1.

to the COP-MOP, but also to offer advice or facilitate assistance to the Party whose compliance is at issue (the ‘Party concerned’); request or assist the Party concerned to develop a compliance action plan; and invite the Party concerned to submit progress reports on its efforts to comply with the Protocol.⁹⁵ Upon the recommendation of the Committee, these measures may also be taken by the COP-MOP, which may additionally facilitate ‘access to financial and technical assistance, technology transfer, training and other capacity building measures’ (due to a reluctance of some negotiators to undertake financial commitments, it has not yet been agreed whether the COP-MOP may *provide* such assistance⁹⁶); or ‘[i]ssue a written caution, statement of concern or a declaration of non-compliance to the Party concerned’.⁹⁷

The most contentious point regarding response measures has been whether the COP-MOP may take coercive measures that are more severe than a caution in response to non-compliance. In the ICNP 3 plenary, the African Group highlighted the need for punitive measures when non-compliance is repetitive, commenting that, in such instances, mere reminders of non-compliance would be a ‘big joke’; and the EU commented that the compliance mechanism should be balanced in terms of both facilitative and stronger measures. However, other countries (such as Japan) expressed their opposition to all forms of sanctions. In the compliance contact group, delegates were able to delete much of the bracketed text on specific types of sanctions (such as the publication of cases of non-compliance and the application of financial penalties or trade sanctions). However, bracketed provisions on the suspension of specific rights and privileges, and on the imposition of ‘appropriate measures’ in cases of grave or repeated non-compliance, remain in the text for future negotiation.⁹⁸

In sum, the ICNP has thus far agreed that, while the Compliance Committee may take *limited* measures to facilitate compliance, the mandate to assist with financial matters/capacity-building and to impose any kind of sanction as a response to non-compliance will lie exclusively with the COP-MOP. Whether permissible punitive measures will include anything other than the issuance of a written caution/statement of concern/declaration of non-compliance remains to be decided. It has further been agreed that, when considering measures to promote compliance and address cases of non-compliance, the Compliance Committee shall take into account ‘[t]he capacity of the Party concerned to comply’; ‘[t]he special needs of developing country Parties, in particular the least developed countries and small island developing States amongst them, and Parties with economies in transition’; and ‘[s]uch factors as the cause, type, degree and frequency of non-compliance’.⁹⁹ Negotiators have

⁹⁵ *Ibid.* at Part F, para. 2.

⁹⁶ *Ibid.* at Part F, para. 2(*bis*)(b). The compliance procedures of several MEAs specify that the MEA’s governing body may indeed provide such assistance (see, for instance, Kyoto Protocol Decision 27/CMP.1, Annex, Part XIV; Cartagena Protocol Decision BS-I/7, Annex, Part VI, para. 2(a); ITPGRFA Resolution 2/2011, Annex, Part VII, para. 2(a)).

⁹⁷ ICNP Recommendation 3/6, Annex, Part F, para. 2(*bis*)(a)–(c).

⁹⁸ *Ibid.* at Part F, paras 2(e) and (d) respectively.

⁹⁹ *Ibid.* at Part F, para. 1.

thus recognized that some countries are in a better position to implement their obligations under the Nagoya Protocol than others, that there are different causes of non-compliance, and that both of these factors have a bearing on appropriate response measures. It is, however, interesting that the current draft compliance procedures and mechanisms require such factors to be considered by the Compliance Committee, but not by the COP-MOP. The factors would surely be relevant when determining whether to facilitate ‘access to financial and technical assistance, technology transfer, training and other capacity building measures’ and whether to impose coercive measures. Given that both of these measures will fall exclusively within the mandate of the COP-MOP, it seems appropriate that the COP-MOP, and not only the Compliance Committee, be required to consider the factors.¹⁰⁰

3.3.7 Ombudsman

During the negotiation of the Nagoya Protocol itself, the African Group proposed that the Protocol might establish an office of an ‘international access and benefit-sharing ombudsperson’ to support developing countries and ILCs in identifying breaches of rights, and to provide technical and legal support for the effective redress of such breaches.¹⁰¹ However, this provision was not included in the adopted text. In the negotiation of the Protocol’s compliance regime, the African Group is again advocating for the establishment of an ABS ombudsman, and has suggested that such ombudsman could assist developing countries and ILCs in identifying instances of non-compliance and making submissions to the Compliance Committee. This provision was only briefly considered at ICNP 3, and remains in brackets.¹⁰²

3.3.8 Review of procedures and mechanisms

Article 31 of the Nagoya Protocol requires the Protocol’s COP-MOP to evaluate the Protocol’s effectiveness four years after its entry into force, and thereafter at intervals determined by the COP-MOP. At ICNP 2, it was agreed that, as part of this assessment, the COP-MOP shall review the effectiveness of the Protocol’s compliance procedures and mechanisms, and take appropriate action.¹⁰³ At ICNP 3, bracketed text mandating the Compliance Committee to identify the need for any additional review was deleted, with the result that the draft compliance procedures and mechanisms’ text on ‘Review of procedures and mechanisms’ is now completely unbracketed.¹⁰⁴

¹⁰⁰ Compare, for instance, to Cartagena Protocol Decision BS-I/7, Annex, Part VI, para. 2, which requires the Protocol’s COP-MOP to consider the same factors as the Compliance Committee when deciding upon response measures.

¹⁰¹ See Art. 14 *bis* of the draft of the Nagoya Protocol that the ABS Working Group forwarded to CBD COP 10 (Report of the Third Part of the Ninth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UN Doc. UNEP/CBD/COP/10/5/Add.5 (2010), Annex 1).

¹⁰² ICNP Recommendation 3/6, Annex, Part F (*bis*).

¹⁰³ ICNP Recommendation 2/7, Annex, Part G.

¹⁰⁴ ICNP Recommendation 3/6, Annex, Part G.

4 Analysis of progress at ICNP 3 and suggestions regarding the future of the Nagoya Protocol's compliance negotiations

As instructed by its co-Chair at the start of negotiations, the ICNP 3 contact group on compliance managed to pluck much of the 'low-hanging fruit', resulting in a far cleaner, more streamlined draft text on compliance procedures and mechanisms than that with which the ICNP was presented by CBD COP 11. Much of the emerging compliance framework is broadly similar to the compliance mechanisms of other MEAs (in particular, the Cartagena Protocol and the International Treaty on Plant Genetic Resources for Food and Agriculture). However, while negotiators have drawn guidance from the experiences of other treaties, they have also been cognizant of the need to develop compliance procedures and mechanisms that are tailored specifically for the Nagoya Protocol. There are thus a number of important issues on which agreement remains outstanding, some of which are quite unique when compared to other compliance negotiations. This Part of the paper provides a brief analysis of the most contentious sticking points in the Nagoya Protocol's compliance negotiations, and suggestions on how these might be addressed at the first COP-MOP or future meetings of the ICNP.

4.1 The role of indigenous and local communities

During the negotiation toward the Nagoya Protocol itself, one of the most difficult issues on which to reach consensus was the extent to which the Protocol should address traditional knowledge and genetic resources held by ILCs. Now that the Protocol has been adopted and includes several commitments in respect of ILCs, it is thus hardly surprising that debate continues over the role that such communities will play in the functioning of the Protocol once it has entered into force. Indeed, the role of ILCs has arisen not only in the compliance negotiations, but also discussions regarding the development of a global multilateral benefit-sharing mechanism,¹⁰⁵ monitoring and reporting, and the ABS Clearing-House.^{106, 107}

Such discussions are of interest insofar as they address the evolving role of non-state actors in international environmental law. The traditional view of public international law is that it only creates rights and responsibilities for *states*, and that non-state actors consequently are not the subjects of, and may not participate in, internation-

¹⁰⁵ Article 10 of the Nagoya Protocol requires Parties to 'consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant prior informed consent'.

¹⁰⁶ In terms of Art. 14(1) of the Nagoya Protocol, information relating to ABS (particularly information that is made available by Parties concerning their implementation of the Protocol) is to be shared through an ABS Clearing-House, established under the CBD's existing Clearing-House mechanism.

¹⁰⁷ IISD Reporting Services, 'ICNP 3 Highlights: Tuesday, 25 February 2014', *Earth Negotiations Bulletin*, Vol. 9 No. 614, 26 February 2014, available through <<http://www.iisd.ca/enbvol/enb-background.htm>>, at 2.

al law.¹⁰⁸ In recent decades, however, this perception has begun to change. Non-state actors (particularly non-governmental organizations (NGOs)) have played a role in the development of many of today's environmental treaties, and often contribute to the functioning thereof.¹⁰⁹

In the context of the Nagoya Protocol specifically, the CBD COP recognized from the outset that a range of non-state actors needed to participate in the negotiation of an international regime on ABS – including ILCs, NGOs, industry, and scientific and academic institutions.¹¹⁰ The meetings of the CBD's ABS Working Group (which was mandated to negotiate this regime¹¹¹) were thus attended by a wide variety of observers,¹¹² and the Interregional Negotiating Group that was eventually convened to finalize a draft protocol included two representatives each from ILCs, civil society, industry, and public research groups.¹¹³ In the wake of the Nagoya Protocol's adoption, non-state actors (including groups representing the interests of ILCs) continued to participate in the ICNP discussions in preparation for the Protocol's entry into force.¹¹⁴

Of course, participation does not equate to decision-making power. The final say regarding the text of the Nagoya Protocol belonged to states alone, as will any final decisions regarding the Protocol's compliance procedures and mechanisms. That said, the involvement of ILCs in the functioning of the Nagoya Protocol's compliance mechanism is currently supported not only by ILCs themselves, but also by numerous states. As explained above, the EU, Norway and Malaysia, for instance, have highlighted that the Nagoya Protocol contains provisions on ILCs, and that ILCs should thus play a role in the Protocol's future functioning. Indeed, the Nagoya Protocol is significantly more progressive than its parent Convention insofar as it recognizes that ILCs have rights in respect of traditional knowledge associated with genetic resources, and that ILCs may additionally hold rights in respect of genetic resources themselves. Although most of the Protocol's provisions on ABS arrangements with ILCs are phrased in weaker language than its provisions on ABS arrangements with Parties,¹¹⁵ this is not the case with Article 5(5), which imposes a firm obligation upon

¹⁰⁸ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (3rd ed., Foundation Press, 2006) at 255.

¹⁰⁹ For instance, by providing scientific advice/information to assist decision-making, providing data management services, monitoring implementation, and assisting states to implement MEAs.

¹¹⁰ CBD Decision VII/19, section D, operative para. 1.

¹¹¹ *Ibid.*

¹¹² See the reports of the various ABS Working Group meetings, available at <<http://www.cbd.int/abs/reports/>>.

¹¹³ Report of the Second Part of the Ninth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, UN Doc. UNEP/CBD/COP/10/5/Add.4 (2010) at para. 20.

¹¹⁴ See the reports of the various ICNP meetings, available at <<http://www.cbd.int/abs/icnp/default.shtml>>.

¹¹⁵ On the sharing of benefits arising from the utilization of genetic resources, compare Art. 5(1) (requiring benefit-sharing with the Party providing the resources) with Art. 5(2) (requiring measures 'with the aim of ensuring' benefit-sharing with ILCs where genetic resources are held by ILCs 'in accordance with domestic legislation regarding the established rights' of ILCs over these genetic resources); and on prior informed consent for access to genetic resources, compare Art. 6(1) (requiring prior informed consent from

Parties to take measures to share benefits arising from the use of traditional knowledge associated with genetic resources with the ILCs which hold such knowledge, in accordance with mutually agreed terms.¹¹⁶ Contrary to the traditional perception of public international law, the Nagoya Protocol thus creates rights not only for states vis-à-vis one another, but also for ILCs.

Given the Nagoya Protocol's provisions on ILCs, it would certainly make sense for such communities to play some kind of role in the Protocol's Compliance Committee. Expecting that full membership positions on the Committee be reserved exclusively for ILC representatives is probably too optimistic, given the resistance that some negotiators have shown to ILC involvement. The EU's compromise suggestion regarding a broad Secretariat trigger, which would provide ILCs with a means of initiating compliance procedures, might be more feasible. Although triggers of this nature are very uncommon, they are not without precedent. The best example to date is that of the United Nations Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice (the Aarhus Convention).¹¹⁷ As in the case of the Nagoya Protocol, the Aarhus Convention establishes rights not only for states, but also for non-state actors.¹¹⁸ Article 15 of the Aarhus Convention requires the Convention's MOP to establish arrangements for reviewing compliance and (unlike Article 30 of the Nagoya Protocol) provides specifically that '[t]hese arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention'. In response, the Convention's first MOP adopted a decision on compliance,¹¹⁹ which established a Compliance Committee and allows for this Committee's compliance procedures to be triggered by a Party in respect of another Party, a Party in respect of itself, the Secretariat, or

the Party providing the resources, unless otherwise determined by that Party) with Art. 6(2) (requiring measures '[i]n accordance with domestic law ... with the aim of ensuring' prior informed consent or approval and involvement of ILCs where ILCs 'have the established right to grant access to such resources'). See also Art. 7 (on prior informed consent or approval and involvement of ILCs for access to their traditional knowledge), which is qualified by the phrases '[i]n accordance with domestic law' and 'with the aim of ensuring'.

¹¹⁶ See also Art. 12, which requires Parties (in implementing their obligations under the Protocol and in accordance with domestic law) to take into consideration ILCs' customary laws, community protocols and procedures, as applicable; to establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their ABS obligations; to endeavor to support, as appropriate, the development by ILCs of community protocols regarding access to traditional knowledge associated with genetic resources, minimum requirements for mutually agreed terms to secure benefit-sharing from the use of such traditional knowledge, and model contractual clauses for benefit-sharing arising from the use of such traditional knowledge; and (in their implementation of the Protocol) to as far as possible not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst ILCs.

¹¹⁷ 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, 2161 *United Nations Treaty Series* 447, <<http://ec.europa.eu/environment/aarhus/>>.

¹¹⁸ Though, admittedly, the non-state emphasis is far more pronounced in the Aarhus Convention than in the Nagoya Protocol.

¹¹⁹ Aarhus Convention Decision 1/7.

members of the public (in which case the Committee may reject the submission on certain grounds and must consider whether any domestic remedies are available).¹²⁰

The creation of an Aarhus-like triggering system for the Nagoya Protocol (or of a broad Secretariat trigger, allowing the Secretariat to act as a filter against frivolous submissions) would both reflect the Protocol's concern for the rights of ILCs and potentially make for a more effective compliance mechanism. The experience of other MEAs has demonstrated that Parties are often reluctant to initiate compliance proceedings in respect of themselves or against other Parties. For instance, in the case of the Cartagena Protocol, the Compliance Committee, despite having been established a decade ago, has not yet received any submissions from Parties, with the result that its work has been restricted to considering general issues of compliance on the basis of information in Parties' national reports and the Protocol's Clearing-House.¹²¹ Although NGOs have made submissions to the Committee alleging non-compliance of particular Parties with their obligations under the Protocol, the Committee has responded that it lacks the mandate to receive and consider such submissions.¹²² The Committee has decided that, should it receive allegations from non-Party sources concerning the state of compliance of a Party, it may 'invite the Party concerned to indicate, if the Party so wishes, to the Committee to consider the information received with a view to providing advice and assistance to that Party, as appropriate'.¹²³ However, this procedure has yet to be followed by the Committee. In the context of the Nagoya Protocol, a non-state trigger would be particularly important if the Compliance Committee is not mandated to examine questions of compliance beyond those submitted through triggering mechanisms (for instance, systematic issues of general non-compliance which arise from Parties' national reports). As noted in Part 3.3.4 above, the ICNP has failed to reach agreement on whether to include such a provision.

In any event, some form of compromise on ILC involvement will need to be reached before the Nagoya Protocol's compliance mechanism is established. At the final session of the compliance contact group at ICNP 3, with text on ILCs still bracketed, Sweden suggested that a meeting of a regionally balanced expert group be convened to explore different options for the participation of ILCs in cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and

¹²⁰ *Ibid.* at Annex, paras 15 (Party-to-Party trigger), 16 (Party's self trigger), 17 (Secretariat trigger), and 18–24 (public trigger). Interestingly, the Decision also allows members of the Committee to be nominated by NGOs (para. 4), although the actual election of members is the responsibility of the MOP (para. 7).

¹²¹ See reports of the various Compliance Committee meetings (available at <http://bch.cbd.int/protocol/cpb_art34_info.shtml#cc1>).

¹²² See Report of the Compliance Committee Under the Cartagena Protocol on Biosafety on the Work of its Fifth Meeting, UN Doc. UNEP/CBD/BS/CC/5/4 (2008), para. 24; Report of the Compliance Committee Under the Cartagena Protocol on Biosafety on the Work of its Sixth Meeting, UN Doc. UNEP/CBD/BS/CC/6/4 (2009), para. 20.

¹²³ Report of the Compliance Committee Under the Cartagena Protocol on Biosafety on the Work of its Fifth Meeting, UN Doc. UNEP/CBD/BS/CC/5/4 (2008), para. 25.

to address cases of non-compliance. Such a meeting could have explored approaches for utilizing the expertise of ILC representatives in promoting compliance and addressing non-compliance; different options to enable ILCs to raise compliance-related issues; and different procedures for appointing ILC representatives to participate in the Compliance Committee. The result of this work could then have been considered by the Nagoya Protocol's first COP-MOP, at which it is hoped that compliance procedures and mechanisms will be established. However, the proposal to convene a meeting of experts was opposed in plenary (at which GRULAC¹²⁴ highlighted that this suggestion had been made too late to be considered by the meeting) and was withdrawn by Sweden. Further discussions on ILC involvement will thus unfortunately need to wait until the Nagoya Protocol's first COP-MOP.

4.2 Whether the Compliance Committee's functions should include consideration of non-compliance with national ABS laws and mutually agreed terms

As noted in Part 3.2 above, the primary focus of compliance discussions prior to the adoption of the Nagoya Protocol was on how to ensure compliance with the national ABS laws of provider countries, and with the mutually agreed terms subject to which access is granted. As a result of these discussions, the Nagoya Protocol contains several provisions aimed at achieving user country cooperation in ensuring compliance with provider country ABS laws¹²⁵ and mutually agreed terms,¹²⁶ and in monitoring the utilization of genetic resources so as to detect instances of non-compliance.¹²⁷ Should a *Party* fail to comply with these provisions (for instance, by failing to establish a checkpoint to monitor the utilization of genetic resources, or failing to develop measures to ensure that genetic resources utilized within its jurisdiction have been accessed in accordance with the ABS laws of provider countries), this would be an appropriate issue for consideration by the Protocol's Compliance Committee. The Protocol does not, however, impose obligations on non-state actors directly. Nor does Article 30 of the Protocol call for procedures and mechanisms to address non-compliance with domestic laws or mutually agreed terms (rather, Article 30 refers to

¹²⁴ The Group of Latin American and Caribbean countries.

¹²⁵ Article 15 requires each Party to take measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with the domestic ABS requirements (as regards prior informed consent and mutually agreed terms) of the Party providing the resources; to take measures to address situations of non-compliance; and to cooperate with other Parties in cases of alleged violation of domestic ABS requirements.

¹²⁶ Article 17 requires each Party to designate one or more checkpoints to collect information on such issues as the source of genetic resources and whether prior informed consent has been obtained and mutually agreed terms established, and to take appropriate measures to address cases of non-compliance. This article additionally provides for internationally recognized certificates of compliance, which shall serve as evidence that genetic resources have been accessed in accordance with the ABS requirements of a provider country.

¹²⁷ Article 18 requires each Party, *inter alia*, to ensure that an opportunity to seek recourse is available under its legal system for disputes arising from mutually agreed terms, and take measures regarding access to justice and the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.

‘cooperative procedures and institutional mechanisms to promote compliance with *the provisions of this Protocol* and to address cases of non-compliance’¹²⁸).

The arguments of some negotiators that the Compliance Committee should have the mandate to consider non-compliance with domestic laws and mutually agreed terms thus appear to be misplaced and without legal basis. Domestic courts provide the most appropriate fora for adjudicating contractual disputes and alleged violations of domestic legislation (the content of which will inevitably vary from one state to another), and a COP-MOP decision that such issues can be addressed at the international level is not mandated by the text of the Nagoya Protocol and would constitute an inappropriate intrusion on state sovereignty. Indeed, the compliance mechanisms that have thus far been established under other MEAs only address the compliance of Parties, and the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements¹²⁹ (which, although not legally binding, are intended to guide the development of compliance regimes within the framework of international agreements¹³⁰) define ‘compliance’ as ‘the fulfilment *by the contracting parties of their obligations* under a multilateral environmental agreement and any amendments to the multilateral environmental agreement’.¹³¹

Although it would be inappropriate for the Nagoya Protocol’s Compliance Committee to address breaches of domestic ABS laws and mutually agreed terms directly, one solution to this debate could perhaps be to establish an ABS ombudsman with a limited mandate to assist developing countries and ILCs with addressing such breaches. A bracketed provision on an ABS ombudsman is already included in the draft compliance procedures and mechanisms.¹³² Although this provision has been a controversial point in previous negotiations, it could potentially be accepted if further elaborated. The ombudsman could, for instance be a purely facilitative mechanism, with the purpose of advising Parties on domestic ABS issues (such as the development and enforcement of ABS legislation) and could potentially circulate between different UN regions. The acceptance of an ombudsman with a limited mandate could be one means of breaking the current deadlock between those countries and negotiating blocs (such as Canada, the EU, GRULAC and Japan) which insist that the Nagoya Protocol’s compliance mechanism only address the compliance of Parties and those (the African Group in particular) which are advocating a more extensive mandate.

¹²⁸ Emphasis added.

¹²⁹ UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, available at <<http://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf>> (visited 23 June 2014).

¹³⁰ *Ibid.* para. 1.

¹³¹ *Ibid.* para. 9 (emphasis added).

¹³² See ICNP Recommendation 3/6, Annex, Part F *bis*.

4.3 The COP-MOP's authority to impose coercive response measures

The most significant outstanding issue in the negotiations regarding non-compliance response measures is the extent to which the COP-MOP may impose responses aimed at coercing, rather than facilitating, compliance. Although there are examples of MEA compliance regimes that expressly provide for a range of punitive sanctions, this is uncommon amongst the biodiversity-related MEAs of global scope. The major exception is the compliance procedures of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'), which make use of a wide range of non-compliance penalties, including trade suspensions.¹³³

The African Group has, from the outset, suggested that cases of severe or recurrent non-compliance with the Nagoya Protocol should be addressed by a CITES-style compliance regime, which provides for punitive remedies and sanctions.¹³⁴ The Group reiterated the need for coercive measures in the plenary of ICNP 3, questioning the value of 'reminders' of non-compliance when such non-compliance is repetitive. Although this is a fair point (and although it might appear absurd for a mechanism aimed at ensuring compliance with legal obligations to lack the authority to impose penalties), it should be remembered that states are only obliged to implement those treaties to which they express their consent to be bound and that, even once such consent has been expressed, states are generally entitled to withdraw from treaties. Indeed, Article 35 of the Nagoya Protocol provides that '[a]t any time after two years from the date on which [the] Protocol has entered into force for a Party, that Party may withdraw from [the] Protocol by giving written notification to the Depositary'.¹³⁵ Thus, should the Nagoya Protocol's compliance regime provide for coercive measures that some countries perceive to be too stringent, this could potentially have an impact on the number of ratifications/accessions which the Protocol receives or result in future withdrawals from the Protocol.

In any event, the Nagoya Protocol's ICNP has agreed that the COP-MOP may address cases of non-compliance by issuing a written caution/statement of concern/declaration of non-compliance; and only two bracketed provisions on coercive measures remain in the draft compliance procedures and mechanisms – one general in nature, and one relating to the suspension of rights and privileges. Suspensions of rights and privileges are used as a non-compliance response measure under several MEAs, including the Montreal Protocol¹³⁶ and the Kyoto Protocol,¹³⁷ and could, for instance,

¹³³ CITES Resolution Conf. 14.3, Annex, paras 29–30.

¹³⁴ 'African Group views on elements and options for cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and to address cases of non-compliance', October 2011, available at <<http://www.cbd.int/abs/submissions-compliance/>>, at 6.

¹³⁵ Article 35 provides further that '[a]ny such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal'.

¹³⁶ Decision IV/5, read with Annex V to UN Doc. UNEP/OzL.Pro.4/15 (1992).

¹³⁷ Kyoto Protocol Decision 27/CMP.1, Annex, Part XV, para. 5.

include the suspension of voting rights at meetings of the COP-MOP or the suspension of the right to participate as members of any subsidiary bodies that are established by the COP-MOP. However, given the current divergence of positions on coercive measures, it is perhaps more likely that negotiators will agree on the broader provision concerning the imposition of ‘appropriate measures’ in ‘cases of grave or repeated non-compliance’. Of course, such a provision essentially sidesteps the issue, leaving to future COP-MOPs the decision as to what types of sanction might be appropriate. A similar provision was included in the decision establishing compliance procedures for the Cartagena Protocol, which states that, in cases of repeated non-compliance, the COP-MOP may ‘take such measures as may be decided by the Conference of the Parties serving as the meeting of the Parties to the Protocol at its third meeting’.¹³⁸ Such measures have never been decided upon, as the COP-MOP (at its fourth meeting) opted to ‘defer consideration or, as appropriate, adoption of measures on repeated cases of non-compliance until such time as experience may justify the need for developing and adopting such measures’.¹³⁹

Should a general provision regarding appropriate measures in cases of grave or repeated non-compliance be included in the decision establishing the Nagoya Protocol’s compliance regime, it could (if the Cartagena Protocol’s experience is anything to go by) be a long time before this issue is revisited. This is especially likely if compliance procedures can only be triggered by Parties and very few allegations of non-compliance are submitted to the Committee. Nevertheless, deferring the decision on specific coercive measures may be the only means of finalizing the text on response measures in time for adoption at COP-MOP 1.

5 Conclusion

The Nagoya Protocol’s ICNP has made significant progress in negotiating the Protocol’s compliance procedures and mechanisms. Agreement has thus far been reached on such issues as the establishment of a Compliance Committee; the objectives and underlying principles thereof; the inclusion on the Committee of three members from each UN region (each of whom will sit for no more than two consecutive four year terms and shall serve in the best interests of the Protocol and in their individual expert capacity); the frequency of Committee meetings; the holding of open meetings (unless the Committee decides otherwise); the submission of compliance issues by Parties and the COP-MOP; and the various facilitative measures which the Committee and/or the COP-MOP may take to promote compliance and address non-compliance. However, several bracketed provisions remain, which require further negotiation at the Nagoya Protocol’s first COP-MOP.

¹³⁸ Cartagena Protocol Decision BS-I/7, Annex, Part VI.

¹³⁹ Cartagena Protocol Decision BS-IV/1, para. 3. See also Decision BS-III/1, paras 1–2

Many of the issues that negotiators have had to address in developing a compliance regime for the Nagoya Protocol are broadly relevant to MEA compliance regimes in general. The above discussion thus provides an example of common features of MEA compliance procedures and mechanisms, and of the types of issues that may frustrate compliance negotiations. That said, it is possible that the COP-MOP decision on compliance procedures and mechanisms for the Nagoya Protocol will include several innovative features (in particular, the involvement of ILCs and the establishment of an ABS ombudsman). If such features are indeed included, and prove to be effective, they could be drawn upon in developing or amending the compliance regimes of other MEAs in the future.

A final point that warrants consideration is that, even if an MEA has a well-structured compliance mechanism, with multiple 'triggers' and the authority to both facilitate and enforce compliance, this will not necessarily translate into meaningful national action if the provisions of the MEA itself are weakly worded (so as to be essentially discretionary) or vague (and thus capable of multiple interpretations). The Nagoya Protocol's negotiation was characterized by a number of intense disagreements that, ultimately, could only be resolved by completely deleting certain provisions and replacing others with extremely broad language. Indeed, the Protocol's final text has been described as a 'masterpiece in creative ambiguity',¹⁴⁰ and there is currently a great deal of uncertainty concerning how the Protocol will be implemented. Although this cannot be completely resolved by a strong compliance mechanism, the Compliance Committee could potentially play an important role in providing Parties with guidance as to what types of measures may constitute compliance with the Protocol's provisions.

¹⁴⁰ IISD Reporting Services, 'Summary of the Tenth Conference of the Parties to the Convention on Biological Diversity: 18–29 October 2010', *Earth Negotiations Bulletin*, Vol. 9, No. 544, 1 November 2010, at 26.

PROMOTION OF RENEWABLE ENERGY FOR CLIMATE CHANGE AND THE ‘FACILITATIVE’ FUNCTION OF IRENA

*Seita Romppanen*¹

1 Introduction

The Fifth Assessment Report from the Intergovernmental Panel on Climate Change (IPCC)² states that human influence on the climate system is evident. Among the various human activities that produce greenhouse gases (GHG), the use of energy is by far our greatest emitter. The amounts of total energy consumption and the total emissions of carbon dioxide (CO₂) alone have both doubled between 1973 and 2011.³ The IPCC Fifth Assessment Report concluded that in 2010 as much as 78 per cent of all emissions originated from the combustion of fossil fuels and from other industry-related processes.⁴ As all societies depend on energy services to be able to meet basic human needs, energy-related emissions in conjunction with climate change mitigation are a pressing issue for governments around the world.

If implemented properly, renewable energy has good potential to displace GHG emissions from the combustion of fossil fuels, and thus renewables can help us in our efforts to mitigate climate change. Moreover, renewable energy comes with wid-

¹ M.Sc (Env Law) LL.M (Intl Env Law), Lecturer and PhD candidate at the University of Eastern Finland, Law School; e-mail: seita.romppanen@uef.fi. NOTE: This paper underwent a formal anonymous review process, through two anonymous reviewers. The reports of these reviewers, and any relevant further correspondence, are kept on file with the editors.

² See <<http://www.ipcc.ch/>>.

³ According to the International Energy Agency's (IEA) estimates for 1973–2011, the total final consumption of energy has increased from 4674 million tonnes of oil equivalent (Mtoe) to 8 918 Mtoe, and the total emissions of CO₂ have increased from 15 628 million tonnes (Mt) to 31 342 Mt. IEA, 'Key World Energy Statistics', available at <<http://www.iea.org/statistics/>> (visited 19 March 2014), at 28 and 44.

⁴ IPCC, Fifth Assessment Report, Summary for Policymakers, in *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC SPM WGIII, final draft), available online at <<http://mitigation2014.org/>> (visited 24 April 2014), at 5.

er associated benefits, as it is also able to contribute to social and economic development, to a secure and sustainable energy supply and access, as well as to the reduction of negative impacts of energy provision on the environment in general. The estimated contribution of renewable energy to global final energy consumption is currently around 18–19 per cent.⁵ However, renewables do have far greater potential than what is harnessed today, since the global technical potential for renewable energy clearly exceeds the global energy demand.⁶

In 2011, the United Nations Secretary-General Ban Ki-moon launched the *Sustainable Energy for All* (SE4ALL)⁷ initiative with distinct and interlinked objectives to be achieved by 2030.⁸ Doubling the percentage of renewable energy in the global energy mix was one of the objectives. The International Renewable Energy Agency (IRENA) has taken the responsibility for achieving this objective.⁹ IRENA was established in 2009 as an intergovernmental organization supporting countries in their transition to a sustainable energy future and to serve as the central platform for international cooperation on this issue. It has been underlined that the creation of IRENA 'highlights the growing concern over the unfolding energy and climate crises' as it is the major international organization 'set up with its prime objective' to facilitate the transition to more sustainable energy sources.¹⁰ In 2014, IRENA launched its *REmap 2030* initiative.¹¹ REmap is a global road map to meet the challenge set forth by SE4ALL. IRENA is taking the lead as the SE4ALL 'hub' for renewable energy.¹² According to IRENA, renewable energy refers to 'all forms of energy produced from renewable sources in a sustainable manner'.¹³

⁵ Renewable Energy Policy Network for the 21st Century (REN21), *Renewables Global Status Report 2013*, available at <<http://www.ren21.net/REN21Activities/GlobalStatusReport.aspx>> (visited 19 March 2014), at 19. See also International Renewable Energy Agency, *REmap 2030. A Renewable Energy Roadmap* (IRENA, 2014), available at <<http://irena.org/remap/>> (visited 19 March 2014), at 11.

⁶ IPCC, 'Summary for Policymakers' in Ottmar Edenhofer et al (eds), *Special Report on Renewable Energy Sources and Climate Change Mitigation 2011* (Cambridge University Press, 2012) at 10.

⁷ For further information, visit the SE4ALL website, <<http://www.se4all.org/>>.

⁸ See 'Sustainable Energy for All', a Vision Statement by Ban Ki-moon, Secretary-General of the United Nations' (2011), available at <http://www.un.org/wcm/webdav/site/sustainableenergyforall/shared/Documents/SG_Sustainable_Energy_for_All_vision_final_clean.pdf> (visited 27 August 2014) at 4 and 'Sustainable Energy for All. A Framework for Action', the Secretary-General's High-level Group on Sustainable Energy for All (2012), available at <http://www.se4all.org/wp-content/uploads/2013/09/SE_for_All_-_Framework_for_Action_FINAL.pdf> (visited 27 August 2014), at 8. See also para. 128 of the Rio +20 Outcome Document 'Future We Want', UNGA Res. 66/288 of 11 September 2012, available at <<http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>> (visited 14 October 2014).

⁹ See <<http://www.irena.org>>.

¹⁰ Thijs Van de Graaf, 'Fragmentation in Global Energy Governance: Explaining the Creation of IRENA', 13 *Global Environmental Politics* (2013) 14–33 at 14–16.

¹¹ IRENA, *REmap 2030*, *supra* note 5.

¹² *Ibid.* at 1.

¹³ Statute of the IRENA (the Statute), 26 January 2009, Art. III: renewable energy includes, for instance, the following: bioenergy, geothermal energy, hydropower, ocean energy (tidal, wave and ocean thermal energy), solar energy and wind energy. The IRENA statute does not define what 'sustainable manner' in renewable energy production is.

Notwithstanding these ambitious objectives, the deployment of renewable energy technologies, and consequently, the establishment of renewable energy policy approaches has become a priority for governments around the world.¹⁴ While there are a number of opportunities and benefits associated with renewable energy, there is also a range of barriers and challenges to its development and deployment. If renewable energy is to fulfil the expectations in the context of climate and energy policies, for example, or meet the objectives set forth in the SE4ALL initiative, it is crucial to address these barriers and challenges.¹⁵

One such challenge relates to the governance of renewable energy. As such, the lack of effective policies and regulatory frameworks – together with a long-term, consistent and clear government commitment to renewable energy – are distinct barriers for deploying the greater potential of renewable energy.¹⁶ The insufficient understanding about the ‘best’ policy design or regulatory approach on how to undertake energy transitions is a challenge that is also recognized by the IRENA REmap 2030 initiative. Thus, ‘[p]lanning realistic but ambitious transition pathways’ is one of the priority areas of IRENA action in the context of *REmap 2030*.¹⁷

This paper, firstly, lays down a brief overview¹⁸ of the global and regional governance (the European Union (EU)) approaches regarding renewable energy. Secondly, the paper continues with a particular focus on IRENA as it discusses IRENA’s role in the global promotion of renewable energy. The paper shows that we are witnessing a quickly growing and rapidly diversifying renewable energy sector, both regionally and globally. Following this heterogeneity, governments as well as other actors have already proven partly ineffective at coordinating across borders on energy issues. An overarching regime on renewable energy as such would be rather an unfeasible target.¹⁹ Instead, the current global and regional ‘momentum’ on renewable energy could better benefit from facilitative coordination. Therefore, this paper is interested in the abilities of IRENA to facilitate this major transition to renewable energy, and the related policy expansion. The paper approaches IRENA’s role as a newly established intergovernmental ‘umbrella organization’ with a particularly vigorous man-

¹⁴ ‘Promotion of new and renewable sources of energy’, United Nation General Assembly (UNGA), Report of the Secretary-General, UN Doc. GA A/66/100 (2011) at 1.

¹⁵ IPCC, ‘Summary for Policymakers’, *supra* note 6, at 24–25.

¹⁶ Janet Sawin, ‘National Policy Instruments: Policy Lessons for the Advancement and Diffusion of Renewable Energy Technologies around the World’ in Dirk Assmann, Ulrich Laumanns and Dieter Uh (eds), *Renewable Energy: A Global Review of Technologies, Policies and Markets* (Earthscan, 2006) 71–114 at 104–105.

¹⁷ *Ibid.* at 880. See also IRENA, *REmap 2030*, *supra* note 5, at 10.

¹⁸ More profound discussion on global energy governance can be found, for instance, in Thijs Van de Graaf, *The Politics and Institutions of Global Energy Governance* (Palgrave Macmillan, 2013); Timothy Meyer, ‘The Architecture of International Energy Governance’, 106 *American Society of International Law* (2012) 389–394; and Ann Florini and Benjamin Sovacool, ‘Who governs energy? The challenges facing global energy governance’, 37 *Energy Policy* (2009) 5239–5248.

¹⁹ Florini and Sovacool, ‘Who governs energy?’, *supra* note 18, at 5239 and 5246.

date for renewable energy to see how IRENA could help to 'fit together' the patchy²⁰ framework on renewable energy.²¹

The paper suggests that IRENA could serve as the key coordinator facilitating the achievement of the interlinked renewable energy and climate objectives. In this context, the paper suggests that IRENA has the potential to alleviate the challenges related to the distribution of homogeneous information and research and development (R&D) on renewable energy. Secondly, and importantly, IRENA can contribute to policy analysis on the 'best' policies: what works and what does not in particular global and regional contexts. Thirdly, IRENA could promote and coordinate international and regional cooperation on renewable energy approaches, as well as seek opportunities for further synergies and coherence where appropriate.

2 International and regional approaches to renewable energy

2.1 Background

There is no global agreement directly addressing renewable energy. Considering the yet mostly untapped potential of renewable energy, there have been surprisingly few attempts at an international multilateral level to address renewable energy that would go further than general notions on the increased need to turn to renewable energy sources. This section of the paper provides a short overview of the global regulatory approaches to renewable energy as they currently exist. This is followed by an example of a regional approach, namely the EU renewable energy policy framework.

In contrast to the sparse and vague global measures on renewables, it should be noted that the amount of national frameworks promoting renewable energy is immense. According to the 2013 estimates of REN21,²² renewable energy support policies were identified in 127 countries.²³ Countries are using very different policies for promoting renewable energy.²⁴ In addition to national approaches, there is a plethora of other initiatives involved with, or focused solely on renewable energy. These initiatives include partnerships, networks, the organized exchange of experiences and plans, in-

²⁰ On the fragmentation of international energy governance, see Meyer, *The Architecture*, *supra* note 18, at 389 and Van de Graaf, *Fragmentation*, *supra* note 10, at 16.

²¹ See Johannes Urpelainen and Thijs Van de Graaf, 'The International Renewable Energy Agency: a success story in institutional innovation?', *International Environmental Agreements: Politics, Law and Economics* (September 2013) 1–19 at 1 and 10–12.

²² *Supra* note 5.

²³ See REN21, 'GSR Policy Table', available at <<http://www.ren21.net/RenewablePolicy/GSRPolicyTable.aspx>> and Ren21, 'Renewable Interactive Map', available at <<http://map.ren21.net/>> (both visited 25 March 2014). See also Sawin, *National Policy Instruments*, *supra* note 16, *passim*.

²⁴ According to the UNGA, policies promoting renewable energy can be classified into: 1) regulatory policies; 2) fiscal incentives; 3) public finance mechanisms; and 4) climate-led policies. See UNGA, Report on promotion of new and renewable sources of energy, *supra* note 14, at para. 36.

itiatives of non-governmental organizations (NGOs) and so on.²⁵ Although the national approaches and the various initiatives to renewable energy together appear today as a colourful patchwork, there is also a growing global dialogue towards a more coherent scaling up of sustainable renewable energy.²⁶

2.2 Renewable energy in the global arena

In 1981, the United Nations General Assembly, in the context of the United Nations Conference on New and Renewable Sources of Energy, was convinced that a transition from the ‘present international economy based primarily on hydrocarbons’ to an economy based ‘increasingly on new and renewable sources of energy’ was required.²⁷ This was the first occasion on a global level that renewable energy was discussed as a worthy alternative to fossil fuels. Although the greatest achievement of the Conference was perhaps the recognition of the need to start rethinking our energy systems, the Conference did underline the importance of the establishment of an intergovernmental body specifically concerned with new and renewable sources of energy. Even so, it took almost three decades before IRENA was founded.²⁸

The first major step towards an international approach to renewable energy took place in 2002, when the World Summit for Sustainable Development (WSSD) was held in Johannesburg, South Africa. The WSSD linked renewable energy to the climate change context, and the outcome document, the Johannesburg Plan of Implementation of the World Summit on Sustainable Development (JPOI),²⁹ provided an explicit impetus for global and regional action on renewable energy.³⁰ Renewable energy was one of the most controversial issues at the WSSD conference, and no substantial agreements addressing this issue were reached at that time.³¹ The WSSD did, however, produce new partnerships and initiatives on renewable

²⁵ Paul H. Suding and Philippe Lempp, ‘The Multifaceted Institutional Landscape and Processes of International Renewable Energy Policy’, The International Association for Energy Economics documents (IAEE, 2007), available at <<http://www.iaee.org/documents/newsletterarticles/Suding.pdf>> (visited 24 March 2014), at 4–5.

²⁶ See, for instance, *Earth Negotiations Bulletin*, Summary of the Fourth Assembly of the International Renewable Energy Agency: 17–19 January 2014, available at <<http://www.iisd.ca/irena/irenaa4/>> (visited 26 March 2014).

²⁷ ‘United Nations Conference on New and Renewable Sources of Energy’, UNGA Res. 36/193 of 17 December 1981. See also Van de Graaf, *The Politics and Institutions*, *supra* note 18, at 114.

²⁸ Van de Graaf, *The Politics and Institutions*, *supra* note 18, at 114–115.

²⁹ Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002).

³⁰ Van de Graaf, *The Politics and Institutions*, *supra* note 18, at 114–115; JPOI, chapter III, paras 20(c) and 20(e):

‘(c) Develop and disseminate alternative energy technologies with the aim of giving a greater share of the energy mix to renewable energies...

(e) ...[W]ith a sense of urgency, substantially increase the global share of renewable energy sources with the objective of increasing its contribution to total energy supply, recognizing the role of national and voluntary regional targets as well as initiatives...’.

³¹ See, for instance, *Earth Negotiations Bulletin* (ENB), Vol. 22 No. 51, 4 September 2002, at 1 and 7.

energy.³² For instance, the UN-Energy was created after the WSSD, in 2004.³³ However, UN-Energy's mandate does not cover the facilitation of intergovernmental cooperation regarding renewable energy.³⁴

It is claimed that it was only as recently as the launch of the SE4ALL initiative that global action on renewables really commenced at full speed.³⁵ Although global interest in renewable energy intensified, especially after the WSSD, no globally applicable 'hard law'³⁶ measures have been taken on renewable energy as such. The above-mentioned JPOI is the most extensive soft law instrument promoting renewable energy, in addition to the newly introduced SE4ALL initiative. According to Bruce, international soft law has had a 'prevalent' role in guiding the normative development of renewable energy policies.³⁷ He continues that achieving SE4ALL objectives as regards renewable energy would require 'unprecedented' international cooperation and coordination, but the current international law is underdeveloped to meet the challenge.³⁸ The good news is that global society has become aware of the crucial role renewable energy has to play. However, the place that renewable energy holds today on the global agenda is just too negligible to measure up to its global potential and, more importantly, demand.³⁹

The global climate regime has, in particular, been criticized⁴⁰ for its untapped potential as regards creating 'hard law' on renewable energy. The United Nations Framework Convention on Climate Change (UNFCCC)⁴¹ does not explicitly mention

³² For a comprehensive example on such initiatives, see Suding and Lempp, *The Multifaceted Institutional Landscape*, *supra* note 25, at 5–7.

³³ UN-Energy is an interagency mechanism within the UN system in the field of energy. Renewable energy is one of the cornerstones of action for UN-Energy. UN-Energy's work is organized around three thematic clusters and renewable energy is one of these clusters. See Alain Lafontaine et al, *Delivering on Energy: An Overview of Activities by UN-Energy and its Members* (UN, 2010), at 4 and 14–21. See also UN-Energy, 'Renewable Energy Activities', available at <http://www.un-energy.org/activities/renewable_energy> (visited 31 March 2014).

³⁴ Stuart Bruce, 'International Law and Renewable Energy: Facilitating Sustainable Energy for All?', 14 *Melbourne Journal of International Law* (2013) 1–36 at 28.

³⁵ Sybille Roehrkasten and Kirsten Westphal, 'IRENA and Germany's Foreign Renewable Energy Policy. Aiming at Multilevel Governance and an Internationalization of the Energiewende?' German Institute for International and Security Affairs Working Papers (2013) 4.

³⁶ 'Hard law' refers to binding legal instruments (for instance, treaties and laws) including obligations and rights. By contrast, 'soft law' refers to instruments which do not stipulate concrete and legally binding rights or obligations. The content of a soft law instrument (for instance, a declaration or policy) is flexible. See, for instance, Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2003) 123–124. For a discussion on hard and soft law in the climate context, see Antto Vihma, 'Analyzing Soft Law and Hard Law in Climate Change' in Erkki Hollo, Kati Kulovesi and Michael Mehling (eds), *Climate Change and the Law* (Springer, 2013) 143–164 at 146–151.

³⁷ Bruce, *International Law and Renewable Energy*, *supra* note 34, at 34.

³⁸ *Ibid.* at 21.

³⁹ See also Ian Rowlands, 'Renewable energy and international politics' in Peter Dauvergne (ed.), *Handbook of Global Environmental Politics* (Edward Elgar, 2005) 78–94 at 91.

⁴⁰ 'Hard law, missed opportunity', see Bruce, *International Law and Renewable Energy*, *supra* note 34, at 34; see also Steven Ferrey, 'The Failure of International Global Warming Regulation to Promote Needed Renewable Energy', 37 *Boston College Environmental Affairs Law Review* (2010) 67–126 at 68.

⁴¹ United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>.

renewable energy, but it allows its state Parties to choose their domestic measures towards the achievement of the ‘ultimate objective’ of stabilizing GHG emissions (Article 2 of the UNFCCC). With an inclusive interpretation, renewable energy could be seen to fall within Article 4(1)(c), which provides that all parties to the UNFCCC shall ‘promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases’. Article 4(2)(a) continues that ‘parties shall adopt national policies and take corresponding measures on the mitigation of climate change’.

The Kyoto Protocol to the UNFCCC,⁴² however, includes an explicit reference to renewable energy in its Article 2(1)(a)(iv):

1. Each Party included in Annex I, in order to promote sustainable development, shall:
 - (a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:
 - ...
 - (iv) Research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies; ...

Article 4(2)(a) of the UNFCCC and Article 2(1)(a) of the Kyoto Protocol both contain commitments related to policies and measures. The term ‘policies and measures’ is not defined in either the UNFCCC or the Kyoto Protocol.⁴³ Yamin and Depledge explain that although the Article 2(1)(a) of the Kyoto Protocol gives *an indicative*, and not mandatory, list of policies and measures (such as promotion of ‘renewable forms of energy’), the explicit list of examples still carries a particular importance. They write that ‘explicit referencing in the Protocol to particular policies and sectors generates strong expectations that consideration will be given’ by each Annex I Party to the listed policies and measures. However, Article 2(1)(a) of the Kyoto Protocol is relevant in the renewable energy context merely because it offers the Parties a rather gentle but yet explicit push towards the promotion of renewables. Thus actual relevance of the article is to be considered as ‘suggestive’ rather than directive; the article does not include mandatory elements regarding renewable energy.⁴⁴

⁴² 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.

⁴³ Yamin and Depledge clarify in the UNFCCC and Kyoto Protocol context that ‘policy’ would refer to a prescriptive course of action whereas ‘measure’ would mean corresponding means through which policies are implemented. Farhana Yamin and Joanna Depledge, *The International Climate Change Regime. A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004) at 107–111.

⁴⁴ *Ibid.* Under the Kyoto Protocol, renewable energy has perhaps been most relevant in the context of the clean development mechanism (CDM). CDM is one of the ‘Kyoto flexibility mechanisms’ (Art. 12 of the Protocol) designed to lower the overall costs of achieving the emissions targets and enable the state Parties to find cost-effective opportunities to reduce emissions or to remove carbon from the atmosphere. See further Grant A. Kirkman et al, *Benefits of the Clean Development Mechanism 2012* (UNFCCC, 2012),

Van de Graaf summarizes by stating that even as these environmental treaties (such as the Kyoto Protocol) do affect the energy sector, they 'do not lead to radical departure from our current energy path'.⁴⁵ Thus, the concise analysis presented above supports the view that renewable energy has not yet established a strong legal standing on the field of international law. It has been argued that the UNFCCC, the Kyoto Protocol and the international negotiations on climate change have given insufficient attention to renewable energy because there are no binding renewable energy obligations. In a climate and energy context in particular, Bruce notes that 'without modification, the existing regime's superficial engagement with the issue of energy generation is likely to prove inadequate to effectively mitigate climate change'.⁴⁶

This paper does not aim to analyze whether renewable energy obligations at the international level would be beneficial in the first place. The purpose of the above analysis is merely to shed light on the current developments on the issue.

Renewable energy has quite recently been discussed further under the UNFCCC regime. As a result of the climate negotiations that took place in Durban, South Africa, in 2012, a subsidiary body to the UNFCCC called the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) was established.⁴⁷ The mandate of the ADP is to develop a protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC. During its first session, in 2012, the ADP adopted its agenda⁴⁸ and initiated work under two workstreams: 'Workstream 1' focusing on the new agreement due in 2015, and 'Workstream 2' for the pre-2020 ambition. To enhance mitigation ambition, the task of Workstream 2 is to identify and explore options for a range of actions that could help to close the pre-2020 ambition gap.⁴⁹ A workshop under Workstream 2 addressed the pre-2020 ambition through energy transformation, including the scaling-up of renewable energy. Centrally, the workshop recognized that as much as the transition towards less carbon-intensive and more efficient energy systems is needed, this is not possible without having a robust and long-term policy and regulatory frameworks in place. The role of cooperative initiatives aimed at sharing experience and knowledge, identification of mitiga-

available at <http://cdm.unfccc.int/about/dev_ben/index.html> (visited 24 March 2014), at 15 and Axel Michaelowa and Jorund Buen, 'The Clean Development Mechanism gold rush' in Axel Michaelowa (ed.), *Carbon Markets or Climate Finance? Low carbon and adaptation investment choices for the developing world* (Routledge, 2012) 1–38, at 26–27.

⁴⁵ Van de Graaf, *The Politics and Institutions*, *supra* note 18, at 108.

⁴⁶ Bruce, *International Law and Renewable Energy*, *supra* note 34, at 34 and 38–39. See also Ferrey, *The Failure of International*, *supra* note 40, at 68–69.

⁴⁷ 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', UNFCCC Dec. 1/CP.17 (2011).

⁴⁸ 'Report of the Ad Hoc Working Group on the Durban Platform for Enhanced Action on the first part of its first session held in Bonn from 17 to 25 May 2012', UN Doc. FCCC/ADP/2012/2 (2012) para. 13.

⁴⁹ The ultimate objective of the UNFCCC is to prevent dangerous human interference with the climate system. There is, however, a gap between the current emission pledges and the reductions towards the goal of keeping the temperature rise below 2 degrees Celsius. See, for instance European Commission Climate Action, 'Increasing pre-2020 emission reductions', available at <http://ec.europa.eu/clima/policies/international/negotiations/initiatives/index_en.htm> (visited 6 June 2014).

tion possibilities and improving policy approaches was also considered important. The need for ‘creation of the right enabling environments for enhancing mitigation action’ was one of the central conclusions of the workshop.⁵⁰ Of course, it is too early to evaluate how the efforts of Workstream 2 on renewable energy will benefit the international status of renewable energy. However, these preliminary discussions under the climate process present an explicit opportunity to hasten renewable energy as a meaningful part of the future climate approach. The findings also highlight the need for international coordination for promoting the diffusion of renewable energy.

To conclude, for the time being renewable energy has had to settle for soft law approaches at the global level. However, the renewable energy policy framework introduced by the EU represents quite the opposite approach. This approach is concisely discussed below.

2.3 A regional approach – the EU

In 2009, the EU adopted its comprehensive and unique⁵¹ ‘climate and energy package’ as a robust response to the globally tangled progress on working towards the agreed climate goals. The climate and energy package is a set of binding legislation aiming to ensure that the EU meets its ambitious climate and energy targets for 2020. These targets, known as the 20–20–20 targets, articulate three key objectives for 2020: a 20 per cent reduction in EU GHG emissions from 1990 levels; raising the share of EU energy consumption produced from renewable resources to 20 per cent; and a 20 per cent improvement in the EU’s energy efficiency. As the name of the package suggests, climate and energy are an interconnected challenge that is to be tackled jointly.⁵²

The climate and energy package creates an integrated policy that tackles climate change using a variety of legal tools. One of the key elements of the comprehensive EU climate and energy package is the Renewable Energy Directive.⁵³ Article 3 of the Directive sets *mandatory targets* for the 28 Member States to increase their share of renewable energy to 20 per cent of the EU’s primary energy consumption and to increase renewable energy used by the transport sector by 10 per cent. These demand-

⁵⁰ ‘Summary report on the workshop on pre-2020 ambition: energy transformation, including scaling-up renewable energy, enhancing energy efficiency and consideration of carbon capture and storage, ADP 2, part 2, Bonn, Germany, 7 June 2013’, Informal Summary, Ad Hoc Working Group on the Durban Platform for Enhanced Action, ADP.2013.13, available at <<http://unfccc.int/resource/docs/2013/adp2/eng/13infsum.pdf>> (visited 28 April 2014).

⁵¹ Cinnamon Carlarne, *Climate Change Law and Policy. EU and US approaches* (Oxford University Press, 2010) 186–189.

⁵² See Kati Kulovesi, Elisa Morgera and Miguel Muñoz, ‘Environmental Integration and Multi-faceted International Dimensions of EU law: Unpacking the EU’s 2009 Climate and Energy Package’ 48 *Common Market Law Review* (2011) 829–891 at 829–833.

⁵³ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (the Renewable Energy Directive), O.J. 2009, L 140/16.

ing targets require action from all Member States. The 20 per cent target represents the EU's overall target, while Annex I to the Renewable Energy Directive sets the national overall targets ranging from 10 per cent (Malta) up to 49 per cent (Sweden). The Renewable Energy Directive applies to all energy from renewable non-fossil sources (Article 2), although the Renewable Energy Directive has been particularly central to incentivize biofuels in the attainment of the EU's renewable energy targets.⁵⁴

In January 2014, the Commission announced the policy framework for climate and energy for the period from 2020 to 2030. The green paper proposed a 'new reduction target for domestic GHG emissions of 40 per cent compared to 1990', to be shared between the ETS and non-ETS⁵⁵ sector, as 'the centre piece of the EU's energy and climate policy for 2030' as well as a 'coherent headline target at European level for renewable energy of at least 27 per cent with flexibility for Member States to set national objectives'.⁵⁶ The new framework would introduce several changes to the current approach. Most centrally, the new proposal would abolish the mandatory national targets for renewable energy – meaning that after 2020 the Member States would not have legally binding obligations to include renewable energy within their national energy mixes.

The Commission's proposal ignited the already prolonged EU policy debate on renewable energy, because it – if put into effect – could mean a total change of direction as regards the earlier clearly set ambition towards renewables. The EU's approach to climate and energy has been distinct, particularly because of its 'legally enforceable, absolute and measurable commitments' to reduce GHG emissions.⁵⁷ In March 2014, the European Council (the Council) agreed to set a 2030 target in line with the low-carbon roadmap goal of reducing emissions by 80 per cent by 2050, but did not explicitly back the 40 per cent target or comment on the renewables target proposed by the EU executive in January. The Council merely stated that the current targets 'need to be met' by 2020.⁵⁸

⁵⁴ For further discussion on biofuels, see Seitä Romppanen, 'Regulating Better Biofuels for the European Union', 21 *European Energy and Environmental Law Review* (2012) 123–141 at 125–135; and Seitä Romppanen, 'The Role and Relevance of Private Actors in EU Biofuel Governance', 22 *Review of European Community & International Environmental Law* (2013) 340–353 at 345–348.

⁵⁵ Here the abbreviation ETS refers to the EU Emission Trading System. Non-ETS refers to the sectors that are not covered by the EU ETS such as transport (except aviation), buildings, agriculture (excluding forestry) and waste. See European Commission Climate Action, 'Commission adopts national limits on non-ETS emissions for 2013-2020', available at <http://ec.europa.eu/clima/news/articles/news_2013032602_en.htm> (visited 6 June 2014).

⁵⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A policy framework for climate and energy in the period from 2020 to 2030, COM(2014) 15 final, at 5.

⁵⁷ Carlarne, *Climate Change Law and Policy*, *supra* note 51, at 189.

⁵⁸ European Council conclusions, EUCO 7/1/14 REV 1, 20/21 March 2014, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141749.pdf> (visited 25 March 2014).

EU action on climate and energy will continue to be required to ‘accommodate a growing array of actors and interests’, as Mehling, Kulovesi and de Cendra also note.⁵⁹ In addition, the EU is currently establishing its energy policy as the Treaty of Lisbon introduced a specific legal basis for the field of energy.⁶⁰ The new energy policy is to cover the full range of energy sources. Thus, whatever the future framework for climate and energy policy in the context of 2020 to 2030 will be, it is to be integrated with the common EU energy policy. In addition to the approaches on EU level, the individual national support schemes for renewables are rapidly evolving as well. This creates further needs for convergence.⁶¹

Moreover, the EU’s future climate and energy policy needs to be streamlined with *global* approaches as well. This is necessary for the European system to be competitive in terms of energy pricing between the EU and its major trading partners, as well as in the context of research and development and technological innovation. Technological innovation is particularly relevant in the renewable energy context. It is a key indicator for competitive, secure and sustainable energy in Europe.⁶² The proposed future European climate and energy policy seems to be geared towards more flexibility for the Member States, as well as competitiveness as regards third countries. The Council notes that one of the crucial principles for the new policy is to ‘provide flexibility for the Member States as to how they deliver their commitments in order to reflect national circumstances and respect their freedom to determine their energy mix.’ In addition, the new framework should also ensure international competitiveness: ‘the competitiveness of European industry on international markets cannot be taken for granted’.⁶³

The EU’s renewables policy is best described by its continued state of flux.⁶⁴ Afflicted by political hurdles as well as hindered by multifaceted uncertainty, the EU renewable energy sector is desperate for a clear and coherent internal policy on climate and energy. In addition to this, this internal policy needs to be coordinated and streamlined with the global policy on renewables.

⁵⁹ Michael Mehling, Kati Kulovesi and Javier de Cendra, ‘Climate Law and Policy in the European Union: Accidental Success or Deliberate Leadership?’ in Erkki Hollo et al, *Climate Change and the Law*, *supra* note 36, 509–522 at 512–522.

⁶⁰ See Art. 194 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, O.J. 2007, C 306/01.

⁶¹ Lena Kitzing, Catherine Mitchell and Poul Erik Morthorst, ‘Renewable energy policies in Europe: Converging or diverging?’ 51 *Energy Policy* (2012) 192–201 at 193.

⁶² COM (2014) 15 final, at 13.

⁶³ *Ibid.* para 17.

⁶⁴ See also Kim Talus, *EU Energy Law and Policy. A Critical Account* (Oxford University Press, 2013), at 185, 191 and 210.

2.4 Call for coordination

It has been aptly stated that 'if the road to global environmental cooperation is long, the road to global energy cooperation is even longer'.⁶⁵ International approaches on renewable energy require a level of internationalization of essentially domestic matters.⁶⁶ International governance of renewable energy is difficult as it is interwoven into the diverse national circumstances as regards the mere availability of natural resources for renewable energy production. Renewable energy is also an issue under national energy security policies, and the countries' preferences as regards their energy policy mix vary greatly.⁶⁷

The major increase in world energy demand is expected to occur in developing countries.⁶⁸ For several developing countries, the lack of access to modern energy services and low-carbon technologies hinders the achievement of their sustainable development goals. In addition, the governance of renewable energy is interlinked with other, often controversial, policy issues. Renewable energy production could, for example, compete against alternative uses of the same natural resource or conflict with land use planning.⁶⁹

Increasing the share of renewables in the energy mix will require policies to incentivize changes in the energy system both in the developed and developing countries. In particular, further policy development would be required to attract the necessary increases in investment in technologies and infrastructure.⁷⁰ These policies can be sector-specific, implemented at the local, regional and national levels, and can be complemented by bilateral, regional and global cooperation. Thus, there is no 'one-size-fits-all' solution. As countries are individual in terms of their possibilities to develop renewable energy, each of them will need to forge the renewable energy future most appropriate to their circumstances.⁷¹

⁶⁵ Bruce, *International Law and Renewable Energy*, *supra* note 34, at 27.

⁶⁶ Bruce approaches the issue of internationalization in the context of the principle of permanent sovereignty over natural resources. The principle of permanent sovereignty over natural resources is a fundamental principle of contemporary international law commonly reiterated in international environmental agreements; for instance, the preamble to the UNFCCC states that international cooperation on climate change is based on the principle. Bruce argues that, in an energy context, the principle is becoming infused 'with environmental obligations that directly or indirectly impact energy generation'. *Ibid.* at 23. Furthermore, it is claimed that the principle of permanent sovereignty over natural resources is becoming 'unfettered'. In its new context, the principle is not absolute but qualified by environmental considerations. Tuomas Kuokkanen, 'Permanent Sovereignty Over Natural Resources' in Marko Berglund (ed.), *International Environmental Lawmaking and Diplomacy Review 2005*, University of Joensuu – UNEP Course Series 3 (University of Joensuu, 2006) 97–108 at 108.

⁶⁷ Florini and Sovacool, 'Who governs energy?', *supra* note 18, at 5239.

⁶⁸ UNGA, 'Report on promotion of new and renewable sources of energy', *supra* note 14, para. 12.

⁶⁹ *Ibid.* paras 20 and 77.

⁷⁰ IPCC, 'Summary for Policymakers', *supra* note 6, at 7 and 17.

⁷¹ IRENA, *REmap 2030*, *supra* note 5, at 1. See also Urpelainen and Van de Graaf, *The International Renewable Energy Agency*, *supra* note 21, at 7.

As Steiner et al underline, and as noted earlier in this paper, there is a lot of engagement related to renewable energy, but it is mostly dispersed and diffused. In addition, the growth of the renewable energy industry is not balanced. Most of the growth is taking place in developed countries and in some developing countries with large emerging economies – but often the gravest need for renewable energy deployment is in the poorest areas of the world.⁷²

Although measurable progress has already been made in technology development and transfer, investment and policy implementation of renewables, much more is needed in order to increase the contribution of renewable sources of energy. A coordinated pooling of information and policy analysis would create more efficiency and synergies. There should be comprehensive national assessments of the effectiveness of the different policies and activities. In addition, a clear view on the financial aspects (for instance, how comparable the renewable energy measures are to the measures on conventional energy) of renewable energy deployment is required. As the UNGA notes, ‘additional coordinated strategies’ are necessary at the global level to advance energy transitions, especially in the poorest regions of the world. Coordination would facilitate the achievement of the SE4ALL objectives, and particularly reductions in carbon emissions.⁷³ Sustainable energy should have an ‘international home’.⁷⁴

3 IRENA – the international home for renewable energy?

3.1 IRENA

IRENA is an intergovernmental organization currently with 130 members and 37 states in accession.⁷⁵ The IRENA headquarters are in Abu Dhabi. According to Article II of the Statute of the IRENA, the objective of the organization is the promotion of widespread and increased adoption, as well as the sustainable use of all forms of, renewable energy. In its activities, IRENA takes into account national and domestic priorities and benefits ‘derived from a combined approach of renewable energy and energy efficiency measures’. In addition, the contribution of renewable energy to climate protection is explicitly reiterated. Thus, with a mandate from countries around the world, IRENA encourages governments to adopt enabling policies for renewable energy investments, provides practical tools and policy advice to accelerate renewa-

⁷² UNGA, ‘Report on promotion of new and renewable sources of energy’, *supra* note 14, para. 78.

⁷³ UNGA, ‘Report on promotion of new and renewable sources of energy’, *supra* note 14, para. 56.

⁷⁴ Achim Steiner et al, ‘International Institutional Arrangements in Support of Renewable Energy’ in Dirk Assmann, Ulrich Laumanns and Dieter Uh (eds), *Renewable Energy: A Global Review of Technologies, Policies and Markets* (Earthscan, 2006) 152–165 at 157–158.

⁷⁵ For example, the EU, the US, China and India as well as the majority of the African states are members of IRENA. However, other countries such as Russia and Canada are not members. IRENA, ‘Membership’, available at <<http://www.irena.org/Menu/Index.aspx?mnu=Cat&PriMenuID=46&CatID=67>> (visited 26 March 2014).

ble energy deployment, and facilitates knowledge sharing and technology transfer to provide clean, sustainable energy.⁷⁶

In the context of the establishment of IRENA, it has been noted that the creation of IRENA itself was exceptional given the 'relative stasis' in multilateralism, and thus the achievement of an impressive rate of ratification is remarkable as such.⁷⁷ It has also been aptly noted that 'at a moment in history, when the multipolar world has been shaped out and the manifold crisis of multilateralism is evident, e.g. in the international climate negotiations, it is no less than a surprising success that a truly multilateral organization has been founded'.⁷⁸ On the other hand, however, these elevated notions certainly seem to place high expectations towards the output of the new organization.

IRENA's activities are clearly defined in Article IV of its statute.

- A. As a centre of excellence for renewable energy technology and acting as a facilitator and catalyst, providing experience for practical applications and policies, offering support on all matters relating to renewable energy and helping countries to benefit from the efficient development and transfer of knowledge and technology, the Agency performs the following activities:
 1. In particular for the benefit of its Members the Agency shall:
 - a) analyse, monitor and, without obligations on Members' policies, systematise current renewable energy practices, including policy instruments, incentives, investment mechanisms, best practices, available technologies, integrated systems and equipment, and success-failure factors;
 - b) initiate discussion and ensure interaction with other governmental and non-governmental organisations and networks in this and other relevant fields;
 - c) provide relevant policy advice and assistance to its Members upon their request, taking into account their respective needs, and stimulate international discussions on renewable energy policy and its framework conditions;
 - d) improve pertinent knowledge and technology transfer and promote the development of local capacity and competence in Member States including necessary interconnections;
 - e) offer capacity building including training and education to its Members;
 - f) provide to its Members upon their request advice on the financing for renewable energy and support the application of related mechanisms;
 - g) stimulate and encourage research, including on socio-economic issues, and foster research networks, joint research, development and deployment of technologies; and

⁷⁶ For further information, see IRENA, 'About IRENA', available at <<http://www.irena.org/Menu/index.aspx?PriMenuID=13&mnu=Pri>> (visited 26 March 2014).

⁷⁷ Urpelainen and Van de Graaf, *The International Renewable Energy Agency*, *supra* note 21, at 4.

⁷⁸ Roehrkasten and Westphal, *IRENA and Germany's Foreign Renewable Energy Policy*, *supra* note 35, at 10.

- h) provide information about the development and deployment of national and international technical standards in relation to renewable energy, based on a sound understanding through active presence in the relevant fora.
2. Furthermore, the Agency shall disseminate information and increase public awareness on the benefits and potential offered by renewable energy.

The principal organs of IRENA are the Assembly, the Council and the Secretariat (Article VIII). However, these organs do not have an express competence or implied powers to negotiate or establish international legal obligations as regards renewable energy.⁷⁹ For example, according to Article IX of the Statute, the Assembly is the supreme organ and as such, the Assembly can ‘make recommendations’ to Members on matters within the scope of the Statute. However, as Bruce notes, this could just be the key to success.⁸⁰ Without the burden of ‘obligating’ its members, IRENA can establish itself more in its role as a global facilitator, coordinator and centre of excellence for renewable energy. To operate in its agreed activities, IRENA has established three directorates to take charge of operating programmatic activities: the Knowledge, Policy and Finance Centre; Country Support and Partnerships; and the IRENA Innovation and Technology Centre.

Thus, as the statute stipulates, IRENA has a rather sharp focus on renewable energy.⁸¹ However, Van de Graaf notes that:

[b]y focusing on a transformation of the energy sector, it tackles head-on the root cause of some of the world’s major environmental problems, such as air pollution, acid rain, and climate change. In that respect, IRENA differs from the large body of international rules that has been adopted so far to manage the plethora of energy-related environmental externalities, such as the Kyoto Protocol.

Therefore it also remains to be seen how IRENA will manage its renewables mandate in this much wider environmental context.

3.2 IRENA’s role

Although the functions and role of IRENA have received fair attention from scholars, there are few recent, particularly elaborate contributions available. In addition to the more general contributions referred to by this paper, Van de Graaf in particular has analyzed the role of IRENA in more detail.⁸² In a contribution together with Ur-

⁷⁹ Bruce, *International Law and Renewable Energy*, *supra* note 34, at 45.

⁸⁰ *Ibid.* at 46. For a more general discussion on the treaty making capacity of international organizations, see Jan Klabbbers, *An Introduction to International Institutional Law* (2nd ed., Cambridge University Press, 2009) 41 and 53–73.

⁸¹ Urpelainen and Van de Graaf, *The International Renewable Energy Agency*, *supra* note 21, at 4 and Van de Graaf, *Fragmentation in Global Energy Governance*, *supra* note 10, at 16.

⁸² Van de Graaf, *Fragmentation in Global Energy Governance*, *supra* note 10 and Van de Graaf, *The Politics and Institutions*, *supra* note 18.

pelainen, the writers identified three mechanisms through which IRENA could promote global renewable energy uptake: '(1) by offering valuable epistemic services to its member states, (2) by serving as a focal point for renewable energy in a scattered global institutional environment, and (3) by mobilizing other international institutions to promote renewable energy'.⁸³ The following concise discussion on the role of IRENA aims to continue from these contributions to discuss the facilitative coordinator's role that IRENA could build upon.

It can be surmised from the above discussion that the demand for international coordination on renewable energy has clearly increased, and will continue to increase in the coming years.⁸⁴ Coordination is particularly required in the context of renewable energy governance. The lack of effective policies and regulatory frameworks, together with long-term, consistent and clear government commitment to renewable energy, are a distinct challenge for deploying the required potential of renewable energy. It has been suggested that an international organization could coordinate and optimize the required 'expansion' of renewable energies.⁸⁵

In general, international organizations involved in global environmental policy are a heterogeneous set of actors.⁸⁶ The role of intergovernmental organizations for environmental law-making has also been profound in the climate and energy context.⁸⁷ IRENA has filled in the gap of an international organ to coordinate global action on renewable energy. It is also interesting to note that another international organization, namely the International Energy Agency⁸⁸ (IEA), has been paying more attention to renewable energy. However, IRENA can be distinguished from other institutions of international energy governance, such as the IEA, because of its very global scope.⁸⁹

⁸³ Urpelainen and Van de Graaf, *The International Renewable Energy Agency*, *supra* note 21, at 1.

⁸⁴ In a more general context, see G. C. A Junne, 'International organizations in a period of globalization: New (problems of) Legitimacy' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001) 189–220 at 218.

⁸⁵ Steiner et al, *International Institutional Arrangements*, *supra* note 74, at 152; and Bruce, *International Law and Renewable Energy*, *supra* note 34, at 45.

⁸⁶ See, for instance, Ellen Hey, 'International Institutions' in Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 749–769 at 750. International organizations are a common form of intergovernmental cooperation, and organizations vary greatly as to their role. See Klabbers, *International Institutional Law*, *supra* note 80, at 25; Daniel Bodansky, 'The Development of International Environmental Law' in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy Review 2010*, University of Eastern Finland – UNEP Course Series 9 (University of Eastern Finland, 2010) 11–28 at 20 and Roehrkasten and Westphal, *IRENA and Germany's Foreign Renewable Energy Policy*, *supra* note 35, at 11–12.

⁸⁷ For instance, the relevance of the scientific information on climate change that the IPCC has produced has been central in the shaping of climate and energy policies. IPCC is the leading international body for the assessment of climate change: '[t]he IPCC has become the predominant source of scientific and technical information and analysis to the climate change regime'. Yamin and Depledge, *The International Climate Change Regime*, *supra* note 36, at 465.

⁸⁸ See <<http://www.iea.org/>>.

⁸⁹ See IRENA, 'IRENA membership', available at <<http://www.irena.org/menu/Index.aspx?mnu=Cat&PriMenuID=46&CatID=67>> (visited 8 June 2014).

IRENA can facilitate the coordination of renewable energy approaches in three particular ways. Firstly, it can serve as the central hub for information on renewables. Secondly, IRENA can provide crucial policy advice in the context of renewable energy governance and regulatory frameworks. Thirdly, IRENA, as the ‘international home’ for renewable energy, serves a central role in promoting international cooperation through capacity-building.

As Talus notes, it is sometimes difficult to find the truth behind ideological claims about the economic viability of unconventional energy.⁹⁰ Information is a precondition for the implementation of any policies or measures on renewable energy. The IRENA Innovation and Technology Centre (IITC)⁹¹ is equipped to provide unbiased information on renewable energy technologies and innovations. One of the IITC activities is ‘Costs, Technologies and Markets’. Under this activity, IRENA’s goal is to become the principal source for renewable energy cost data. IRENA’s work in this respect would revolve around IRENA’s Renewable Cost Database.⁹²

IRENA’s activities under the Knowledge, Policy and Finance Centre (KPFC)⁹³ include giving policy advice and conducting policy assessment. It is crucial to monitor the latest developments in terms of policy in the renewable energy sector, and provide information on the ‘best’ policy design practices in the field. IRENA is also looking into the socio-economic impacts of renewables, with a special focus on the job creation potential of renewable energy deployment.⁹⁴

As Steiner et al note, it has not been possible to identify, ‘in a clear and convincing way’, which policy (or other) initiatives actually work and which do not. Successful cases do have the potential to serve as a model and failures open the doors for further development. For instance, as the EU has gone through its first generation of regulating renewable energy, perhaps some aspects of the EU framework could serve as a test case, if not a model, for others. However, this is not to say that the EU framework would be perfect as such. The EU approach to renewable energy has been rather bold when compared internationally, and the EU renewables scheme has succeeded in producing a huge increase in the development of renewable energy in Europe. However, as clarified above, the EU renewables scheme also suffers from particular shortcomings that need to be addressed. Steiner et al. continue that ‘an assessment by an independent, respected and expertise-based institution or institutionalized processes appears imperative to find out how to make promotion of renewable energy

⁹⁰ Talus, *EU Energy Law and Policy*, *supra* note 64, at 191.

⁹¹ See IRENA, ‘IRENA Innovation and Technology Centre’, available at <<https://www.irena.org/menu/index.aspx?mnu=cat&PriMenuID=35&CatID=112>> (visited 5 May 2014).

⁹² See further IRENA, ‘Costing Analysis at IRENA’, available at <<http://costing.irena.org/about-costing.aspx>> (visited 26 March 2014).

⁹³ See IRENA, ‘Knowledge, Policy and Finance Centre’, available at <<http://www.irena.org/menu/index.aspx?mnu=cat&PriMenuID=35&CatID=109>> (visited 5 May 2014).

⁹⁴ See further IRENA, ‘Policy Advice’, available at <<http://www.irena.org/menu/index.aspx?mnu=Subcat&PriMenuID=35&CatID=109&SubcatID=158>> (visited 26 March 2014).

work in practice'.⁹⁵ This assessment could serve both global and regional level policy making. IRENA fits this need rather perfectly.

In the context of the KPFC, joint efforts between the IEA and the IRENA should also be mentioned. Namely, the IEA and IRENA maintain a joint database for policies and measures related to renewable energy. The IEA/IRENA Joint Policies and Measures Database for Global Renewable Energy⁹⁶ includes country-validated renewable energy policy data and country-specific policy profiles from more than 100 countries. The database aims to address the increasing demand from policy-makers, researchers and the general public for easily accessible information on renewable energy policies and measures.⁹⁷

Finally, IRENA'S REmap 2030 initiative underlines the importance of global cooperation and coordination for nations to meet their growing energy needs without negatively affecting the climate system. The development and deployment of renewable energy technologies cannot be contained within national borders. International cooperation is thus vital to the advancement of the deployment of renewables, and special focus should be placed on those areas of the world where the impact of cooperation would be the greatest.⁹⁸

IRENA's 'Capacity Building Strategic Framework'⁹⁹ includes the principles that help countries to overcome the challenges that hinder the achievement of their ambitious renewable energy deployment targets. Countries around the world are becoming increasingly focused on accelerating the uptake of renewable energy. Renewable energy targets are being set, policies that promote the deployment of renewable energy technology are being established, and countries are incentivizing innovation and expanding related markets. While this is a positive thing, for developing countries in particular the primary challenge is not about accepting renewables targets or adopting policies as such. The challenge is rather the actual implementation, and the lack of required institutional skills and knowledge as regards effective implementation.¹⁰⁰ IRENA is equipped with the expertise to support developing countries towards the effective implementation of renewable energy policies. IRENA can play a key role in shaping policy choices and technology decisions particularly in developing countries.¹⁰¹

⁹⁵ Steiner et al., *International Institutional Arrangements*, *supra* note 74, at 157.

⁹⁶ See IRENA, 'IEA/IRENA Global Renewable Energy Policies and Measures Database', available at <<http://www.irena.org/menu/index.aspx?mnu=Subcat&PriMenuID=35&CatID=109&SubcatID=158&RefID=158&SubID=170&MenuType=Q>> (visited 26 March 2014).

⁹⁷ *Ibid.*

⁹⁸ IRENA, *REmap 2030*, *supra* note 5, at 38.

⁹⁹ See IRENA, 'Strategic framework for RE capacity building', available at <<http://www.irena.org/menu/index.aspx?mnu=Subcat&PriMenuID=35&CatID=110&SubcatID=156&RefID=156&SubID=160&MenuType=Q>> (visited 26 March 2014).

¹⁰⁰ Capacity Building Strategic Framework for IRENA (2012–2015), November 2012, available at <http://www.irena.org/DocumentDownloads/Publications/Capacity_Building_Strategy.pdf> (visited 29 April 2014), at 6.

¹⁰¹ Urpelainen and Van de Graaf, *The International Renewable Energy Agency*, *supra* note 21, at 8.

To summarize, IRENA's best features currently are, firstly, its capabilities to produce and disseminate information on renewable energy; and, secondly, its commitment to very extensive policy analysis. It needs to be also noted, especially in the context of IRENA's renewables focused mandate, that IRENA does have a massive task at hand before becoming a truly credible international coordinator on renewable energy. For example, its relationship with the other global energy organizations, such as the IEA and the UN-Energy, needs to be clear to the global audience.¹⁰² Thus, IRENA, as a young organization with an ambitious agenda, does hold the necessary prerequisites for becoming the established home of renewables. Urpelainen and Van de Graaf see the greater potential of IRENA by stating that: '[a]lthough IRENA's current direction is already promising, leadership in mobilizing the renewable energy community across the world would raise the importance of the organization to an altogether new level'.¹⁰³

4 Concluding remarks

Climate protection has gained global political priority and renewable energy has been recognized as playing a pivotal role as part of our efforts to tackle dangerous climate change. A transformation of the global energy system is required. Ferrey writes that 'the common assumption has been that control of carbon will result in the implementation of renewable energy technologies as the new world energy base'.¹⁰⁴ A similar assumption is adopted in the context of the revised EU policy framework for climate and energy for the period from 2020 to 2030, as elaborated upon earlier in this paper. In reality, nothing concrete enough to match the task at hand is going to be achieved with an assumption, or through a presumed self-encouragement in the field of international (or regional) environmental law-making. Effective policy and regulatory frameworks on renewable energy together with long-term, consistent and clear commitments to renewable energy are the preconditions for a sustainable energy future and for the achievement of the SE4ALL objectives.¹⁰⁵

IRENA's diverse membership requires the organization to be adaptable, and to be able to respond quickly and effectively to the rapidly changing energy landscape with diverging interests.¹⁰⁶ IRENA, as a fresh and active organization with a clear set of activities, is in a unique position to coordinate the acceleration of renewable energy towards a globally coherent approach to the achievement of the renewable energy objectives set out in the UN SE4ALL initiative.

¹⁰² For more in-depth discussion on the relationship of IEA and IRENA, see, for instance, Van de Graaf, *Fragmentation in Global Energy Governance*, *supra* note 10, *passim*.

¹⁰³ Urpelainen and Van de Graaf, *The International Renewable Energy Agency*, *supra* note 21, at 17.

¹⁰⁴ Ferrey, *The Failure of International*, *supra* note 40, at 78.

¹⁰⁵ Sawin, *National Policy Instruments*, *supra* note 16, at 104.

¹⁰⁶ *Ibid.* at 13.

Some scholars are convinced that an international energy convention, as the predominant form of international regulation, would be the primary instrument in the achievement of the renewable energy objectives.¹⁰⁷ However, considering the huge challenge that it would present for the current global discussion on climate and energy, an international (renewable) energy convention appears to be a rather unrealistic alternative. At the moment, one feasible option could be to develop the discussions under the process that is already taking place in the context of the UNFCCC and ADP Workstream 2. If there were binding obligations or codified targets of some form on renewable energy, the most realistic scenario would be to place them under the climate law process.

This paper has approached the role of IRENA as the 'umbrella organization' capable of 'fitting together' the currently active but heterogeneous uptake on renewable energy. Although it is too early to evaluate the full potential of IRENA, it can be concluded with certainty that IRENA could alleviate the challenges related to the distribution of homogeneous information and research and development on renewable energy. Centrally, IRENA can contribute to policy analysis on the 'best' policies. Furthermore, IRENA could function as a facilitative coordinator to steer international and regional cooperation on renewable energy approaches. Lastly, IRENA is also in prime position for seeking opportunities for further synergies and coherence where appropriate. The paper has, however, also suggested that IRENA could perhaps serve a far greater role within the global renewable energy governance, and establish itself truly as the international home for renewable energy.

¹⁰⁷ Bruce, *International Law and Renewable Energy*, *supra* note 34, at 47–48.

PART IV

INTERACTIVE NEGOTIATION SKILLS IN THE AREA OF NATURAL RESOURCES GOVERNANCE

THE JOENSUU NEGOTIATION: A MULTILATERAL SIMULATION EXERCISE – COMPLIANCE NEGOTIATIONS IN THE INTERGOVERNMENTAL COMMITTEE FOR THE NAGOYA PROTOCOL¹

Cam Carruthers,² Tuula Honkonen³ and Sonia Peña Moreno⁴

1 Overview

1.1 Introduction

This paper reflects the elements and structure of a negotiation simulation exercise used for the University of Eastern Finland – UNEP Course on Multilateral Environmental Agreements (MEAs), held between 8–14 August 2013.

The scenario for the negotiation simulation focused on compliance-related issues under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equit-

¹ The materials for this simulation exercise are for professional development purposes only. With the exception of the text of official documents of UNEP and UN bodies, these materials may not be used, reproduced, revised or translated in whole or in part, by any means, without written permission of the authors. They are not intended to represent any official policy, positions or views of any state, organization, legal entity or individual. Any views expressed in these materials are solely those of the authors.

² LLB (University of British Columbia) M. Public Administration (University of Victoria); Director, Integrity Division, Temporary Foreign Worker Program, Employment and Social Development Canada; former senior legal officer with the Legal Affairs Programme, UN Climate Change Secretariat; e-mail: cam.carruthers@sympatico.ca. The authors of this paper are referred to collectively as ‘the organizers’ throughout.

³ LLM (London School of Economics and Political Science) D.Sc Environmental Law (University of Joensuu); researcher of International Environmental Law at the University of Eastern Finland; e-mail: tuula.h.honkonen@gmail.com.

⁴ MSc International Relations (Univ. of Geneva) BSc Political Science and Modern Languages (Univ. of Los Andes, Bogota, Colombia); Senior Policy Officer, Biodiversity at the Global Policy Unit of the International Union for Conservation of Nature (IUCN); email: Sonia.PenaMoreno@iucn.org.

able Sharing of Benefits Arising from their Utilization (the Protocol),⁵ and involved both substantive and structural/procedural issues. The simulation was based on compliance-related negotiations in the Intergovernmental Committee (IC) for the Nagoya Protocol, as well as the adoption of the outcome of the IC's work at the subsequent High Level Segment of the first Conference of the Parties (COP) serving as the Meeting of the Parties to the Protocol (COP/MOP). The simulation was hypothetical but drew on issues at play in actual ongoing negotiations. Four groups (I–IV) were asked to produce agreed text on the following compliance committee issues:

- I. Objectives, nature and underlying principles; and Functions of the Committee;
- II. Institutional Mechanisms and Ombudsman;
- III. Measures; and Review (Friends of the Chair); and
- IV. Procedures; and Information and Consultation.

In addition, the simulation explored issues related to MEA decision-making procedure, in particular as it relates to the delegation of authority from a supreme decision-making body under an international legal agreement (such as a Conference of the Parties for a treaty, or a COP serving as the Meeting of the Parties, or MOP, for a Protocol); and, as it relates to consensus decision-making.

A supplementary objective of this exercise was to produce discussion and results, including this paper, which may be of interest to participants in the forthcoming meetings of the Intergovernmental Committee as well as the COP/MOP. The theme also provided an opportunity for participants to gain perspective on the complexity of international environmental law-making in the current international environmental governance (IEG) system.

1.2 Importance of procedures and rules of procedure in MEA negotiations

In MEAs' decisions, procedures and/or rules of procedure (rules) are set up to govern activities in decision-making bodies, based on a provision in the MEA itself which usually stipulates that Parties are to agree on such rules. The COP (or other similar body) serves as the supreme decision-making body of the agreement. A COP takes decisions to implement the agreement, and reviews and evaluates implementation of the agreement, including related decisions. In the case of a completely new MEA, while there would be no agreed rules in place to govern an intergovernmental negotiation conference, there are generally accepted norms of practice (for example, requiring consensus decision-making). Where a new legal instrument, such as a protocol, is being negotiated under the umbrella of an existing treaty, generally the rules of procedure of the existing treaty would apply, absent an alternative agreement.

⁵ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, <<http://www.cbd.int/abs/>>.

Rules of procedure generally regulate the activities of decision-making bodies (Intergovernmental Negotiating Committee (INC) or COP) including subjects such as membership, officers, conduct of business, decision-making, agendas, languages and amendments to the rules, and, for an MEA that is in force, secretariat functions. Among other things, the rules reflect fundamental principles of transparency and procedural fairness, the latter of which is based largely on the principle of equality of sovereign states. Another principle reflected in the rules is that in international law, authority is ultimately derived from states. While the fundamental principles are common, each set of rules is adapted to its specific context. A good knowledge of the rules of procedure of the forum a negotiator works in is invaluable. Knowing the rules means knowing what one can do to advance or protect one's position, and how to do it.⁶

All too often, however, negotiators in multilateral environmental fora have only a limited awareness of the rules that define the arena in which they operate. The rules and related issues may seem either mundane or arcane, and only incidental to the more compelling questions of substance. Negotiators are often more concerned with strategy or technical priorities. Some may not even be aware of the influence of the rules on the process, which can be subtle. Even when no reference is made to the rules by negotiators, they can still have a profound influence on outcomes. A key example is decision-making: votes are generally avoided, but whether and how consensus is obtained on a given issue may depend to some degree on the understanding of how Parties would vote if they did vote. Negotiators who fail to understand the underlying dynamics on such issues can make serious strategic errors.

Indeed, ignorance of the rules can lead to major failures and frustrations with the process, especially since problems may be discovered after key decisions have been taken. It is difficult, if not practically impossible, to undo multilateral process decisions, once taken. Therefore, it is important to consider strategic issues about decision-making processes and relevant rules early in any multilateral endeavour. Once a process is underway, it may result in a proliferation of sub-processes based on a set of interrelated decisions. While these processes are susceptible to congestion and inertia, it is also possible that they can move toward an unexpected direction or conclusion very quickly, with major outcomes in the balance.

This simulation was designed, in part, to open up certain procedural issues so that participants can strengthen their knowledge and understanding of the procedures and rules as tools for more effective and efficient negotiation of individual and common objectives. The idea was for participants to negotiate conceptual ownership of procedures while they negotiate practical textual solutions. The premise was that the procedures and rules constitute a code which reflects the values and interests of Par-

⁶ For an analysis of the importance of the rules of procedure in a particular MEA, see Joanna Depledge, *The Organization of Global Negotiations: Constructing the Climate Change Regime* (Earthscan, 2005), particularly at 80–102.

ties and informs the way negotiators work together to take decisions. The rules frame what happens, who can make it happen, when, where and how. The higher the level of common understanding and agreement of the rules in any given body, the more efficiently and effectively that body can operate and reach agreement to attain common objectives.

1.3 Simulation objectives

This negotiation simulation exercise focused on the negotiation of issues related to Nagoya Protocol compliance procedures, and compliance in a MEA context. Through simulation experience, the general objectives were to promote among participants the following:

1. Understanding of the challenges and opportunities related to compliance, both in general and in this specific MEA context.
2. Understanding of the principles and practices of multilateral negotiation (including high level segments) and appreciation of the value and role of the rules of procedure.
3. Familiarity with specific substantive and drafting issues.
4. Discussion and appreciation of different perspectives on substantive and institutional issues related to compliance, in particular under the Nagoya Protocol.

The focus of this exercise was on substantive compliance related issues and on issues of procedure. Within the exercise, the specific objective of the meeting was to produce agreement on the four issues set out in 1.4 below.

1.4 Procedural scenario

The scenario was set in two bodies: 1) The third meeting of the Ad Hoc Open-ended Intergovernmental Committee for the Nagoya Protocol on Access and Benefit-sharing (IC); and 2) the High Level Segment of the first COP/MOP of the Nagoya Protocol. The IC was in the phase of preparing draft decisions to recommend to the COP/MOP of the Nagoya Protocol, once the Protocol enters into force. The negotiation simulation scenario and the issues set out within it were hypothetical, but based on actual and recent discussions.

The premise of the scenario was that the third meeting of the IC and the first COP/MOP were both taking place in Joensuu, Finland, August 2013, and that at this meeting, the IC had been asked to address the compliance related issues forwarded to it. The exercise began on the first day in the IC and proceeded to three drafting groups and one Friends of the Chairs group. Then, on the second day, the exercise moved to the COP/MOP for a decision on adoption of agreed texts. When the action began in the IC, the body had before it the texts forwarded to it by the CBD

COP. The Parties had agreed on the establishment of a drafting group to address three of four key issues, but had been unable to agree on a drafting group for the fourth issue. The IC co-Chairs had therefore asked for a Friends of the Chair group to negotiate the proposed text.

The first day of the simulation was understood as ending on the last day of the drafting group activity and, because of difficulties in the negotiations and limited availability of rooms, this was also the penultimate day of the high level segment. The second day of the simulation was the last day of the high level segment.

The IC had two co-Chairs, the COP/MOP had a President and there was one rapporteur for the whole simulation. These officials were selected by Parties for the third meeting of the IC in informal discussions before the opening plenary. The Parties followed established practice and balanced developed country and developing country representation in these elected positions. In addition, the drafting groups each elected one facilitator and one rapporteur.

The negotiation text forwarded to the IC is found below in subsection 3.2. The draft text addressed issues related to compliance under the Protocol, including institutional and procedural issues.

Each drafting group was told that it needed, at least, to address the issue of the substance of the draft text before it, and possibly also the form (decision or conclusion). Four drafting groups were envisaged for four issue clusters, which were:

- I. Objectives, nature and underlying principles; and Functions of the Committee;
- II. Institutional Mechanisms and Ombudsman;
- III. Measures; and, Review (Friends of the Chair);
- IV. Procedures; and, Information and Consultation.

1.5 Introduction to the exercise

Each participant played a specific role, representing a Party. Participants were encouraged to play their part in the overall scenario for the simulation, following general and individual instructions.

It was suggested to participants that, where possible, it is a good idea to make alliances and develop coordinated strategies to intervene in support of others, or to take the lead in other cases. Participants were particularly encouraged to seek support in the context of their negotiation group. No specific time allocation was made for negotiation group coordination, nor was any organizational approach set out for such groups. It was noted that in real life, negotiation groups differ widely in their internal organization and they usually have very limited status in official multilateral ne-

gotiations (with the exception of the European Commission, which now often has Party status in MEAs). However, they can be very effective at driving negotiation outcomes, particularly when their members have consistent interests and positions, and when they are well organized. As in real life, there were negotiation groups in this simulation. However, in this exercise, the negotiation groups were only known by colours (blue, red, yellow, purple), with membership randomly pre-determined, and it was up to participants to organize and negotiate within their assigned groups. It was suggested that their effectiveness would depend on the investment made by participants.

Some roles, including the co-Chairs, were set up to play a resource function – to be useful to participants. Those playing such roles were asked to serve all participants and work for a positive outcome in addition to following their individual instructions. They were encouraged to state when they took up their partisan roles (for instance, ‘I’m taking off my Chair’s hat’).

Participants were asked to keep in mind their interests and positions with respect to all four issues, but to focus on the issue assigned to their drafting group. The groups were asked to narrow their focus as quickly as possible to identify issues to be addressed, and to dispose of issues expeditiously where possible. Participants were asked not to give up when faced with obstructions to their instructions, but to work hard and creatively to achieve their objectives.

Participants were strongly urged to follow their instructions, and to elaborate interventions with a compelling rationale to advance their positions by drawing on context provided by their twin (see below for an explanation of ‘twinning’). Participants were also encouraged to take the initiative and be inventive and to intervene in drafting groups and in plenary even if they had no specific instructions on a particular issue. Participants representing Parties were highly encouraged to seek support from other participants for, and identify opposition to, their positions, including positions discussed in drafting groups in which they did not participate. To this end, participants were asked to consider developing joint drafting proposals and making interventions on behalf of more than one Party. Participants were encouraged to consider using regional and negotiation groups as a point of departure. Participants were also asked to think about issues for discussion in the ‘post mortem’, a facilitated review of the exercise that immediately followed the final plenary, and include issues of both process and substance within the exercise, as well as issues relating to the structure and management of the exercise itself.

It was noted that the simulation was designed to focus on both the negotiation process as well as the substantive issues, and it was set up to be difficult, with failure to reach agreement a real possibility. It was also noted that a random distribution of positions was likely to result in making some Parties appear more or less constructive and, for simulation purposes, some positions were designed to cause various kinds

of challenges. It was highlighted that the positions in individual instructions were developed and assigned randomly. They were entirely hypothetical and not intended to reflect specific positions of particular Parties or the views of organizations or individuals.

It was noted that individual delegates often face situations similar to this exercise, where they have little opportunity to prepare, but need to define objectives and develop a strategy. Informal diplomacy is where most progress toward agreement on concepts is made, while drafting group and plenary discussion is often required for agreement on specific texts. Drafting often involves a fine balance between accommodation and clarity. In real life, decision-making on final text in plenary may appear to be simply '*pro-forma*' (merely a formal repetition of what has already been agreed) but there can be surprises. Decisions in the plenary are critical and can sometimes move very quickly, at times moving back and forth on an agenda, so being prepared with an effective intervention at any moment is essential.

The co-Chairs and the four drafting group facilitators were set up to play important roles, driving and managing the process – and managing time – to produce agreement. They were encouraged to consult broadly, including with facilitators and Party representatives (it was noted that the simulation organizers were able to provide advice acting as senior secretariat officials). The key to collative success, it was suggested, was thoughtful organization of the work of the groups, including strategic management of how the smaller drafting groups and the plenary sessions function and were linked.

1.6 IC v. High Level Segment

Participants were asked to focus on drafting in the IC context, and then shift to more discussion of trade-offs and accommodations with other Parties for the High Level Segment. Participants were also warned to expect that in the High Level Segment, Ministers and Heads of Delegation would only have limited time to deal with compliance, perhaps only one issue. It was noted that it can often be important to settle complex issues at the technical level and in settings like drafting groups, and that it can be very risky to rely on outcomes from the High Level Segment. In the latter setting, it was noted that issues which can be formulated as a 'yes' or a 'no' are most susceptible to resolution. And the formulation of the question can be critical.

2 Instructions

The primary materials for the exercise, provided to participants, included the general instructions reproduced below, as well as supporting materials referenced below. Individual instructions were provided separately to each participant.

2.1 Individual instructions

The core of the simulation was set out in **confidential** individual instructions, each between 1–2 pages in length. They provided very brief positions and fallback positions on each of the issues under negotiation, but no rationale or strategy (this had to be developed by each participant). In some cases, the instructions contained positions that appeared to be mutually incompatible. It was noted that similar challenges arise for delegates in real MEA processes from time to time, especially in cases where different domestic departments make decisions on different issues, and inconsistencies are not effectively addressed in the development of that Party's negotiation mandate. For this exercise, instructions were provided in a simplified form with only simple positions, rather than that of official delegation instructions, which often set out linkages and rationale as well as strategic negotiation approaches. In some cases, instructions stipulated that a particular position was not to be abandoned, and the participant was not to resort to a fall-back without consulting a designated senior official in the state's capital. For simulation purposes, the coordinators of the exercise served in this capacity. For further guidance in dealing with procedural and strategic issues, participants were referred to the *MEA Negotiator's Handbook*.⁷

2.2 General instructions

The following are the general instructions, as provided to all participants:

At a minimum, please review the general and individual instructions and the key simulation documents (subsection 3.1).⁸

- 1) Each participant is assigned dual role as a Lead Negotiator (in the ICNP) and then as Head of Delegation (in the COP/MOP High Level Segment) for a particular Party (these are both 'speaking roles'); each participant will also play the role of a Delegation Expert (see 2.4, below) in the delegation of another participant, to whom they provide advice about their country or region of origin (a non-speaking role); in addition, each participant will also be asked to rotate into a secretariat support role at least once in the exercise.⁹ Additional **confidential** individual instructions will be provided to each participant.
- 2) Participants representing Parties, according to the secretariat, have been sent with full credentials from their governments to participate in the meeting of the IC and COP/MOP, using their confidential individual instructions as a guide.¹⁰

⁷ Cam Carruthers (ed.), *Multilateral Environmental Agreement Negotiator's Handbook* (2nd ed., University of Joensuu – UNEP Course Series 5, 2007), available in English and French at <<http://www.uef.fi/en/unep/publications-and-materials>>.

⁸ See also *ibid.* at sections 3.1, 3.2, 3.3, 3.6, 2.4, 4.3 and 5, in particular.

⁹ There are no IGO or NGO roles in this exercise, based largely on feedback from participants in other simulations who indicated that they found such roles very limited.

¹⁰ **Confidential** individual instructions have been developed without reference to actual country positions, and it is not necessary that participants attempt to follow positions in the real negotiations.

- a. Participants should do their best to achieve the objectives laid out in their instructions. You should develop a strategy and an integrated rationale to support your positions.
 - b. On any issues which you do not have a position in your individual instructions, you should develop your own positions, with a view to securing agreement on the issues where you do have a position;
 - c. Do not share your confidential individual instructions with other participants.
 - d. Do not concede to a fallback position without a serious effort to achieve your primary objective (and not on the first day!).
 - e. You should work with your negotiation group and allies as much as possible – within the scope of your individual instructions. If possible, consult with others before the session, to identify and coordinate with those who have similar instructions, and even prepare joint interventions. You should build alliances and try to support anyone with a similar position who is outnumbered. You should try to identify participants with opposing views, and influence them both in formal negotiations, as well as in informal settings.
 - f. At any time, you may receive supplementary instructions. Participants should, of course, always be respectful of each other's views and background.
- 3) All participants will temporarily play the role of a secretariat official to support the Parties, President, Chair and rapporteurs, including in both plenaries and drafting groups, as appropriate (only in a support / advisory role).
 - a. Participants will rotate into a secretariat role based on time "slots" set out in the table of roles in section 2.3 and in the schedule for the simulation annexed to these instructions (Participants may agree among themselves to switch slots – e.g. if elected as a Co-Chair).
 - b. Secretariat officials should keep speakers lists, take notes and intervene as needed to respond to Parties. You should focus on matters of procedure and organization of work, as well as issues related to secretariat resources and capacity, but are required to maintain neutrality on issues where there is a divergence of views among Parties.
 - c. Participants temporarily in a secretariat role may also switch roles and intervene in their Party representative role as a last resort if necessary to maintain their position (when acting as a secretariat official they should use a secretariat flag; when as a Party, their Party flag).
 - d. There is no intended link between a participant's role as a Party representative and their temporary functions as a secretariat official.
 - 4) Simulation Coordinators may, as needed, act as senior secretariat officials and/or a designated senior government official in a state's capital authorized to provide supplementary instructions to their delegations. Coordinators will remain as far as possible outside of the simulation and should not be consulted unless necessary. Questions on procedure, etc. should be addressed to the co-Chairs, drafting group facilitators or secretariat officials.

- 5) In the plenaries, the President or co-Chairs sit at the head of the room, with secretariat officials beside them. Parties will have the opportunity to select a ‘flag’ or country nameplate (fold it twice, so the name is in the mid panel). To speak, raise your ‘flag’ and signal the secretariat official keeping the speakers’ list. Secretariat officials will also have nameplates.
- 6) The simulation will begin in an IC plenary and end in COP/MOP plenary. As explained in subsection 1.4, the IC will establish three drafting groups and one Friends of the Chair group (Groups I-IV). No arrangements will be made for regional groups unless made by participants themselves.
- 7) The first task for Parties is to elect a COP/MOP President, and co-Chairs of the IC, then a facilitator for each group. The usual practice is that developing country Parties and developed country Parties are equally represented. Selection should be based on informal consultations, and decided by consensus.
- 8) When the IC breaks into the four groups, please join the group identified in your individual instructions. The groups will operate much like an informal drafting group (see the *MEA Negotiator’s Handbook*).
- 9) The four groups must reach agreement on what to report back to the plenary. Each drafting group selects a facilitator to manage the meeting and a rapporteur to record agreed text (see the *MEA Negotiator’s Handbook* on drafting, especially use of brackets).
- 10) Once elected, the President, co-Chairs and facilitators must each play their role in the session of the body they manage, and in that body, generally refrain from openly taking positions. If they do, they should explicitly indicate that they are ‘taking their Chair’s hat off’.
- 11) Please use only the materials provided, as well as advice and information from other participants, and don’t be distracted by Internet resources or use any precedent found there or elsewhere (even though this is often a good idea in real life!).
- 12) The exercise will take place over a two-day period. Participants are encouraged to consult informally before the exercise for nominations to the co-Chair positions and in the evening of the first day to form alliances and broker solutions (as in real life).

2.4 Roles and twinning

Each participant was assigned to represent one Party, playing the role of a Lead Negotiator. They were also asked to play temporary and secondary roles as a Delegation Expert on the delegation of their twin, and as a Secretariat Official.

2.4.1 Party Representative

Each participant was assigned to represent one Party, playing the role of a Lead Negotiator on the first day of the simulation, and of the Head of Delegation on the second day. In these roles, participants negotiated directly with other participants, including by speaking ‘at the microphone’. Each Participant represented the Party

of another participant with whom they were ‘twinned’, or a Party from the same region as their twin.

As a Lead Negotiator or Head of Delegation, participants were encouraged to consult their twin (or twins, as was the case), in order to develop the rationale for their positions and interventions and to put their negotiation instructions in the substantive context of the country they represented. In particular, they were asked to seek information from their twin about economic, social, cultural and environmental drivers that could inform their approach to negotiations and support their instructions (which were not intended to represent the position of any actual Party, as noted above).

Participants were each provided with a ‘flag’ (country nameplate) for use in the formal meeting. Each participant was then asked to select the flag of their ‘twin’ (see below). If this flag was not available (when there was more than one participant from that country), then they were asked to select a flag from a country in the same region or negotiating group (if known) as their twin.

2.4.2 Delegation Expert

In their role as Delegation Expert, participants were asked not to speak ‘at the microphone’ or negotiate directly with other Parties. Their only function was to advise their twin on substantive issues related to their actual home country (or in some cases, a country with which they had some affiliation or one from the same region as their home country).

In their role as Delegation Expert, they were not expected to provide any information on actual official or political positions, but rather to focus on national economic, social, cultural and environmental issues and drivers with which they were familiar. They were told that no research was required for this role, and that this role was temporary and secondary to their role as a Party representative.

2.4.3 Secretariat Official

Each participant was also asked to temporarily play the role of a Secretariat Official. In this role, their objective was to support all Parties and the process, including officers elected by the Parties (President, Chair and rapporteurs), both in plenaries and in drafting groups. Each participant was scheduled to play a secretariat role for one time slot (with time slots reflected in the schedule annexed to their materials and this note. The general instructions above also contain specifics on the functions of Secretariat Officials.

2.4.4 Twinning

Twining was also intended to promote general understanding of how different perspectives may affect approaches to substantive and process issues – and to add some

dramatic interest to the scenario. One participant had two twins (both from Finland), as a result of the uneven number of participants.

In addition to providing substantive information, Delegation Experts were encouraged to provide their twin with cultural references, local sayings or anecdotes to help them illustrate a point related to the negotiation process or to substantive positions – as negotiators often do.¹¹ While humour is often an effective negotiation tool, participants were asked to always be respectful of each other's views and background.

It was noted, again, that there was no intended link between the positions and instructions participants were given in their roles as Party representatives (Lead Negotiator or Head of Delegation) and the positions and instructions of their twin, as a Party representative. Twins were not expected to act as allies or to coordinate in any way when acting as Party representatives. Given the random distribution of positions, it was noted that some twins had conflicting positions. Twins were asked not to disclose their fallback positions to each other, only their opening positions. If they were to accidentally learn about their twin's fallback positions, they were asked not to reveal them to any other participant. In order to reduce potential confusion, twinning was arranged so that twins were not in the same drafting group.

Individual instructions were developed without reference to actual country positions, and it was not expected for this simulation that participants would attempt to follow such positions. It was suggested, however, that participants develop their positions and interventions with the economic, cultural and social context of the regional group of their twin in mind.

The intention was to have each participant twinned with another whose background or experience was different from their own. As many developing country participants as possible took on a developed country role and perspective, and vice-versa. Instruction sets and roles were otherwise assigned randomly, except in as much as they were adjusted for regional, gender and sectoral balance. Participants were 'twinned' and assigned roles and positions based on instruction sets numbered 1–35 (some roles were re-assigned on the day of the simulation itself, in order to align with actual course participation).

¹¹ There was an informal competition and vote for the best use of such a saying. One real example is from the late Malaysian 'Chairman' Chow Kok Kee's use of a 'walk through a rose garden' metaphor in UNFCCC negotiations (United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>); see Depledge, *The Organization of Global*, *supra* note 3, at 43. A second example is when the Chair of a SAICM (Strategic Approach to International Chemicals Management) session, Halldor Thorgeirsson of Iceland, used a 'boat' metaphor in the SAICM negotiations; see IISD, *Earth Negotiations Bulletin* (ENB), Vol. 15 No. 89, 11 November 2003, <<http://www.iisd.ca/enbvol/enb-background.htm>>. These simple metaphors were repeatedly used by each Chair, and embellished with reference by each to their home country. In both cases, other negotiators made interventions, drawing on the same metaphors and/or adding their own personal or national perspective.

3 Key simulation documents

3.1 Background material

Participants were provided with key sections of two documents with particular relevance to multilateral discussion of the Nagoya Protocol, including introductory,¹² compliance¹³ and access and benefit-sharing and Protocol adoption¹⁴ related material from the CBD website. More specific to this exercise, participants were provided with COP Decision XI/1 (2012) on the ‘Status of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization and related developments’, and in particular the section on ‘Cooperative procedures and institutional mechanisms to promote compliance with the Nagoya Protocol and address cases of non-compliance’. They were also provided with the text of the COP decision to forward the draft ‘Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Protocol and to Address Cases of Non-compliance’, as contained in annex IV to that decision,¹⁵ to the third meeting of the Intergovernmental Committee, to enable the first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol to consider and approve them.

In addition, participants were provided a high level review of some of the key developments in the history of the Protocol, from *Earth Negotiation Bulletin (ENB)* on the Nagoya Protocol.¹⁶ The materials for participants also contained more excerpts from the *ENB* on major issues and views of the Parties with the strongest voices on key issues from the most recent session of the IC. The latter was intended to help participants better understand the text forwarded to the IC by the COP, including why certain sections of the text were bracketed. While the positions of Parties in this simulation exercise were randomly allocated, and were not linked to historical/actual positions, the substance of these actual positions were used to inform the kind of positions contained in individual instructions of participants.

Participants were also given the *ENB*’s Summary of the Second Meeting to the Intergovernmental Committee for the Nagoya Protocol (2–6 July 2012).¹⁷ Some expla-

¹² CBD, ‘The Nagoya Protocol on Access and Benefit-sharing’, available at <<http://www.cbd.int/abs>>.

¹³ CBD, ‘Compliance with the Protocol’, available at <<http://www.cbd.int/abs/key-issues.shtml#compliance>> (visited 20 April 2014). For an analysis of Article 30 and related issues, see Thomas Greiber, Sonia Peña Moreno, et al, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing* (IUCN, 2012), available at <https://cmsdata.iucn.org/downloads/an_explanatory_guide_to_the_nagoya_protocol.pdf>, at 243–249.

¹⁴ See CBD, ‘Nagoya Protocol: Background’, available at <<http://www.cbd.int/abs/background/default.shtml>> (visited 20 April 2014).

¹⁵ See draft texts for negotiation, Section 3.2, below.

¹⁶ *Earth Negotiations Bulletin*, Vol. 9 No. 579, 9 July 2012, at 1–2.

¹⁷ *Ibid.* at 13.

nation was also added to elucidate the context specific use of the term ‘indigenous and local communities’.¹⁸

3.2 Draft texts used for the negotiation exercise and requests to drafting groups

The simulation was set up around the work of four drafting groups (I–IV). The specific texts used for negotiation in this exercise, already noted above, came from COP Decision XI/1.¹⁹ These texts were used without modification, and included different options and much bracketed text. Group I was specifically requested to provide a clean and agreed proposal of text for adoption on parts A and C; Group II was requested to do the same for parts B and Fbis; Group 3 had parts F and G, and group IV parts D and E. In order to guide their negotiations, and in order to provide them with different strategic opportunities and challenges, participants were also provided with selected rules of procedure from the CBD on officers, the conduct of business, voting and languages.²⁰

4 Review of the exercise

4.1 Introduction

The following is a brief summary of the proceedings and analysis based on observations made by the facilitators during the simulation as well as the post-mortem conducted immediately following the simulation, written evaluations from participants, and notes from additional verbal feedback.

There were 23 official participants in all, not including the facilitators and the other resource people who supported or played various roles in respect of the simulation.²¹ The participants were mainly from Ministries of Foreign Affairs or from ministries responsible for environmental matters of their respective countries. Academic and non-governmental organizations were also represented.

¹⁸ The preamble to the Protocol contains several paragraphs related to indigenous and local communities (ILCs) and traditional knowledge (TK), with reference to Article 8(j) of the CBD.

¹⁹ CBD Dec. XI/1 (2012) 13–20.

²⁰ Annex to Decision I/1 (‘Rules of procedure for the Conference of the Parties’) and Decision V/20 (‘Operations of the Convention’), as abridged for this exercise. Selected rules related to participation, conduct of business, voting and language have been included. See Carruthers, *MEA Negotiators’ Handbook*, *supra* note 4, section 3.1.1, for an overview of the subjects most commonly covered by rules of procedure in MEAs.

²¹ The 23 participants included 15 women and 8 men from 19 countries: Afghanistan, Armenia, Cambodia, China, Cuba, Dominican Republic, Finland (5), Indonesia/Australia, Islamic Republic of Iran, Liberia, Malta, Pakistan, Russia, Saint Lucia, South Africa, Tanzania, Turkey, Vietnam and Zambia.

This was the seventh time that a simulation exercise based on the same basic organizational model has been run in a UEF/UNEP course and published in this *Review*. In each exercise, there has been a different substantive focus, while at the same time each has included key issues related to the rules of procedure. In each case, the procedural settings and mechanics have varied in important respects, while there has consistently been a focus on two aspects of negotiation: informal drafting groups, and then formal processes for adoption of agreed text. This is the fourth time that the exercise was set to run over two full days. The positive results achieved were largely the product of the creativity of the participants in overcoming the challenges of the exercise. The simulation organizers were able to monitor and influence the negotiations by providing supplementary instructions ‘from capitals’ to individual participants, in order to ensure that the process remained challenging, but also to allow room for positive progress. However, concrete substantive and procedural proposals and strategies were produced exclusively by participants.

4.2 General comments

As reflected in the plenary post mortem held immediately following the simulation, as well as in written evaluations, the exercise was considered to be a success by the organizers and by all of the participants who provided feedback.²² In particular, one participant wrote: ‘This was a fantastic exercise. Really gave me a good foundation to work on’. Others emphasized that they ‘[...] learned a lot from the exercises’, including the value of learning ‘speaking skills’, ‘procedures’, ‘rules’ and ‘the structure of negotiation’.

However, there were also suggestions for improvement. As in previous years, at least one participant indicated that ‘[i]t would have been nice to get some individual feedback on what went well and not so well’. The organizers have not yet found an effective response on this question. While some issues are identified and raised for discussion in the plenary post mortem, there is simply not enough time available during the course, and individual post-course follow-up was not seen as being practical.

In previous years, there were calls for access to course materials in advance for the purpose of preparation. This year, the ‘Primary materials’ (not including individual positions/instructions) were shared approximately two weeks before the course began, which seemed to address this concern effectively.

²² On a scale of 1–5, with 1 as very poor and 5 as very good, the introduction to the exercise was rated at 4.8/5 by the participants in terms of relevance; and 4.5/5 in terms of quality. Participation in the exercise was rated at 5/5 in terms of relevance and 4.9/5 in terms of quality.

4.3 Feed-back on the simulation objectives

The debriefing session focussed initially on the four objectives of the exercise:

- 1) Understanding of the challenges and opportunities related to compliance, both in general and in this specific MEA context.
- 2) Understanding of the principles and practices of multilateral negotiation (including high level segments) and appreciation of the value and role of the rules of procedure.
- 3) Familiarity with specific substantive and drafting issues.
- 4) Discussion and appreciation of different perspectives on substantive and institutional issues related to compliance, in particular under the Nagoya Protocol.

4.3.1 Understanding of the challenges and opportunities related to compliance, both in general and in this specific MEA context

For the first objective, there was positive feedback about the support and information provided by the resource experts who led relevant sessions in the Course. Participants agreed that understanding of these substantive issues was derived from the lecture on the Nagoya Protocol preceding the simulation exercise,²³ but that debate in the exercises, and the continuing involvement of the lecturers helped most participants deepen their understanding of the issues.

4.3.2 Understanding of the principles and practices of multilateral negotiation (including high level segments) and appreciation of the value and role of the rules of procedure

One participant crystalized feed-back about learning from the challenge of the exercise by saying that the exercise provided valuable practical experience of ‘[h]ow to defend your position even when it’s hard to’. The simulation organizers highlighted that the goal of the exercise was not for all groups to achieve consensus. On the contrary, the intent was to present participants with possibly irresolvable issues so that there would be more than usual pressure on the rules and procedures of MEA negotiation; and, in turn, more pressure on participants to use – or even misuse – the rules.

In past exercises, the facilitators had not been as transparent with participants about this objective and, as a result, frustration was expressed by participants and course lecturers. The organizers recognize that it is more usual during MEA negotiations for delegates to cooperate and work in a collegial effort to reach consensus toward progressive agreed outcomes. However, participants were warned not to assume that

²³ Sonia Peña Moreno, ‘Introduction to the Nagoya Protocol (Session 18), available at <https://www.uef.fi/documents/1508025/1949373/Sonia_+Introduction+to+ABS+%2B%20Nagoya+Protocol+Joensuu+2013.pdf/c8209861-b3e2-4316-884a-4c07300b4441> (visited 22 April 2014). The lecture was later transformed into a paper to be found in Part III of the present *Review*.

they could simply rely on experts to intervene once there is an issue with rules of procedure – the problem often is that it is very hard to undo procedural decisions.

It was noted that a number of participants had specific instructions to be obstructionist, and to use rules of procedure aggressively. Some had instructions to raise points of order and to look for opportunities to challenge rulings by the Chair.²⁴ This is extremely rare in actually MEA negotiations, and participants expressed appreciation for the opportunity to consider how to resolve such issues. Participants were generally congratulated on their perseverance and creativity, as the outcome produced a higher than expected amount of agreed text, with only a few outstanding issues reflected in bracketed text from one drafting group. There was substantial discussion among participants, including several with considerable negotiation experience, about how best to negotiate high stakes procedural issues, such as a motion to overrule the Chair. The organizers of the exercise noted that the Chair who was faced with the motion to overrule, and all involved with the motion, played their roles effectively. They were organized and thoughtful, and managed to maintain good diplomatic relationships even while making very forceful interventions.

Participants were confronted with results that would be untenable within the terms of their instructions and they were forced to grapple with the constraints of the rules of procedure, as well as the frustrations of being unable to reach agreement. Participants nonetheless worked through challenges and appreciated the learning opportunity in the exercise. The underlying objective was to highlight the importance of knowing the rules of procedure in the very rare instances where participants could be involved in actual negotiations with such difficulties, and this objective was clearly achieved.

In the end, participants were unable to overcome a key negotiation challenge and were prevented from adopting an agreed outcome by two intransigent Parties. Different negotiation and procedural approaches were made by different participants, but to no avail. There was some debate about the principle of consensus decision-making, and some questions about whether one or two Parties had taken sufficient steps in blocking consensus. The Chair, supported by those in the roles of secretariat officials, wisely chose to suspend the formal session more than once in order to provide for informal consultations among Parties and review of the key rules of procedure.

After repeated attempts by key players to broker an agreed solution, the situation became tense, and for the first time in several years running the exercise, the organizers contemplated halting the proceedings, and moving to the post mortem. However, consultations with key participants assured the organizers that the participants were comfortable in continuing to play their roles to the final gavel of the session. Ultimately, the Chair of the session put forward the decision for adoption and despite

²⁴ Note that both co-Chairs and the President may be referred to as ‘the Chair’.

attempted interventions by the dissenting Parties, declared that he saw no objection, and pronounced the decision adopted. In the debriefing session following the exercise, the Chair indicated that he drew on accounts of the adoption of the Kyoto Protocol, discussed in the lecture related to rules of procedure earlier in the Course.²⁵

As discussed in the post mortem, although instances of such procedural conflict might be rare and therefore not reflect typical negotiations, the techniques employed during the exercise are both useful and valid. It is not uncommon for a few Parties to have serious difficulties at some point in any MEA negotiation process leading to the adoption of a major decision. Parties in this position often have to consider the possibility of blocking consensus. In these situations, the importance of the rules of procedure increases, as Parties may seek procedural solutions. The assumption behind this objective is that many negotiators could be better prepared to deal with such challenges. It should be noted that some instructions and the roles of some groups were somewhat exaggerated in order to give these participants stronger roles and to contribute to the inter-locking sets of challenges confronting participants.

Most of the challenges facing participants were based on actual experience and all were based on real issues. Only a few of the instructions were somewhat unrealistic. One of the concerns noted by participants was the lack of detailed explanations for positions, some of which contained internal contradictions. Internal contradictions appear to be relatively common in MEA fora, and so were purposefully included in the simulation. The organizers recalled that participants were intentionally being challenged to impose a coherent logic on their set of positions, in part because delegates in real negotiations often face such challenges, as domestic interests are not always easy to reconcile. They also noted that because positions were allocated to different participants in a random manner, this also led to further contradictions. While some participants agreed that internal contradictions were not uncommon in real negotiation mandates, others suggested that there were enough challenges in the exercise, and that this aspect only caused unnecessary confusion.

Most of the questions involved subjective assessments of different kinds of negotiation tactics and strategies. Much of the discussion focused on the motion to overrule the Chair put forward in the final plenary session. As noted above, the participants were able to make forceful interventions in line with their instructions, and yet maintain a diplomatic approach that was largely realistic. It was emphasized that such a motion is extremely rare in actual MEA negotiations. However, participants agreed that this situation in the exercise helped in gaining an appreciation of how MEA rules can be used, and prepared them for dealing with high stakes procedural issues in the future.

²⁵ Cam Carruthers, 'MEA negotiation primer: negotiating techniques' (Session 20), available at <https://www.uef.fi/documents/1508025/1949373/Cam_MEA+Negotiation+techniques+2013.pdf/b4f-b7f40-88d3-4428-a0a7-6b2a4dbab0bd> (visited 20 April 2014).

4.3.3 Familiarity with specific substantive and drafting issues

Some participants wanted more focus on drafting techniques in the negotiation exercise, and indicated that they would be interested in more instruction on technical drafting issues, as well as a glossary of technical terms. The organizers recognized that the exercise involves procedural issues, negotiation techniques and drafting, and that while drafting is an important activity in the negotiations, techniques are not much discussed. It was highlighted that the Course did include another session on drafting techniques,²⁶ using text from a different context.

Some participants suggested that the negotiation exercise and drafting exercise could be linked, so that participants could focus on a specific text and take it through a more complete process. This is a suggestion that will be considered for any future versions of the exercise led by the organizers. In particular, participants noted one particular drafting issue with respect to how to balance clarity and ‘constructive ambiguity’ in a negotiated text in order bridge divergent views and to reach agreement. This was one of the key issues discussed in the drafting exercise earlier in the Course.

Participants and organizers noted that the negotiated outcome of this exercise reflects considerable ‘constructive ambiguity’ on a few issues, but that it also appeared to have sufficient clarity and specificity to be considered useful in practical terms. There were a number of comments from participants who found the Course sessions on negotiation and drafting techniques, which preceded the simulation, as well as the *MEA Negotiator’s Handbook* very useful with respect to drafting.

4.3.4 Discussion and appreciation of different perspectives on substantive and institutional issues related to compliance, in particular under the Nagoya Protocol

On the fourth and final objective, the organizers suggested that achievement of this objective was driven by participants themselves, and that the simulation only provided a platform for exchange among participants. They noted with appreciation that all participants took the exercise seriously and the simulation, indeed, reflected real-life multilateral discussions on the subject. Participants agreed that they had learned more about the issues and different perspectives on the issues in some ways than they could have through readings or lectures alone.

4.4 Specific issues

Both participants and organizers raised specific issues for review of the exercise, both in the post mortem plenary, bilaterally and in written evaluations. Those issues which generated the most substantive comments and discussion are reflected below.

²⁶ Drafting exercise led by Ms Barbara Ruis (Legal Officer, UNEP Regional Office for Europe) and Mr Cam Carruthers (session 21).

4.4.1 Materials

As noted above, participants were provided with a Primary Materials document, which contained general instructions and supporting material, and which was reflected in an introductory presentation.²⁷ There were many general positive comments about the materials, contents, structure and accessibility. The only concerns expressed related to those seeking greater clarity with respect to twinning (see below). There were more positive comments about the *MEA Negotiator's Handbook*. Some participants suggested, however, that the latter could usefully be updated.

It was noted that individual instructions were provided separately to each negotiation simulation participant. It was noted by the organizers that, in response to participant responses in previous simulation exercises, participants in this exercise were provided with an introduction and materials about two weeks before the exercise took place; they were not given detailed substantive background to their instructions, nor were they provided with detailed rationales for the linkage – or lack of linkages – between their positions. Instead, participants were encouraged to develop their own rationales and given the freedom to do so.

4.4.2 Roles and individual instructions

In response to feedback from a previous simulation exercise, there were no NGO or IGO roles. Some participants noted this absence, and it was discussed how the simulation might be adapted to bring in these perspectives. For the same reasons, full-time secretariat roles were also not included in this simulation, and participants took turns to play secretariat roles only for brief 'time slots'. Feedback on this arrangement was positive. The mere presence of participants in secretariat roles allowed the Chair of a session the opportunity to consult and seek advice. Participants in secretariat roles were able to provide substantive support and advice by, among other things, identifying applicable rules of procedure, or other relevant material for the Chair, while allowing the Chair to focus on the flow of discussion.

Other participants who played secretariat officials at key points in the process were faced with managing logistical demands of Parties, and helped to organize interaction with course support staff providing services such as document reproduction. While these activities were often simple and practical, many participants noted that they gained an appreciation of secretariat roles and perspectives, including on substantive issues, such as institutional or procedural issues, which would have implications for secretariat management. There was general agreement that this approach was preferable to having one or more participants dedicated entirely to a secretariat role or roles, where they would have less scope to intervene and engage on substance.

²⁷ Cam Carruthers, 'Negotiation simulation exercise: Compliance negotiations in the Intergovernmental Committee for the Nagoya Protocol and the COP/MOP', introductory lecture, available at <<https://www.uef.fi/documents/1508025/1949373/Joensuu+sim-x+2013-3.pdf/2887543e-b212-4a52-ac35-cf82e-b3e2eab>> (visited 20 April 2014),

Some voiced concerns about confusion over instruction sets that contained internal contradictions. For example, on four issues, a participant might be asked to defend three positions that emphasize state sovereignty, and on the fourth issue, take a position that would undermine state sovereignty. The concern was that it is difficult to persuade others to support your positions if you can't present a compelling and coherent rationale. The organizers purposely designed the exercise to have such contradictions in the instructions of some participants because it is a challenge often faced by real negotiators – and because it can make the simulation more interesting. However, in any future iterations of this exercise the organizers plan to reduce the number of individual instructions which contain such internal contradictions.

4.4.3 Twinning

Most participants indicated that mutual mentoring between 'twinned' partners was a particularly useful way of exploring and learning about different perspectives. Twinning was helpful in initiating discussion about cultural, regional and country-specific views, and was also conducive to improving the social dynamic amongst participants. Most felt that twinning provided a useful opportunity to put themselves in 'someone else's shoes'.

However, as in previous years, several participants expressed some disappointment that they had not been able better to engage with their twins and draw out more relevant views and perspectives, largely owing to the limited time frame of the exercise. Others suggested that the concepts could have been better explained, or that twinning could have been set up earlier in the course, or even before the course began. While the organizers have taken note of suggestions for improvement in the materials, unfortunately, given that participation was not confirmed in many cases until the first days of the course, and that many different variables in the simulation could be affected, it was not practical to twin participants earlier.

The organizers questioned participants during the post mortem on their experiences playing different roles. This edition of the exercise was the first time that the role of 'technical advisor' was formalized. Participants found that this concept helped them better understand 'twinning'. There was also support for the two-day format, as the extra day helped participants to take advantage of opportunities to learn more from their twin. While there was interest in having twinning done before the Course, it was recognized that this would not be fair to those participants twinned later (some whose participation is confirmed late would be twinned as late as the first day of the course).

4.4.4 Negotiation groups

Participants appreciated the opportunity to organize among themselves in negotiation groups, but concern was expressed about the random distribution of participants into these groups. Negotiation groups had been intentionally avoided in all but one previous version of this series of exercises, based on participant feed-back about the

need to minimize the complexity of the exercise. However, it was reintroduced this year following the removal of full-time NGO and secretariat official roles. There are limitations in how well the organizers can manage all of the different variables given the need to be able to redistribute positions/individual instructions right up to the beginning of the course, depending on final participation. However, the organizers agreed that participants should, in general, be assigned to negotiation groups aligned to their positions. There was some discussion about whether it would also be useful to introduce a European Union/Commission model, however, there were concerns that this would constrain the learning opportunities of participants by making them subject to common positions, and would not work well with the idea of randomly distributed positions as in the current design of the exercise. The organizers agreed that in any future iterations of the course, negotiation groups should be continued, with common positions generally grouped together, but likely into fictional groups (quite likely continuing to distinguish groups by colours).

4.4.5 Chairing and lead roles

In this simulation, it was clear that those in a Chair role were kept working hard on substantive and procedural issues, so that keeping track of the real and simulation names of all participants became a concern. The Chairs in this simulation were given greater flexibility to design the process and to respond to ongoing developments. This was particularly challenging and increased the intensity of the simulation. However, the Chairs were closely supported by participants in secretariat roles, and effectively used their time between and during sessions to consult with each other. Participants congratulated their Chairs on dealing effectively with rules of procedure, issues and motions, and felt that the Chair did an excellent job of continuing to effectively manage the meeting, even when dealing with a motion to overrule the Chair. It was noted by participants that the Chair was effective in moving the Parties toward agreement, and there was some discussion of whether a Chair in an actual MEA would move so quickly from declaring that they saw no objection to concluding, 'So decided'. When informed that this often occurs, a discussion followed about the need for the Chair to exercise more careful judgement, and act in line with their assessment of the general will of the Parties. Among other things, the organizers and participants found that they had developed a good practice of limiting the time for interventions, and were encouraged to find that this kind of approach is, from time to time, employed in actual negotiations.

4.4.6 High Level Segment strategies

For the first time in this series of simulations, a high-level segment was added, with participants switching roles from lead negotiators (in drafting groups) on the first day, to Heads of Delegation in the COP/MOP plenary on the second day. There was general support for this structure and for the way it made participants shift their focus from drafting to higher level strategies leading to adoption of decisions by Parties. However, while there was a general recognition of time limitations, there was some disappointment that there was not more specific general guidance as well as

more detailed individual instructions for participants to help distinguish between these two roles.

There was, nonetheless, considerable discussion and debate about strategies for finding room for consensus, ‘swing votes,’ and moderates, as well as blocking consensus (both in technical terms related to the rules of procedure and in strategic terms). There was also discussion of how to deal with Parties threatening to block consensus, and how to deal with situations when a majority of Parties seek agreement against the strong objection of one or more isolated Parties. As with substantive issues related to compliance or the Nagoya Protocol, there were different views on how MEA decision-making may evolve in the wake of the UNFCCC Copenhagen²⁸ and Cancun²⁹ results, with almost equally divided opinions. Most participants emphasized the need for the rules to provide Parties with flexibility to produce meaningful decisions that work for the majority of Parties, while a large minority emphasized the need to respect the principle that no Party should be bound against its will, and the recognition that if this principle is not respected, it could also have practical implications where Parties avoid certain kinds of multilateral engagement.

²⁸ See IISD, *Earth Negotiations Bulletin*, Vol. 12 No. 459, 22 December 2010, <<http://www.iisd.ca/climate/cop15/18dec.html>>.

²⁹ See IISD, *Earth Negotiations Bulletin*, Vol. 12 No. 498, 11 November 2011, <<http://www.iisd.ca/climate/cop16/10december.html>>.

Annex: Schedule of the exercise.

THURSDAY	8th August 2013
Session 17 4.30 – 5.30. p.m.	Introduction to the negotiation workshop – Slot 1.

SATURDAY	10th August 2013
Session ** TBD	Informal consultations (optional) – Slot 1.

TUESDAY	13th August 2013
Session 23 9.00 – 10.30 a.m.	IC Plenary - Slot 2.
10.30 – 11.00 a.m.	TEA/COFFEE BREAK
11.00 a.m. – 12.30 p.m.	IC Groups – Slot 3
12.30 – 2.00 p.m.	LUNCH BREAK
2.00 – 3.30 p.m.	IC Groups – Slot 4
3.30 – 4.00 p.m.	TEA/COFFEE BREAK
4.00 – 5.30 p.m.	Report to IC Co-Chairs – Slot 5

WEDNESDAY	14th August 2013
9.00 – 10.30 a.m.	IC plenary - Slot 6
10.30 – 11.00 a.m.	TEA/COFFEE BREAK
<i>High-level segment</i>	
11.00 a.m. – 12.30 p.m.	Report to COP/MOP - Slot 7
12.30 – 2.00 p.m.	LUNCH BREAK
2.00 – 3.30 p.m.	COP/MOP Plenary - Slot 8 (cont.)
3.30 – 4.00 p.m.	TEA/COFFEE BREAK
4.00 – 5.30 p.m.	COP/MOP Plenary - adoption of decisions - Slot 9 -
5:30 – 6:30 p.m.	SimX Post-Mortem / Awards

N.B. – This schedule is subject to change by agreement of the Parties.

FIGHTING FOR SANCTUARY: A MULTILATERAL SIMULATION EXERCISE BASED ON THE INTERNATIONAL WHALING COMMISSION

*Ed Couzens*¹

1 Introduction

This paper explains a multilateral simulation exercise which was designed to enhance the negotiation skills of the participants on the 2013 University of Eastern Finland – United Nations Environment Programme Course on Multilateral Environmental Agreements.² The exercise was crafted to give participants experience in negotiating over an issue related to the management of natural resources, in an atmosphere of potential conflict. The background chosen was the International Whaling Commission (IWC); a body which is often the scene for bitter disputes, given the disparate views many of its Parties hold over its subject matter – and even over the terms of its core mandate.

The issue chosen was that of a proposal to establish a whale sanctuary in the South Atlantic, with the intention being that the participants would therefore be required to consider – and to argue over – the merits of establishing sanctuaries in order to conserve natural resources.

Negotiation exercises have always been a core part of the UEF–UNEP Courses on Multilateral Environmental Agreements. Successful negotiation exercises cannot be thrown together overnight – they require careful planning. The hope of the organiz-

¹ BA Hons LLB (Wits) LLM Environmental Law (Natal & Nottingham) PhD (KZN); Attorney, RSA; Associate Professor, School of Law, University of KwaZulu-Natal, Durban, South Africa; email: couzens.ed@gmail.com. (From 2015, Associate Professor, Sydney Law School, University of Sydney, Australia.)

² See <<http://www.uef.fi/en/unep/courses>>. The 2013 Course was held from 4-16 August, in Joensuu, Finland. The theme of the 2013 Course was 'Natural Resources'.

ers of the Courses is that the papers which record the exercises, especially when considered over a number of years, will make a valuable contribution to knowledge as tools which educationalists can use in training diplomats, negotiators and students in the international environmental field.³

2 Instructions and materials

Each participant was assigned to represent a Contracting Government (a Party) represented in the International Whaling Commission (IWC), the managing body of the International Convention for the Regulation of Whaling (the ICRW)⁴. Where possible, each participant was assigned to a Party with a view unlike that of the country which the participant normally lives in or represents.

The way the Course was designed in 2013, this negotiation exercise took place early in the first week. Initial instructions were given on Tuesday evening 6 August, and the exercise ran for the duration of Wednesday 7 August. The issues considered needed, therefore, to be concise and self-contained. Although the participants were able to conduct some research overnight,⁵ and it was evident that many did avail themselves of the opportunity to conduct internet-based research of the issues as well as conducting negotiations with potential allies, it could not be expected that the debate would be well-informed. A briefer exercise early in the Course did, however, set the participants up well for a more lengthy exercise in the second week.⁶

Given the time constraints, the participants were not given the option of choosing their own Chair – one was assigned (being the participant assigned to the Contracting Government whose Commissioner held the Chair in reality: St Lucia).

A month before the Course began each participant had been supplied with certain documents.⁷ Each participant was instructed to be conversant with these texts by the

³ The exercise materials described in this paper were prepared for the 10th UEF-UNEP Course on Multilateral Environmental Agreements. Where the materials are used for educational purposes, it would be appreciated if suitable acknowledgement of the University of Eastern Finland and the United Nations Environment Programme Course could be made.

⁴ International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72.

⁵ Participants were warned that if they did not fully inform themselves as to their own (allocated) Party's position, then they might find themselves embarrassed by other participants knowing more about the first participant's (allocated) country.

⁶ See the paper by Carruthers, Honkonen and Peña Moreno in Part IV of the present *Review*.

⁷ These included the text of the 1946 International Convention for the Regulation of Whaling; and also a copy of the Schedule thereto. The Schedule to the ICRW contains amendments which the Contracting Governments have made to the operation of the Convention. The ability so to amend operating procedures arguably gives the Convention an inherent degree of flexibility; however, a 75 per cent majority is required to carry an amendment, if consensus is not reached. The participants were also given copies of the IWC's Rules of Debate and Rules of Procedure. The participants were further given a copy of the 2006 St Kitts and Nevis Declaration, which provides a set of useful arguments for the pro-whaling Parties – as

time of the exercise. This was important, as the exercise was essentially an exercise on the interpretation of treaty provisions; there was not time to explain these documents on the Course itself; and an understanding of these was essential to give a realistic flavour to the exercise. Each participant was requested to bring copies of the documents with them to the negotiation exercise. Of course, it has to be accepted that in an exercise of this nature some participants will arrive well-prepared, and others not. This does, however, reflect real life also, as many international negotiators do not arrive well-prepared – especially when they are new appointees to relevant positions.

Participants were encouraged to form alliances with other Parties – some of which alliances suggested themselves naturally. As the organizer could not assume knowledge on the part of the participants, each participant was given a list of groupings into which it was expected that Parties would fall⁸ – this gave the participants the opportunity easily to identify others with whom they wished to meet, to negotiate and to try to form alliances. Participants were instructed to wear their mock Party name badges in the evening and morning. Other alliances arose which might not have occurred had this been the real IWC. Participants were expected to realize that they could achieve better results if united. It needs to be understood by the deviser of such a negotiation exercise that the larger the group the easier it is to achieve a realistic flavour. In 2013 there were 88 contracting governments to the IWC – whereas there were only 22 participants⁹ on the 2013 Course. This made it difficult to allocate proportionately realistic groupings – for instance, in reality the Parties belonging to the European Union (EU) make up a formidable voting bloc, but in the exercise only four participants could be assigned EU roles. The point, though, was to try to reflect proportionate groupings and, for purposes of the exercise, it would not matter in the final analysis if a result out of kilter with reality were to be achieved, just as it would not really matter if a Party were to take a position that it would not normally take.

Each participant was given a mock Resolution. The Proposal was to amend a provision of the Schedule to the ICRW.¹⁰ Within the IWC there is a difference between a proposed Schedule amendment and a Resolution, in that a Schedule amendment

many of the participants representing these might otherwise struggle for material. For the original of this document, see IWC Resolution 2006-1, available at <<http://iwc.int/resolutions>>.

⁸ These were as follows: LIKE-MINDED GROUP MEMBERS: Argentina, Brazil, Colombia, France, Germany, Hungary, Italy, South Africa, United States; SUSTAINABLE USE GROUP MEMBERS: Ghana, Iceland, Japan, Mongolia, Norway, St Lucia, St Vincent and the Grenadines, Solomon Islands; BUENOS AIRES GROUP MEMBERS: Argentina, Brazil, Colombia; EUROPEAN UNION MEMBERS: France, Germany, Hungary, Italy; NOT SPECIFICALLY ALIGNED: China, Russia, South Korea, Switzerland; SMALL ISLAND DEVELOPING STATE MEMBERS: St Lucia, St Vincent and the Grenadines, Solomon Islands; AFRICAN MEMBERS: Ghana, South Africa.

⁹ The 22 participants were from Afghanistan; Armenia; Cambodia; China; Cuba; the Dominican Republic; Finland (4); Indonesia/Australia; Iran; Liberia; Malta; Pakistan; Russia; South Africa; St Lucia; Tanzania; Turkey; Vietnam; and Zambia/Kenya.

¹⁰ In total, each participant was given a copy of the ICRW text; a copy of the Schedule to the ICRW; a name plate for that country; a map of world countries; a mock (draft) Resolution; a mock Agenda; a copy of the 2006 St Kitts and Nevis Declaration; and a set of (brief) individual instructions. Participants were also each given several blank mock voting sheets.

can be passed only with a three-quarters majority while a Resolution can be passed by a simple majority. This meant that there was a fair chance, with appropriate alliance-building, that the Resolution would be adopted. The numbers were so slanted that there was a bias toward the anti-whaling side, which reflects reality. The actual exercise, then, was for the participants to deal with the mock Resolution – and to choose to take it off the table; to drive it to a vote; to adopt it by consensus; or to amend it and to choose one of the above options in respect of the amended version. Given that there were 22 participants, five¹¹ were allocated arguably ‘middle-of-the-road’ Parties, with it being intended that these were ‘swing’ Parties some of whom might be persuaded to go in either direction; leaving the balance roughly nine¹² for and eight¹³ against whaling. The intention was that it would be uncertain what result would follow should there be a vote on any issue, although the pro-whaling Parties would obviously need to be more persuasive than the anti-whaling Parties.

Each Party was then given a set of, necessarily brief given the constraints of the exercise, individual instructions. A few of these are given here as samples:

Australia

Member of the ‘Like-minded group’. Is considered one of the leaders of the anti-whaling movement and takes a hard line against any form of whaling, with the exception of aboriginal subsistence whaling. Would be expected to be at the forefront of opposition to any moves that might lead to whaling being resumed in any form. Has a high degree of national awareness on the issue, and probably the most demanding of all national constituencies to try to satisfy.

Would support (ferverently) the South Atlantic sanctuary proposal, should this go to a vote, and would also lobby strongly for its adoption.

Would be expected to attend, perhaps even to organize, a meeting with the ‘Like-minded Group’ members; and perhaps to have a bilateral meeting with the United States.

Brazil

Member of the ‘Like-minded group’ and also of the Buenos Aires Group. In recent years has sought to play an increasingly active role in pushing the anti-whaling agenda.

‘Range state’ of the current proposed sanctuary. Is a co-sponsor of the sanctuary proposal and will push hard to have it voted on and lobby hard to have it adopted. As a 75% majority is unlikely to be achieved, Brazil would be relatively happy to have the proposal pass with a simple majority (and would see this as a moral victory) – but would not like to have the proposal fail in a vote.

Is likely to argue in favour of its proposal that there is scientific clarity that sanctuaries are useful; that this one has been on the agenda for a long time; and that any contracting

¹¹ China; Rep. of Korea; the Russian Federation; Switzerland; and the United States. Switzerland and the United States would, in reality, generally be expected to vote for the anti-whaling side or, very occasionally, to abstain – the other three, although usually leaning toward the anti-whaling stance, would be more inclined to find a way to avoid commitment if possible.

¹² Argentina; Australia; Brazil; Colombia; France; Germany; Hungary; Italy; South Africa.

¹³ Ghana; Iceland; Japan; Mongolia; Norway; St Lucia; St Vincent and the Grenadines; Solomon Islands.

government which argues against it is thinking only of its own short-term interests and not in the long-term interests of both the IWC and environmental conservation. Uncompromising in its opposition to any move that might lead to whaling being resumed in any form. Would be expected to align itself closely with Argentina. Would be expected to attend a meeting with the 'Like-minded Group' members; and also a meeting with the Buenos Aires Group; and also a meeting with its co-sponsors of the current proposal.

Hungary

Member of the 'Like-minded group'. Does not have a high level of interest in whaling issues, does not have a long history of involvement with the IWC, and whaling is not a major issue within the state. However, currently (ie: mid-2014) holds the Presidency of the European Union and so will be expected to play a significant role in coordinating EU policy.

Will always need to have spoken to an Agenda item, on behalf of the EU members who are contracting governments to the IWC, before any of them can speak individually.

Will try to ensure that the EU members have a unified position and to call for several compulsory 'EU Coordination meetings'. Would be expected to attend at least a meeting with the 'Like-minded Group' members.

Japan

Member of the 'sustainable use' group. Generally seen as the leader of the 'pro-whaling' IWC contracting governments. Is an active whaling country, but this takes place through 'scientific permit whaling' as Japan is bound by the 1982 'moratorium' on commercial whaling. Would be expected to be uncompromising in its opposition to any increase in protective conservation measures, but would probably seek to make subtle points on the plenary floor rather than to appear immovable. Sophisticated negotiator and would prefer to have many of its points made for it by other 'pro-whaling' IWC members. Would be expected to have at least one bilateral meeting with the United States, and also to consult with all of the other 'pro-whaling' members early on. It is possible that Japan might seek to apply subtle pressure on, and to give subtle inducements to, economically weak allies within the 'sustainable use' group in order to gain their support.

Should push at the beginning of a meeting, on adoption of the Agenda, for votes to be conducted by way of secret ballot – arguing that many smaller, developing contracting governments do not feel free to vote as they would like to do, given the pressure on them from powerful NGOs.

Is firmly opposed to whale sanctuaries, and lodged an objection to the creation of the Southern Ocean Sanctuary in 1994. Has always opposed the current proposal (for a South Atlantic sanctuary) by Argentina, Brazil and South Africa. Its argument against the proposal is likely to focus on the sanctuary being about closing off areas for commercial whaling 'through the back door'. Further, Japan is likely to make the argument that the continued putting forward of the current proposal has negative implications for any negotiated resolution of the differences between IWC members, since the creation of such a sanctuary ought not to be done in isolation but as one element of a 'package deal' (as the IWC tried to negotiate in the years 2007-2010, under the title 'The Future of the IWC') with compromises on all sides.

Rep. of Korea (South Korea)

Member of the 'sustainable use' group. A somewhat enigmatic IWC member. Is traditionally a fishing (and whaling) state and has a considerable national lobby which favours whaling, but has in recent years tried to be fairly neutral and to avoid taking firm stances. In 2012 at IWC 64, however, South Korea created something of a 'scandal' by announcing that it was 'considering' resuming scientific permit whaling, since it does wish eventually to resume commercial whaling to meet the needs of its dissatisfied fishing communities. On this basis, would be expected to align itself with Japan. However, in January 2013 it circulated a letter to IWC contracting governments in which it advised that it will be conducting its research through non-lethal means.

Would be expected to meet with the 'sustainable use' group members generally.

It is unclear how South Korea might vote on the current proposal for a South Atlantic sanctuary, should the proposal go to a vote, and it might even choose to abstain.

St Lucia

Member of the 'sustainable use' group. Is not an active whaling country, but does support sustainable use and generally speaks in support of national sovereignty (and the right of states to make their own decisions over the use of natural resources) and the need to ensure food security, and would be expected to support pro-whaling arguments and moves. St Lucia's views are well-reflected in the 2006 St Kitts and Nevis Declaration.

As marginally a 'range state' (North Atlantic/Caribbean) of the proposed sanctuary, might argue that it has an interest.

Would be expected to vote against the current proposal for a South Atlantic sanctuary, should the proposal be put to a vote.

Would be expected to meet with Japan; with the other 'sustainable use' group members; with the small island developing states; and also with St Vincent and the Grenadines individually.

Its Commissioner is the current Chair of the IWC, which means that St Lucia is in a slightly difficult position – will wish to make known its firm opposition to the South Atlantic sanctuary proposal, but will need to establish credentials as a 'fair' Chair also if not to face challenges to its authority and perhaps credibility.

Switzerland

European state, but not an EU member. Is not a member of the 'Like-minded Group'. Would be expected to be most sympathetic to the anti-whaling position, but could take a position unlike that of the majority of the anti-whaling contracting governments should Switzerland be convinced that this is correct. However, this is more likely to take the form of an abstention than a vote against the anti-whaling position.

Is not expected necessarily to attend any coordinated meetings, but might be sought out by (and be receptive to bilateral meetings with) various other IWC contracting governments seeking to explain their positions

3 The issue of sanctuaries

There are many reasons why marine sanctuaries are, almost self-evidently, a good idea. As Hoyt writes, ‘the best conservation projects consider the entire ecosystem, monitoring and protecting animals, plants and microorganisms, as well as considering people’.¹⁴ Pauly and Maclean tell us that ‘[a]reas and/or seasons in which no fishing is allowed offer the means to protect fish during the most vulnerable stages of their life, times when they should not be hunted, especially the spawning and nursery stages’.¹⁵ In the face of the current exploitation of the world’s oceans, with global marine capture production reaching 83.7 million tonnes in 2005,¹⁶ 90 percent of the ‘big fish of the ocean’ being gone ‘compared with 50 years ago’,¹⁷ and numerous human-induced threats to the marine environment,¹⁸ it is hard to imagine reasons to object to sanctuaries. As Ellis writes, however, ‘[e]ven though it is becoming evident that marine reserves would help the fishermen in the long run, there is great resistance to the idea because of its short-term consequences and the economic interests involved’.¹⁹ In the context of the IWC, sanctuaries are extremely contentious – which is that certain Contracting Governments appear to fear that anti-whaling forces may be attempting to close off significant portions of the globe to future resumption of commercial whaling by dint of the creation of sanctuaries.

Within the text of the ICRW, sanctuaries are provided for. Article V provides that the ‘Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing ... (c) open and closed waters, including the designation of sanctuary areas; ...’. To date, the IWC has established two sanctuaries, as explained below.

In order to understand the importance of this issue within the context of the IWC, a few words of explanation of the IWC’s recent history are needed. The IWC has for many years been a byword for conflict, with stark divisions between its contracting governments over both procedural and substantive issues.²⁰ After the 57th Meeting in 2007, the Parties engaged in a process termed the ‘Future of the IWC’,²¹ in which

¹⁴ Erich Hoyt, *Marine Protected Areas for Whales, Dolphins and Porpoises* (Earthscan, 2005) 3.

¹⁵ Daniel Pauly and Jay Maclean, *In a Perfect Ocean: The State of Fisheries and Ecosystems in the North Atlantic Ocean* (Island Press, 2003) 99.

¹⁶ Hans Ackefors, ‘Global Fisheries – Threats and Opportunities’ in Royal Swedish Academy of Agriculture and Forestry, *Fisheries, Sustainability and Development* (RSCAA/KSLA, 2009) 35–68 at 39.

¹⁷ Alexander Gillespie, *Conservation, Biodiversity and International Law* (Edward Elgar, 2011) 72.

¹⁸ For a scan of such threats, see Ed Couzens, ‘International Law relating to Climate Change and Marine Issues’ in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy Review 2010* (University of Eastern Finland – UNEP Course Series 10, University of Eastern Finland, 2011) 185–216 at 187–191.

¹⁹ Richard Ellis, *The Empty Ocean* (Shearwater Books, 2003) 296.

²⁰ For recent histories of the conflict in the IWC, see for instance Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster’s International Wildlife Law* (2nd ed., Cambridge University Press, 2010) 150–198; Ed Couzens, *Whales and Elephants in International Conservation Law and Politics: A comparative study* (Earthscan/Routledge, 2014); Alexander Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Edward Elgar, 2005).

²¹ See, generally, International Whaling Commission, ‘Future of the IWC’, available at <<http://iwcoffice>>.

compromise was sought through the acceptance of a 'package deal' which would include compromise on issues such as Aboriginal Subsistence Whaling (ASW);²² Japanese Small Type Coastal Whaling (JSTCW);²³ the lifting of the 1982 'moratorium' on commercial whaling; the management of small cetaceans; and the creation of whale sanctuaries; amongst others. It was originally envisaged that the 'package deal' would be adopted or rejected at IWC 62 in 2010; but at that Meeting Parties agreed that a further 'period of reflection' was required until the 2011 Meeting. No significant progress was made at the 2011, 2012 and 2014 Meetings, and although the matter will probably remain an Agenda item it does not seem likely that impetus will be regained soon. One of the aspects that has apparently 'derailed' the process is that certain Parties have objected to others, since 2011, putting forward as proposals selected items which were included in the 'package deal'.

For approximately the period 2001 to 2014 (proposal was made again in 2014 after the present exercise ran), a regular proposal was put forward annually, by Argentina, Brazil and South Africa, and in 2012 and 2014 also by Uruguay (all being range states), for the establishment of a whale sanctuary in the South Atlantic. In most of the years the proposal was put forward it was successfully voted for by a simple majority, but did not receive the three quarters majority required to amend the Schedule. The proposal was not, however, put forward in the years 2009–2010, as it was part of the proposed 'package deal'. In 2011, Argentina and Brazil put a similar proposal forward once again. Putting the proposal forward was controversial as it required separating the proposal from the 'package deal', which was part of the 'Future of the IWC' process. The controversy proved so divisive that no vote was eventually taken,²⁴ and the proposal was held over until 2012. In 2012 the proposal, voted upon, once again received a majority vote.²⁵

So far, two sanctuaries agreed to by the Commission have come into existence, in both of which commercial whaling is prohibited unless a Party to the IWC holds a reservation.²⁶ These sanctuaries are the Indian Ocean Sanctuary, which covers almost the whole of the Indian Ocean (including waters in both the Northern and

int/commission/future.htm> (visited 6 September 2014), for the history of this process.

²² A small number of communities in the state of Alaska, US; the Chukotka region of Russia; Greenland; and on the island of Bequi, St Vincent and the Grenadines, have traditionally been allocated by the IWC annual quotas of whales, for which there is no commercial whaling quota, for subsistence purposes. Authority for this is derived from the Schedule to the ICRW.

²³ Japan has four coastal communities (Abashiri, Ayukawa, Taiji and Wada) which have traditionally engaged in whaling – their whaling is not recognized by the IWC as being 'aboriginal' in nature and they are not allocated quotas of whales by the IWC.

²⁴ See Ed Couzens, 'A Strange Beast Swimming Upstream: The International Whaling Commission in the Context of Synergies between Biodiversity-related MEAs (including a multilateral simulation exercise' in Tuula Honkonen and Ed Couzens, *International Environmental Law-making and Diplomacy Review 2011* (University of Eastern Finland – UNEP Course Series 11 (University of Eastern Finland, 2013) 223, 252–258.

²⁵ See Couzens, *Whales and Elephants*, *supra* note 20, at 95–104.

²⁶ Japan holds a reservation to the Southern Ocean Sanctuary, to the extent that it applies to Antarctic minke whale stocks.

the Southern hemispheres, and including the Arabian and Red Seas and the Gulf of Oman), and which was established in 1979; and the Southern Ocean Sanctuary, which covers the Southern Ocean around Antarctica, and which was established in 1994.²⁷ The proposed South Atlantic sanctuary would be in addition to these two existing sanctuaries.

4 The Proposal

The following is the draft text which was given to the participants.

65-Doc1
7/8/2013
IWC/65/1
Agenda item 1.2

THE SOUTH ATLANTIC: A SANCTUARY FOR WHALES

Presented by the Governments of Argentina, Brazil and South Africa to the IWC 65.

The Governments of Argentina, Brazil and South Africa propose the following text as a new sub-paragraph in 7c Chapter III of the Schedule to the ICRW. We request the Commission to take a decision on the inclusion of this sub-paragraph at IWC64:

In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the South Atlantic Whale Sanctuary. This Sanctuary comprises the waters of the South Atlantic Ocean enclosed by the following line: starting from the Equator, then generally south following the eastern coastline of South America to the coast of Tierra del Fuego and, starting from a point situated at Lat 55°07,3'S Long 066°25,0'W; thence to the point Lat 55°11,0'S Long 066°04,7'W; thence to the point Lat 55°22,9'S Long 065°43,6'W; thence due South to Parallel 56°22,8'S; thence to the point Lat 56°22,8'S Long 067°16,0'W; thence due South, along the Cape Horn Meridian, to 60°S, where it reaches the boundary of the Southern Ocean Sanctuary; thence due east following the boundaries of this Sanctuary to the point where it reaches the boundary of the Indian Ocean Sanctuary at 40°S; thence due north following the boundary of this Sanctuary until it reaches the coast of South Africa; thence it follows the coastline of Africa to the west and north until it reaches the Equator; thence due west to the coast of Brazil, closing the perimeter at the starting point. This prohibition shall be reviewed twenty years after its initial adoption and at succeeding ten-year intervals, and could be revised at such times by the Commission. Nothing in this sub-paragraph shall prejudice the current or future sovereign rights of coastal states according to, inter alia, the United Nations Convention on the Law of the Sea. With the exception of Brazil, this provision does not apply to waters under the national jurisdiction, according to its current delimitation or

²⁷ See 'Whale Sanctuaries', <<http://iwc.int/sanctuaries>>. See also paras 7(a) and 7(b) of the Schedule to the ICRW. The Southern Ocean Sanctuary is due for a 'Decadal review' in 2014, but it is not likely that any changes will be made.

another that may be established in the future, of coastal states within the area described above, unless those States notify the Secretariat to the contrary and this information is transmitted to the Contracting Governments.

Participants were also given a draft Agenda.

IWC 65 – 2014 DRAFT AGENDA

PROPOSED AGENDA FOR APPROVAL AT THE OPENING OF THE PLENARY SESSION
OF THE 65TH MEETING OF THE INTERNATIONAL WHALING COMMISSION, 2014

1. Welcome by Chair
2. Notes by Secretary
3. Confirmation of Agenda
4. Confirmation of Procedure
5. Proposal IWCDoc1 – Argentina, Brazil, South Africa
6. General – if appropriate
7. Closing

5 Expectations from the exercise

It was intended that the participants, from the beginning of the plenary session, would run the exercise themselves – under the direction of their Chair. The originator of the exercise played the role of the Secretary of the IWC – sitting alongside the Chair and assisting with procedural issues without intervening in the actual negotiations themselves.

It was uncertain whether the parties would succeed in reaching consensus (on an issue on which the real contracting governments of the IWC have been unable to agree over the course of many meetings); or whether the session would end in an impasse.

6 The exercise

Plenary – 1st session

The Chair declared the 65th Meeting of the International Whaling Commission open, and the Agenda adopted. Russia asked for clarification on the procedure to be followed before the Agenda was adopted. The Chair, however, said ‘Next item. Overruled. The Agenda is adopted and it is confirmed that the Rules of Procedure stand’.

Japan then greeted all delegates (in Japanese), congratulated the Chair, thanked Fin-

land as host,²⁸ and then made a request that votes be conducted by way of secret ballot.²⁹ Norway congratulated the Chair and said that it supported Japan on the secret ballot. South Africa also extended its congratulations and thanked Finland, then indicated that it opposed the secret ballot move. Australia gave its congratulations, and then argued that the Rules of Procedure³⁰ show that ballots should proceed by way of a show of hands, that there was ‘nothing by way of secret ballot’ and argued that this would be ‘against transparency’. Brazil offered its congratulations to the Chair and thanks to the host, before indicating that it ‘supported the open ballot proposal by South Africa and Australia, based on transparency’. Russia then gave its support to Japan and Norway. Japan then replied that it noted Brazil’s point of transparency, but that the reason for its request was that having an open vote ‘allows small developing states to be unduly coerced by multinational NGOs’, that it is ‘important to vote freely’, and that the ‘need is to be transparent to one’s own country but not to other governments’.

The Chair then asked whether Brazil and Russia could ‘rethink’ their positions. Brazil, however, said that it would ‘stay with our position’. Australia asked whether, in the history of the IWC, there had ever been a secret ballot. The Executive Secretary³¹ replied that there had not.

Ghana said that it supported Japan and that ‘there has been pressure’. France said that ‘for purposes of transparency the Commission has the right to vote at plenary’ and agreed ‘with the member who said voting should be open’. St Vincent and the Grenadines supported Japan; the Solomon Islands lent its support to ‘its colleague from St Vincent and the Grenadines’; South Korea and Iceland then gave their support to Japan, as did Hungary.³² The Chair then ruled that there was no consensus and ordered that there be a vote on the issue. Japan suggested that this should be ‘a vote for future meetings’. The Chair queried whether the vote was ‘for this, or for future meetings?’. Japan said that it ‘would like the Rules of Procedure to be future’. At this point, Australia asked: ‘Can we have time?’. Russia said that it wished to ‘highlight’ the voting ‘procedure as part of procedure’ and that ‘the Rules of Procedure should be made part of the Agenda items’. Colombia said that it would ‘support the meeting’. The Chair said that she had ‘already once overruled Russia’.

Italy then said that it would ‘express an opinion on behalf of the European Union

²⁸ A useful and pleasing aspect of running negotiation exercises is that the participants usually take the exercise seriously and address each other formally and in the same terms as occur in real negotiation fora.

²⁹ This is a change to procedure which Japan regularly proposes.

³⁰ See the Rules of Procedure, available at <<http://iwc.int/index.php?CID=2385&cType=document>> (visited 31 July 2014).

³¹ The role of the Executive Secretary of the IWC was played by the organizer, the author of this paper.

³² This was presumably a misunderstanding on Hungary’s part as the country would not normally adopt such a position and, in any case, ought to have taken a position consistent with that of other EU member states Party to the IWC.

and Italy' and that it was 'against the proposal'. St Vincent and the Grenadines then suggested that, 'in the spirit of compromise suggested by Japan', the vote be 'just for this meeting'. Japan said that 'in a spirit of cooperation Japan is prepared to limit to this meeting only', but stressed that 'the danger of pressure is a continuing occurrence'. Argentina indicated that it supported Brazil. Russia said that it 'would like to emphasise that the Rules of Procedure should be made part of the Agenda items and that the overruling be reflected'. The Chair confirmed that the overruling would be reflected. The USA said that 'to preserve transparency' there should be an open ballot. The Chair asked whether Australia still wanted discussion; Australia confirmed that it did. The Chair ordered a ten minutes break.

Plenary – 2nd session

At the commencement the Chair asked: 'Japan, do you wish to proceed?' Japan confirmed that it did. An open vote was held, the result of which was: 10 for,³³ 10 against,³⁴ one abstention,³⁵ and one Party (Mongolia) was not present.³⁶ The Chair then said 'so we are not going to buy a pig in a bag, as we say in the Caribbean'; Japan thanked those who had voted in favour and suggested that the matter could hopefully be reconsidered in the future; and the Chair announced that the procedure was confirmed.

Brazil then introduced the proposal for a South Atlantic sanctuary, saying that it was concerned about whaling in the proposed sanctuary – which sanctuary it said had 'been proved useful by strong scientific evidence' as a 'breeding ground for Great Atlantic whales'.³⁷ Brazil referred to a study 'conducted by South African scientists'; and said that the proposal 'poses no threat to food security as Great Atlantic whales eat no fish but eat plankton'. Whales, according to Brazil, are crucial parts of their ecosystems and, therefore, 'disturbance or removal of whales disrupts ecosystems and will threaten the food security of the region and even the whole world'. Whalewatching, said Brazil, is important and helps reduce poverty. In respect of scientific whaling, said Brazil, 'there is little peer-reviewed research' and 'scientific whaling is clearly for the purpose of maintaining a market for whale meat' and 'we're not to be misled by these tactics'. Brazil then said that there is 'clear scientific evidence that sanctuaries are useful and cause no damage to food security'; that it supported non-lethal scien-

³³ China; Ghana; Iceland; Japan; Korea, Rep. of; Norway; Russian Federation; St Lucia; St Vincent and the Grenadines; Solomon Islands.

³⁴ Argentina; Australia; Brazil; Colombia; France; Germany; Hungary; Italy; South Africa; USA.

³⁵ Switzerland.

³⁶ This was a disappointment to the pro-whaling side, which had lobbied hard for support, as Mongolia would have been expected to have voted for a secret ballot. It is always very difficult, when running a negotiation exercise, to allocate positions and balance numbers and then to have participants be absent – only 21 of the allocated 22 roles were filled in 2013. However, this can also be said to add an element of 'reality' to an exercise – in real negotiations Parties occasionally do 'let their sides down'.

³⁷ It was unclear throughout whether Brazil, and other speakers subsequently, was referring to 'great whales' generally or to a specific species – there is no species called a 'Great Atlantic whale'.

tific whaling; and that establishing sanctuaries would be ‘implementing the objectives of this Convention’.

The Chair said that, speaking ‘not as Chair but as a scientist, we must base our decisions on science, not emotions’. South Africa responded by saying that it congratulated the Chair on those ‘wise words’ and confirmed that ‘we have full scientific evidence available’. The Great Atlantic whale, South Africa continued, ‘is a critical endangered species, confirmed by the IUCN Red List’ and ‘there is plentiful scientific evidence of this Great Atlantic whale for food security’. South Africa added that the whales were ‘not eating commercial fish’ and that ‘baleen whales eat plankton’. South Africa then referred to an article ‘by Couzens, Lewis and Kidd³⁸ titled “The Implications of Great Atlantic whales for Food Security”, in the “Marine Ecological Progress Series”, to be published in *Nature*’;³⁹ said that ‘whalewatching is another important source of income’; and said ‘so we are confident we can count on the support of developing countries’.

Australia strongly supported the proposal, ‘based on evidence’. Australia then said that ‘we’re facing new challenges for the protection of whales’, and new threats ‘such as climate change, acidity of seawater, and so forth’. The creation of the South Atlantic Sanctuary, said Australia, ‘will be an important step in the protection of whales’ and that ‘even without scientific evidence, it can be based on the precautionary principle’. Australia stated that it would be donating money to the Commission to support research, and that ‘research whaling is against the Convention’. St Vincent and the Grenadines thanked previous speakers ‘for highlighting scientific justification’, and said that ‘we need to be guided by the Convention’. St Vincent and the Grenadines then referred to Paragraph 6 of the Preamble, which refers to ‘industry and development’ and ‘not just protection’. St Vincent and the Grenadines then said that ‘the interests of consumers of stocks should be taken into consideration’, and referred to the ‘St Kitts and Nevis Declaration’ according to which ‘marine resources are an integral part of our development’; before concluding that having the ‘1982 moratorium and other sanctuaries’ meant that there was ‘no need for further sanctuaries’; and adding that there should ‘be respect for coastal communities’. The Chair thanked St Vincent and the Grenadines ‘for your well-grounded view’.⁴⁰

Hungary, speaking ‘as representative of EU’, said that ‘there is pressure from illegal hunting’. Japan then aligned itself with St Vincent and the Grenadines, highlighting the ‘need to remember the purpose of original adoption – and respect for coastal communities’. Japan thanked the Chair for her comments on science; then said that the research which South Africa and Australia referred to had not been placed before

³⁸ These being persons involved with the Course in various ways, as resource persons and/or *Review* co-editors.

³⁹ This being a respected scientific journal, see <<http://www.nature.com/nature>>.

⁴⁰ In private consultation with the organizer, the Chair (playing St Lucia) had decided to express some overt bias in favour of the pro-whaling side, to be a little provocative and perhaps spark more debate.

the Commission. Japan said that the proper procedure would have been to place the evidence 'before the Scientific Committee to make a recommendation'. According to Japan, the IWC's 'own Scientific Committee has confirmed that many species and stocks are abundant and sustainable whaling is possible'; and that this was 'highlighted in the St Kitts and Nevis Declaration'. 'We do not need a sanctuary to protect one species', said Japan: 'there is already a moratorium' and more would be 'building a roof on top of a roof'. Japan then said that 'adding additional protectionist measures is against the original purpose' of the ICRW and indicated that it hoped the proposal would be rejected. South Africa, reacting to Japan, said that papers show that the Great Atlantic whale's breeding is disrupted and that it is 'critically endangered'.

The USA said that 'whales are under threat from ship strikes, climate change, pollution, et cetera', and that it 'supported efforts to end lethal scientific research whaling'; but indicated that 'all countries supporting the proposal should be open to negotiations'. Russia said that it would 'echo Japan and St Vincent and the Grenadines' and that it 'believes in the role of scientific policy'. Russia added that it was 'concerned that any precedent would be damaging to the development of the Commission'. Norway aligned itself with St Vincent and the Grenadines and with Japan, saying that it viewed this proposal as being 'against the reason the Convention was adopted'; that there was 'no demonstrated scientific need for the sanctuary' and it viewed the 'proposal to be against whaling'.

Germany said that it was 'in line with EU policy to protect' and that it supported the sanctuary, which it said 'would promote conservation and communities through whalewatching'. Germany said that it was important to 'maintain ecosystems' and the sanctuary would be important 'even though there are two sanctuaries already' as whales are 'migratory species'. France said that it 'really' supported the 'sentiment by the EU', that whale species are in danger and that there is a need to protect breeding grounds. France supported the proposal and said that 'by protecting one will be able to promote the objects of the Convention'. In respect of St Vincent and the Grenadines 'and respecting livelihoods', France said 'I agree ... however, hurting or killing or exploiting in area, there're other ways to benefit. Whalewatching is also important'. Finally, France reiterated that it strongly supported the proposal.

Japan thanked Norway and Russia for their support. In response to South Africa Japan stressed that 'even if there have been scientific investigations in South Africa, it is highly inappropriate to make decisions not objectively assessed by the IWC's own Scientific Committee'. All commercial whaling, said Japan, 'is banned in the South Atlantic by the moratorium'; and Japan questioned the 'need for additional protective measures'. The core objective of the Convention, said Japan, 'is not to protect abundant species or absolute conservation for the future' and that 'no precautionary principle is mentioned'. Japan concluded that the matter is 'dealt with by the moratorium' and that it is 'disheartening to see the Commission abrogating its original mandate'.

The Solomon Islands said that it supported ‘its sister countries’; then referred to Article 5(2)⁴¹ of the Convention and said that ‘any amendments must support the original purpose’. St Vincent and the Grenadines welcomed the statement by France, but said that it is ‘unrealistic to try to force foreign ideas on our people’. Ghana said that it ‘would like to note that sustainable whaling is possible’; that it ‘supports national sovereignty and the right to make own decisions’; and that it is ‘dangerous to make new regulations – the CBD is enough’. Iceland referred to the ‘social, economic and environmental aspects of sustainable development’ and said that ‘use of environmental resources must include the economic’. Iceland then characterized the proposed sanctuary as ‘illegal’ and said that it supported Japan and others. China said that ‘currently there is a lack of impartial scientific knowledge about commercial whaling and whether this kind of sanctuary is necessary’; and said that it was ‘at the moment torn between supporting or opposing’, and that ‘we need more impartial research’. Italy said that ‘as a country of the EU and the Mediterranean, we strongly support Brazil’s proposal’ and that ‘whales are endangered and we need to protect them’. Italy confirmed that it did not ‘support Japan and other colleagues’. The Chair then gave a short summary, referring to there being two strong views which made things ‘a bit difficult’; and concluded by stating that ‘every effort must be made to reach consensus’.

Plenary – 3rd session

The Chair began by saying that she had had a ‘short discussion’ with Japan, South Africa and Australia in respect of consensus, and that ‘although it was difficult’ she ‘would urge you to try’. Brazil thanked supporters for showing ‘commitment to whales, ecosystems, environmental protection’. Brazil emphasized that ‘sanctuaries are in the long term interest of whales and nations’. Whales, said Brazil, ‘are endangered’ and it is ‘hard to have sustainable whaling’. Brazil requested that ‘all distinguished delegates consider the issues and vote in favour’.

Australia then interjected to say that ‘my understanding is Japan is saying we have a moratorium so don’t need a sanctuary. So means Japan accepts moratorium is forever’. Japan responded that it ‘remains firm in its resistance to the moratorium which derogates from the Convention’; and reminded Parties of the ‘ongoing compromise package process’ in which context Japan ‘would be willing to consider sanctuaries – but adopting this proposal would be counter-productive and frustrate ongoing negotiations’. Japan then reconfirmed that it remains firmly opposed to the moratorium.

South Africa said that concerns had been raised about the Scientific Committee, but that the issue of the establishment of the sanctuary ‘has been ongoing for decades’ and ‘research shows need’ with ‘plenty of evidence existing’ and it being ‘well-known

⁴¹ Per Art. V(2), amendments of the Schedule ‘(a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources; (b) shall be based on scientific findings; ... and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry’.

that sanctuaries are the best protection'. On the issue of the moratorium, South Africa pointed out that 'Japan remains firmly against the moratorium, but argues against the sanctuary because there is a moratorium'. Japan responded that it was an 'inappropriate time to raise sanctuaries unless considering the moratorium' and that to do so 'would frustrate future deliberations on the package deal'.⁴² France said that it supported South Africa on the existence of the moratorium. France stressed that this was an 'existing moratorium', and said that 'since the moratorium there continues to be hunting and killing of whales so we need more efforts and the only way is establishment of a sanctuary'. The Chair then said that she appreciated that scientific data had been talked about; and emphasized that it was 'not a matter of emotion'.

Norway raised the principle of sustainable development and said that 'management of whales should take a holistic approach'. The Convention, said Norway, 'is not meant to protect' and 'development should include sustainable use of whales, not just viewing'. Japan thanked Norway and aligned itself with Norway's views. Japan highlighted its own approach to conservation and pointed out that it had hosted the 10th COP to the CBD⁴³ – at which the Aichi Targets⁴⁴ had been agreed. But, Japan then argued, there is a 'clear difference between conserving and taking a strict preservationist stance'. Japan indicated that it supported Ghana and St Vincent and the Grenadines 'on state sovereignty'; then said that a number of countries 'have raised economic benefits of whaling' but that it is 'inappropriate to impose Western views on others'. St Vincent and the Grenadines then referred to the studies conducted by South Africa and said that they 'should not be a basis for approval of the proposal' and that St Vincent and the Grenadines 'would like to suggest postponement of the proposal until the Scientific Committee has considered the research'.

Australia said that since 2009 Australia 'has proposed eleven principles'⁴⁵ which provide for 'priorities' and are 'based on the precautionary approach'. Australia said that it wished to 'highlight the importance of a new kind of approach'. Right now, said Australia, 'only three countries in the Commission are wanting to do commercial whaling – Iceland, Norway and Japan'; but 'there are 89⁴⁶ members' and we should 'try to avoid a position that benefits only three countries' since 'the whale has no boundaries and sanctuaries are related'.

The USA said that it wished to 'highlight that whale conservation is not just the right thing to do, but that it also provides economic benefits'. This sanctuary, said

⁴² The 'package deal' having been explained above in section 3.

⁴³ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79, <<http://www.biodiv.org>>.

⁴⁴ 'The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets', Decision X/2, in Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, 18–29 October 2010, UN Doc. UNEP/CBD/COP/10/27* (2011), <<http://www.cbd.int/sp/targets/>>.

⁴⁵ It is unclear what was being referred to, if a real document.

⁴⁶ In fact, there were 88 at the time.

the USA, 'will not only help whale conservation but also people'. The USA then referred to an IWC study in 2012⁴⁷ 'which found that 13 million people had whale-watched', and that '13 000 jobs had been created in the region, including in Mexico and the Dominican Republic'. Countries are, said the USA, 'still hunting whales for commercial purposes'. Japan said that it agreed with St Vincent and the Grenadines 'to suspend this proposal until relevant scientific evidence is placed before the Commission and also other elements of the package deal'. Although a minority of members, said Japan, 'have a direct interest in whales, many of these have an interest in the sustainable use of natural resources – and that there is potential to set a very dangerous precedent'. The Chair then said that 'at the moment it seems difficult to reach consensus'.

China then said that it was strongly in support 'of the view of postponing this proposal until more important information and research is gained'. The Chair said: 'thank you for your wise words'. Germany said that it supported the USA, and that 'despite the moratorium there are some countries that have objectives and continue to do commercial whaling and some do commercial whaling under the term scientific whaling'. Switzerland said that it supported the 'prohibition for commercial whaling generally', but that it had 'doubts about the overwhelming necessity for this sanctuary'. The Chair then said: 'I will give ten minutes for Argentina, Brazil and South Africa to decide the way forward'; and added 'I strongly encourage them to withdraw their proposal'.

Plenary – 4th session

Chair: 'Welcome back'. Russia said that it took 'strong exception to allegations raised against a few countries as to illegal whaling' and that there was a 'strong case for taking this proposal off the table'. 'If there are allegations of illegal activities', said Russia, 'what would this proposal achieve?' Russia concluded by suggesting that 'such allegations avoid the spirit of consensus'.

The Chair then asked: 'Brazil, Argentina, South Africa?' Brazil replied: 'our commitment is to environmental protection, sustainable development, and poverty reduction, so we want to continue'. The Chair then said: 'every effort should be made to reach consensus. I'm a polite person, so I haven't pushed the idea of consensus further'.

Australia then asked for permission to show a short video. There was no objection and Australia loaded and began to play a video of whales being killed on Japan's JARPA II⁴⁸ research whaling programme in the Antarctic. After only a minute or so, however, St Vincent and the Grenadines raised a 'Point of Order' and objected to the screening. The Chair ordered the video stopped.⁴⁹ The Chair then said: 'No-one

⁴⁷ It is unclear whether a real study was being referred to or not.

⁴⁸ See <<http://www.icrwhale.org/scJARPA.html>> and <<http://iwc.int/permits>>.

⁴⁹ Ironically, on a graphic still image which remained on screen for the remainder of the Plenary. The image

objected'. Russia, however, said 'this is not a court of law. May I request no video'. Iceland said: 'I do not agree with this film – it's emotion, nothing scientific. We are not ready to see it now'. Norway said that it 'takes great exception to this kind of video at this meeting' and asked 'why should countries impose their values? Hunting has gone on for time immemorial'. Norway added that it had 'lodged a reservation'⁵⁰ because it believes that hunting of whales is part of the livelihood'. Japan said that it supported the others, and that it questioned the value of a video showing hunting methods. The video, said Japan, 'demonstrates that the proposal is influenced by emotion, not science' and that Japan was 'very disappointed by refusal to withdraw the proposal and that a small group was insisting on putting the proposal forward, derailing the package deal'.

Australia then said that the video 'is part of the evidence of my government into so-called research whaling'⁵¹ which has been used to 'violate the moratorium since 1986'. Australia then drew an analogy with 'showing evidence to a criminal and he says don't show evidence' then that is not a reason not to show the evidence. The Chair asked: 'please try to be concise'. Australia asked: 'how can you support this kind of whaling?' Russia said 'such analogies should not be brought into this forum' and requested Australia not to 'make such claims'. The Chair said: 'Australia, I think you heard these words'.

The Solomon Islands gave its support to Japan. South Korea said: 'the IWC is a forum of legal, not moral, debate, so we object to the video'. South Africa, however, said that it was 'perplexed by the discussion' and that 'Japan and others are willing to do whaling but not to see how it's done'. 'As to emotions', said South Africa, 'you are getting emotional. Scientific evidence exists about nervous systems of whales being close to those of humans so there is a strong reason to show the video'. In respect of sustainable use, asked South Africa, 'how can the sanctuary be a threat to sustainable development?' South Africa then concluded that 'the sanctuary is important in promoting sustainable use', we 'need healthy fish stocks', and so there is 'every justification'. Japan replied that in respect of 'Japan's programme on scientific whaling, there is no bearing', that 'no scientific whaling occurs in the proposed area' and 'methods used to kill whales have no relevance to the sanctuary'. St Vincent and the Grenadines

(of a female whale and a calf being hauled up the slipway of a whaling factory ship, the *Nisshin Maru*) was taken by the Australian Customs Service and can be seen at <<http://www.smh.com.au/news/environment/whale-watch/revealed-secret-whale-deal/2009/01/26/1232818339535.html>> (visited 6 September 2014), for instance.

⁵⁰ When the IWC amended the Schedule in 1982 to reflect that quotas for the killing of whales for commercial purposes would be zero (para. 10(e) of the Schedule), Japan, Norway, Peru and the Soviet Union lodged objections. Japan and Peru subsequently withdrew these objections/reservations.

⁵¹ This being a reference to litigation in the International Court of Justice which Australia commenced against Japan in 2010, averring, *inter alia*, that Japan's JARPA II research whaling programme was in breach of its obligations under the ICRW. See ICJ, *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)*, available at <<http://www.icj-cij.org/docket/files/148/18136.pdf>> (visited 6 September 2014). Australia eventually was formally successful in the case, with judgment in its favour, but this could not have been known at the time of this exercise – judgment being given on 31 March 2014.

said that it supported Japan and that ‘Australia has clearly told us evidence is being used against Japan in ICJ.’⁵² So Japan does not support use of video’. France said that it supported Australia, and that the video was ‘not to condemn, but to show methods’; then added that the ‘sanctuary’s a good method’ to ‘protect ecosystem’. Iceland, Norway and Brazil then all tried to take the floor, but were considered by the Chair to have intervened too late.

Australia then said: ‘you can find all the information on the website of the International Court of Justice’; and ‘it is important to highlight that this is not a matter of emotion but of ethical principles’ and ‘it is illogical and against principle and religion’. Japan, concluded Australia, ‘is violating the mandate of the Convention’. The Chair then said: ‘as Australia has had so much floor time, I will give to Iceland and Norway to respond’. Iceland said that whaling is ‘traditional’, that there is a ‘need for us, as for Alaska’, and that to ‘speak about other countries, is not right’. Norway responded to France, and said that it wished to ‘re-emphasise that the objective of the Convention is not to protect whales but to conserve toward the future’. The Chair then ruled that the proceedings were ‘not a court case, so we won’t continue’. Following this she pointed out that some states had not yet spoken; but queried whether these had new views. She then turned to Argentina, Brazil and South Africa, and asked: ‘once again, how to proceed?’ Brazil answered that they would ‘like some time to discuss’.

Plenary – 5th session

After the break, the Chair asked: ‘Argentina, Brazil and South Africa?’ Brazil replied: ‘again, we re-emphasise our commitment. We wish to keep the proposal’.

Japan then said that it wished again to ‘reiterate its disappointment at this position’ and that it was ‘disheartened by Brazil’s saying that by taking a sustainable use position Japan is anti-conservation’. This, said Japan, ‘is not the position’. Japan stated that it did not feel that ‘an unnecessary protective measure was in the spirit of the package deal’; and that the effect was to ‘place the needs and interests of whales above those of humans’. Australia said that it accepted the position of the Chair on the video, but that the ‘first image was of a mother and calf whale’ although the ‘Convention prohibits whaling of babies’. There was now, said Australia, an ‘opportunity to protect whales with sanctuaries’, but that ‘two or three countries defend whaling’. Russia said that all of the contracting countries were going around in circles and that if there was no consensus, the proposal should be put to the vote.

Brazil said: ‘some countries are saying that they are in favour of conserving whales, but are slaughtering whales to fill their markets’. ‘One of the ways to avoid this’, said Brazil, ‘is to establish sanctuaries’. The USA said that the point ‘is to protect’.

⁵² See *ibid.*

Ghana said that it ‘joined in with Japan’ and that it was ‘in favour of sustainable use’. South Korea said that it believes that ‘sustainable whaling is important for food security’ and that there is a ‘long history of whale consumption to prehistoric times’. South Korea said that it had received ‘strong criticism after last year announcing we would resume scientific permit whaling. Now we say that we’ll conduct research by non-lethal means’.⁵³

The Chair then ordered a break for lunch. Before breaking, the Chair said: ‘I strongly advise Argentina, Brazil and South Africa to consult with states that might have more sense during lunch’.

Plenary – 6th session

After lunch, the Chair began: ‘I would like to ask if Argentina, Brazil and South Africa have come to their senses?’ Brazil replied: ‘I would like to emphasise some points. Sanctuaries are the only effective way to conserve whale populations. No ways will the sanctuary pose any threat to sovereignty or food security. Whales are important for ecosystems and any disturbance will cause disruption. Whalewatching and ecotourism are important and sanctuaries are in line with sustainable development’. Brazil then said ‘I kindly request distinguished delegates to vote in favour’.

Italy said that ‘the EU is concerned about endangered whale species’; and that ‘the UN⁵⁴ must support endangered whale species for future generations’. The Chair said: ‘taking my Chair’s hat off, I ask are new sanctuaries really needed?’

The proposal was then voted upon and was passed with ten votes in favour, eight against, three abstentions and one not present. The resolution to create a South Atlantic sanctuary was therefore adopted – of course, even in the fictitious world of this exercise, this did not have the effect of amending the Schedule and actually creating the sanctuary.

In reaction, Japan thanked its supporters and said that it would ‘work toward compromise packages’. France said that it was sorry that ‘we could not manage to adopt the proposal, but are encouraged’. South Korea thanked its ‘fellow delegates for the debate, for large part based on scientific information’; and explained that as it did not have a strong position, it had decided to abstain. Russia thanked contracting govern-

⁵³ At IWC 64 in 2012 South Korea announced that it was considering introducing scientific permit whaling in its waters in order to research the differences between whale stocks, which research South Korea claimed is difficult to undertake through non-lethal methods (see Opening Statement 64/Osc Korea, available at <https://archive.iwc.int/pages/search.php?search=!collection82&bc_from=themes>). However, in January 2013 South Korea advised the IWC in writing that it would undertake research using non-lethal methods (Circular Communication, 7 January 2013, <<http://iwc.int/private/downloads/bdr2k21z880gkogcw-48w8s004/IWCALL187.pdf>>) (both visited 6 September 2014).

⁵⁴ It is unclear what Italy meant here. The ICRW is not a convention which falls under the auspices of the United Nations. The point may simply have been that in Italy’s view there should be general support for the future.

ments 'for expressing solidarity on an issue we think not required at this time' and also thanked 'those who abstained'.

The Plenary then turned to other matters and the exercise concluded.

7 Conclusion

In the end, the exercise yielded a result not markedly unlike that which might have occurred in reality. Japan made an effort to have a secret ballot procedure adopted, which proposal was rejected. This was then followed, after some acrimonious debate, by a majority vote in favour of a proposal to establish a South Atlantic sanctuary in which no commercial whaling would be allowed. Despite the majority vote being in favour, the proposal did not achieve a 75 percent majority and so the proposed sanctuary was not adopted.

Participants on the exercise researched an issue related to the international management and use of natural resources. With varying degrees of vigour, the participants argued from positions which would not have reflected their countries' usual positions; debate became vigorous at times; and the participants were required to engage with difficult questions of substance in the course of two votes. Even more importantly, perhaps, the exercise gave many of the participants a taste of international negotiation, including efforts to form alliances and to persuade other participants to favour their points of view.

The organisers of the University of Eastern Finland – United Nations Environment Programme Courses on Multilateral Environmental Agreements have always sought to make practical negotiation exercises a major focus of the Courses. This is in the belief that negotiators with any level of experience will benefit from being required to apply in a realistic setting the theory which they are exposed to in the lectures and presentations on the Courses. As raised in the introduction to this paper, the organizers' hope is also that recording and explaining these exercises in the various volumes of this *Review*, which are then made available open-access on the internet,⁵⁵ will add to the corpus of knowledge in the field of international environmental law-making and diplomacy.

8 Postscript: the sanctuary proposal in 2014

At the first real IWC meeting following the exercise, IWC 65 held in Slovenia in September 2014, co-sponsors Argentina, Brazil, Gabon, South Africa and Uruguay

⁵⁵ See <<http://www.uef.fi/en/unep/publications-and-materials>>.

proposed again that the Southern Ocean Sanctuary be adopted.⁵⁶ Introducing the proposal, Brazil indicated that:

the primary goal of the Sanctuary was to promote biodiversity, conservation and the non-lethal use of whale resources in the South Atlantic Ocean. It would also maximise the rate of recovery of whale populations within ecologically meaningful boundaries; promote long-term conservation of whales throughout their life cycle and their habitats, with special emphasis on breeding, calving and feeding areas and migratory paths. In addition, it would: stimulate coordinated research; develop the sustainable and non-lethal utilisation of whales for the benefit of coastal communities in the region; provide an overall framework for the development of measures at an ocean basin level; and integrate national research, conservation and management efforts and strategies in a cooperative framework, taking into account the rights and responsibilities of coastal States under the United Nations Convention on the Law of the Sea (UNCLOS). Brazil considered that, as whales are highly migratory animals, a concerted multilateral effort is required to guarantee their conservation and the recovery of their populations. The Sanctuary would result in the creation of an important preserved area in the Southern Hemisphere with three contiguous whale sanctuaries (South Atlantic – Indian Ocean – Antarctica).⁵⁷

Argentina, Australia, Chile, Colombia, Dominican Republic, Ecuador, Gabon, Germany, Italy (on behalf of the EU), Mexico, Monaco, New Zealand, Panama, Peru, South Africa, Uruguay and the USA all spoke in support of the proposal. Antigua and Barbuda, Côte d'Ivoire, Grenada, the Republic of Guinea, Iceland, Japan, Norway, the Russian Federation and St Lucia then opposed the proposal. The Chair's Report records that:

Norway, Japan, Iceland and the Russian Federation considered that the proposal should first be reviewed by the Scientific Committee and not discussed at this time. Japan stated that an IWC Sanctuary prohibiting whaling would not address many of the threats that the proposal aimed to deal with (e.g. ship strikes, oil exploration or climate change). It considered that the proposal would go against the Convention's objectives of conservation and sustainable use. It suggested that the countries in the region could instead cooperate through the establishment of a Memorandum of Understanding. Iceland remarked that most of the proponents were from the western side of the south Atlantic and that the consequences for States on the eastern side had not been considered.

⁵⁶ See IWC, Chair's Report IWC 65, available at <<http://iwc.int/private/downloads/92rmtt9u0aw4kg44ksksgkksg/IWC%2065%20Chair's%20Report.pdf>> (visited 2 November 2014) at 10-12.

⁵⁷ *Ibid.* at 11.

With there clearly being no consensus, Brazil requested that the proposal be voted on. The proposal achieved a majority vote, but not the required 75 per cent.⁵⁸ There were 40 votes in favour,⁵⁹ 18 votes against⁶⁰ and two abstentions.⁶¹ These figures represented greater support for the proposal than had been the case at IWC 64 in 2012, where there were 38 votes in favour, 21 against and two abstentions.⁶² Despite this increased support, however, it does not seem likely that the proposal will achieve the necessary 75 per cent majority in the near future.

Just as the present issue of the *Review* was going into press, it was reported that Japan had announced its intention to begin a new research whaling programme (to be known as 'Newrep-A') in the Antarctic to replace the programme (JARPA II) which was held by the ICJ to be illegal.⁶³ It was reported also that Japan's stated intention is to extend the programme from the Antarctic itself into areas, including the South Atlantic, in which no lethal whaling has been conducted in recent decades.⁶⁴ Clearly another gauntlet has been thrown down and the fight will continue.

⁵⁸ The voting countries recorded in footnotes 59, 60 and 61 are drawn from the present writer's notes taken in the plenary session, 2014.

⁵⁹ Argentina, Australia, Austria, Belgium, Brazil, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, Finland, France, Gabon, Germany, Hungary, Ireland, Israel, Italy, Luxembourg, Mexico, Monaco, The Netherlands, New Zealand, Oman, Panama, Peru, Poland, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, the UK, the USA, Uruguay.

⁶⁰ Antigua and Barbuda, Cambodia, Côte d'Ivoire, Ghana, Grenada, Rep. of Guinea, Iceland, Japan, Kiribati, Rep. of Korea, Lao Republic, Mongolia, Morocco, Norway, Russian Federation, St Kitts and Nevis, St Lucia, Tuvalu.

⁶¹ Cameroon, Tanzania. (St Vincent and the Grenadines did not abstain formally, but were not present when the vote was taken.)

⁶² Present writer's notes, 2012.

⁶³ See *supra* note 51.

⁶⁴ For the official announcement, see IWC.ALL.220, 'Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEREP-A)', 19 November 2014, available at <http://www.iwc.int/private/downloads/7bqy9b9maskkk0gc0scccoo40/NEWREP_A.pdf> (visited 19 November 2014). For media comment, see Andrew Darby, 'Japan to expand its Antarctic whaling area', *Sydney Morning Herald*, 18 November 2014, available at <<http://www.smh.com.au/environment/whale-watch/japan-to-expand-its-antarctic-whaling-area-20141118-11pa1l.html#ixzz3JPc1lb1G>> (visited 19 November 2014); and Oliver Milman, 'Australian government to scrutinise new Japanese whaling plan', *The Guardian*, 19 November 2014, available at <<http://www.theguardian.com/environment/2014/nov/19/australian-government-to-scrutinise-new-japanese-whaling-plan>> (visited 19 November 2014).