



International Environmental Law-making and Diplomacy Review 2009

Tuula Honkonen and Ed Couzens (editors)

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FOREWORD

The papers in the present *Review* are based on lectures given during the sixth University of Joensuu¹ – UNEP Course on International Environmental Law-making and Diplomacy, which was held from 28 June to 10 July 2009 at the UNEP Headquarters, Nairobi, and in the Lake Naivasha Sopa Lodge, Kenya. Previous courses have been held in Joensuu (2004, 2005, 2007) and in South Africa (2006, 2008). The proceedings of those courses have been published in the previous Course *Reviews*.²

The aim of the Course is to convey key tools and experiences in the area of international environmental law-making to present and future negotiators of multilateral environmental agreements; and to contribute to the further development and implementation of such instruments. In addition, the Course serves as a forum for fostering cooperation between developed and developing country negotiators; and for taking stock of recent developments in the negotiation and implementation of multilateral environmental agreements and diplomatic practices in the field. The ultimate aim of the Course is to improve environmental negotiation capacity and governance worldwide.

The Course is an annual event designed to enhance the negotiation skills of government officials who are, or will be, engaged in international environmental negotiations. In addition, other stakeholders such as representatives of non-governmental organizations and the private sector may apply and be selected to attend the Course. Researchers and academics in the field are also eligible. Altogether 31 participants from 24 countries, with an equal distribution between developed and developing countries, as well as between genders, participated in the sixth Course.

We would like to express our gratitude to all of those who contributed to the successful outcome of the sixth Course. It gives us great pleasure to recognize that the lectures and presentations given during the Course are now recorded in this *Review*. We are grateful that the authors were willing to take on an extra burden after the Course by transferring their presentations into paper form; thereby making the *Review* such a useful resource. In addition, we would like to thank Tuula Honkonen and Ed Couzens for skilful and dedicated editing of the *Review*, and the members of the Editorial Board for providing guidance in the editing process.

Professor Perttu Vartiainen
Rector of the University of
Eastern Finland

Achim Steiner
Executive Director of UNEP

¹ Please note that the University of Joensuu is now the University of Eastern Finland.

² For electronic versions of the 2004, 2005, 2006, 2007 and 2008 *Reviews* please see the University of Eastern Finland – UNEP Course on International Law-making and Diplomacy website, <<http://www.joensuu.fi/unep/envlaw>>.

EDITORIAL PREFACE

The lectures given on the sixth University of Eastern Finland¹ – UNEP Course on International Environmental Law-making and Diplomacy, from which most of the papers in the present *Review* emanate, were delivered by experienced diplomats, government officials and members of academia.² One of the main purposes of the Course is to take advantage of the practical experiences of experts working in the field of international environmental law-making and diplomacy. Consequently, the papers in this *Review* and the different approaches taken by the authors reflect the diverse professional backgrounds of the lecturers and resource persons. Overall, the papers in the *Review* represent various aspects of the broad and complex field of international environmental law-making and diplomacy.

The current *Review* seeks to provide practical guidance, professional perspective and historical background to decision-makers, diplomats, negotiators, practitioners, researchers and stakeholders working in the area of international environmental law-making and diplomacy specifically related to environmental governance. The *Review* highlights different approaches, doctrines and techniques in the field, including international environmental compliance and enforcement, international environmental governance, international environmental law-making, environmental empowerment, and sustainable development generally.

Additionally, the sixth volume focuses on ‘Environmental Governance’ as a special theme. This was an appropriate theme for the Course which was held at the UNEP headquarters, and which reflected this (one of six) UNEP priority area. The first, second and fourth Courses were hosted by the University of Joensuu, in Joensuu, Finland – an area in which forests and water provide abiding and dominant images. The special themes of the first two Courses were, therefore, ‘Water’ and ‘Forests’. The third Course was hosted by the University of KwaZulu-Natal, on its Pietermaritzburg campus in KwaZulu-Natal, South Africa. KwaZulu-Natal is an extremely biodiversity-rich area, both in natural and cultural terms, and the chosen special theme was therefore ‘Biodiversity’. The fourth Course, which returned to Finland, had ‘Chemicals’ as its special theme. The chosen focus was very appropriate considering the important role Finland has played in international chemicals management. The fifth course focused on ‘Oceans’ as its special theme, and was again held in the coastal province of KwaZulu-Natal in South Africa, on the Pietermaritzburg campus of the University of KwaZulu-Natal.

¹ It is to be noted that 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 has been renamed the University of Eastern Finland – UNEP Course. The course activities concentrate on the Joensuu campus of the new university.

² General information on the University of Eastern Finland – UNEP Course on International Environmental Law-making and Diplomacy is available at <<http://www.joensuu.fi/unesp/envlaw>>.

The editorial board and the editors believe that the ultimate value of this *Review* lies in its making a contribution to knowledge and learning in the field of international environmental negotiation and diplomacy. The papers contained in the *Review* are in most cases based on lectures or presentations given during the Course, but take their subject matters further as the authors explore their ideas. In particular, the *Review* has been proud to receive ongoing contributions – through the various editions, meaning that the same writer has contributed several papers and, in many cases, thereby been able to focus and develop their own ideas – of persons who have been involved in some of the most important environmental negotiations in the past several decades. Publication of these contributions means that the experiences, insights and reflections of these environmental leaders are now recorded and disseminated, where they might not otherwise have been committed to print. The value of these contributions cannot be overstated.

Governance, the theme of the 2009 *Review*, is an international legal issue-area of growing importance. To both newcomers and experienced diplomats, it seems that questions of governance can sometimes be extremely perplexing. Sometimes, in fact, it might seem that the international legal system is characterized by an absence of governance rather than by effective governance. This might be because the process of maturation by which the average person becomes legally, politically and socially aware is likely to be heavily dominated by a strict national legal regime – represented by the traditional threefold division of legislature, executive and judiciary. In such a system, there are legitimately made laws, which are executed by legitimate authorities and enforced by an effective policing structure. In contrast, to the average person from such a regime a description of a system in which no party has the right to impose behavioural strictures on any other, and which has no formal policing system, no body with the power to make binding overall rules and no effective system for the adjudication of disputes, might seem a description of chaos.

In at least some ways, such an observer holding such a perception would incontrovertibly be correct. The doctrine of state sovereignty lies at the core of the international legal system, and in theory no state has any duties or rights greater than any other. In determining where international laws have their sources, reliance is often placed on the founding statute of the International Court of Justice (ICJ),³ which provides that the four essential sources are *ius cogens*, laws that are generally agreed by all to be laws;⁴ customary international law;⁵ conventions or treaties agreed to between states;⁶

³ The statute of the International Court of Justice, which was established in 1945 and began its work in 1946, is described on the ICJ's own website as being annexed to the Charter of the United Nations, 'of which it forms an integral part'. See, generally, <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>> (visited 23 November 2010).

⁴ Per Article 38(1)(c): 'the general principles of law recognized by civilized nations'.

⁵ Per Article 38(1)(b): 'international custom, as evidence of a general practice accepted as law'.

⁶ Per Article 38(1)(a): 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'.

and persuasive sources, such as arbitration precedents and the writings of jurists.⁷ Each of these sources is, of course, problematic. *Ius cogens* is arguably customary law which has been universally recognized – but recognition is not completely universal⁸ and, in any case, there are only a few contenders for the status of such laws.⁹ Customary international law is problematic as a source of law as it varies between regions and issue-areas. If one makes the argument that laws with the status of *ius cogens* are binding as customary rules which have achieved universal acceptance, then customary international law might well be rejected on the ground that it has not achieved such universal acceptance – in other words, that because it has not yet achieved the status of laws *ius cogens* it is inherently unsettled. Conventions or treaties¹⁰ are contracts and therefore are, by their very nature, binding only on those specific state parties who have agreed to be so bound. Conventions or treaties may come to be seen as good evidence as to provisions of binding customary law, but cannot in and of themselves be general sources of law. Finally, the precedent value of ‘judicial decisions’ and the influential value of the teaching of celebrated jurists can obviously not be definitive sources of law.

The International Court of Justice itself differs from what might be expected of a national court – particularly in not having automatic jurisdiction. No one state can compel another to submit itself to the jurisdiction of the ICJ in a dispute. (Where the dispute concerns *ius cogens*, mandatory ICJ jurisdiction is provided for by Art. 66 of the Vienna Convention on the Law of Treaties, 1969;¹¹ but this is complicated by the fact of a number of states party to the Convention having lodged reservations to this Article.¹²) However, the existence of the ICJ may be seen as an indication of the direction in which international governance is moving. International environmental jurists and commentators make much use of those ‘judicial precedents’ which we do have – usually in the form of early arbitral tribunal awards (such as the *Bering Sea*

⁷ Per Article 38(1)(d): ‘subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.

⁸ To give an example, although there is probably no state which would not today agree that gender equality is a general practice accepted as law, there are states which might have different determinations as to how gender equality is determined, established or recognized. In the environmental context, although there are a number of contenders for the status of ‘principles’ of international environmental customary laws (such as the precautionary principle, the polluter pays principle and the prior informed consent principle) it is unlikely that any have yet achieved the status of principles. (Although sustainable development, and intra- and inter-generational equity may have achieved ‘principle’ status, these are less useful – being more in the nature of overarching goals.)

⁹ Such as prohibitions against gender inequality; genocide; piracy; racial inequality; slavery; and the unilateral use of armed force against another state.

¹⁰ Or agreements, pacts, protocols, etc.

¹¹ Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331; also available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

¹² Karl Zemanek, ‘Vienna Convention on the Law of Treaties 1969’, *Audiovisual Library of International Law*, available at <<http://untreaty.un.org/cod/avl/ha/vclt/vclt.html>>.

Furs Seals,¹³ the *Trail Smelter*¹⁴ and the *Lac Lanoux*¹⁵ arbitrations) – and these have become influential beyond their apparent value as contractual means of settling disputes between states agreeing to such settlement. The ICJ has, since the mid-1990s, been called upon to adjudicate four disputes which were environmental in nature (these being the *Request for an Examination of the Situation Case* (New Zealand v France);¹⁶ the *Advisory Opinion on Nuclear Weapons Case* (requested by the United Nations General Assembly);¹⁷ the *Gabčíkovo-Nagymaros Case* (Hungary v Slovakia);¹⁸ and the *Pulp Mills on the River Uruguay Case* (Argentina v Uruguay)¹⁹).²⁰ What is indicated, the present editors contend, is a desire for established principles and for stable international governance.

This desire²¹ is reflected also in the profusion of multilateral environmental agreements to be found today. How many there are is uncertain – MEAs can be global, regional or interest-based, or even bilateral. According to a database project run by the University of Oregon, there are more than 1 500 bilateral, more than 1 000 multilateral, and more than 250 ‘other’ environmental agreements.²²

What is clear is that international environmental governance is today a complex issue-area, understanding of which involves the study of both the international and national legal systems; the interrelationships between them; the development of international environmental principles;²³ the involvement of a vast array of governmental, quasi-governmental and non-governmental actors; the history of the rise of environmental concern and the concomitant development of international environmental law; and the application of various contemporary and historical approaches to the understanding of all of these. The intention is that the 2009 *Review* will make a contribution to such study, containing as it does papers which interrogate both general and particular issues of international environmental governance, the influences of various actors on these, and (throughout) endeavours to give practical insights into the nature of governance problems and suggestions as to how these problems might be addressed.

¹³ *Bering Sea Fur Seals Arbitration, (Great Britain v USA), Moore's International Arbitration Awards* (1898) 755.

¹⁴ *Trail Smelter Arbitration (USA v Canada), 35 American Journal of International Law* (1941), 684.

¹⁵ *Affaire du Lac Lanoux, XII United Nations Reports of International Arbitral Awards* at 285–317; *Lac Lanoux Arbitration* (English Translation), *24 International Law Reports* (1957) at 105–142.

¹⁶ ICJ Reports (1995) 288.

¹⁷ ICJ Reports (1996) 226.

¹⁸ ICJ Reports (1997) 7.

¹⁹ ICJ Reports (2006).

²⁰ On the ICJ cases generally, see Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment*, (3rd. ed., Oxford University Press, 2009), 138–140.

²¹ On the search for legitimacy and increasingly effective governance, see Tuomas Kuokkanen, ‘Legitimacy in International Environmental Law’, in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy 2008*, University of Joensuu – UNEP Course Series 8 (University of Joensuu, 2009) 3–10.

²² See University of Oregon, International Environmental Agreements (IEA) Database Project, <<http://iea.uoregon.edu/page.php?file=home.htm&query=static>> (visited 23 November 2010).

²³ See *supra*, note 8.

The present *Review* is divided into four Parts. Part I contains papers which address general issues relating to international environmental law-making and governance, and their national aspects. The first paper in the 2009 *Review*, by Louis Kotze, explains that although national governments and the international community have for decades sought to introduce governance structures to deal with environmental problems, there has been little scholarly attention given to understanding the concept of environmental governance itself. As long as there is not an overall understanding of this concept, it is likely that governance efforts (both national and international) will suffer from the problems of fragmentation and lack of coordination – and perhaps even be hampered by their ad hoc and piecemeal nature. Lack of overall understanding of governance is arguably a particular problem in the field of the environment, where governance must straddle many different areas and cover many different actors. The aim of this paper is to make a contribution toward improving coordinated, overall understanding of environmental governance.

The second paper in Part I of the 2009 *Review*, by Tuomas Kuokkanen, considers the ways in which national governments incorporate their international law commitments into their domestic legal systems. This is arguably an aspect of international law which is generally given insufficient attention – when particular environmental problems are considered (be these biodiversity loss, chemical pollution, climate change, deforestation, or pollution generally) positive change will be virtually impossible to achieve if there is not coordination between national and international governance efforts. Significant change needs to occur at national level, guided by international best practice and commitment, and the relationship between international and national governance needs to be well-understood.

Part II contains papers which address particular issues relating to governance in international environmental law-making and diplomacy, or which relate to the interface between the international and national positions. The first paper in Part II, by Roy Brooke, considers how environments might be affected by human conflict, how these effects are changing over time, and how governance efforts in post-conflict periods might best be structured. The author calls for coherent institutional and political responses to the linkages between conflict, natural resources and the environment. Rwanda is used as a case study and lessons are drawn from the post-conflict restructuring efforts in that country.

The second paper in Part II was delivered as the keynote lecture of the 2009 Course. Tadanori Inomata explains and discusses the governance structure of the United Nations system, and how the strengths and weaknesses in this structure influence the ability of the system to contribute to improved international environmental governance – and thereby to contribute to sustainable development. After discussing the weaknesses of the UN system, the paper considers ways in which efforts are being made to overcome these. The paper concludes with recommendations as to how governance within the UN system might be improved.

In the third paper in this Part, Daniel Schramm and Carl Bruch consider the specific environmental issue of climate change. Recognizing climate change as a ‘crosscutting, multi-sector stressor that implicates a wide range of legal frameworks’, the paper shows how difficult it is to create an effective governance regime to deal with so wide an issue. The paper goes on to explain, however, that such development is essential as it is becoming apparent that existing ‘old order’ governance structures are not equipped to deal with the wide nature of the climate change issue area. The paper then identifies ‘adaptive management’ as a potential governance ‘tool’ for dealing with climate change; assesses the tool in relation to the precautionary principle and other policy instruments; and proceeds to explain how ‘adaptive management’ might be introduced into national environmental governance regimes.

In the fourth paper in this Part, Ines Verleye and Jorge Ventocilla focus specifically on the TEMATEA project on Issue-Based Modules – an internet based capacity building tool designed to assist with national biodiversity governance in seven key environmental areas. The paper demonstrates the desirability of having such a ‘legal system comparator’ by raising some the problems which are, or which might be, caused by the present plethora of biodiversity-relations multilateral environmental agreements. The paper concludes by explaining how the programme can be used to improve environmental governance, through distributing the experiences to a wider international audience.

In the fifth and final paper in Part II, Jeremy Wates and Seita Romppanen discuss the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters – the ‘Aarhus Convention’. The paper shows how the Convention rests on three pillars – access to information, public participation, and access to justice. The success of much of environmental governance – both at national and international level – can arguably be said to rest on these pillars. The Aarhus Convention contains numerous innovative provisions which, through the level of success which the Convention appears to have achieved, have been proved useful models for other conventions, groups or regions to consider.

Part III of the 2009 *Review* contains papers which address the roles played by particular subjects (groups and issue-areas) which influence and shape governance in international environmental law. In the first paper in this Part, the seventh in the *Review*, Olivier Deleuze considers the roles played in international environmental governance by the so-called ‘major groups’ – nine interest groups identified during the United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 1992. Deleuze points out that ‘stakeholders’ have been added to include interest groups not included in the original nine – and discusses how these are included in the United Nations Environment Programme’s efforts to improve environmental governance through its six priority areas.

In the second paper in this Part, Patricia Kameri-Mbote tackles the issue of gender in relation to environmental governance. Her paper scans the history of increasing focus on women's environmental rights in international fora, and shows how difficult, if not impossible, it will be to achieve environmental protection and sustainable development if gender issues are not included in governance reform. Particularly, the paper considers the relationship between the gender issues in international environmental governance and the contrasting focuses in national environmental governance. Recommendations for the future are then made.

International environmental governance can achieve only a certain amount on its own. Effective international governance rests on the cooperation and on effective national governance. The third paper in this Part, by Donald Kaniaru, considers the role that might be played by national environmental tribunals in achieving such effective national environmental governance. Numerous national environmental tribunal examples are considered from different states, before a focus is brought to bear on Kenya's experience.

The final paper in this Part, by Elizabeth Mrema and Ramakrishna Kilaparti, reflects on the importance to effective international environmental governance of multilateral environmental agreements being grounded in wide acceptance. For this to happen, and for the disparate views of numerous Parties to be included and reconciled, they argue that it is important for negotiation skills to be enhanced worldwide. As a contribution toward this, they offer insights and suggestions for improving negotiation techniques.

Part IV of the *Review* reflects the interactive nature of the Course. During the Course negotiation simulation exercises were organized to introduce the participants to the real-life challenges facing negotiators of international environmental agreements. In the main simulation exercise, participants were given individual instructions and a hypothetical, sometimes country-specific, negotiating mandate and were guided by international environmental negotiators. Excerpts from, and explanations of, the exercise are included in Part III.

The 2009 simulation exercise was devised and run by Cam Carruthers and Kerstin Stendahl, with input from Osvaldo Alvarez-Perez and Masa Nagai. The exercise was based on cooperation and coordination between the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and the 2001 Stockholm Convention on Persistent Organic Pollutants. The exercise therefore highlighted an important topic in current thinking in international environmental governance: the significance of synergies between multilateral environmental agreements. The exercise further highlighted the importance for a negotiator in the field of international environmental governance of a sound understanding of procedural issues.

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 (which now spans six years) has significant potential value as a teaching 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 *Review*.

Generally, it is the hope of the editors that the 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* (spanning the years 2004 to 2009), all of which are easily accessible on the internet through a website provided by the University of Eastern Finland,²⁴ to gain a broad understanding of international environmental law-making and diplomacy.

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²⁴ See <<http://www.joensuu.fi/UNEP/envlaw>>; link to 'Publications and Materials'.

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PART I

**GENERAL ISSUES OF INTERNATIONAL
ENVIRONMENTAL LAW-MAKING
AND GOVERNANCE**



TOWARDS A TENTATIVE LEGAL FORMULATION OF ENVIRONMENTAL GOVERNANCE

*Louis J. Kotzé*¹

1 Introduction

Human-induced environmental change and degradation pose some of the greatest threats to life on Earth.² It is now generally accepted that human-induced environmental change and degradation is likely to lead to, or are already resulting in, amongst other things: irreversible depletion of renewable and non-renewable resources; destruction of whole ecosystems; displacement of people; armed conflicts; threats to state and human security; and threats to human well-being, societal stability, and good order.³ It is also trite that environmental change and degradation are caused, but not exclusively, by human activities⁴ and, consequently, that one of the best (in fact, probably the most essential) ways to regulate environmental change and degradation is by

¹ B.Com, LLB, LLM, LL.D. Professor of Law, Faculty of Law, North West University, South Africa. Email: Louis.Kotze@nwu.ac.za. Parts of this paper were completed during a research visit to the Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht (MPI), Heidelberg, Germany. My sincere thanks to the Institute and its personnel for accommodating me.

² Although there are many examples, the most topical issue currently is that of climate change. See, generally, Rajendra K. Pachauri and Andy Reisinger (eds), *IPCC Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, 2007).

³ See, for example, United Nations Environment Programme (UNEP), *Global Environment Outlook GEO 4: Environment for Development* (UNEP, 2007); UNEP/GRID-Arendal and Le Monde diplomatique, *Planet in Peril: An Atlas of Current Threats to People and the Environment* (UNEP/GRID-Arendal, 2006); United Nations (UN), *Millennium Ecosystem Assessment* (2005), available at <<http://www.millenniumassessment.org/en/Index.aspx>>.

⁴ An often-cited example in this respect is the link between population growth, consumption, and exploitation of renewable and non-renewable resources. Joseph F. C. DiMento, *The Global Environment and International Law* (University of Texas Press, 2003) 57–81. See for more detailed views on the issue of growth, generally, Timothy Beatley and Richard Collins, 'Smart Growth and Beyond: Transitioning to a Sustainable Society', 19 *Virginia Environmental Law Journal* (2000) 287–322.

regulating human activities.⁵ Considering that it goes to the heart of core issues of human survival, there is an urgent need to intervene in this dire state of affairs.

For ages, humans have sought to address environmental change and degradation by means of a host of interventions, including, among others, the creation of environmental laws.⁶ In tandem with environmental law, but more recently, the concept of 'environmental governance' has emerged as a 'new' mode of intervention or strategy to regulate human behaviour and its effects on the environment. While environmental governance is an extra-legal concept, it is increasingly used in the legal domain and its growing popularity is specifically evidenced by its increased use within environmental law literature.⁷

Notwithstanding its frequent use, there has been little scholarly effort to formulate a general theory of environmental governance. This is evidenced by the dearth of literature specifically dealing with the concept itself. The net result is that there seems to be no universally accepted definition, description or typology of the concept which should allow for consistent and universal application to environmental law problems. It is, accordingly, unclear what a legal theory of environmental governance entails; and what the content and meaning of the concept are for environmental lawyers.

Lawyers, especially law academics, frequently employ definitions in an effort to understand certain legal concepts. As a result, they also often seek themselves to formulate definitions of certain concepts. Even though such an approach (i.e. the desire to define) may rightly be criticized by some, for the purpose of this contribution an attempt will be made to propose a tentative preliminary definition of environmental governance, insofar as the present author views the concept's function in the legal domain. This can, and will, never be the final word on the matter. However, in the

⁵ Daniela Von Bubnoff, *Der Schutz der Künftigen Generationen im deutschen Umweltrecht: Leitbilder, Grundsätze und Instrumente eines dauerhaften Umweltschutzes* (Erich Schmidt Verlag, 2001) 24–25, describes the very direct intervention by humans in natural systems and conditions with reference to humans' desire to manipulate the environment for their benefit.

⁶ See, generally, on environmental law in some jurisdictions, a sample of the more recent publications: Regina S. Axelrod, David Leonard Downie and Norman J. Vig (eds), *The Global Environment: Institutions, Law and Policy* (2nd ed., CQ Press, 2005); Steven Ferrey, *Environmental Law* (4th ed., Aspen Publishers Wolters Kluwer, 2007); Laurel A. Vietzen, *Practical Environmental Law* (Aspen Publishers Wolters Kluwer, 2008); Kathryn L. Schroeder, *Environmental Law* (Thomson Delmar Learning, 2008); Nancy K. Kubasek and Gary S. Silverman, *Environmental Law* (6th ed., Pearson Prentice Hall, 2008); Jan H. Jans and Hans H. B. Vedder, *European Environmental Law* (3rd ed., Europa Law Publishing, 2008); Craig N. Johnston, William F. Funk and Victor B. Flatt, *Legal Protection of the Environment* (Thompson West, 2005); Jamie Benidickson, *Essentials of Canadian Law: Environmental Law* (3rd ed., Irwin Law, 2009).

⁷ The following is an illustrative sample of recent publications: Dena Marshall, 'An Organization for the World Environment: Three Models and Analysis', 15 *Georgetown International Environmental Law Review* (2002) 79–103; Ken Conca, 'Environmental Governance after Johannesburg: From Stalled Legalization to Environmental Human Rights?', 1 *Journal of International Law and International Relations* (2004/2005) 121–138; Bradnee W. Chambers (ed.), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press, 2005); Daniel C. Esty, 'Towards Optimal Environmental Governance', 74 *New York University Law Review* (1999) 1495–1574; and Kanie Norichika and Peter M. Haas (eds), *Emerging Forces in Environmental Governance* (United Nations University Press, 2004).

absence of a current uniform explanation for the concept in terms of a legal setting, it is hoped that this paper may contribute to initiating the debate.

The paper commences with a brief reflection on the scope and scale in terms of which environmental governance currently is used. The discussion then attempts to summarize some of the challenges resulting from definitional and interpretative deficiencies. The concept of 'governance' is then explored; and the paper endeavours also to explain the link between the environment, governance and law. In the final instance, the paper proposes a tentative definition of environmental governance and also explains what it deems to be the principal objective of environmental governance.

2 Scope and scale of use

Most lawyers use environmental governance as a broad contextual setting for discussion of specific environmental law-related issues including, among others, the functioning of environmental law in the European Union (EU); the operation and administration of international environmental law regimes; the role of courts in environmental dispute resolution; the role of environmental governance in biodiversity and protected areas conservation; good environmental governance; and sustainability governance.⁸ It seems as though environmental governance has become an umbrella concept which has itself not yet been fully described, but which is frequently used to accommodate environment and/or sustainability-related issues.

Apart from these varying contexts, the concept is also used at various levels, including, the international,⁹ the national, the regional¹⁰ and the local.¹¹ Its origins can be

⁸ This is by no means a closed list. See, for example, Louis J. Kotzé and Alexander R. Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International, 2009); Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009); Joanne Scott, 'Law and Environmental Governance in the EU', 51 *International and Comparative Law Quarterly* (2002) 996–1005; Deidre M. Curtin and Ige F. Dekker, 'Governance as a Legal Concept within the European Union: Purpose and Principles' 4 *International Law Forum* (2002) 134–148; IUCN, *Implementing the CBD Programme of Work on Protected Areas: Governance as Key for Effective and Equitable Protected Areas Systems*, Briefing Note 8 (IUCN, 2008); Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, 2008); and Konrad Ginther, Erik Denters, and Paul I. J. M. De Waart (eds), *Sustainable Development and Good Governance* (Martinus Nijhoff, 1995).

⁹ John Scanlon and Françoise Burhenne-Guilmin (eds), *International Environmental Governance: An International Regime for Protected Areas*, IUCN Environmental Law and Policy Paper No. 49 (IUCN, 2004); Andreas Rechkemmer, 'International Environmental Governance: Issues, Achievements and Perspectives' in Studies of the University: Research, Council, Education (SOURCE) Publication Series of UNU-EHS No. 3/2006; Bharat H. Desai, 'Mapping the Future of International Environmental Governance' 13 *Yearbook of International Environmental Law* (2002) 43–61; Steven Bernstein, 'Legitimacy in Global Environmental Governance', 1 *Journal of International Law and International Relations* (2004/2005) 139–166; Lynda M. Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' 30 *Dalhousie Law Journal* (2007) 79–140; Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007).

¹⁰ Scott, 'Law and Environmental Governance', *supra* note 8; Albert Weale, *Environmental Governance in Europe: An Ever Closer Ecological Union?* (Oxford University Press, 2000).

¹¹ Louis J. Kotzé, 'Environmental Governance' in Alexander R. Paterson and Louis J. Kotzé (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta, 2009) 103–125.

traced back to developments at the international level including, among others, the work of the World Bank¹² and other international organizations such as the United Nations (UN)¹³ and the United Nations Environment Programme (UNEP)¹⁴ (to name but a few); the development of multilateral environmental agreements on a very extensive range of issues; various treaty regimes and the work of treaty secretariats; the influential work of non-state actors such as the scientific community and the World Conservation Union (IUCN);¹⁵ and a host of other environmental and developmental organizations.¹⁶ In this sense, environmental governance is a generic concept and its influence has filtered down from the international level to regional and national levels where it is currently widely used in, for example, the EU and various country-specific contexts.¹⁷

3 Definitional and interpretative challenges

While many environmental lawyers employ the concept of environmental governance, it is clear from the available literature that the concept has different meanings to different people and that it is variously understood by different sectors within the environmental law domain itself.¹⁸ Moreover, it is evident from the literature that, because ‘governance’ could potentially broaden legal perspectives on law-making, implementation, enforcement and regulation, while lawyers are increasingly recognizing the importance of environmental governance they remain hesitant about engaging fully with the theory of environmental governance.¹⁹

Like one of its parent concepts, sustainability, the meaning of the concept seems to depend on the context in and the purpose for which it is used, as well as the scientific discipline in terms of which it is used.²⁰ More importantly for present purposes, there has been to date no comprehensive analysis and synthesis that aims to advance

¹² See <<http://www.worldbank.org/>>.

¹³ See <<http://www.un.org/>>.

¹⁴ See <<http://www.unep.org/>>.

¹⁵ See <<http://www.iucn.org/>>.

¹⁶ Philippe Sands, *Principles of International Environmental Law* (2nd ed., Cambridge University Press, 2003) 70–122; Benedict Kingsbury, ‘Global Environmental Governance as Administration: Implications for International Law’ in Bodansky, Brunnee and Hey (eds), *The Oxford Handbook*, *supra* note 9, at 64–83; Jeffrey L. Dunoff, ‘Levels of Environmental Governance’ in Bodansky, Brunnee and Hey (eds), *The Oxford Handbook*, *supra* note 9, at 86–106; and Toru Iwama, ‘Multilateral Environmental Institutions and Coordinating Mechanisms’ in Kanie and Haas (eds), *Emerging Forces*, *supra* note 7, 15–34.

¹⁷ See the citations in footnotes 6, 7 and 8 above.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See for a general overview of sustainability and a mere sample of some of the more authoritative publications, among others: Philippe Sands, ‘International Law in the Field of Sustainable Development’, 65 *The British Yearbook of International Law* (1994) 303–381; Ben Boer, ‘The Globalisation of Environmental Law: The Role of the United Nations’, 20 *Melbourne University Law Review* (1995) 101–125; and Michael Redclift, ‘Sustainable Development: Economics and the Environment’ in Michael Redclift and Colin Sage (eds), *Strategies for Sustainable Development: Local Agendas for the South* (Wiley Publishers, 1995) 17–34. See also the discussion below in section 7.

a theoretical description of environmental governance in the context of environmental law. In the words of Fisher et al: '[i]n indeed, the concept of [environmental] governance is much admired and referred to in worshipful tones but rarely scrutinised and deconstructed by environmental law scholars'.²¹ In short: while the popularity of environmental governance appears to be mounting, the concept suffers from diversity and inconsistency in application and interpretation; it remains subject to frequent but imprecise use; it fits awkwardly within the environmental law domain; and, because it is an amorphous concept, for environmental lawyers, it remains at best clouded and vague.

In addition to the broader theoretical uncertainty related to the concept itself, various other very specific, but related, issues arise, namely: a) the issue of the origins of environmental governance, the context in which it is used, and, more importantly, the issue of why it has become such a popular concept in current discourse; b) whether environmental governance is an ideal or an objective, a means to achieve an ideal or objective, a regime, a process or processes, a principle, an institution or institutions, or all or a combination of the foregoing; c) what the dimensions, object(s), objectives, purpose and scope of environmental governance are; d) what comprise the basic fundamental elements, institutions, mechanisms and stakeholders of environmental governance in the environmental law domain; e) the ways in which lawyers perceive environmental governance, its value and its use for environmental law discourse, and what the relationship or link between environmental governance and environmental law may be; and finally, f), what a theory of environmental governance might entail in the environmental law context.

This paper by no means attempts to answer any of these questions. Rather, it attempts briefly to provide some initial thoughts that may serve as a starting point for further exploration of some of the issues listed above definitely.

4 Unpacking the concept of 'governance'²²

Much of the uncertainty surrounding environmental governance can be attributed to the non-existence of a uniform understanding of the concept 'governance'. This is so because 'governance' remains a vague and transcendent concept subject to frequent but imprecise use despite numerous attempts to define it. One of the reasons for the illusiveness and ambiguity of the concept may be that, as Ocheje puts it: '[i]n a divided and multicultural world, "governance" is a value-laden concept, and this invariably militates against the emergence of a single universally acceptable definition'.²³

²¹ Elizabeth Fisher et al., 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', *Journal of Environmental Law* (2009) 1–38 at 23/38.

²² Some parts of this section have also appeared in Kotzé, 'Environmental Governance', *supra* note 11.

²³ Paul Ocheje, 'Exploring the Legal Dimensions of Political Legitimacy: A 'Rights' Approach to Governance in Africa' in Edward Kofi Quashigah and Obiora Chinedu Okafor (eds), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (Kluwer Law International, 1999) at 165.

Nevertheless, any effort that seeks to attribute some meaning to the concept of ‘governance’, must, as a point of departure, acknowledge that the concept is ambiguous and illusive and that ‘governance’ may be defined differently depending on one’s scientific perspective and discipline. The aim of this paper requires a definition of ‘governance’ from a legal perspective.

The United Nations Commission for Global Governance defined ‘governance’ in 1995 very broadly as: ‘...the sum of the many ways individuals and institutions, public and private, manage their common affairs’.²⁴ It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.²⁵

Curtin and Dekker²⁶ point to the all inclusive nature of this definition and to the fact that the definition emphasizes certain characteristics of ‘governance’ as a legal institution, ie. that the actors and subjects which are part of the governance regime have legal powers in relation to one another and in relation to other subjects.²⁷

The Governance Group of the World Bank Institute²⁸ defines ‘governance’ more constrictively as follows:

[g]overnance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them.²⁹

The European Commission (EC) acknowledges that ‘governance’ is a versatile term that is used in the corporate (private) or state (public) contexts.³⁰ It essentially refers to actions by executive bodies, assemblies such as national parliaments, and judicial bodies such as courts or tribunals.³¹ As a concept of contemporary social science, it is used with six different meanings, namely: corporate governance, good governance,

²⁴ Deirdre M. Curtin and Ige Dekker, ‘Good Governance: the Concept and its Application by the European Union’ in Deirdre M. Curtin and Ramses A. Wessels (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, 2005) 3–20 at 5, interpret ‘common affairs’ as also relating to governance for the ‘common good’.

²⁵ Commission for Global Governance, *Our Global Neighbourhood* (Oxford University Press, 1995) at 2.

²⁶ Curtin and Dekker, ‘Good Governance’, *supra* note 24, at 9.

²⁷ See also the discussion below in section 5 for an explanation of the link between law and governance.

²⁸ See <<http://www.worldbank.org/wbi>>.

²⁹ World Bank, ‘Governance Matters 2007: Worldwide Governance Indicators, 1996–2006’, available at <<http://info.worldbank.org/governance/wgi2007/>> (visited 11 May 2010).

³⁰ European Commission, ‘Governance in the European Union’, available at <http://ec.europa.eu/governance/index_en.htm> (visited 11 May 2010).

³¹ *Ibid.*

the minimal state, new public management, self-organized networks, and social cybernetic systems.³²

A United Nations (UN) study on good governance in the UN Economic and Social Commission for Western Asia (UNESCWA)³³ defines ‘governance’ as: ‘...the existence of institutions, processes and mechanisms by which authority is exercised in an economy’.³⁴ According to the study, ‘governance’ also includes formal institutions and regimes that are responsible to ensure and enforce compliance. Apart from these formal arrangements, it also includes more informal arrangements between citizens, institutions and the state. It suggests that the main actors in ‘governance’ are actors at the global level (global governance), state or national actors, and civil society governance (grass-roots or local government level).³⁵ According to UNESCWA, ‘governance’ includes three aspects: political governance (policy formulation); economic governance; and administrative governance (policy implementation or enforcement).³⁶

Another synthesizing view on governance is that of Young, who states that:

[a]t the most general level, governance involves the establishment and operation of social institutions (in the sense of rules of the game that serve to define social practices, assign roles, and guide inter-actions among the occupants of these roles) capable of resolving conflicts, facilitating cooperation, or, more generally, alleviating collective-action problems in a world of interdependent actors.³⁷

Any effort to understand ‘governance’ must also distinguish between the concepts of ‘government’ and ‘governance’. The definitive difference between the two concepts seems to be that ‘government’ usually relates to institutional structures and ‘governance’ to a process.³⁸ Parry and Grant define ‘government’ from an international law point of view as:

³² *Ibid.*

³³ See <<http://www.escwa.un.org/>>.

³⁴ ‘Good Governance: Enhancing Macro-Management in the ESCWA Region’, UN Doc. E/ESCWA/ED/2000/7 (2000) at 1.

³⁵ *Ibid.* at 4.

³⁶ *Ibid.*, at 9.

³⁷ Oran R. Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, 1994) at 15.

³⁸ The procedural characteristics of ‘governance’ are highlighted by Igor Vidačak and Jasmina Božić, ‘Civil Society and Good Governance in Societies in Transition: The Case of Croatia’ in Wolfgang Benedek (ed.), *Civil Society and Good Governance in Societies in Transition* (Neuer Wissenschaftlicher, 2006) at 57 when they state that ‘governance’ is:

...the capacity of the formal and informal institutional environment (in which individuals, social groups, civil associations and government officials and employees interact) to apply and carry through a given government policy and to improve coordination in the private sector.

Their description also, coincidentally, points to the various relationships and organizational patterns inherent to ‘governance’.

...the organization of public power within any given territory. In this sense, it is said that a government is an essential element of the State. The term is further used to connote the executive organs of States in their relationships with one another.³⁹

‘Government’ is, accordingly, a necessary element/ingredient or actor to realize ‘governance’, which, in turn, involves various relationships and postulates a certain organizational pattern.⁴⁰

Reinalda’s⁴¹ explanation of the governance theory for the purpose of the theoretical analysis appears suitable for the purposes of the present enquiry because it encapsulates the essence of governance as derived from the various authorities above. Reinalda states that:

[t]he governance perspective...is grounded in the normalcy of continuous change. It departs from the ‘social engineering’ thesis that society is always malleable by governmental policies and institutions (‘steered’ or ‘managed’ social change)...Governments can manipulate long-term processes and, with these in mind, they are willing to perform various tasks...In this context, legislation has obtained a steering effect. It has become more and more instrumental, in particular in combination with research into the impact of legislative measures ... Non-governmental or private actors are also involved in this social engineering. The idea that private groups can initiate social and political change is not new ... Governance thus refers to the solving of collective problems in a continuously changing public and private realm, stressing processes and institutional procedures and practices.

This analysis suggests that ‘governance’ is a continually changing process principally aimed at directing the behaviour of people for the purpose of promoting common interests including, among others, the mutual well-being of all. This process is executed by way of institutional structures (governments), mechanisms and procedures which are, generally speaking, embedded in and mandated by law. Government is, however, not the sole actor in the process of governance. The private sector, including, *inter alia*, non-governmental organizations (NGOs), community-based organizations (CBOs), private individuals and the public at large, also (should) influence the outcome of the public sector driven process of governance.

³⁹ Johan P. Grant and Craig J. Barker (eds), *Parry and Grant Encyclopaedic Dictionary of International Law* (Oceana Publications, 2004) at 206.

⁴⁰ United Nations Department of Economic and Social Affairs, Division for Public Economics and Public Administration, *Building Partnerships for Good Governance: The Spirit and Reality of South-South Cooperation* (United Nations, 2000) at 6.

⁴¹ Bob Reinalda, ‘International Organizations as Sources of Political Change’ in Kees Van Kersbergen, Robert H. Lieshout and Grahame Lock (eds), *Expansion and Fragmentation: Internationalization, Political Change and the Transformation of the Nation State* (Amsterdam University Press, 1999) 107–124 at 116–117.

5 Law, governance and the environment

In his work *The Concept of Law*, Hart⁴² refers to a ‘simple society’ and seems simultaneously to distinguish the latter from what one may call a ‘complex society’. According to Kornhauser’s estimation of Hart’s treatise, the latter author considers a ‘simple society’ to be: small and closely knit; insulated from external shocks; free from the plagues of natural disasters; and homogenous.⁴³ As such, a ‘simple society’ is easy to govern and would not require more complex societal constructs, such as law, to better facilitate governance. A society, however, becomes more complex in the absence of these ‘ideal’ conditions, and, as a result, ‘...law emerges as an instrument of governance of societies that are large and no longer closely knit or that face an external environment that changes too rapidly for social custom to adapt to these changes’.⁴⁴ It goes without saying that, when viewed in terms of this typology, we live in complex societies rather than simple ones; and, as a consequence, our societies require law as an instrument of governance.⁴⁵ It may even be fair to predict that our society on Earth, or life as we know it, will be subject to even greater complexities, external influences and ‘shocks’ as we prepare to suffer increased environmental impacts as a result of our own doing, and would accordingly in future rely even more heavily on law to facilitate governance of these complexities.

The question might be asked whether law *can* govern the environment? The present author holds the view that environmental governance (or environmental management as some choose to call it), cannot ‘manage or govern the environment’ in a strict sense.⁴⁶ This is so because governance is a human function directed at humans and, as such, it is impossible for humans to be able to ‘govern the environment’. Humans, arguably, can only govern humans. Law is one of the societal constructs that humans use to govern humans. Extrapolated to the environmental context, this would mean that humans can only indirectly ‘govern the environment’ in a strict sense insofar as

⁴² H. L. A. Hart, *The Concept of Law* (2nd ed., Clarendon Press, 1994) at 60, 91–99.

⁴³ Lewis A. Kornhauser, ‘Governance Structures, Legal Systems, and the Concept of Law’ 79 *Chicago-Kent Law Review* (2004) 355–381 at 357–358.

⁴⁴ *Ibid.*

⁴⁵ Ost generally describes complexity with reference to the ‘game model’ and self-responsibility of firms with respect to environmental governance thus:

...post-modern society and law quite clearly require the application of complex models. The paradigm of simplicity developed by Descartes has in fact become definitively obsolete, as have the associated ideas of linear causality, ontological dualism ... and of apodictic certainty. By contrast we need notions of multiple and circular causality, the interweaving of elements and involvement of the observer, and the idea of uncertainty. Order has henceforth to make compromises with disorder.

Francois Ost, ‘A Game without Rules? The Ecological Self-Organization of Firms’ in Gunther Teubner, Lindsay Farmer and Declan Murphy (eds), *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-regulation* (John Wiley & Sons, 1994) 337–361 at 339.

⁴⁶ Johan Nel and Louis J. Kotzé, ‘Environmental Management: An Introduction’ in Hennie A. Strydom and Nick D. King (eds), *Fuggie and Rabie’s Environmental Management in South Africa* (2nd ed., Juta, 2009) at 1.

they are able to influence/manipulate/direct/change the behaviour and actions of people which have impacts on the non-human environment. Bothe summarizes these ideas eloquently as follows:

[n]one of these [environmental] problems can be addressed directly by [legal] prohibitions or orders. To give an example pertaining to the field of environmental protection: An 'order' given to a river to be clean is not a valid legal rule-it is devoid of a valid addressee.^[47] Law can only determine human behaviour, it cannot change nature. Thus, if law is to contribute to the solution...it has to direct or induce human behaviour in a way that the problem is solved. As these are very complex problems, the behaviour of many actors must be determined in a coherent way so that the factual end result is the one which was desired. Thus, the impact of law on the solution of those problems will always be an indirect one. This being so, the question has to be asked where and how precisely law should trigger which type of human behaviour in order to solve a problem.⁴⁸

For a law to be effective, and hence to achieve its desired outcome, Bothe argues that the law should trigger a '...causation process consisting of many steps';⁴⁹ ultimately with the view to changing behaviour, influencing human actions and, hence, controlling the effect of these actions on the environment. In other words: law should contain incentives, disincentives, and sanctions, among others, which should 'force' or convince someone to do something, or to abstain from doing anything at all which may negatively affect the environment.

These sentiments are reiterated by DiMento who states that:

[l]aw aims to influence behavior in order to promote environmental quality. It works in parallel with other institutions. It also works according to dynamics that some theorists would not classify as institutional. Law interacts - sometimes effectively, sometimes awkwardly, sometimes counter productively - with other systems that seek to order behavior and achieve social control.⁵⁰

In view of this explanation, environmental law could be described as an institution and social construct which aims to regulate/dictate/inform/guide humans or, more specifically, human behaviour which may affect environmental quality.⁵¹ Further sup-

⁴⁷ Moreover, the river would not respond to this command since it is not human. Law, in the form of commands in the present instance, would only have an effect on humans.

⁴⁸ Michael Bothe, *Environment, Development, Resources Offprint: Volume 318*(2005) (Martinus Nijhoff Publishers, 2007, Leiden) 337–516 at 351.

⁴⁹ *Ibid.*

⁵⁰ Joseph F. C. DiMento, *The Global Environment and International Law* (University of Texas Press, 2003) at 7.

⁵¹ See also the view of David R. Boyd, 'Sustainability Law (R)Evolutionary Directions for the Future of Environmental Law', 14 *Journal of Environmental Law and Practice* (2004) 357–385 at 360.

port for the role of law in influencing environmental quality through governance is derived from Godden and Peel's statement that:

[t]ypically, the role of law in environmental governance has been to facilitate social change by influencing the decisions and behaviour of individuals, governments, businesses, organisations and the community to embrace more sustainable forms of living. Taking a very general perspective, the manner in which legal rules are used to achieve social reform is by setting standards for the behaviour of various actors and agents, and providing a range of sanctions and incentives to ensure compliance with that desired behaviour. Although this is only one possible interpretation of how law operates in a complex society, nonetheless many people typically associate law with the idea of rule setting ... this rule setting is multidimensional and now operates across several levels from the local to the global. From this perspective, law is about giving effect to (evolving) societal norms. These norms may derive from formal written sources, such as international treaties, national statutes and case-law decisions made by judges within the court hierarchies, or from customary practices ...⁵²

They continue by stating that:

[i]n a context where the human-environment relationship was generally conceived in terms of the impact (often negative) of human activities upon the environment, a key role played by law and legal institutions in emerging form of environmental governance was in regulating the environmental effects of human activity and, where necessary, mediating or ameliorating those impacts in various ways. As our conception of the environment has evolved, this has created momentum for transformations in the broader frameworks of law, policy and social structures that for convenience, rather than more precise articulation, we have designated as governance. Different models of governance thus provide a significant framework affecting the manner in which the human-environment inter-relationship is conceived. Yet describing different modes of environmental governance that have manifested in environmental law presents a significant challenge given the very dynamic and complex interactions involved.⁵³

The relationship between law, the environment, and governance is particularly complex, and in some instances also problematic. Richardson puts it as follows:

[t]he sustainable development agenda poses major challenges for public law systems premised on administrative agencies' monopoly of decision powers and whose functionality and legitimacy traditionally has been grounded in jurisdictional and procedural rules. A regulatory agency conceived in the Weberian

⁵² Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) at 81–81.

⁵³ *Ibid.* at 83.

schema is controlled by inputs-by legislative directions, which are to be applied strictly and faithfully. However, what government promotion of sustainability presupposes is control primarily by outputs: an activity is “adequate” not if it conforms to statutory rules and procedures, but primarily if it produces certain policy results.⁵⁴

Environmental law is part of substantive law and, as such, is focused on substantive modes of regulation (or governance) which ‘...depends significantly on supporting public administrative bodies for its enunciation and implementation’.⁵⁵ Richardson refers to these failures as ‘systemic problems’ and lists these as including: operational constraints ensuing from the magnitude of regulatory controls which result in ‘regulatory overload’; normative difficulties with respect to the disconnection between environmental law-making and democratic legitimating procedures; and the inability of substantive (environmental) law to effectively and continually engage with an increasingly fragmented and pluralistic modern society, the latter which ideally requires various sub-systems such as law, politics, and economics for the purpose of designing effective problem-solving strategies to contemporary problems.⁵⁶

Be this as it may, what is clear is that there is a definite link between law, the environment and governance. Law (but not only law) provides the institution of governance with the means and legitimacy to regulate human behaviour and activities that affect the environment.

6 Environmental governance⁵⁷

If the foregoing describes, at least to some extent, what ‘governance’ may entail and what the connection between law and governance is, then one could possibly apply this theory of governance and law to environmental issues with the view to formulating a definition of environmental governance. In other words, an admittedly simplistic explanation of environmental governance would be one which marries ‘governance’, ‘law’ and ‘environment’. What, then, is ‘environment’ for the purpose of law and governance?

⁵⁴ Benjamin J. Richardson, ‘Trends in North America and Europe’ in Klaus Bosselmann and David Grinlinton (eds), *Environmental Law for a Sustainable Society* (New Zealand Centre for Environmental Law, 2002) at 48.

⁵⁵ *Ibid.* at 49. While this paragraph deals with the procedural background, it is worth noting that it might be argued that, as a substantive law response to environmental challenges, environmental law has been successful to a certain degree, but that it has also had, and continues to have, numerous failures, which could be because of the deficiencies of substantive law itself.

⁵⁶ *Ibid.* at 50–51.

⁵⁷ Parts of this section have also appeared in Kotzé, ‘Environmental Governance’, *supra* note 11.

It hardly needs repeating that there have been many attempts to define ‘environment’.⁵⁸ Sprout and Sprout point to the ‘semantic chaos’ as a result of the varied approaches, contextual differences, and varied priorities and expectations in this regard.⁵⁹ Generally speaking, ‘environment’ has historically been perceived to relate only to the natural, non-human environment, together with the physical man-made changes to this environment. This is not true anymore. Scientists have increasingly come to realize the significance of human or social conditions and dimensions as also being important components of the ‘environment’.

In this sense, we have come to realize that the environment is a complex and integrated system where the one element or condition is often dependent on others. The very nature of the environment as a holistic, integrated and inter-related whole requires us to part with our current fragmented, ‘silo-based’, and reductionist approach to the way we perceive and purport to regulate the effects of our activities in and on the environment. Dubos emphasizes the need for an integrated approach to the way we govern human behaviour by stating that:

[t]he most pressing problems of humanity...involve relationships, communications, changes of trends-in other words, situations in which systems must be studied as a whole, in all the complexity of their interactions. This is particularly true of human life. When life is considered only in its specialized functions, the outcome is a world emptied of meaning. To be fully relevant to life, science must deal with the responses of the total organism to the total environment.⁶⁰

Kubasek and Silverman also point out that:

...environment is not viewed primarily as a set of independent, strictly bounded territories but, rather, as one related unit, divided if at all, into natural components - air, water and land - each having interactive relationships with one another and with humans.⁶¹

What is clearly evident is that we need to use the sciences (legal, natural, political – to name but a few) to formulate strategies for solutions which should address the entire complex system of the total environment. In an attempt to do just this, this paper will employ the definition of ‘environment’ as provided in the South African Na-

⁵⁸ Redgwell agrees that there is as of yet no uniformly accepted definition of ‘environment’ in the realm of international environmental law. See, generally, Catherine Redgwell, ‘International Environmental Law’ in Malcolm D. Evans, *International Law* (2nd ed., Oxford University Press, 2006) 657–688 at 658.

⁵⁹ Harold Sprout and Margaret Sprout, ‘The Ecological Viewpoint-and Others’ in Cyril E. Black and Richard A. Falk (eds), *The Future of the International Legal Order Volume IV: The Structure of the International Environment* (Princeton University Press, Princeton, 1972) 569–605 at 579.

⁶⁰ René Dubos, *So Human an Animal* (Scribner, 1968) at 27, quoted in Sprout and Sprout, ‘The Ecological Viewpoint’, *supra* note 59, at 575.

⁶¹ Nancy K. Kubasek and Gary S. Silverman, *Environmental Law* (6th ed., Pearson Prentice Hall, 2008) at 428.

tional Environmental Management Act, 1998 (NEMA),⁶² simply because it is one of the most comprehensive definitions of which the present author is to date aware; and because it exemplifies the integrated and holistic nature of the environment. NEMA defines 'environment' as:

- ...the surroundings within which humans exist and that are made up of -
- (i) the land, water and atmosphere of the earth;
 - (ii) micro-organisms, plant and animal life;
 - (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
 - (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.⁶³

It has been illustrated above that 'governance' is a process which we can apply to formulate and implement strategies for solutions to regulate the effects of human activities, primarily by means of law. This implies that it would also be possible, therefore, to regulate the effects of human activities on the environment by means of governance and law.

Considered as such, 'environmental governance' could, therefore, be defined from a legal perspective as:

[a] management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effect of human activities on the total environment (including all environmental media, and biological, chemical, aesthetic and socio-economic processes and conditions) at international, regional, national and local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the common present and future interests human beings hold in the environment.

7 Environmental governance and sustainability

The way chosen for purposes of this paper to conceptualize and, hence, to understand environmental governance as described above is, admittedly, very broad. Such a broad or comprehensive understanding is convenient since it allows one the luxury to derive various objectives or purposes for which environmental governance could be used. The present author is convinced also that many other authors have already and will in future identify and formulate various other specific objectives of environmental governance. Regardless of possible criticism that it may result in too superfi-

⁶² Act 107 of 1998.

⁶³ Section 1.

cial an analysis, this paper, due to space constraints, focuses only on what, to the present author's mind, is the ultimate objective of environmental governance: namely, sustainability.⁶⁴

Why is 'sustainability' relevant to environmental governance? The link between ecology and societal constructs such as law and governance lies in sustainability itself, or, more specifically, a biological conception of sustainability, or sustainability in ecology (as opposed to sustainability operating within the confines of human experience in a true Modernistic sense at a meta-level of discourse).⁶⁵ Redclift explains it as follows:

[w]ithin plant ecology "sustainable" refers to the successional changes in plant communities which might serve as a model for the management of forests and rangeland. The key idea is that environmental management [or governance] can benefit from referring to natural succession, from utilizing the knowledge we have acquired about natural, ecological systems.⁶⁶ The principle of "sustainable yields" has become well established in certain fields of environmental management [or governance], particularly in fisheries management and forestry.⁶⁷

In other words, the more traditional and general conceptions of sustainability are those expressed in the way humans experience the world, or expressed by means of social sciences, as opposed to sustainability expressed in terms of ecological systems (for example, a rain forest), or natural sciences. This distinction is not to say that sustainability from a social sciences point of view should operate in isolation from sustainability from an ecological point of view; on the contrary. One of the important features of ecological sustainability, in fact, is that it frequently informs human in-

⁶⁴ A selection of the most recent publications on sustainability include, among others: Klaus Bosselmann, 'The Concept of Sustainable Development' in Klaus Bosselmann and David Grinlinton (eds), *Environmental Law for a Sustainable Society*: (New Zealand Centre for Environmental Law, 2002); Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, 2008); Philippe Sands, *Principles of International Environmental Law* (2nd ed., Cambridge University Press, 2003), Philippe Sands and Jacqueline Peel, 'Environmental Protection in the Twenty-first Century: Sustainable Development and International Law' in Regina S. Axelrod, David L. Downie and Norman J. Vig (eds), *The Global Environment: Institutions, Law and Policy* (2nd ed., CQ Press, 2005); Todd B. Adams, 'Is there a Legal Future for Sustainable Development in Global Warming? Justice, Economics, and Protecting the Environment', 16 *Georgetown International Environmental Law Review* (2003) 77–126; Ulrich Beyerlin, 'The Concept of Sustainable Development' in Rudiger Wolfrum (ed.), *Enforcing Environmental Standards: Economic Instruments as Viable Means?* (Springer, 1996) 95–121; Ulrich Beyerlin, 'Gedanken zur ethischen Fundierung internationaler Umweltschutznormen am Beispiel des Konzepts 'nachhaltige Entwicklung' *Frieden in Freiheit* (2008) 581–594; and Boyd, 'Sustainability Law (R)Evolutionary Directions', *supra* note 51.

⁶⁵ Redclift, 'Sustainable Development', *supra* note 20, at 23.

⁶⁶ Some argue that certain international environmental law instruments are to a greater or lesser extent increasingly focusing on ecological systems as a means of more effective legal protection. See, for example, Edith Brown Weiss, 'Global Environmental Change and International Law: The Introductory Framework' in Edith Brown Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, 1992) at 17.

⁶⁷ Redclift, 'Sustainable Development', *supra* note 20, at 23.

tervention; the latter which is then executed by means of a wide variety of social constructs such as law and governance.⁶⁸

Sustainability, like 'governance', is one of those terms which are clouded by uncertainty and vagueness. Pinto opines that the vagueness of terms like these can be attributed, among others, to international negotiation strategies which aim to achieve a certain 'constructive ambiguity' for the simple reason that '...often because the idea that first fired the collective imagination and mobilized legislative effort, was contained in some captivating phrase capable of widely different interpretations...'.⁶⁹ The most basic understanding of the concept suggests that sustainability has been developed, inter alia, to embed or articulate the increased realization that environmental issues cannot be viewed in isolation from various other considerations, including, inter alia: adaptation, infrastructural development, migration, protection of human rights, social development, and socio-economic development.⁷⁰

There are various approaches to sustainability. Each approach will, depending on its objectives and theoretical underpinnings, influence the manner in which sustainability will be understood and defined. One approach is to define sustainability as an 'opportunity'. According to Serageldin, '[s]ustainability is to leave future generations as many opportunities as, if not more, than we have had ourselves'.⁷¹ The same author equates 'opportunity' with capital which includes: human capital (taking into account, for example, education and health considerations); man-made capital (usually used in a financial or economic sense); natural capital (as used by environmental economists); and social capital (including institutional and cultural bases for allowing a society to function adequately as a society).⁷² Depending on one's view of maintaining this 'capital', sustainability could be strong, sensible, or weak. Weak sustainability is '...maintaining total capital intact without regard to the composition of that capital between the different kinds of capital...'.⁷³ Sensible sustainability requires that '...in addition to maintaining the total level of capital intact, some concern should be given to the composition of that capital between natural, man-made, human and

⁶⁸ The one is in fact dependent on the other. See *ibid.* at 32 and at 24 where the author states that:

...the idea that ecosystems only evolve successfully when they are protected from rapid changes, served as a guide to the way that power was exercised in human society. Ecology provided ideas about the way systems work, including systems subject to human intervention, at the same time highlighting the point beyond which such systems are no longer "sustainable".

⁶⁹ Moragodage C. W. Pinto, "'Common Heritage of Mankind'": From Metaphor to Myth, and the Consequence of Constructive Ambiguity' in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, 1996) 249–268 at 250.

⁷⁰ See also Malgosia Fitzmaurice, 'The Contribution of Environmental Law to the Development of Modern International Law' in Makarczyk, *ibid.* at 918.

⁷¹ Ismail Serageldin, 'The Formation of a Global Developmental Agenda' in 2 *Boutros Boutros-Ghali: Amicorum Discipulorumque Liber* (1998) 1345–1368 at 1349.

⁷² *Ibid.* at 1349–1350.

⁷³ *Ibid.* at 1351.

social'.⁷⁴ Strong sustainability '...requires maintaining different kinds of capital intact separately'.⁷⁵ While a second approach is to describe sustainability as a 'given stage of development of nations',⁷⁶ a third would entail viewing sustainability as a compromise between economic and environmental interests.⁷⁷ In this sense, its '...principal merit is that it modifies the previously unqualified development concept, insofar as development must possess both economic and ecological sustainability'.⁷⁸ Another approach, and in the present author's view the most preferred one, is to consider sustainability as an 'area' in which certain scientific activities take place, all of which aim to achieve certain beneficial outcomes.⁷⁹

By way of summary: sustainability requires the integration and harmonization of potentially conflicting concerns; it demands preservation of current capital for the use of present and future generations; and it means that ecological limits will restrict socio-economic activities. Mostly, though, sustainability requires a change in the way we think and act with respect to life, our existence on Earth and, specifically, the environment. Because law and governance (or environmental governance) can influence and mould the ways in which humans think and act with respect to the environment, one should be able to use environmental governance as a strategy for achieving sustainability. This is, admittedly, far easier said than done; partly because the many complexities espoused by sustainability also concomitantly increase the complexities that environmental governance needs to deal with. The success of environmental governance in tackling these challenges, with the view to achieving sustainability, will ultimately depend on the design, quality, quantity and effectiveness of environmental governance interventions.

8 Conclusion

This paper by no means intended comprehensively to elaborate on the environmental governance concept. The word 'tentative' in the title was deliberately chosen with the view to indicating that the debate on the theoretical design and legal meaning of the environmental governance concept has only just begun and that much remains to be done in this respect. What is clear, to the present author, is that this is the dawn of the 'governance', and more specifically the 'environmental governance', era. In addition, law and the environmental law sub-discipline, flawed as they may be, play an important part in the environmental governance paradigm, especially insofar as law aims to regulate human behaviour. It is also evident that the world is currently

⁷⁴ *Ibid.* at 1352.

⁷⁵ *Ibid.*

⁷⁶ Konrad Ginther and Paul J. I. M. De Waart, 'Sustainable Development as a Matter of Good Governance: An Introductory View' in Ginther et al., *Sustainable Development*, *supra* note 8, at 9.

⁷⁷ Winfried Lang, 'How to Manage Sustainable Development' in Ginther et al., *Sustainable Development*, *supra* note 8, at 93.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

set on an unsustainable path; and that what is clearly required is that laws, legal institutions, mechanisms and processes, along with governance arrangements, insofar as they relate to environmental matters, must be continually revisited and improved if we are to achieve sustainability, both in the theoretical and the practical contexts.

While this paper has attempted to provide a tentative theoretical formulation of environmental governance from a legal perspective, it is hoped that many more will follow and, more importantly, that the theory will be implemented in practice to change behaviour and ultimately to achieve sustainability.

In conclusion, and by way of summary, this paper sought to point out that: a) environmental governance is an amorphous extra-legal concept which has an unclear meaning and/or inadequate content for environmental lawyers; b) environmental governance should be accommodated in law given its increased popularity in the legal domain; c) environmental governance is used in many contexts and at various levels and originates from myriad international developments; d) it is unclear what environmental governance means to lawyers; and that, e), lawyers have only recently embarked on a process to apply and explore 'governance' in the environmental law domain, and this process is far from complete. Most importantly perhaps, the foregoing suggests that much work still needs to be done before the legal fraternity's appetite for legal clarification by means of definition is satisfied in this respect.

ADOPTION AND IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS FROM A NATIONAL GOVERNANCE POINT OF VIEW

*Tuomas Kuokkanen*¹

1 Introduction

National governance plays an important role when states are preparing for the development and implementation of multilateral environmental agreements. Even though, formally, an instrument of ratification can be signed by one of the so called Big Three — that is, the head of state, the prime minister or the minister of foreign affairs — in reality, engagement with an international treaty requires extensive coordination at the domestic level. In most cases, various inter-ministerial coordination and stakeholder consultations are needed. In addition, there is often a need to take different policies and measures to implement international obligations.

A shift from the word ‘government’ to ‘governance’ underlines the expansion of decision-making and represents, as Veijo Heiskanen puts it, ‘intellectual attempts to come to terms with ongoing technological, economic, social and political developments’.² Governance refers to a range of entities, from traditional governments to businesses, civil society, inter-governmental organizations, non-governmental organizations and professional associations.³

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² Veijo Heiskanen, ‘Introduction’, in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001), 1–43 at 9.

³ Achim Steiner, Lee A. Kimball and John Scanlon, ‘Global Governance for the Environment and the Role of Multilateral Environmental Agreements in Conservation’, 37 *Oryx* (2003) 227–237 at 227.

This paper will first discuss what is meant by a ‘treaty’; and then discuss the relationship between international and national law. Thereafter, engagement with international treaties and the implementation at the national level of obligations imposed by multilateral environmental agreements (MEAs) will be discussed.

2 The definition of a treaty

According to Article 2, paragraph 1a, of the Vienna Convention on the Law of the Treaties,⁴ a treaty means

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

The definition includes many important elements.⁵ For example, titles of agreements are not decisive. In the environmental field, agreements have been designated, for instance, as treaties, or framework conventions, or protocols. Usually, framework conventions provide general institutional frameworks for subsequent more detailed specific protocols.

With regard to special issues, one can refer to Memorandums of Understanding (MOU) and to decisions taken by international organizations. An MOU is usually a non-legally binding instrument.⁶ Likewise, decisions by international organizations or Conferences of Parties (COPs) are normally not legally binding.⁷ However, in certain instances such decisions can be legally binding.⁸

Every state possesses the capacity to conclude treaties. In addition, international organizations can conclude a treaty if that is so provided in its constituent instrument or is indispensable for the fulfillment of its purposes.⁹ Now that the Lisbon Treaty⁸ has entered into force, the European Union enjoys international legal personality.⁹ In almost all MEAs, the European Union and its member states have shared compe-

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

⁵ For discussion on the definition, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007) 16–31; Päivi Kaukoranta, ‘The Treaty-Making Process and Basic Concepts of Treaty Law’, in Marko Berglund (ed.), *International Environmental Law-making and Diplomacy Review 2004*, University of Joensuu – UNEP Course Series 1 (University of Joensuu, 2005), 53–60 at 54.

⁶ See Aust, *Modern Treaty Law*, *supra* note 5, at 32–57.

⁷ See Kaukoranta, ‘The Treaty-Making Process’, *supra* note 5, at 56.

⁸ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Lisbon, 13 December 2007, OJ 2008 No. C115, 9 May 2008, at 1.

⁹ See Nicola Notaro, ‘The New European Union Reform Treaty: What’s in it for EU Environment Negotiators?’, in Ed Couzens and Tuula Kolari (eds), *International Environmental Lawmaking and Diplomacy Review 2007*, University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 65–75.

tence which means that both the European Union and its member states can be parties to an MEA.

The treaty-making process has different stages, from the preparatory phase to the entry into force of a treaty.¹⁰ In negotiations, states may have various interests. Such interests are not necessarily limited to national self-interests but can mean the pursuit of general interests, e.g. to solve a regional or global environmental problem. It is important that state officials leading national delegations coordinate nationally among different ministries and relevant stakeholders sufficiently in order to ensure that their national interests and domestic priorities can, if necessary, be taken into account in the negotiations. In a case where interests or concerns are not sufficiently coordinated and addressed during negotiations, the subsequent ratification can be difficult or even impossible.

3 The relationship between international law and domestic law

Treaties are said to restrict the sphere of state sovereignty. This is slightly misleading because states are using their sovereignty to agree on different kinds of obligations. To put it differently, in the words of the Permanent Court of International Justice, ‘the right of entering into international agreements is an attribute of State sovereignty’.¹¹

There are two main theories on the relationship between international and national law.¹² Monism contends that international law and national law form part of one universal regime in which international law is superior. According to dualism, international law and national law are separate and independent systems of law. The approaches adopted by states to the theories of monism and dualism vary on the basis of their constitutions.¹³

¹⁰ See Kaukoranta, ‘The Treaty-Making Process’, *supra* note 5, at 56–59. See also Cam Carruthers, *Multilateral Environmental Agreement Negotiator’s Handbook*, University of Joensuu – UNEP Course Series 5, (2nd ed., University of Joensuu, 2007) (hereinafter *Negotiator’s Handbook*), picture at 2-14.

¹¹ See *S.S. Wimbledon*, Judgment of 17 August 1923, P.C.I.J. (ser. A) No. 1, at 25 (‘No doubt any convention creating obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.’).

¹² For more in-depth discussion on the relationship between international and municipal law, see Veijo Heiskanen, *International Legal Topics* (Finnish Lawyers’ Publishing Company, 1992) at 1–199; Tuomas Kuokkanen, ‘The Relationship of International and Municipal Law’, in *The Effectiveness of Multilateral Environmental Agreements – A Report from a Nordic Project*, TemaNord 1996:513 (Nordic Council of Ministers, 1996) 16–23.

¹³ In addition, the doctrines of transformation and incorporation provide further a more pragmatic distinction than the monism–dualism approach. The doctrine of transformation refers to a national act whereby a treaty is transformed into the domestic legal system by changing the character of the international obligation. The doctrine of incorporation implies that international law is part of the law of land even though there has not been any act of transformation. See Heiskanen, *International Legal Topics*, *supra* note 14, at 12–23.

From the international law point of view, the distinction between monism and dualism is not particularly relevant. International law is not concerned with domestic legislation as such, but whether parties are acting in conformity with their international obligations. Domestic legislation is, at the international law level, a mere fact on the basis of which the compliance with international obligations can be evaluated.¹⁴ Therefore, states have to take appropriate measures and make necessary amendments in their domestic legislation prior to ratifying a treaty. At the international law level, the essential requirement is that parties fulfill their international obligations.

Indeed, one of the basic rules of the law of treaties is the rule *pacta sunt servanda* which is expressed in Article 26 of the Vienna Convention on the Law of Treaties as follows:

[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.

With regard to internal law, it follows from the rule of *pacta sunt servanda* that a state cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.¹⁵

4 Engagement in international treaties

A state or an international organization can express its consent to be bound by a treaty in different ways. According to Article 11 of the Vienna Convention on the Law of Treaties, the consent may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

With regard to environmental treaties, signature itself does not normally constitute consent to be bound; but its main function is the authentication of the text agreed in the negotiation. The established practice is that a treaty specifies states and international organizations which are entitled to sign a treaty; as well as a time period during which the treaty is open for signature.¹⁶ Once a state has signed a treaty but has not yet ratified it, it has to refrain, according to Article 18 of the Vienna Conven-

¹⁴ See *Certain German Interests in Polish Upper Silesia* (Merits), Judgment of 25 May 1926, P.C.I.J. series A, No. 7, at 19 ('From the Standpoint of International Law and of the Court, which is its organ, national laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.').

¹⁵ See Article 27 of the Vienna Convention on the Law of Treaties. See also *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 8 December 1927, 1928 P.C.I.J. (ser.B) No. 15, at 26–27; *Free Zones of Upper Savoy and District of Gex*, Judgment of 7 June 1932 P.C.I.J. (ser. A/B) No. 46, at 167; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement Case*, Advisory Opinion of 26 April 1988 ICJ Report 1988, 2, at 33.

¹⁶ See, e.g., Article 17 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>>.

tion on the Law of Treaties, from ‘acts which would defeat the object and purpose of a treaty’.

From the legal point of view, it is logical that states do not commit themselves only upon signature, but that they reserve the possibility thoroughly to examine the obligations of the treaty before giving their final consent to be bound. New issues might have come up during the final stages of negotiations which have not been fully coordinated during the state’s preparations for the negotiations. The national law of a country may be in contradiction with the agreement and have to be amended before the engagement in the treaty. Moreover, adoption of the treaty may require other measures at the national level. In addition, there might be a need for the parliament of that country to accept the treaty. All of these national steps and measures will have to be taken before a country can give its consent to be bound.

Ratification, acceptance, approval and accession are international acts whereby a state establishes its consent to be bound by a treaty. Accession originally meant an option for a state to become a party after the signature period had lapsed or after a treaty had become into force. Nowadays, accession is in many instances possible also prior to a treaty’s entry into force.¹⁷ A treaty enters into force, according to paragraph 1 of Article 24 of the Vienna Convention, in such a manner and upon such a date as it provides or as the negotiating states have agreed. Usually, treaties require a certain number of deposits of instruments of ratification, acceptance, approval or accession.¹⁸

5 Implementation of international obligations at the national level

The Permanent Court of International Justice, in the case *Exchange of Greek and Turkish Populations*, stated that:

[a] state [which] has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations taken.¹⁹

¹⁷ See Aust, *Modern Treaty Law*, *supra* note 5, at 94–124.

¹⁸ See, e.g., paragraph 1 of Article 36 of the Convention on Biological Diversity (‘This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.’).

¹⁹ *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925, P.C.I.J. (ser. B) No. 10, at 20–21.

This dictum is still valid today. Indeed, it is important that states take necessary implementing measures to comply with an MEA. The same issue is expressed in the UNECE guidelines in the following way:

[a]ll legal and appropriate measures required to implement the agreement should be in place, in order to ensure that a Party is in a position to comply with its international obligations at the time of entry into force of the MEA for that Party.²⁰

If an MEA requires parties to take certain specific measures, a monist approach is not necessarily sufficient for the proper implementation of the agreement.²¹ In many cases, MEAs require parties to take certain specific measures. There are different ways to categorize these obligations. For example, Catherine Redgwell divides national implementation into three parts: legislative, administrative and judicial implementation;²² whilst Philippe Sands makes a distinction between traditional direct regulations and economic instruments.²³

6 Conclusions

National governance is pertinent throughout the life cycle of an MEA. During the negotiations, it is important to ensure that a country's participation is based on well-informed and coordinated understanding at the national level.²⁴ During the ratification period, it is crucial to determine what kind of implementation measures are needed prior to the ratification. Even once the treaty is in force and operation; there

²⁰ See Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements (MEAs) in the ECE Region, adopted by the Fifth Ministerial Conference, 'Environmental for Europe', Kiev, Ukraine, 21–23 May 2003, UN Doc. ECE/CEP/107 (2003).

²¹ For example, the Compliance Committee of the Aarhus Convention has underlined this aspect. See, e.g., by failing to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation, the Party concerned was not in compliance with Article 3, paragraph 1 of the Convention. See Decision III/6a: 'Compliance by Albania with Its Obligations under the Aarhus Convention', adopted at the third meeting of the Parties, held from 11 to 13 June in Riga, UN Doc. ECE/MPPP/2008/Add.9 (2008).

²² Catherine Redgwell, 'National Implementation' in Daniel Bodansky, Jutta Brunnée and Ellen Hay (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 922–946 at 929–938.

²³ With direct regulations Philippe Sands means command-and-control type of environmental quality standards, product standards, environmental quality standards and technology standards and with economic instruments such instruments which make use of economic incentives. See Philippe Sands, *Principles of International Environmental Law* (2nd ed., Cambridge University Press, 2003) at 154–169. Alexandre Kiss and Dinah Shelton list the following legal techniques and procedures suggested or mandated by international environmental instruments: regulatory measures, environmental impact assessment, licensing and permitting, economic measures, monitoring and surveillance, environmental audits, and enforcement standards. See Alexandre Kiss and Dinah Shelton, *International Environmental Law*, Second Edition, (2nd ed., Transnational Publishers, 2002) 191–245. See also discussion by Dan Bodansky on varieties of environmental norms in Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010), at 86–107.

²⁴ *Ibid.*, at 37.

is still need for national coordination and consultation in respect of its application, implementation and further development.

As stressed by the UNEP *Compliance Guidelines*, the implementation at the national level is the core of an MEA's effectiveness.²⁵ Effective national governance underpins, as Steiner, Kimball and Scanlon note, 'sound, regional, multilateral and global governance, and vice-versa'.²⁶ Indeed, national and international governance are mutually supportive.

²⁵ See UNEP Guidelines on Compliance with and Enforcement of MEAs, available at <<http://www.unep.org/DEPI/law/implementation.html>> (visited 11 July 2010). See also Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (UNEP, 2006), available at <http://www.unep.org/dec/docs/UNEP_Manual.pdf> (visited 11 July 2010) at 179. The Guidelines address in detail implementation measures to promote compliance. They also emphasize the importance of coordination among departments and agencies at different levels of governments as well as the involvement of major stakeholders, local communities, business and industry, citizen groups and NGOs. For discussion, see Elizabeth Maruma Mrema, 'Cross-Cutting Issues in Compliance with and Enforcement of Multilateral Environmental Agreements' in Marko Berglund (ed.), *International Environmental Law-making and Diplomacy Review 2005*, University of Joensuu – UNEP Course Series 2 (University of Joensuu, 2006) 129–154.

²⁶ Steiner et al., 'Global Governance for the Environment', *supra* note 3, at 227.



PART II

PARTICULAR ISSUES CONCERNING GOVERNANCE IN INTERNATIONAL ENVIRONMENTAL LAW



ENVIRONMENTAL GOVERNANCE IN POST-CONFLICT SITUATIONS: LESSONS FROM RWANDA

*Roy Brooke*¹

1 Introduction

Both the environment and natural resources have been a part of conflict for millennia. Poisoning of water supplies in Ancient Greece, for example, occurred as long ago as 590 B.C.² and crop-burning is also an age-old tactic of warfare.³ In the modern era, examples of environmental destruction in warfare remain plentiful. For example, the first Persian Gulf War left indelible images of marine and coastal pollution. In times past, these practices were studied primarily to ensure success in future wars. Today, in contrast, there is a growing body of research exploring the link between environment, natural resources, and conflict with a view to preventing future wars and protecting the environment that sustains human populations. With this research we are gaining a better, but still far from complete, understanding of how natural resources and the environment can contribute to conflict and be affected by conflict. Indeed, the very concept of security and conflict now includes not only traditional political and military elements, but also environmental degradation and resource exploitation as additional aspects of violent conflict.⁴ Coherent institutional and political responses to the linkages between conflict, natural resources and the environment, however, are much less in evidence.⁵ For example, environment and natu-

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² Adrienne Mayor, *Greek Fire, Poison Arrows and Scorpion Bombs: Biological and Chemical Weapons in the Ancient World* (Overlook, 2003) at 100.

³ *Ibid.* at 106.

⁴ See UNGA, 'Follow-up to the outcome of the Millennium Summit, Note by the Secretary General', UN Doc. A/59/565 (2004) at 11, available at <<http://www.un.org/secureworld/report.pdf>> (visited 12 January 2010).

⁵ Alexander Carius, *Understanding Environment, Conflict and Cooperation* (UNEP, 2004).

ral resources challenges are often understood and treated as threats that are distinct from conflict, with correspondingly fragmented policy and institutional responses.⁶

In this paper it will be argued that it is of increasing importance to have a sound understanding of how both environmental governance doctrine and institutional policies and actions can influence environmental management before, during, and after conflicts. It will be argued further that such an understanding will help to ensure appropriate responses that effectively address the nexus of environmental concerns, natural resources, and conflict. Lessons will be drawn from Rwanda and some effective governmental and non-governmental responses to the environmental degradation that has occurred there (as the result of violent conflict) will be described. Unless otherwise specified, 'environment' is defined as the sum of all external conditions affecting the life; development and survival of an organism; 'natural resources' are defined as actual or potential sources of wealth that occur in a natural state; and 'conflict' is defined as a dispute or incompatibility caused by the actual or perceived opposition of needs, values and interests.⁷

2 Overview of the link between the environment, conflict and natural resources

The environment and natural resources are just two of the variables that can contribute to conflict, and some observers argue that they are relatively minor ones.⁸ However, the United Nations Environment Programme (UNEP)⁹ summarizes recent field experience and academic research, and concludes that, in fact, about 40 percent of all intrastate conflicts since 1950 are associated with natural resources, and that since 1990, at least 18 violent conflicts have been fueled by natural resources.¹⁰ UNEP states that this link follows three main pathways: conflict arising from competing demands for available natural resources, whether these be high-value diamonds or scarce water, for example; conflict being financed or 'fueled' by natural resources, such as using proceeds from the sale of diamonds to buy weapons; and conflict being extended or peacemaking undermined by an unwillingness to consider environment and natural resources in peace arrangements. Conversely, there are also examples of cases where environment and natural resources have contributed to peace-building.¹¹

⁶ UNGA, 'Follow-up', *supra* note 4.

⁷ These definitions are drawn from, and fuller definitions are contained in, UNEP, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (UNEP, 2009).

⁸ Thomas F. Hower-Dixon, Jeffrey H. Boutwell, and George W. Rathjens, 'Environmental Change and Violent Conflict', *Scientific American* (1993) 38–45 at 38.

⁹ See <http://www.unep.org>.

¹⁰ UNEP, 'From Conflict' *supra* note 7, at 8.

¹¹ *Ibid.* at 22.

One such example can be seen in the case of Liberia, which illustrates the links between the environment, natural resources, and the environment. Access to Sierra Leone's diamonds (a natural resource) has been identified as a contributing cause to long-standing conflict in that country. United Nations sanctions on Liberian diamonds diminished the importance of this natural resource as a source of conflict.¹² However, high-value timber harvested in the country was not the subject of sanctions, and its sale helped to fuel conflict in the region. Following the election of new Liberian leader Ellen Johnson-Sirleaf in November 2005, some of the first executive actions were to cancel natural resource contracts that were believed to be fueling the conflict¹³ and to revisit forestry governance more generally to address the role of timber as a source of revenue for the conflict.¹⁴ These steps illustrate the role that the environment and natural resources can play in peacebuilding.

UNEP has also examined evidence of the impacts of conflict on the environment, drawing three main conclusions. These conclusions are, first, that the environment can sustain direct impacts from conflict. These impacts can range from the burning of crops (as happened in Ancient Greece) to hazardous waste leakages from bombed infrastructure in modern warfare that may damage water, soil and biodiversity. Second, the environment can sustain indirect effects such as the coping strategies of people displaced by conflict, which may involve, for example, cutting down forests for fuel-wood. Third, conflict can result in a loss or erosion of governance and investment during conflicts. Any one of these impacts may help to create conditions that are conducive to further conflict.¹⁵

3 The growing importance of the link between environment, natural resources and conflict

Some observers state that because the link between conflict, natural resources and environment has always existed, it is not very relevant.¹⁶ There are at least three reasons to discount this perspective: the changing nature of conflict; the changing nature of humankind's relationship with the environment and natural resources; and emerging evidence on the likelihood of natural resource-based conflicts to relapse.

¹² UNGA Res. 55/56 (2001), 'The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts'.

¹³ Mike Davis, *Why Should Mediators Consider the Economic Dimensions of Conflicts?* (Centre for Humanitarian Dialogue, 2009), available at <<http://www.hdcentre.org/files/Economics%20paper.pdf>> (visited 12 January 2010), 10.

¹⁴ See, for example, Executive Order Number 1 on Forest Sector Reform in Liberia, available at <<http://www.elaw.org/system/files/%252Fdrupal/files/lr.timber.eo.doc>> and an overview of the Liberia Forest Initiative, available at <http://www.usaid.gov/our_work/environment/forestry/pubs/brochure_liberia.pdf> (both visited 14 June 2010).

¹⁵ UNEP, 'From Conflict' *supra* note 7, at 15.

¹⁶ Hower-Dixon et al, 'Environmental Change', *supra* note 8, at 38.

Conflict has changed with the end of the Cold War.¹⁷ Now, conflict does not exist within the primary boundaries of these superpowers struggling for supremacy, but rather, numerous states and actors in conflict within a wider range of contexts. As a consequence, there has been an increase in the number of violent conflicts, and of the parties to these conflicts. For example, in the period 1990–2001 there were 57 major armed conflicts in 45 locations around the world.¹⁸ Most occurred in the developing countries of Sub-Saharan Africa and in Asia. Of the world's 20 poorest countries, 80 percent have experienced conflict since the 1980s.¹⁹ Many of these are long-term conflicts. Of the 24 conflicts recorded in Africa in 2001, for example, 11 had lasted eight or more years. The nature of these conflicts has also changed from being primarily wars between states, to being wars within states, as tensions previously suppressed by superpower rivalry resurfaced following the Cold War. There is evidence to suggest that these internal conflicts are often more disruptive for national economic and social systems than are inter-state conflicts.²⁰

In summary, it can be argued that the increased numbers of violent conflicts results in more scope for the environment to become a casualty of war through direct and indirect impacts; and also results in greater likelihood of natural resources enabling or fueling the military ambitions of the increased number of parties to armed conflict. Furthermore, as conflict predominantly occurs in the developing world, it affects primarily people who derive their livelihoods directly from the land, which means there is a closer and more direct link between conflict and resources in a majority of cases.²¹ There is, for example, a greater likelihood that vulnerable groups affected by conflict will rely on environment and natural resource-based coping strategies, thus increasing the potential for indirect environmental impacts.

Humankind's relationship with natural resources and the environment is also changing. At the most fundamental level, a growing global population places greater demand on a diminishing natural resource base. The world's population is expected to grow to nine billion by 2050, with the bulk of that growth in developing countries²². Population growth in itself can contribute to resource scarcity, as natural resources are divided amongst greater numbers of people.²³ At the same time, by all current

¹⁷ The post-World War II period was shaped by political, military and ideological struggle between the former Soviet Union and its allies, and Western powers, primarily the United States.

¹⁸ Stockholm International Peace Research Institute Yearbook 2002, available at <<http://www.sipri.org/yearbook/2002/>> (visited 12 January 2010), Appendix 1A.

¹⁹ See, for example, World Bank, 'Global Challenges: Fragile States', available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:21708932-menuPK:4851994-pagePK:51123644-piPK:329829-theSitePK:29708,00.html>> (visited 14 June 2010).

²⁰ Slobodanka Teodosijevic, *Armed Conflicts and Food Security*, Working Paper, (FAO, 2003) at 1.

²¹ Carl Bruch, David Jensen, Mikiyasu Nakayama, Jon Unruh, Rebecca Gruby, Ross Wolfarth, 'Post-Conflict Peace Building and Natural Resources', 19 *Yearbook of International Environmental Law* (2008) 58–96.

²² See United Nations Department of Economic and Social Affairs, Population Newsletter number 87, June 2009, available at <http://www.un.org/esa/population/publications/popnews/Newsstr_87.pdf> (visited 14 June 2010).

²³ Hower-Dixon et al, 'Environmental Change', *supra* note 8, at 40.

scientific understanding, most major ecosystems are degraded and in decline,²⁴ some potentially irreversibly. As an example, *Science* magazine reported in November 2008 that without fundamental fisheries management changes, all wild fish stocks would almost certainly collapse by 2050, with a related loss of food and livelihoods for major segments of the world's coastal populations. If livelihoods, ecosystems and food sources of entire populations are put into question, then logically this could potentially contribute to natural resource scarcity conflicts on scales far greater than is currently the case.

Climate change has the potential to bring about massive changes to the environment, in potentially non-linear and unexpected ways. Therefore, it must also be considered when discussing the links between environment, natural resources and conflict. Scientific evidence suggests that the world's poorest nations – those already affected the most by conflict – will bear the brunt of climate change impacts.²⁵ A recent review by the International Institute for Sustainable Development (IISD)²⁶ identified three security challenges posed by climate change: an intensification of land-use conflicts and triggering of migration by exacerbating existing environmental crises; new causal relationships from climate change-induced sea level rising, flooding and glacier melting; and the possibility that, unchecked, climate change will result in large-scale changes such as the loss of the Asian monsoon, with potentially catastrophic results.²⁷ Africa, according to the IISD, is particularly vulnerable because substantial areas are characterized by flood plains or poor soil, many of its economies depend on sectors susceptible to climate change fluctuations, and the continent has a low overall adaptive capacity to climate change.

As a final consideration on the link between the environment, natural resources and conflict, it is important to note that, according to UNEP, conflicts that have natural resources as a major element are twice as likely to relapse after apparent resolution than those that do not have this major element.²⁸ This may indicate that conflicts based on competition over natural resources have deeper and more complex roots, and are more difficult to resolve, than those that do not.

The foregoing analysis is not intended to suggest that humans will *necessarily* outstrip their natural resources, fail to adapt to environmental challenges or choose conflict over peace-building. Nor does it suggest any direct causality between environmental and natural resource factors and conflict. Rather, it suggests that the environment and natural resources can be important variables in conflict, perhaps more so than is

²⁴ See the Millennium Ecosystem Assessment, available at <<http://www.millenniumassessment.org/en/index.aspx>> (visited 12 January 2010).

²⁵ UNFCCC, *Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries* (UNFCCC, 2007), available at <<http://unfccc.int/resource/docs/publications/impacts.pdf>> (visited 14 June 2010) 5.

²⁶ See <<http://www.iisd.org/>>.

²⁷ Oli Brown and Alec Crawford, *Climate Change and Security in Africa: A Study for the Nordic-African Foreign Affairs Ministers Meeting* (IISD, 2009) at 4.

²⁸ UNEP, 'From Conflict' *supra* note 7, at 5.

typically recognized, and that this importance is likely to increase over time. Therefore, more solutions to address the role of the environment and natural resources in conflict must be identified. The rest of this paper is devoted to this topic.

4 Environmental governance and conflict

‘Environmental governance’ is not a single, finite theory or field with universally accepted boundaries and definitions. As UNEP notes, governance is defined in many ways.²⁹ For the purposes of this paper, it is defined as the sum of organizations, mechanisms, rules, procedures and norms that regulate the process of environmental protection.³⁰ As noted by UNEP, institutions, particularly weak ones, as well as government authority, accountability and transparency are frequently eroded by conflict.³¹ Impacts can include resource exploitation proceeding in an uncontrolled fashion, diminished property rights and environmental practices, and a diversion of funds for military purposes and away from environmental sectors such as energy, waste and water.³²

As noted earlier, a coherent set of norms, policies and strategies to address the environment, conflict and natural resources nexus does not yet exist. There is some acceptance that natural resources and the environment are important considerations in peace-building. There is, for example, material available to guide post-conflict mediators in considering the link between natural resources and intrastate conflicts.³³ However, in general, natural resource and environmental issues are not adequately analyzed for, or integrated into, peace-building doctrine, guidance or activities.³⁴

There is as yet no body of evidence to indicate what environmental governance factors would make a country more or less susceptible to the negative environmental consequences of conflict; or, following a conflict, what environmental governance factors would assist in putting the country on a sound environmental management footing that would help prevent a relapse of conflict.

²⁹ UNEP Year Book 2010: New Science and Developments in Our Changing Environment. (UNEP, 2010), available at <<http://www.unep.org/yearbook/2010/>> (visited 14 June 2010) at 1.

³⁰ Adapted from Adil Najam, Mihaela Papa. and Nadaa Taiyab, *Global Environmental Governance: A Reform Agenda* (IISD, 2006), available at <<http://www.iisd.org/publications/pub.aspx?id=797>> (visited 12 January 2010).

³¹ UNEP, ‘From Conflict’ *supra* note 7, at 17.

³² *Ibid.*

³³ Davis, *Why should mediators?*, *supra* note 13, is an example of this type of guidance.

³⁴ Bruch et al., ‘Post-Conflict Peace Building’, *supra* note 21.

5 The case of Rwanda

5.1 An introduction

Rwanda is a small, mountainous and landlocked country in Africa's Great Lakes region. It has a population of approximately 9.7 million (2007 figure), according to the Government of Rwanda website.³⁵ Population density is the highest in Africa, and population growth stands at 3.5 percent per year.³⁶

The tragic events of the 1994 genocide, in which over 800 000 Tutsis and moderate Hutus were killed in 100 days, are well-documented elsewhere and will not be recounted here except to state that it is difficult to overstate the social, political and economic effects of the genocide. The country's economy was halved in a year, leaving it the poorest on the planet. Some 80 percent of the population was plunged into extreme poverty, vast tracts of land were destroyed, a generation of professionals was lost and many pre-existing development challenges were exacerbated.³⁷

Today, 15 years later, Rwanda is clearly resurgent. It is considered stable and safe, and on a development rather than post-conflict footing, as demonstrated by reaching the completion point in 2005 of the International Monetary Fund's³⁸ Heavily Indebted Poor Countries Initiative,³⁹ which provides debt relief and loans to countries that meet a range of economic performance targets. Rwanda also has a clear development vision for the year 2020 and many of the institutions in place to achieve it. Growth has averaged 5.8%, making it one of the continent's top performers. Poverty has dropped from 70 percent at the end of the war to 56.9 percent in 2006.⁴⁰

Rwanda's environmental situation is complex. The country has inherent challenges including limited geographical size, steep slopes which are difficult to cultivate without erosion, and soil that is in many places weathered and acidic. Rwanda's population puts high pressure on the environment both because of its density and because of the patterns of land use – in particular, because 90 percent of people rely on subsistence agriculture that takes place on land plots of diminishing size as they are further divided between generations of farmers. The results include severe soil deg-

³⁵ Available at <http://www.gov.rw/page.php?id_rubrique=8> (visited April 20 2010).

³⁶ UNDP, *Turning Vision 2020 into Reality: From Recovery to Sustainable Human Development: Human Development Report Rwanda 2007* (UNDP, 2007), available <http://hdr.undp.org/en/reports/national-reports/africa/rwanda/RWANDA_2007_en.pdf> (visited 14 June 2010) 14.

³⁷ Republic of Rwanda Ministry of Finance and Planning, *Rwanda Vision 2020* (2000), available at <<http://www.minecofin.gov.rw/docs/LatestNews/Vision-2020.pdf>> (visited 14 June 2010).

³⁸ See <<http://www.imf.org/>>.

³⁹ According to the IMF, the HIPC Initiative was launched by the IMF and the World Bank (see <<http://www.worldbank.org/>>) in 1996 with the object of 'ensuring that no poor country faces a debt burden it cannot manage' by reducing external debt burdens of the poorest countries to 'sustainable' levels. See IMF, 'Fact sheet: Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative', available at <<http://www.imf.org/external/np/ext/facts/hipc.htm>> (visited 14 June 2010).

⁴⁰ UNDP, *Turning Vision, supra* note 36, at 5.

radation and erosion in many places, widespread deforestation, pressure on wetlands, and contamination of water.⁴¹ Inadequate water management and drought are having negative impacts on the country's energy production, and it is likely that climate change will compound these effects. The country's rapid rates of urbanization – amongst the highest on the continent – will create other environmental challenges.⁴² Many problems are interrelated. For example, ecosystem degradation can have severe negative impacts on the effectiveness of the country's hydro-electric facilities, and poverty and high birth rates can intensify pressure on land, which in turn may further compound poverty.⁴³ The net result is that in very tangible ways, environmental quality affects the country's development sectors.

5.2 Conflict and environmental governance in Rwanda

Due to a combination of environmental challenges noted above, Rwanda faced environment and natural resource challenges well before the genocide. The conflict itself has had devastating impacts on the environment including some direct impacts from landmines and pollution; and far-reaching indirect impacts from the vast movements of millions of displaced people.⁴⁴ UNEP is in the process of developing a comprehensive Post-Conflict Environmental Assessment of Rwanda. A draft version of the report discussed at a consultation workshop in Kigali, Rwanda in March 2009 suggested that impacts include: enormous loss of forests, which were lost due to cutting for fuel and agriculture; the loss of the majority of the savannah in eastern Rwanda, as Akagera Park was used for resettlement; the deterioration of key sectors such as agriculture, which lost personnel, data and infrastructure such as meteorological stations; and the loss of major ecosystems to resettlement and uncontrolled farming. Issues such as the deterioration of forests and protected areas as a result of the conflict are generally well-documented.⁴⁵

There are, not surprisingly, differing views on the role of land and environment as contributing factors leading to the genocide. There is evidence to suggest that both the consequences of environmental degradation and the political and social elements of land use, for example land capture by elites, contributed to the tensions that contributed to the genocide. This view is controversial and far from universally accepted, however.⁴⁶ For example, the Government of Rwanda's official website casts the genocide in entirely political and ethnic terms, noting that 'the Genocide of the Tutsi in

⁴¹ Fabien Twagirumungu, *Environmental Profile of Rwanda*, Prepared for the European Commission and Republic of Rwanda (2006), available at <<http://www.unpei.org/PDF/Rwanda-Environmental-Profile.pdf>> (visited 14 June 2010).

⁴² UNDP, *Turning Vision*, *supra* note 36, at 11.

⁴³ Republic of Rwanda, *Rwanda Vision 2020*, *supra* note 37, at 20.

⁴⁴ UNDP, *Turning Vision*, *supra* note 36, at 11.

⁴⁵ Andrew J. Plumptre, *The Impact of Civil War on the Conservation of Protected Areas in Rwanda* (WWF, 2001), available at <<http://www.worldwildlife.org/bsp/publications/africa/145/Rwanda-English.htm>> (visited 14 January 2010).

⁴⁶ James K. Gasana, 'Natural Resource Scarcity and Violence in Rwanda' in Richard Matthew, Mark Halle and Jason Switzer (eds), *Conserving the Peace: Resources, Livelihoods and Security* (IISD, 2002), available at

1994 was a carefully planned and executed exercise to annihilate Rwanda's Tutsi population and Hutus who did not agree with the prevailing extremist politics of the Habyarimana regime'.⁴⁷

What is perhaps most striking about environmental governance in Rwanda is that the country has moved from a pre-conflict situation of having little in the way of organizations, mechanisms, rules, procedures and norms that regulate the process of environmental protection, through a catastrophic conflict that eroded further even that limited environmental governance, to a point where there is now emerging a strong and effective regime for environmental management and sustainable development.

Environmental governance before the genocide can be characterized as having been generally weak. Protected areas have existed since the 1950s, but these were gradually encroached upon, through the 1950s and beyond, up to and including the time of the genocide. National parks were managed by the Office Rwandais pour Tourisme et Parcs Nationaux (ORTPN); while other protected areas such as the Gishwati Forest were managed by the Direction Generale des Forêts (DGF) in the Ministry of Agriculture and Forest Management.⁴⁸ Environmental issues more generally were managed by the Ministry of Agriculture and Forestry Management, which led to an extractive, rather than a conservation and sustainable development, focus.

During the genocide, tourism numbers dropped drastically, with a corresponding loss of revenue for effective management. For example, the Virunga Park received 61 visitors in 1994. This was down from 1 111 the year before and far below the 10 641 visitors received in 2005.⁴⁹ Numerous foreign assistance projects related to protected areas also ended during this time.⁵⁰

In the immediate aftermath of the genocide, the institutional focus was, of necessity, on security and humanitarian issues and on dealing with vast influxes of returning refugees. As such, environmental governance was weak and eclipsed by other priorities. For example, it was during this time that substantial parts of Akagera Park lost park status to accommodate returning refugees. By 1998, parts of the Park had been re-gazetted but it was still reduced to about 30 percent of its original size. Gishwati Forest, which had never had the same level of protection as Akagera Park even prior to the conflict, lost the remainder of its area following 1994 for resettlement purposes, such that now there are few stands of trees greater than one hectare. Donor

<http://www.iisd.org/pdf/2002/envsec_conserving_peace.pdf> (visited 14 January 2010), 199–246 at 206.

⁴⁷ See <http://www.gov.rw/page.php?id_rubrique=5> (visited 28 March 2010).

⁴⁸ Plumptre, *The Impact of Civil War*, *supra* note 45.

⁴⁹ Rwanda Environmental Management Authority, Economic analysis of natural resource management in Rwanda. Poverty and Environment Initiative and Rwanda (2006), available at <<http://www.unpei.org/PDF/Rwanda-Economic-Analysis.pdf>> (visited 14 June 2010) at 27.

⁵⁰ Plumptre, *The Impact of Civil War*, *supra* note 45.

assistance was almost exclusively focused on humanitarian rather than on developmental assistance, and until 2000 the German and Dutch governments were the only funders of limited conservation initiatives.⁵¹

During the last five to seven years there has been a striking turnaround in environmental governance, relative both to the situation during and after the genocide, and to the situations of even other developing countries that have not experienced the type of devastating conflict that beset Rwanda. At a superficial level, many visitors to the country note its striking cleanliness and a law strictly prohibiting the use of plastic bags, the latter initiative being one that, until recently, only a few far-sighted cities in developed countries had adopted.⁵² At a policy and planning level, environment is clearly recognized as a stand-alone sector and as a cross-cutting issue in the country's national vision document: *Vision 2020*, and in the *Economic Development and Poverty Reduction Strategy Paper*. There is a national environmental policy and an 'organic law' for the environment that spell out the obligation to protect the environment and to manage resources sustainably. The guiding strategies for economic sectors such as agriculture clearly recognize the need for sustainable development.

Institutionally, the Rwanda Environment Management Authority,⁵³ the creation of which is provided for in the National Environmental Policy,⁵⁴ is fully operational and charged with making governmental environmental priorities operational. Other major initiatives such as the Land Policy (2004),⁵⁵ which provides for security of land tenure amongst other things, are also reshaping the nation's environmental governance context. At the time of writing, the government had launched an initiative to develop a Sector Wide Approach (SWaP)⁵⁶ for the environmental and natural resources sector, with the objective of aligning the programming and spending of all development partners in the country with a single strategic plan for the environment. At the level of environmental projects, there is a striking amount of activity, ranging from the largest solar installation on the continent⁵⁷ to a wide range of ecosystem restoration and climate change adaptation projects.⁵⁸

⁵¹ *Ibid.*

⁵² To illustrate, San Francisco was the first US city to ban plastic bags, in 2007. See, for example, 'San Francisco bans plastic shopping bags', *The Independent*, 27 March 2007, available at <<http://www.independent.co.uk/environment/green-living/san-francisco-bans-plastic-shopping-bags-442326.html>> (visited 14 June 2010). Since then, other countries have followed suit.

⁵³ See <<http://www.rema.gov.rw/>>.

⁵⁴ See Laurent Nkusi, *Le Ministre des Terres, de la Réinstallation et de l'Environnement*, available at <http://www.minirena.gov.rw/IMG/pdf/POLITIQUE_ENV_Version_finale_2003_.pdf> (visited 14 June 2010) and Republic of Rwanda Ministry of Natural Resources, 'Policy', available at <<http://www.minirena.gov.rw/spip.php?article25>> (visited 14 June 2010).

⁵⁵ See, for example, Republic of Rwanda, *National Land Policy*, available at <http://www.minela.gov.rw/IMG/pdf/National_Land_Policy.pdf> (visited 14 June 2010).

⁵⁶ Details contained in *Environment and Natural Resources Sector Working Group (SWG) Terms of Reference*, 23 July 2009 (unpublished).

⁵⁷ See, for instance, Arthur Asiimwe, 'Rwanda installs "Africa's biggest" solar plant', *Reuters.com* 8 June 2007, available at <<http://www.reuters.com/article/idUSL0871691720070608>> (visited 4 February 2010).

⁵⁸ Many details can be found on the REMA website at <<http://www.rema.gov.rw/>>.

The foregoing is not to suggest that environmental governance in Rwanda is perfect. Many challenges remain, including a lack of implementation capacity and coordination within the environment sector that are sufficient to meet the country's enormous challenges. For example, policy prescriptions in the agricultural sector strategy documents are not yet routinely translated into concrete activities, simply because there are insufficient human resources to do so. As another example, one of the reasons a SWaP is being developed in Rwanda is precisely because environmental programming remains fragmented. A robust array of environmental non-governmental organizations is also not in evidence.

The foregoing does suggest, however, that in Rwanda the environment is not generally viewed as an add-on to more essential development challenges, as the World Resources Institute asserts is the case in many countries; but is, rather, an essential element of successful development.⁵⁹ There is also the beginning of a solid policy, legislative, and institutional basis with which to tackle the country's pressing environmental concerns. This is all the more striking when considering how recent the devastation of the genocide was, and how weak the initial environmental governance starting point is in Rwanda. An issue requiring investigation is why and how this promising environmental governance regime has begun to emerge in Rwanda. A full answer that might support environmental governance efforts in other post-conflict countries requires substantial further research. However, a number of interviews⁶⁰ combined with the author's own observations in Rwanda suggest the following factors as a starting point.

1. The immediacy of inescapable facts

All countries and people depend on the environment for life, health and livelihoods. In Rwanda, however, the linkages between these things are much more evident, the alternatives and options are fewer than in many other countries, the environmental base is particularly fragile, and thus challenges are magnified. To illustrate this, climate change is increasingly understood as a global strategic challenge. However, globally, many still appear to have the sense that the majority of effects are further in the future, and that humans can still mitigate and adapt to the worst of the challenges. In Rwanda, by contrast, environmental challenges are immediate, and the consequences of inaction both potentially immediate and dire, given that 90 percent of the population gains their livelihood directly from the land, as noted above.⁶¹ The environmental governance policy implication is not that all post-conflict countries

⁵⁹ UNDP, UNEP, World Bank, and World Resources Institute, *World Resources 2005: The Wealth of the Poor: Managing Ecosystems to Fight Poverty*, (World Resources Institute, 2005), available at <http://pdf.wri.org/wrr05_full_hires.pdf> (visited 14 June 2010).

⁶⁰ Interviews: Alex Mulisa, National Consultant, Poverty and Environment Initiative (August 2009). Richard Ngendayho, United Nations Environment Programme Consultant. (August 2009). Louise Sorrenson, Task Manager, Poverty and Environment Initiative (August 2009).

⁶¹ Republic of Rwanda, *Rwanda Vision 2020*, *supra* note 37 at 7.

should or must wait until the environmental situation is particularly acute before taking action. Rather, it is that the nature and relevance of the environmental challenges, and their connection to key economic challenges, must be clearly understood by national policy-makers.

2. Leadership

One of the people interviewed for this paper⁶² stated that in terms of developing environmental governance structures in post-conflict societies, ‘character matters’. The general perception is that the current President of the Republic of the Rwanda and other senior leaders understand clearly the environmental problems the country faces, and the linkages of environment to all other development goals. Moreover, these leaders are acting upon their knowledge and convictions, ensuring that appropriate institutions were developed. However, the fact that Rwanda’s leadership appears to be ensuring that the environment is well reflected in national vision documents, and that an institutional framework exists, do not guarantee good environmental governance. However, they do create a basis for it. It could be said, therefore, that informed leadership can create enabling conditions for environmental governance. The environmental governance policy implication is that the nature of environmental challenges must be clearly understood by a country’s leadership, and that they must be prepared to act upon this.

3. Making the environment matter

Committed leaders and pressing environmental problems do not by themselves lead to solutions. Senior decision-makers, including Ministers, Permanent Secretaries and Heads of Departments, as well as donors and many others, must still be convinced to act on environmental issues and to translate top-level commitment into action in the face of competing priorities. This is less likely to happen if environment is narrowly understood as an issue of parks, wildlife and clean streets; and more likely to happen if it is understood in very practical terms as being vital to agriculture, energy, tourism and other economic sectors. This, in turn, means that environmental benefits must be understood and communicated in terms that are relevant to key economic sectors that drive development. In Rwanda, a substantial effort was made several years ago through an initiative of the government, UNEP and the United Nations Development Programme (UNDP)⁶³ through the Poverty and Environment Initiative⁶⁴ to calculate the costs of environmental action and degradation. This, and

⁶² Interviews, *supra* note 60.

⁶³ See <<http://www.undp.org/>>.

⁶⁴ The UNDP-UNEP Poverty-Environment Initiative (PEI) is, according to its website, a joint programme to provide countries with financial and technical support in order to build capacity for ‘mainstreaming poverty -environment linkages into national development planning processes’. The programme was

related efforts, led to oft-quoted figures on the costs associated with soil erosion and fuel consumption, and the value of services provided by various ecosystems, that helps put environmental protection in a central place on the agenda of the most powerful ministries concerned with the country's development. For example, one report included figures indicating that the soil erosion may cost up to 1.9 percent of Rwanda's GDP and that its conservation could increase productivity by 25-33 percent.⁶⁵ The environmental governance implication is that, to gain momentum and support, the real costs of environmental protection and degradation must be understood and acted upon.

4. Institutional linkages

Despite the foregoing developments, it is still far from clear that environment has become a central development issue in Rwanda. Some public officials still regard the environment as a 'non-core' issue when compared to agriculture, health, governance and education. The reality is that, notwithstanding senior commitments and the existence of institutions, it is more difficult to understand the connections between environment and development than between schools and education or doctors and health. Moreover, environment is a cross-cutting issue that is most relevant when seen in the context of other sectors; whereas the organizational structures of almost all bureaucracies are found in stand-alone sectors and their related ministries and donors. The development of a SWaP, noted above, may help to address this issue. In essence, it should help to align the programming of all development partners, not only those involved in the environment narrowly defined, behind a single strategic plan for the sector. Moreover, by virtue of being a cross-sector structure, a SWaP should force greater institutional linkages between agriculture, energy, environment, tourism, and so forth. The mechanism is still evolving, but the initial indications are positive. The environmental governance policy implication is that specific mechanisms for integrating the environment across sectors at operational and policy levels, could be important mechanisms to consider in a variety of fora.

launched in 2005 and, after being 'scaled up' in 2007, operates in 17 countries in Africa, the Asian-Pacific, Eastern Europe, Central Asia, Latin America and the Caribbean. The programme is funded by the Governments of Belgium, Denmark, Ireland, Norway, Spain, Sweden, the United Kingdom and the European Commission. See <<http://www.unpei.org/>> and <<http://www.unpei.org/about/index.asp>> (visited 4 February 2010).

⁶⁵ These and other examples may be found in Rwanda Environmental Management Authority, *Economic Analysis*, *supra* note 49, at 7.

6 Conclusions

Essential and inescapable links between the environment, natural resources and conflict are increasingly well-understood. The imperative to identify appropriate policy responses is of growing importance. However, appropriate institutional responses, or even a sound understanding of what these might be, are lagging. All post-conflict situations will be different and will teach their own lessons. The Rwanda example suggests that it is possible to move from a situation of almost no environmental governance to an increasingly robust regime, under even the most challenging of circumstances. The lessons of this country should therefore be researched in more detail, understood and shared. These lessons could, in turn, inform the development of mechanisms, norms, organizations, procedures and rules that enhance protection and sustainable management of the environment for its own sake, for sustainable economic development, and for the sake of mitigation against any potential for resource and environment-based conflicts.

BUILDING INSTITUTIONAL AND MANAGERIAL FOUNDATIONS FOR ENVIRONMENTAL GOVERNANCE WITH THE UNITED NATIONS SYSTEM – TOWARDS A NEW GOVERNANCE STRUCTURE FOR ENVIRONMENT PROTECTION AND SUSTAINABLE DEVELOPMENT¹

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1 Introduction

Before entering into discussion of specific issues of international environmental governance (IEG), one should consider how the United Nations (UN)³ system,⁴ through its governance, can provide member states and their peoples with public accountability of its operations.

¹ This paper was given, by invitation, as the keynote lecture on the Sixth University of Joensuu-UNEP Course on International Environmental Law-making and Diplomacy, Nairobi and Naivasha, Kenya, July 2009.

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³ Charter of the United Nations, 26 June 1945; see, for instance, <<http://uncharter.org/>>.

⁴ For a comprehensive index of the United Nations system of Organizations, see <<http://www.unsystem.org/>>. According to the UN's official website, the Charter established six principal organs of the United Nations: these being the Economic and Social Council, the General Assembly, the International Court of Justice, the Secretariat, the Security Council, and the Trusteeship Council. The United Nations encompasses also, however, 15 agencies and several programmes and bodies. For a comprehensive overview of the structure, see <<http://www.un.org/en/aboutun/structure/index.shtml>> (visited 14 June 2010).

The UN public accountability has two aspects: *managerial accountability* within the UN system and *democratic accountability* of the UN system. The first aspect relates to objectives and policy setting, and management of resources within the UN inter-governmental forums. The second aspect concerns the delivery of output to the global community, including public scrutiny aimed at making the objectives and policies of the UN system conform to global public interests.

This paper deals with building a foundation for environmental governance *with*, but not *within*, the UN system. It is about both managerial and democratic accountability.

2 Current management and governance framework

Generally speaking, any organization should have in place a clearly defined governance framework for decision-making and a mechanism for setting its agenda and its objectives, goals and policies, as well as a management framework for the implementation of the decisions taken with the necessary resources made available to its administration. In the context of domestic organizations, either governmental or private, there exists a single constitution, a body of law, by-laws, regulations and rules that are relevant to their governance, organization, management and administration. It is therefore relatively easy to identify what parameters should apply in performance evaluation of the organization, who should be accountable to whom in the discharge of his or her responsibilities.

In the case of international organizations, the situation differs radically. Particularly in those in the UN system, in view of their intergovernmental nature and composition, not only their objective setting but also the execution and delivery by the administration of organizational decisions are subject to the will of intergovernmental governing bodies composed of member states. Therefore, in order for an organization to sustain any meaningful work, there should be a common mechanism to identify and agree on concrete and clear objectives and on the benefit of multilateral initiatives for member states. Obviously, those who meet the expenses of the organization are reluctant to accept any open-ended commitment to the activities of the organization without being assured of best effective use of the resources they provide.

However, it would be wrong to believe that governments take arbitrary decisions on the management of international organizations on account of the sovereign nature of their competence. On the contrary, they have continued to seek to establish an elaborate system of procedures for the governing body collectively to approve the programmes of the organizations, allocate appropriate funds for them, and to monitor the use and effects of programmes implemented. In addition, the established system would provide delegated authority to the executive heads and administrations of the organizations, in return for the provision of transparency and accountability

to them. This reflects the real needs of member states in tackling the common problems and issues they identify.

The formation of international regimes has been motivated by the realism of states to find in situ solutions to inter-state problems in which their interdependent interests are at stake. However, the solutions that they have resorted to have been far from complete and durable, instead being rather ad hoc, short-term and often duplicative in the long run. The result was that, as and when a new global issue sprang up, an independent regime came into life. The proliferation of international regimes has then over time increased the burden on member states not only of making additional efforts to manage individual regimes better, but also that of providing effective governance to ensure coherence and coordination amongst them.

3 Salient features of management and oversight lacunae

3.1 Introduction

Fragmentation and proliferation in the decentralized UN system institutions inhibit the system from setting up a single governance and management framework. On the one hand, a number of salient features in management methods and approaches militate against such a framework at the intergovernmental level. Partly, these features are a corollary of the reluctance of member states to make long-term policy and resource commitments to durable and far-reaching systematic solutions to the multilateral issues they confront. Also attributable to that reluctance is increased use of voluntary contributions relative to the declining role of assessed contributions as well as member states' preference for zero-growth budgeting. Part of this problem concerns a facility of the UN funds and programmes to bear the cost of activities of a normative nature out of their voluntary contributions, which tends to create confusion between normative and operational activities in the UN institutions. On the other hand, there are built-in deficiencies in the methods and approaches employed in the management of the secretariats of the organizations. These include a dichotomy between programming and budgeting, the inadequacy of system-wide management frameworks and the lack of a mandatory framework for joint programming and financial appropriation among the organizations. These features are examined in the following subsections of this paper.

3.2 Lack of a single governance and management framework

There are diverse independent entities within the UN system, each of which has its own governing body for setting objectives and making management decisions. Therefore, no single management and governance framework exists within the system. This is inherent in the decentralized nature of the structure of international institutions.

3.3 Lack of coherent follow-up and implementation

Improvements in setting objectives and governance within the UN system have yet to achieve all that could be desired. Various attempts have been made from the inception of the United Nations through more than six decades, ranging from the adoption of global platforms and action programmes common to all institutions within the UN system through UN-sponsored world conferences, to the establishment of new funds, programmes and organizations. Very often, a new organization has been established when coordinated follow-up was required to ensure the implementation of an adopted programme. However, monitoring and implementation of the agreed actions were often hortatory at best, relying upon the will of stakeholders and constituencies in the sectors concerned.

3.4 Dichotomy between programming and budgeting

There is a dichotomy between programming and budgeting in almost all normative bodies. Policy decisions are taken in isolation from resource considerations or vice versa. Member states are generally reticent to accept additional financial obligations as a direct consequence of their programmatic decisions on the work of the organization. Therefore, extra-budgetary and voluntary contributions in money, goods and services are predominant in the economic, social and humanitarian sectors. The practice of the zero real growth principle in the budgeting of the regular programmes of international organizations has exacerbated this trend. The demarcation between voluntary contributions and regular core resources is blurred. In fact, the concept of expenses of the organization in the meaning of Article 17 of the UN Charter,⁵ which shall be borne by member states as apportioned by the General Assembly, seems no longer existent. Funding of the UN system organizations is assured according to the convenience of member states and donors.

Under the circumstances, the ability of the organizations to deliver results from programmes depends heavily on the ability of the programme managers to interact with contributors and donors for fundraising. This situation is detrimental to the public mission of UN organizations of ensuring their transparency and accountability for mobilizing the necessary regular resources, in order to achieve the officially mandated objectives and programmes.

⁵ Article 17 provides that the General Assembly shall consider and approve the budget of the Organization (Art. 17(1)); that the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly (Art. 17(2)); and that the General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies (as referred to in Art. 57) and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned (Art. 17(3)). See <<http://uncharter.org/chapter/4>>.

3.5 Confusion between normative activities and operational activities

The demarcation between normative activities and operational activities has also been blurred. For example, the regular core budget programmes of the UN Development Programme (UNDP),⁶ the UN Children's Fund (UNICEF),⁷ the UN High Commissioner for Refugees (UNHCR)⁸ and other UN funds and programmes cover research and policy development components whose output is very similar to research and policy-formulation activities that should be financed by the regular budget of the United Nations and its specialized agencies.

3.6 Lack of system-wide management tools

There are no reliable data and statistics to inform the public of how much money is being spent by the UN system as a whole. This information is fundamental to any systematic planning and management of international organizations. The Joint Inspection Unit (JIU)⁹ had to compile available data to arrive at total annual expenses of the UN system in the amount of mobilized roughly \$26 billion (exclusive of the Bretton Woods institutions¹⁰) in 2005/2006). To arrive at this total, data from various sources had to be collected, such as expense¹¹ of the Oil-for-Food Programme¹² the expenditures on peacekeeping, international criminal tribunals for Rwanda¹³ and the

⁶ See <<http://www.undp.org/>>.

⁷ See <<http://www.unicef.org/>>.

⁸ See <<http://www.unhcr.org/>>.

⁹ The Joint Inspection Unit is, according to its official website, the 'only independent external oversight body of the United Nations system mandated to conduct evaluations, inspections and investigations system-wide'. The Unit's aims are to assist legislative organs of participating organizations to meet their governance responsibilities 'in respect of their oversight function concerning management by the secretariats of human, financial and other resources'; to assist in improving efficiency and effectiveness of secretariats in achieving the 'legislative mandates and the mission objectives established for the organizations'; to promote 'greater coordination between the organizations of the United Nations System'; and to identify 'best practices, propose benchmarks and facilitate information-sharing throughout the system'. See <<http://www.unjiu.org/>>.

¹⁰ These being the World Bank (see <<http://www.worldbank.org/>>), and the five institutions which comprise it (the International Bank for Reconstruction and Development (IBRD); the International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for the Settlement of Investment Disputes (ICSID)), and the International Monetary Fund (see <<http://www.imf.org/>>). These were created at a meeting of 43 countries in 1944, which meeting was held at Bretton Woods, New Hampshire, USA, with the aim being to rebuild the world's war-shattered economy; and generally to promote international economic cooperation. See <<http://www.brettonwoodsproject.org/background/index.shtml>> (visited 14 June 2010).

¹¹ For instance, for the 2004–2005 budget data of the Rwanda International Criminal Court, see International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Financial report and audited financial statements for the biennium ended 31 December 2005 and Report of the Board of Auditors, UN Doc. A/61/5/Add.11 (2006) at 39.

¹² The Office of the Iraq Programme Oil-for-Food; see <<http://www.un.org/Depts/oip/>>.

¹³ See <<http://www.ictcr.org/>>.

former Yugoslavia¹⁴ and the International Criminal Court¹⁵ in addition to data from the UN Chief Executives Board for Coordination (CEB)¹⁶ on regular budget and extra-budgetary resources inclusive of in-kind contributions in 2005.¹⁷ The latest data obtained from the CEB indicates that the total level of expenditure of the system grew to US\$ 29.9 billion in 2007.¹⁸

However, thus far, the UN system has never been able to establish a readily available system-wide accounting framework to measure total available resources and their use. Nor has it attempted to establish a process for common resource planning and allocation. In the past, there *was* a reliable interagency report providing more accurate breakdowns of resources spent by programmes established by programme sectors and subsectors based on the agreed Administrative Committee on Coordination (ACC)¹⁹ Programme Classification of programmes and resources in the system.²⁰ However, that has been discontinued since 1995 for ‘unknown reasons’.²¹

The results-based budgeting and management (RBBM) approach in force for the last three biennia since 2002 is a successor concept to the programme budgeting adopted in 1974 within the UN system. It has been instrumental in visualizing ‘specific, measurable, achievable, relevant and time-bound’ (SMART) objectives in the budgeting in the United Nations.²² On the recommendations of the Committee for

¹⁴ See <<http://www.icty.org/>>.

¹⁵ See <<http://www.icc-cpi.int/Menus/ICC>>.

¹⁶ The CEB, according to its official website, brings together (under the Chairship of the UN Secretary-General) the executive heads of the organizations in the United Nations system with the intention of improving cooperation ‘on a whole range of substantive and management issues facing’ the UN system organizations. See <<http://www.unsystemceb.org/>>.

¹⁷ UN Chief Executives Board for Coordination, Budgetary and Financial Situation of Organizations of the United Nations System, Note by the Secretary-General Transmitting the Statistical Report of the United Nations System Chief Executives Board for Coordination on the Budgetary and Financial Situation of the Organizations of the United Nations System, UN Doc. A/61/203 (2006), Corr. 1–2, at 46.

¹⁸ See ‘Budgetary and financial situation of the organizations of the United Nations system’, UN Doc. A/63/185 (2008) 69, table 3.

¹⁹ The ACC is a predecessor body to the CEB, established by the Secretary-General in response to ECOSOC resolution 13(III) (1946).

²⁰ UN Administrative Committee on Coordination, Addendum to the Annual Overview Report of the Administrative Committee on Coordination, Programme and Resources of the United Nations System, UN Doc. E/1991/42/Add. 1 (1991), table 1; UN Administrative Committee on Coordination, ‘Programme and Resources of the United Nations System for the Biennium 1992–1993’, UN Doc. E/1993/84 (1993), table 1; UN Administrative Committee on Coordination, Programme and Resources of the United Nations System for the Biennium 1994–1995, UN Doc. E/1995/64 (1995), table 4, sector 160.

²¹ The ACC Consultative Committee on Programme and Operational Questions and ACC Consultative Committee on Administrative Questions addressed the issue for the last time in 1998 and 1999, respectively. See UN Docs ACC/1998/7 and ACC 1999/6 as well as CEB Management Handbook, section 17-6: ‘Inter-organization Financial Reporting’, para. C.4.

²² UN Joint Inspection Unit, ‘Implementation of Results-based Management in the United Nations Organizations’, UN Doc. JIU/REP/2004/6 (2004), available at <http://www.unjiu.org/data/reports/2004/en2004_6.pdf> (visited 19 January 2010).

Programme and Coordination,²³ the General Assembly, in a resolution²⁴ adopted at its resumed 60th session in May 2006, approved the benchmarking framework for results-based management (RBM) proposed by the JIU as a concept applicable to the United Nations and recommended consideration of its application in other UN system organizations.

However, it has not been possible to establish a system-wide RBBM resource management framework in the absence of commonly agreed intergovernmental objectives among all organizations within the UN system. Without such a global governance framework, the results-based management approach simply exacerbated fragmentation and compartmentalization of the activities of the organizations.

3.7 Persistence of an archaic interagency coordination concept

The traditional concept of so-called interagency coordination still prevails; namely, that member states believe that the administrations of UN agencies tend to duplicate their activities despite the will of member states. To them, the only panacea has appeared to be a call for better interagency coordination at the administrative level. Obviously, there is an inherent limit to such coordination. Unless the governing bodies' decisions are coherent and clear in resource allocation on common ventures among agencies, there is no chance for effective coordination. The current coordination framework of the UN CEB, composed of executive heads of agencies, is run mostly on a post factum basis, respecting the *fait accompli* committed by their governing bodies with respect to their own programmatic and financial decisions. There is no mandatory framework to enable the administrations to negotiate and agree *ex ante* in a proactive way on system-wide programmes and projects.

4 Management and oversight lacunae in play in the environmental field

4.1 Proliferation of environment-related initiatives

Examples of the management and oversight lacunae can be identified in environmental governance within the UN system. Continuing deterioration of the overall state of the global environment and growing concern about sustainable development led to the creation of the UN Environment Programme (UNEP)²⁵ in 1972. This was followed by the establishment of other environment-related institutions, such as the Commission on Sustainable Development (CSD)²⁶ numerous multilateral environ-

²³ UNGA, Report of the Committee for Programme and Coordination, UN Doc. A/60/16 (2005), Corr. 1, para. 248.

²⁴ 'Programme Planing', UNGA Res. 60/257 (2006) para. 2.

²⁵ See <<http://www.unep.org>>.

²⁶ See <<http://www.un.org/esa/dsd/index.shtml>> and <http://www.un.org/esa/dsd/csd/csd_index.shtml> (both visited 14 June 2010).

mental agreements (MEAs), the Multilateral Fund for the Implementation of the Montreal Protocol²⁷ and the Global Environment Facility (GEF).²⁸ (See Table 1)

The environmental sector is characterized not only by the diversity of these environmental institutions but also by the overlapping of activities between these institutions and global and regional cooperative programmes and frameworks that are involved more or less actively in environment-related activities. Furthermore, it has been accompanied by the existence of multiple intergovernmental and inter-secretariat coordinating bodies.

As the environment is today a very popular subject, every organization in the UN system has some environmental activities and projects to attract voluntary contributions from donors, thus helping to perpetuate their survival. Similar to other sectors, this sector is also subject to confusion between normative and operational activities, and between the modalities of funding these activities.

4.2 Management of resources

The resources mobilized in the environmental sector within the UN system amounted to annual expenses of \$1.65 billion²⁹ in 2006. This should be compared with \$1.44 billion committed to general environmental protection in 2006 by 22 member states of the OECD³⁰ Development Assistance Committee³¹ in their bilateral official development assistance to developing countries.³² Underfunding persists as a source of weakness in the UN system, as is often claimed by its bureaucrats. However, if funds were strategically used with better coherence, an amount of \$1.65 billion would enable the system to play a more significant catalytic role in ensuring global governance in the environmental sector than in other sectors such as the humanitarian sector.

However, what prevents the UN system from managing resources efficiently is the competition and confusion of mandates between the environmental institutions and development organizations undertaking environment-related activities. The blurring of distinctions between environmental protection and sustainable development has exacerbated this confusion. Table 2 indicates a clear trend that during the 1990s normative activities promoted by UNEP and the multilateral agreements for environmental protection grew much faster than did operational activities for development devoted to the environment. However, in the early 2000s that trend was re-

²⁷ See <<http://www.multilateralfund.org/>>.

²⁸ See <<http://www.gef.org>>. On the role of the GEF generally, see Matti Nummelin, 'The Global Environment Facility: A Brief Introduction to the GEF and its International Waters Focal Area', in Ed Couzens and Tuula Honkonen (eds), *International Environmental Law-making and Diplomacy Review 2008*, University of Joensuu – UNEP Course Series 8 (University of Joensuu, 2009) 133–138.

²⁹ See UN Doc. A/61/203 (2006), Table 1.

³⁰ The Organization for Economic Cooperation and Development. See <<http://www.oecd.org/>>.

³¹ See <<http://www.oecd.org/dac>>.

³² OECD, 'OECD Stat Data, Dataset 3: OECD by Sector' (2008), available at <<http://www.oecd.org/dac/stats/idsonline>>.

versed in favour of operational activities. Nowadays the primary growth is in developmental agencies such as the UNDP, UNICEF and specialized agencies undertaking environmental-related activities as part of their work on sustainable development. In recent years the MEAs' core budgets have stagnated. This suggests that much of the MEAs' additional financial needs for normative activities had to be met by voluntary contributions under their non-core programmes.

4.3 Towards governance of sustainable development

4.3.1 Introduction

Adding to the institutional fragmentation is the lack of a *modus operandi* to govern and manage the relationship between sustainable development and environmental protection. In the context of agreements concluded at the 1992 Rio Earth Summit³³ and the 2002 Johannesburg World Summit on Sustainable Development,³⁴ sustainable development is meant to be a development process which enables meeting of the needs of present generations without compromising the ability of future generations to meet their own needs.³⁵ Furthermore, integrating its three components – economic development, social equity and environmental protection – as interdependent and mutually reinforcing pillars should achieve sustainable development.³⁶

A variety of General Assembly and UN Economic and Social Council (ECOSOC)³⁷ resolutions, most notably UNGA resolution S-19/2 (1997),³⁸ have stated that good governance for sustainable development consists of properly constructed strategies to enhance prospects for economic growth and employment and at the same time protect the environment. On the other hand, the UNEP Governing Council/Global Ministerial Environment Forum (GC/GMEF) held in Cartagena in 2002³⁹ adopted the 'Cartagena Package' on international environmental governance,⁴⁰ according to which environmental governance consists of mainstreaming environmental protection into developmental and economic policies through the development of a

³³ The United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 1992. See <<http://www.un.org/geninfo/bp/enviro.html>>.

³⁴ The World Summit on Sustainable Development (WSSD), Johannesburg, 2002. See <<http://www.johannesburgsummit.org/>>.

³⁵ This formulation of the term essentially being that suggested by the 1987 World Commission on Environment and Development – the 'Brundtland Commission' – which released a report titled Report of the WCED: Our Common Future. See <<http://www.un-documents.net/wced-ocf.htm>> (visited 14 June 2010).

³⁶ UNGA, Development and International Co-operation; Environment. Report of the World Commission on Environment and Development, Note by the Secretary-General, UN Doc. A/42/427 (1987).

³⁷ Established under the UN Charter as the principal organ for coordination of economic, social and other work of the UN's 14 specialized agencies, functional commissions and regional commissions. See <<http://www.un.org/en/ecosoc/about/>>.

³⁸ 'Programme for the Further Implementation of Agenda 21', UNGA Res. S-19/2 (1997).

³⁹ See, for instance, UNEP, 'UNEP process on International Environmental Governance (IEG)', available at <<http://www.nyo.unep.org/ieg.htm>> (visited 14 June 2010).

⁴⁰ UNEP, 'Cartagena Package on International Environmental Governance', UNEP GC/GMEF decision SS.VII/1 on international environmental governance (2002).

system-wide coherent policy, as well as resources management for its implementation.

Theoretically, a consensus seems to exist within the UN system as to the definition of and relationship between the concepts of sustainable development and environmental protection. However, in practice, equitable governance between sustainable development and environmentally protective measures is not easy to achieve, as there is no consensus on how to reconcile the competing priorities of the three components of sustainable development.

The Rio Summit broadened the scope of governance far beyond the confines of UNEP, thus rendering coordination of multilateral policies and decisions much more complex for the UN. Parallel with this new governance concept, we observe an arguable 'fading out' of certain of the Rio principles germane to international cooperation for environmental protection: these being precautionary control measures based on scientific assessments, common but differentiated responsibilities of all countries for the protection of the global environment, and the bearing of incremental costs⁴¹ by the international community incurred to implement environmental measures by developing countries.

At the national level, there do exist, a long-term approaches and mechanisms to reconcile the interests in play.⁴² However, the UN system has never been able to establish such a process, nor has it had a mechanism to ensure it. As addressed above, the ever-growing involvement of international organizations and bilateral donors in strengthening norms, capacity-building, networking and funding in the environmental field has exacerbated institutional fragmentation and duplication of policies and operations of international environmental initiatives. These initiatives, springing up after the Earth Summit in 1992 and the WSSD in 2002, have arguably eroded UNEP's embracing mandate for global environmental governance.

There are a number of salient features which can be derived from lacunae in UN accountability and environmental governance. Under the circumstances, such lacunae encompass the following:

⁴¹ The notion of incremental cost means the change in total cost arising from the implementation of an additional measure of environmental protection. The Incremental costs concept is a key to environmental financing that should not be confused with or substituted by ordinary developmental assistance. They are based on rigorous environmental assessments and identification of differential costs to implement MEASs in developing countries. See Tadanori Inomata, 'Management Review of Environmental Governance within the United Nations System', Keynote Presentation in the Opening Plenary of the Ministerial Consultations, 16 February 2009 at the 25th Session of the UNEP Governing Council/Global Ministerial Environmental Forum at Nairobi, Kenya, available at <http://www.unep.org/civil_society/GCSF10/pdfs/GCpresentation-mgmt-env-gov-T-Inomata.pdf> (visited 14 June 2010).

⁴² See, for example, Quebec's Sustainable Development Act. Canada [Quebec] Sustainable Development Act, R.S.Q. c. D-8.1.1 (2007), available at <<http://www.canlii.org/qc/laws/sta/d-8.1.1/20080115/whole.html>> (visited 22 January 2010).

- a lack of coordination, coherence and cooperation at the global level;
- an absence of programmatic and planning instrument for system-wide coordination;
- inadequate levels of implementation and coordination at national level;
- a lack of intergovernmental ownership in interagency coordination;
- a need for synergy of control measures among MEAs, such as exists between the Kyoto and Montreal Protocols; and
- an absence of environmentally sound procurement policies in international organizations.

This paper will now address these features in greater depth.

4.3.2 Coordination mechanisms

The UN system Secretariats established the Environmental Management Group (EMG),⁴³ with the support of the General Assembly in its resolution 53/242 of 1999,⁴⁴ for the purpose of enhancing interagency coordination among the UN agencies, funds and programmes and the secretariats of MEAs in the field of environment and human settlements. It meets under the chair of the UNEP executive director, who reports on its activities to the UNEP GC/GMEF. The most important goal of the EMG was to promote a so-called issue management approach to key areas of environmental and human settlements concern. That is aimed at achieving, on an issue-by-issue basis, effective management, coordination, joint action, rational and cost-effective use of capacities and resources and facilitating linkages among MEAs, and between the activities under the MEAs and relevant activities elsewhere in the international environmental governance system.

On the other hand, from 1993 until 2001 the Inter-Agency Committee on Sustainable Development (IACSD)⁴⁵ existed for interagency coordination in the area of sustainable development. Its role was to identify major policy issues relating to the follow-up by the UN system and to advise the ACC⁴⁶ on ways and means of addressing them so as to ensure effective system-wide cooperation and coordination in the implementation of Agenda 21,⁴⁷ the Programme of Action for the Sustainable Development of Small Island Developing States (SIDS)⁴⁸ and other UN Conference on Environment and Development (UNCED) outcomes⁴⁹ It provided coordinated pol-

⁴³ See <<http://www.unemg.org/>>.

⁴⁴ UNGA, Report of the Secretary-General on Environment and Human Settlements, UN Doc. A/RES/53/242 (1999).

⁴⁵ See <http://www.un.org/esa/dsd/dsd_aofw_uniac/uniac_index.shtml> (visited 14 June 2010).

⁴⁶ See *supra* note 19.

⁴⁷ Agenda 21 is the ambitious 'global blueprint' for sustainable development. UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, A/CONF.151/26/Rev.1 (1992).

⁴⁸ See <<http://www.un-documents.net/sids-act.htm>> on the Programme; and see <<http://www.sidsnet.org/>> (both visited 14 June 2010) generally on the Small Island Developing States Network.

⁴⁹ Such other outcomes might include the 1992 United Nations Framework Convention on Climate Change (UNFCCC, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, <<http://unfccc.int>>); and the 1992 United Nations Convention to Combat Desertification (Paris,

icy positions as input to the Commission on Sustainable Development. In 2001, the CEB⁵⁰ abandoned a holistic approach. It disbanded IACSD and took steps through its High-level Committee on Programmes⁵¹ to establish or strengthen interagency collaborative arrangements in the key areas of freshwater, water and sanitation, energy, oceans and coastal areas, and consumption and production patterns. Specific actions taken included the establishment of various sector groups: UN-Water⁵² UN-Oceans⁵³ the International Strategy for Disaster Reduction⁵⁴ the Marrakech Process on sustainable consumption and production patterns,⁵⁵ and UN-Energy.⁵⁶

From the above, it is obvious that there are two sets of coordinating mechanisms building up: one in UNEP on environmental protection and another in the CEB purview on sustainable development. Irrespective of any theoretical or juridical explanation of their relationships, one cannot deny considerable overlapping of their tasks.

At the country level, the UN agencies are yet to generalize the use of the Common Country Assessment and UN Development Assistance Framework (CCA/UNDAF)⁵⁷ processes to mainstream environmental protection in the development policy. Although compliance with MEAs should take place at the country level as the respon-

17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, <<http://www.unccd.int>>).

⁵⁰ See *supra* note 16.

⁵¹ See <http://hlcp.unsystemceb.org/about_ccpoq>.

⁵² UN-Water, which runs various water-related programmes, is comprised of 26 UN organizations, both from within and outside of the UN system (see <<http://www.unwater.org>> and <<http://www.unwater.org/members.html>>).

⁵³ See <<http://ioc3.unesco.org/un-oceans/>>. In 2003, the United Nations System Chief Executives Board endorsed the creation of an Oceans and Coastal Areas Network (subsequently renamed UN-Oceans). See UN Doc. CEB/2003/7.

⁵⁴ The UN ISDR is, according to its website, the 'principal body for the development of disaster reduction strategy'. It is comprised of 25 UN, international, regional and civil society organizations and is headed by the UN Under-Secretary General for Humanitarian Affairs. Its object is to promote 'links and synergies between, and the coordination of, disaster reduction activities in the socio-economic, humanitarian and development fields'. See <<http://www.unisdr.org/>> and <http://www.unisdr.org/eng/about_isdr/isdr-mission-objectives-eng.htm> (both visited 14 June 2010).

⁵⁵ According to UNEP's website, the Marrakech Process is a 'global multi-stakeholder process to promote sustainable consumption and production and to work towards' forming a 'global framework for action' to achieve this goal. See <<http://www.unep.fr/scp/marrakech/>> (visited 14 June 2010).

⁵⁶ UN-Energy, according to its official website, is the inter-agency mechanism on energy which was created to 'help ensure coherence in the UN system's multi-disciplinary response to the World Summit on Sustainable Development (WSSD) and to ensure the effective engagement of non-UN stakeholders in implementing WSSD energy-related decisions'. Its aim is to promote 'system-wide collaboration in the area of energy', given that there is no one entity within the UN system with responsibility for energy. See <<http://esa.un.org/un-energy/>> (visited 14 June 2010).

⁵⁷ Described on its website as both being 'both a process and a product', the Common Country Assessment is, as defined by the General Assembly, the common instrument of the UN system for analyzing national development situations and identifying key development issues. The Development Assistance Framework is intended, as a common framework at country level, to provide a 'collective, coherent and integrated UN system response' to national needs and priorities. The UNDAF 'emerges from the analytical and collaborative effort of the CCA' and provides the foundation for UN system programmes of cooperation. See <http://www.un.org/special-rep/ohrlls/ohrlls/cca_undaf_prsp.htm> (visited 14 June 2010).

sibility of the contracting parties concerned, the UN resident coordinators and the secretariats of the MEAs have made few efforts to promote the implementation of MEAs in the CCA/UNDAF processes.

4.3.3 Programmatic and planning instrument for system-wide coordination

The UN system is still to develop a common fundamental programmatic instrument spelling out who does what and how their communalities of interests can be enhanced. The UN system lost a system-wide instrument of coordination in the environmental sector when the United Nations Medium-term Plan⁵⁸ and the UNEP's System-wide Medium-Term Environmental Programme⁵⁹ ceased to be system-wide instruments in the 1990s. These instruments provided the UN system with a mandatory process to define a system-wide strategic objectives and orientations of the UN system organizations based on legislation by the intergovernmental fora as well as the agreed programmes and activities of the organizations in a 4- or 5-year medium term.

Under the implementation frameworks of the Millennium Development Goals, the CEB has identified 27 mechanisms for international cooperation to ensure environmental sustainability, such as the GEF, UN-Water, the World Water Assessment Programme (WWAP),⁶⁰ the Global Environment Monitoring System (GEMS),⁶¹ Cities Alliance,⁶² the ISDR,⁶³ UN-Oceans, the Global Programme of Action of the Marine Environment from Land-based Activities (GPA),⁶⁴ and the Millennium Ecosystem Assessment,⁶⁵ etc.⁶⁶

⁵⁸ A mandatory programme planning instrument providing for a strategic framework of the UN organization's biennium programme and budgeting exercise.

⁵⁹ In 1981 the concept of the System Wide Medium-term Environment Programme was adopted as a process for joint planning of environmental activities within the UN system. The first SWMTEP report for the years 198–89 was adopted by GC Decision 10/13 (1982).

⁶⁰ The WWAP is described on its website as the 'flagship programme of UN-Water'. See <<http://www.unesco.org/water/wwap/>> (visited 14 June 2010).

⁶¹ See <<http://www.gemstat.org/>> and <<http://www.gemswater.org/>>.

⁶² The Cities Alliance, according to its website, is a 'global coalition of cities and their development partners committed to scaling up successful approaches to poverty reduction'. See <<http://www.citiesalliance.org/ca/about-cities-alliance>> (visited 14 June 2010).

⁶³ See ISDR, 'Mission and objectives', available at <http://www.unisdr.org/eng/about_isdr/isdr-mission-objectives-eng.htm> (visited 14 June 2010). The ISDR, International Strategy for Disaster Reduction is originally a name of a framework document to implement international natural disaster reduction. See, for example, UN ECOSOC, Implementation of the International Strategy for Disaster Reduction, Report of the Secretary-General, UN Doc. A/56/68-E/2001/63 (2001). To implement the strategy, member states government agencies and NGOs meet in a multilateral forum, the Global Platform for Disaster Risk Reduction since 2007. The framework was recognized by the UN General Assembly in A/RES/56/195 (2001).

⁶⁴ This programme is described on the UNEP website as 'the only intergovernmental programme addressing the linkages between watersheds and the coastal environment'. See <<http://www.gpa.unep.org/>>.

⁶⁵ According to its website, from 2001 to 2005 the Millennium Assessment was conducted by more than 1 300 experts worldwide – their findings providing a 'state-of-the-art scientific appraisal of conditions and trends in the world's ecosystems'. See <<http://www.millenniumassessment.org/en/index.aspx>>.

⁶⁶ UN Chief Executives Board for Coordination, One United Nations – Catalyst for Progress and Change, (2005), available at <<http://www.unsystemceb.org/oneun/downloads/>> (visited 22 January 2010), Annex.

On the other hand, UNEP has compiled a list of joint projects and programmes undertaken with other UN system organizations relevant for the activities of MEAs in the areas of world climate impacts assessment, biodiversity, protection of regional seas, marine pollution, chemicals and waste control, customs and illegal trade, harmonization of reporting under MEAs, health and environmental initiatives and education for sustainable development and advocacy. As of September 2007, there were 49 of these in partnerships with a number of specialized agencies (the FAO,⁶⁷ UNESCO,⁶⁸ IMO,⁶⁹ World Bank, WMO,⁷⁰ IFC,⁷¹ ILO,⁷² and the WHO⁷³), with UN funds and programmes (the UNDP, WFP,⁷⁴ UNITAR,⁷⁵ UNU-IAS,⁷⁶ UNOPS,⁷⁷ UNCTAD,⁷⁸ UN-HABITAT,⁷⁹ UNFPA⁸⁰) and with MEA secretariats such as the UNFCCC and UNCCD.

In the light of the foregoing, it is still not clear how the UN system should integrate these networks and a series of joint programmes as a programmatic and planning instrument for system-wide coordination.

4.3.4 Lack of intergovernmental ownership in interagency coordination

Most environmental management issues have been left to the discretion of various secretariats of international organizations, probably because of the technical and scientific nature of environmental protection. Most coordination issues have been perceived at the administrative level and dealt with among the secretariats of the entities of the UN system. The issue of synergies among the various MEAs has also been approached with the aim of achieving coherence between the operations of the conventions' secretariats. The Environment Management Group⁸¹ and the CEB⁸² environmental sector groups are essentially secretariat bodies and subject to the 'principle of subsidiarity' for decision-making among them. That means these interagency bodies should make their decisions at the lowest level. However, obviously, they cannot take decisions contrary to the interest of any of their organizations.

In the absence of explicit directives from member states, the organizations have not established even a basic administrative discipline to implement environmentally

⁶⁷ The Food and Agriculture Organization. See <<http://www.fao.org>>.

⁶⁸ The UN Educational, Scientific and Cultural Organization. See <<http://www.unesco.org>>.

⁶⁹ The International Maritime Organization. See <<http://www.imo.org>>.

⁷⁰ The World Meteorological Organization. See <<http://www.wmo.int/>>.

⁷¹ The International Finance Corporation. See <<http://www.ifc.org/>>.

⁷² The International Labour Organization. See <<http://www.ilo.org/>>.

⁷³ The World Health Organization. See <<http://www.who.int/>>.

⁷⁴ The UN World Food Programme. See <<http://www.wfp.org/>>.

⁷⁵ The UN Institute for Training and Research. See <<http://www.unitar.org/>>.

⁷⁶ The UN University – Institute of Advanced Studies. See <<http://www.ias.unu.edu/>>.

⁷⁷ The UN Office for Project Services. See <<http://www.unops.org/>>.

⁷⁸ The UN Conference on Trade and Development. See <<http://www.unctad.org/>>.

⁷⁹ The UN Human Settlements Programme. See <<http://www.unhabitat.org/>>.

⁸⁰ The UN Population Fund. See <<http://www.unfpa.org/>>.

⁸¹ See *supra* note 41 and discussion in accompanying text.

⁸² See *supra* note 16.

sound procurement. For example, none of the UN system organizations, except for the United Nations University⁸³ and the International Atomic Energy Agency,⁸⁴ implement ISO environment standards.⁸⁵

4.3.5 Need for synergy of control measures among multilateral environmental agreements

The international community is not equipped with a regular mechanism to solve substantive contradictions in control measures between environmental conventions. For example, between the Kyoto Protocol⁸⁶ and the Montreal Protocol⁸⁷ regarding the use of alternative substances and technology to replace chlorofluorocarbons and other ozone-depleting substances by hydrochlorofluorocarbons and its by-product hydrofluorocarbons with high global warming effects. Successive efforts within the Montreal Protocol at applying an environmentally responsible approach to its primary-rule system for the control of ozone-depleting substances, i.e., to use alternative substances taking into account environmental effects such as global warming, are yet to succeed in ensuring integrated implementation of that Protocol and the Kyoto Protocol on climate change.

This lack of coherence in governance is due to the inadequate development of common criteria for environmentally responsible principles, and more fundamentally due to the absence of an overriding legal framework applicable to all environmental conventions ensuring environmentally sound and responsible policy and behaviours in the implementation of MEAs.

There is no overriding legal framework applicable to all environmental conventions that ensures environmentally sound and responsible policies and behaviours in the implementation of MEAs. Such a framework, which would be based on a world convention on the law of environmental treaties, has yet to be developed. Development of a *jus cogens* in this field might include the principle that actions under multilateral environmental programmes and conventions must be harmonized to ensure that perceived benefits under one are not achieved at the expense of deleterious consequences for another.⁸⁸ This means that no MEA shall solve its problems at the expense of other conventions.

⁸³ See <<http://www.unu.edu>>.

⁸⁴ See <<http://www.iaea.org/>>.

⁸⁵ The International Organization for Standardization. See <<http://www.iso.org/iso/home.htm>>. The ISO sets international standards for businesses, governments and societies – the 14001 series is the environmental series. See <http://www.iso.org/iso/iso_14000_essentials> (visited 14 June 2010).

⁸⁶ 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.

⁸⁷ 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/>>.

⁸⁸ Report of the Secretary-General, Protection of the Atmosphere, UN Doc. E.CN.17/2001/2 (2000), para. 3 and Tadanori Inomata, 'Toward Integrating the Implementation of Multilateral Environmental Agreements – Reflection on the Harmonization of Measures to Protect the Ozone Layer and Global Climate System', 12 *Gaimushou Chosa Geppou* (Ministry of Foreign Affairs Research Journal) (2001) 1–41 at 37.

Such a law of treaties should consist in identifying and horizontally harmonizing principles and rules applicable to MEAs with respect to environmentally responsible principles, precautionary approaches, sharing of scientific assessments, mutual information and monitoring of transboundary hazards, compliance procedures and mechanisms of coordination of normative and operational actions. Without these principles and rules, a full and integrated accountability could not be rendered to meet human demands on the environment, recognizing that the environmental issues are inextricably linked through the multiple drives stemming from these demands.

Notwithstanding the increasing trend to call for more conventions and legally binding frameworks for environmental protection, there are serious and paradoxical lacunae in the rule of law that should govern the coherent application of different provisions of control measures under the MEAs.

4 Future administrative and managerial foundation: How to avoid creating new sectoral institutional arrangements and moving toward a new governance structure for environment protection and sustainable development

From the fore-going, it is clear that at the headquarters level, the secretariats should not create further permanent interagency coordinating bodies – nor perpetuate the existing ones established among them. Rather, a bottom-up process of compiling needs in the field at the country level should be strengthened. To this end, active use should be made of the CCA/UN Development Assistance Framework⁸⁹ processes to identify common country needs in sustainable development and environmental protection and map national and regional ecosystem problems, including compliance with the MEAs. Such bottom-up processes will keep momentum for multilateral cooperation in the respective areas of environmental protection. Based on these processes, the global legislative forums, such as the UN General Assembly and the Economic and Social Council, should develop at field and headquarters levels a system-wide planning process for managing resources for results.

In this respect, with a view to enhancing the overall effectiveness of the environmental governance within the United Nations system, the author in his report of the Joint Inspection Unit ⁹⁰ recommends, inter alia:

1. Establishment by the General Assembly of a clear understanding on the division of labour among development agencies, UNEP and the MEAs. This understanding must outline these entities' respective roles and competences for environmental protection and sustainable development.⁹¹

⁸⁹ See *supra* note 57.

⁹⁰ JIU/REP/2008/3 in 'Management review of environmental governance within the United Nations system', UN doc. A/64/83–E/2009/83 (2009).

⁹¹ *Ibid.* Recommendation 1.

The question is: How can the division of labour be organized? The current framework of international environmental governance is undermined by the absence of a holistic approach to environmental issues and lack of clear operational linkages between development assistance on the one hand; and compliance and capacity-building assistance for environmental protection in developing countries, on the other.

The proposed division of labour may reflect a governance structure which consists of a chain of phases of:

- (a) assessment of environment status;
- (b) international policy development;
- (c) formulation of MEAs;
- (d) policy implementation;
- (e) policy assessment;
- (f) enforcement; and
- (g) sustainable development.

Traditionally, UNEP has focused on the normative role of engagement in the first three phases. Phases (d) to (f) are covered by MEAs and the phase of sustainable development involves developmental organizations such as UNDP and the World Bank.

1. Adoption of a strategic system-wide policy orientation for environmental protection and sustainable development in the results-based management planning document of the United Nations system;⁹² the UNEP GC/GMEF⁹³ and the UNEP secretariat should build up a system-wide Medium-Term Strategy of UNEP as part of such strategic policy-orientation.
2. Establishment of ways and means of governing and managing the MEAs to avoid the proliferation of MEA secretariats and achieving savings of resources through:
 - (a) the establishing of modalities better to formulate and manage MEAs without creating an independent convention secretariat: The Executive Director of UNEP and the GC/GMEF should assist the Secretary-General in formulating his proposals to this end;⁹⁴
 - (b) activation of the regular review of the General Assembly of the reports of MEAs to enable GC/GMEF to fulfill its mandate under the Cartagena Package in GC decision SS.VII./1 to undertake a horizontal and periodic review of the effectiveness of MEAs in order to rectify inconsistencies among them: in this context, the GC/GMEF should act to review the effectiveness of MEAs under the authority of the General Assembly;⁹⁵

⁹² *Ibid.*, Recommendations 2 and 3.

⁹³ The UNEP Governing Council/Global Ministerial Environment Forum. See <<http://www.unep.org/GC>>.

⁹⁴ JIU/REP/2008/3, Recommendation 4.

⁹⁵ *Ibid.*, Recommendation 5.

- (c) the organizations have to develop a common fundamental programmatic and administrative planning instrument containing a catalogue of initiatives and stakeholders spelling out who does what and how commonalities of interests can be enhanced among them. In such an instrument, the purposes of normative activities and operational activities should be clearly spelled out together with financial bases of the types of activities to be met by both core and non-core funding;⁹⁶ and
 - (d) integration of programme support funds of MEAs as well as the review of adequacy and effectiveness of funding environmental activities based on coherent application of the concept of incremental cost funding for MEAs: MEAs, UNEP and other organizations should provide the Secretary-General with their views to assist in his assessment of these matters.⁹⁷
3. The author further recommends enhancing the coordination of capacity-building activities in the field, through the promotion and establishment of national and regional platforms on environmental protection and sustainable development policies that can integrate the implementation of MEAs in the Common Country Assessment and United Nations Development Assistance Framework. To this end, the Secretary-General shall propose guidelines on the platforms on the basis of the UNEP Executive Director's proposal and consult with MEA secretariats.⁹⁸

6 Conclusions: Future institutional arrangements

A number of different options for the reform of global environmental governance have been put forward in recent years. One option would be the upgrading of UNEP to a real authority, endowed with normative and analytical capacity and a broad mandate to review progress towards improving the world environmental situation. Another would be the creation of a new 'World Environment Organization'. A third would be strengthening of the existing institutional framework. It is essential that organizations with environmental responsibilities have an effective mechanism to discuss and agree on a holistic approach to ensure more productive and cost-effective responses to emerging major challenges.

Any future institutional overhaul of global environmental governance needs to build on the reform of UNEP and good practices and lessons gleaned from successful international environmental regimes such as the Montreal Protocol. In order to reform the UNEP and enhance its contribution to international environmental governance system, the author recommended a series of administrative and managerial reforms to strengthen the functions and synergy of existing environment and environment-

⁹⁶ *Ibid.*, Recommendation 7

⁹⁷ *Ibid.*, Recommendations 8, 9 and 11.

⁹⁸ JIU/REP/2008/3, Recommendation 6.

related entities within the UN system.. Such reforms should aim at laying a foundation for a new governance structure for environment protection and sustainable development which would consist in:

- promoting and enforcing common legally binding principles such as the law of treaties to reconcile substantive differences and contradictions among MEAs;
- promoting and enforcing a system-wide strategic planning framework for the management and coordination of environmental activities; and
- promoting and enforcing a set of common guidelines for the provision and use of administrative, financial and technical support services to enhance synergies between United Nations system agencies and MEAs, as well as amongst MEAs.

Table 1 : Multilateral resources available for environment activities in 2006
(In 2006, Million US Dollars)

Organization	Million US\$
UNEP	136.5 (core and non-core budget)
Global MEAs	146.5
9 Global MEAs* administered by UNEP	62.3
4 Global MEAs administered by UN (UNFCCC, UNCCD, UNCLOS & Fish stocks agreement)	55.0
Other Global MEAs (Convention on protection of world cultural and heritage/UNESCO, ITPGRFA**/FAO and Ramsar Convention)	29.2
Multilateral Fund for the Implementation of the Montreal Protocol	179.9
General Environment Facility	600 (2006, based on donors commitments to US\$3 billion for the period from 2002 to 2006)
Other UN system organizations***	592.4
Total	1,655.3

* Vienna Convention for the protection of the Ozone Layer, Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on Biological Diversity, Cartagena Protocol on Biosafety, Convention on International trade in endangered species of wild fauna and flora (CITES), Convention on Migratory Species (CMS), Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

** International Treaty on Plant Genetic Resources for Food and Agriculture

*** UNDP, UNICEF, UNITAR, UNRWA, UNWTO, WHO, UNU, ESCAP ,ESCWA and ECE including ECE regional environmental conventions.

Source: Unless otherwise stated, based on the Joint Inspection Unit's compilation of core and non-core programme budgets of the United Nations system organizations contained in 'Management Review of Environmental Governance within the United Nations system' (JIU/REP/2008/3), Annex II.

Table 2: Expenditures on normative vs. operational environmental activities within the United Nations system
(in millions of United States dollars)

	1993	2000	2006
I. Normative activities			
Environmental protection activities by UNEP funds	89.8	139.8 (6.5 per cent)**	132.5(-0.9 per cent)**
Total expenditures for UN/UNEP-administered MEAs***	6.8	45.0 (31.0 per cent)	78.3 (9.7 per cent)
II. Operational activities			
Non-UNEP operational activities for development devoted to environment*	149.4	176.7 (2.4 per cent)	332.7 (10.6 per cent)
UN system operational activities for development	5,153.3	6,494 (3.4 per cent)	16,368.4 (16.7 per cent)

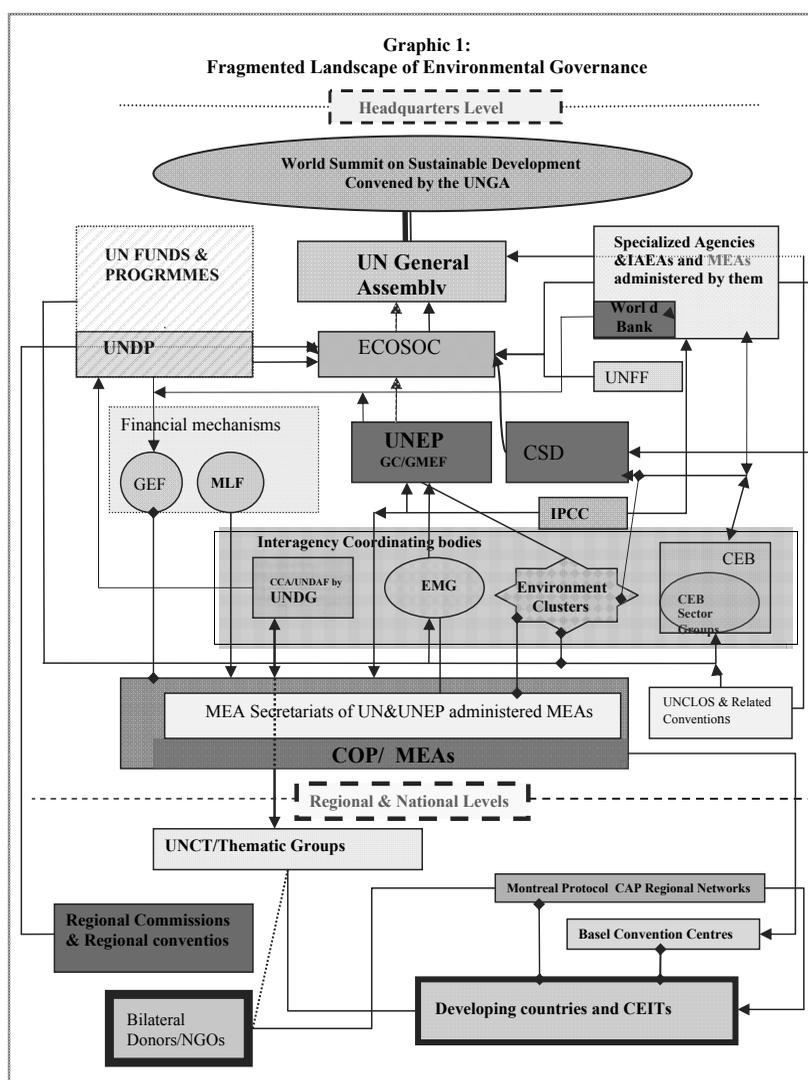
*Undertaken by UNDP, UNICEF and specialized agencies

** The percentage in parentheses indicates growth per annum over the previous period.

*** Core activities

Sources: For operational activities, A/61/77-E/2006/59 and A/63/71-E/2008/46;

For normative activities: In 1993 and 2000, Financial reports and audited statements in Reports of the Board of Auditors (e.g. A/49/5/Add.6 to A/63/5/Add.6) and A/61/203 on UNFCCC; and 2006, budget performance reports of organizations concerned.



ADAPTING LAWS AND INSTITUTIONS TO A CHANGING CLIMATE

Daniel Schramm¹ and Carl Bruch²

Nothing endures but change. ~*Heraclitus*³

1 Introduction: The uncertain impacts of climate change

A growing body of research is bringing to light the present and future consequences of anthropogenic climate change and highlighting the unpredictability and uncertainty policy-makers face as they seek to adapt to those impacts. Storm surges and sea level rise are predicted to displace as many as 200 million ‘climate migrants’ by 2050 and even to jeopardize the existence of small island states.⁴ Shifting weather patterns in some parts of Africa may cause a ten percent decrease in precipitation, resulting in losses of perennial drainage (i.e., water supply) in major African cities ranging from 20 percent in Cabinda, Angola to 72 percent in Maun, Botswana by 2100.⁵ Climate change will likely cause a shift in the ranges of malaria and other vector-borne diseases.⁶

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³ See Frank B. Golley, *A History of the Ecosystem Concept in Ecology: More than the Sum of the Parts* (Yale University Press, 1993) at 204; John Kricher, ‘Nothing Endures but Change: Ecology’s Newly Emerging Paradigm,’ 5 *Northeastern Naturalist* (1998) 165–174 at 165.

⁴ Koko Warner and Charles Ehrhart, ‘In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement’, available at <http://www.ciesin.columbia.edu/documents/clim-migr-report-june09_media.pdf> (visited in May 2009).

⁵ Maartende Wit and Jack Steinkiewicz, ‘Changes in Surface Water Supply Across Africa with Predicted Climate Change’, 311 *Science* (March 2006) 1917–1921.

⁶ U.B. Confalonieri et al., ‘Human Health,’ *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), available at <http://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch8.html> (visited 14 June 2010) at 391.

Along the coasts, the Intergovernmental Panel on Climate Change (IPCC)⁷ predicted in 2007 that sea level rise due to climate change by the end of the century could range from 18 to 59 centimetres; although this did not include new volumes from melting ice caps, and sea level rise by 2100 is now estimated to range from 0.5 to one metre in most areas.⁸ The collapse of the West Antarctic Ice Sheet alone could lead to a 3.2 metre rise in the global mean.⁹ Coastal erosion will increase in some areas: for example, approximately 66 percent of California's beaches are now eroding compared to a historical rate of 40 percent 'suggesting a shift towards a state of chronic erosion.'¹⁰ Furthermore, available fresh groundwater will decrease in other areas due to salinity intrusion.¹¹

The agricultural sector faces potentially devastating changes from climate change. By 2050, one study estimates, 247 million acres of land in Africa will be too arid for crop farming.¹² In Tibet, shepherds will be forced to travel greater distances to find suitable water for livestock due to receding glaciers.¹³ As much as 25 percent of global food production could be lost by 2050 while the human population is estimated to grow by two billion people.¹⁴

Impacts on the forestry sector in developing countries could be especially severe. A rise of four degrees Celsius could result in the deaths of 85 percent of the trees in the Amazon, while a two-degree rise could result in the deaths of 20 percent to 40 percent of trees.¹⁵ Forest areas will see an intensification of dry seasons; ranging, for example, from 30 percent in the western Amazon to as high as 80 percent in the southeast Amazon and Guyanas.¹⁶ Studies of previous droughts in Africa demonstrate that forest richness decreased from 64 species to 43 species of trees in northwest

⁷ The Intergovernmental Panel on Climate Change is a research body formed, by the United Nations Environment Programme (see <<http://www.unep.org>>) and the World Meteorological Organisation (see <<http://www.wmo.int>>), to assess climate change and provide objective scientific views on climate change and the possible consequences thereof. See <<http://www.ipcc.ch/organization/organization.htm>>.

⁸ Jonathan L. Bamber et al., 'Reassessment of the Potential Sea-Level Rise from a Collapse of the West Antarctic Ice Sheet', 324 *Science* (2009) 901–903 at 901.

⁹ Eric Rignot, Presentation at the International Scientific Congress on Climate Change, Copenhagen, Denmark (10 March, 2009).

¹⁰ Cheryl J. Hapke, 'Rates and Trends of Coastal Change in California and the Regional Behavior of the Beach and Cliff System', 25 *Journal of Coastal Research* (2009) 603–615 at 603.

¹¹ Kevin Hiscock and Yu Tanaka, 'Potential Impacts of Climate Change on Groundwater Resources: From the High Plains of the U.S. to the Flatlands of the U.K.', *National Hydrology Seminar* (2006), University of E. Anglia, Norwich, UK.

¹² Philip Thornton et al., 'Croppers to Livestock Keepers: Livelihood Transitions to 2050 in Africa Due to Climate Change', 12 *Environmental Science and Policy* (2009) 427–437.

¹³ Christina Larson, 'Tibet Shepherds Live on Climate Frontier', *Christian Science Monitor* (21 Jan. 2009).

¹⁴ UNEP, *Rapid Response Assessment: The Environmental Food Crisis. The Environment's Role in Averting Future Food Crises. A UNEP Response Assessment* (2009), available at <<http://www.grida.no/publications/rr/food-crisis/>> (visited 28 August 2009).

¹⁵ Chris Jones et al., 'Committed Terrestrial Ecosystem Changes Due to Climate Change', 2 *Nature Geoscience* (2009) 484–487.

¹⁶ Yadvinder Malhi et al., 'Climate Change, Deforestation and the Fate of the Amazon', 319 *Science* (January 2008) 169–172.

Senegal between 1945 and 1993.¹⁷ Similar loss of biodiversity is widely anticipated in tropical forests as a result of climate change.

Marine ecosystems face similarly dire forecasts. Fish species are showing changes in population size and distribution as a result of changes in the ocean climate. Many fisheries are moving to higher, cooler latitudes.¹⁸ Africa is particularly vulnerable to collapses of fisheries as the continent remains reliant on the industry for food and income.¹⁹ At carbon dioxide levels of 560 ppm (which are possible by 2050), the combined effects of acidification and bleaching could reduce the calcification rates of all coral reefs by 80 percent or higher. Reefs and shellfish will be vulnerable to dissolution in new ‘acid bath’ oceans.²⁰ (Not all is gloom: Asian Suminoe oysters have been found to tolerate more acidic waters than their American relatives, a promising sign that they may be able autonomously to adapt to climate change, which may presage similar adaptive capacities in other species.²¹)

Overall, the planet’s biodiversity is threatened with the worst extinction event in 65 million years. Fifteen to 37 percent of species from a sample of 1 103 face extinction by 2050, arguably due to climate change.²² Bird species are migrating further north and to higher elevations to find breeding grounds – causing an increase in disease and fatigue and increasing mortality rates as well as moving those and other population outside traditional protected areas.²³ In 2006, for example, emperor penguins chose a breeding spot on ice that succumbed to a strong storm, resulting in what one researcher called ‘total colony wide breeding failure’.²⁴

Perhaps the greatest challenge for policy-makers presently is the inherent uncertainty that surrounds the effects of climate change over long time-horizons. Sea level rise projections by 2100 now range from a few centimetres to five metres.²⁵ Although most models predict less than a one metre rise, it might be asked what would

¹⁷ C.D. Allen, ‘Climate-Induced Forest Dieback: An Escalating Global Phenomenon?’ (FAO, 2009), available at <<http://www.fao.org/docrep/011/i0670e/i0670e10.htm>> (visited 11 March 2010).

¹⁸ Chih-Hao Hsleh et al., ‘Climate Driven Changes in Abundance and Distribution of Larvae of Oceanic Fishes in the Southern California Region’, 15 *Global Change Biology* (2009) 2137–2152.

¹⁹ Edward H. Allison et al., ‘Vulnerability of National Economies to the Impact of Climate Change on Fisheries’, 10 *Fish & Fisheries* (2009) 173–196.

²⁰ Jacob Silverman et al., ‘Coral Reefs may Start Dissolving when Atmospheric CO₂ Doubles’, *Geophysical Research Letters* (March 2009).

²¹ A. Whitman Miller, Amanda C. Reynolds, Cristina Sobrino, Gerhardt F. Riedel, ‘Shellfish Face Uncertain Future in High CO₂ World: Influence of Acidification on Oyster Larvae Calcification and Growth in Estuaries’, 4 *PLoS ONE* (27 May, 2009).

²² ‘Feeling the Heat: Climate Change and Biodiversity Loss’, 427 *Nature* (8 January 2004) 107–109.

²³ Nathalie Poswald et al., ‘Potential Impacts of Climate Change on Breeding and Non-breeding Ranges and Migration Distance of European Sylvania Warblers’, 36 *Journal of Biogeography* (2009) 1194–1208 at 1199.

²⁴ P. Dee Boersma, ‘Penguins as Marine Sentinels’, 58 *BioScience* (2008) 597–607 at 597.

²⁵ New Scientist, ‘Sea level rise: it’s worse than we thought’, available at <<http://www.newscientist.com/articleimages/mg20327151.300/2-sea-level-rise-its-worse-than-we-thought.html>> (visited 11 March 2010).

happen if a three or a five metre rise were to happen, when decision-makers and planners are preparing for one metre?

Models are not always able to predict the frequency, severity, and location of extreme weather events, much less the secondary effects such as fire and the spread of invasive species. In many parts of the world, incomplete or very short historical records make it difficult to establish baselines against which to compare changing conditions. For example, ambiguous findings on levels of recruitment of new growth in a tropical rainforest may leave policy-makers wondering whether it is worth doing anything at all to adapt management practices in response to climate change.²⁶ The dire statistics presented above, although they might motivate international action to reduce greenhouse gas emissions, mean little by themselves to the forest management authority of a small country or a specific forest. Ultimately, our understanding of aggregate impacts does not necessarily imply an understanding of local impacts subject to profound regional variations. This uncertainty heightens the challenge of crafting effective and appropriate measures to adapt and respond to future threats at the local or regional level.

2 Climate change adaptation and the law

2.1 Introduction

Policy-makers must begin to consider the efficacy of existing legal frameworks in the new context of a changing climate. Despite widespread and growing efforts to incorporate adaptation strategies in development planning and conservation projects by national governments, international funding institutions, and global civil society, these efforts largely do not occur within, grow out of, or update the generally applicable legal frameworks in these countries.²⁷ Nonetheless, there are precedents and models available for undertaking systematic reviews of national laws and policies as these laws relate to a given sector or to cross-sectoral stressors, such as assessments of national legal frameworks governing biodiversity performed in conjunction with the Convention on Biological Diversity,^{28/29} as well as the National Capacity Self-Assessment (NCSA)³⁰ process under the Global Environment Facility (GEF).³¹

²⁶ See, for example, Ariel E. Lugo, 'Novel Tropical Forests: The Natural Outcome of Climate and Land Cover Changes', in Adam Fenech et al. (eds), *Climate Change and Biodiversity in the Americas* (Environment Canada, 2009) 135 at 136–139.

²⁷ See, for example, UNDP and Gov. of Armenia, Project Document for PIMS 3814: Adaptation to Climate Change in Mountain Forest Ecosystems of Armenia 28–29 (2008) (noting ministerial forest management initiatives in Armenia lack the capacity to carry out climate adaptation measures in absence of GEF-funded project on forest adaptation measures).

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 Lyle Glowka et al., 'A Guide to Undertaking Biodiversity Legal and Institutional Profiles', Environmental Policy & Law Paper No. 35 (IUCN Environmental Law Centre, 1998).

³⁰ UNDP, 'National Capacity Self-Assessment Global Support Programme', available at <<http://nca.undp.org/>> (visited 1 March 2010).

³¹ See <<http://www.thegef.org>>.

Climate change is a cross-cutting, multi-sector stressor that implicates a wide range of legal frameworks, involving virtually all environmental legislation at the national level and including:

- general environmental laws (including framework environmental law and environmental impact assessment (EIA) law);
- water (allocation, efficiency, reuse, pricing, quality, and pollution control);
- land (tenure, land use, and zoning);
- agriculture, grasslands, and grazing;
- coastal, marine, and fisheries;
- protected areas, biodiversity, and tourism;
- disaster management and emergency preparedness;
- insurance regulation;
- building codes;
- transportation (siting and construction of infrastructure);
- energy development and transmission; and
- forestry.

Laws relating to all or any of these areas may prove relevant to climate adaptation. These laws govern who uses which resources, where, and under what conditions, but generally without reference to the changing ecological context in which they operate. Even where capacity for enforcement is lacking, as is frequently the case in many countries, law provides the normative standard for governance that governments and stakeholders can work toward achieving.³² Continued operation of laws that fail to consider fluctuations or changing dynamics in ecological conditions can present barriers to actions necessary for long term adaptation; for example, by prohibiting relocation of endangered species or prohibiting reuse of gray water even in times of water scarcity. This concern is exemplified in a 1996 case in which the Kenyan High Court enjoined the Kenya Wildlife Service³³ from moving the rare and endangered hirola antelope³⁴ to a protected area not in its native habitat. The court reasoned that the authorizing statute for wildlife protection only ‘entitle[s] [the Service] to conserve the wild animals in their *natural state*. It does not entitle it to translocate them’ to new habitats.³⁵ But the ‘natural state’ in a world undergoing significant climate change

³² Most importantly in situations where governments lack resources to enforce enacted laws, the very existence of the law (if only on paper) provides the locus standi for citizen enforcement of environmental rights and protections. See, e.g., *Dr. Mohiuddin Farooque v. Bangladesh et al.*, Civil Appeal No. 24 of 1995, 17 B.L.D. (AD) 1997, vol. XVII, at 1–33, 1 BLC (AD) (1996) at 189–219 (High Court of Bangladesh) (‘If [the citizen-applicant or the indigenous and native association] espouses a public cause involving public wrong or public injury, he need not be personally affected. The public wrong or injury is very much a primary concern of the Supreme Court which in the scheme of our Constitution is a constitutional vehicle for exercising the judicial power of the people.’).

³³ See <<http://www.kws.org>>.

³⁴ *Beatragus hunteri*; also known as Hunter’s hartebeest. See, for instance <http://www.ultimateungulate.com/Artiodactyla/Beatragus_hunteri.html> (visited 14 June 2010).

³⁵ *Abdikadir Sheikh Hassan et al. v. Kenya Wildlife Service*, Civil Case No. 2959 (High Court of Kenya at Nairobi 1996) (emphasis in original).

is potentially very different from the one that existed previously. For example, protected area boundaries may need to be redrawn and connectivity between areas strengthened to account for different ecological conditions and shifting habitats.

Systemic weaknesses can complicate environmental governance under conditions of changing climatic and ecological conditions. Lack of tangible objectives, measurable criteria, or procedures for data collection, analysis, and use make it difficult to measure laws' effectiveness. Permits that confer broad use rights for extended periods of time without re-opener clauses (for example, for changed conditions) provide users with *carte blanche* permission to exploit resources. If monitoring and reporting are only required to assure compliance by users or managers with an agreed-upon plan, subtle changes in ecological conditions or the status of natural resources are more likely to be overlooked. Even the information that is collected may be of little value if officials are not required to use it to inform future decision-making. There may be basic jurisdictional confusion due to a media-centric rather than ecosystem-based legal structure (for instance, land law, air law, water law, laws governing access to and use of natural resources, protected area law, etc.), resulting in policies that can be extraneous, conflicting, or at the very least highly confusing to key stakeholder groups.

Officials are often confronted with 'front-loaded' decision-making requirements that can obstruct the law's ultimate ability to protect the environment. Most environmental laws require regulators to select a project alternative, set the right standard, or implement the correct management plan based on the information they have available at the time of the initial decision. Once a decision is reached, mechanisms for amending that decision might either not exist, are present but ignored without consequence, or might impose overly stringent or inappropriate procedural hurdles. Monitoring for compliance with the initial choice may be required, but little else – once an option is selected, it can be very difficult (if not unlawful) to change it.³⁶ Administrative resources might instead be directed toward crafting the most effective policies from their outset, rather than being spread out over a longer timeframe to provide support for assessing and revising activities, policies, plans, and standards.

³⁶ See *In re Operation of Missouri River System Litigation*, 363 F. Supp. 2d 1145, at 1163–1164 (D. Minn. 2004), affirmed, 421 F. 3d 618 (8th Cir. 2005) (holding that adaptive management approach to water flow levels is lawful only if environmental assessments subject to judicial review are done when adjustments are made).

2.2 Effects of climate change on the ‘old ecology’ of existing laws and institutions

One reason that legal systems may fail to achieve specific environmental or natural resource objectives is that they were not designed to confront and address the problem of scientific uncertainty regarding basic ecological processes.³⁷ These frameworks are frequently based on a more static, less dynamic, view of ecology: that the natural environment would exist in a pristine ‘steady’ state but for human impacts; that though there may be variations from day-to-day and year-to-year, these generally fluctuate around a constant baseline; and that the goal of environmental law and policy is to manage resources to prevent significant deviations from this baseline.³⁸ But what if there is no such norm, no true baseline, no steady state? What if the historical range of a species’ distribution is no longer valid, or water basin agreements allocate water based on an accepted precipitation regime which has ceased to exist? Climate change may void the historical record; or at least call the record into serious question.

To understand better how the assumption of predictability in ecological processes can undermine management frameworks, it is worth briefly considering the development of key ecological concepts over the past century. The debate concerning the ‘nature of nature’ as it has played out in modern ecological science can be dated to Frederic Clements’ early twentieth century studies of Great Plains plant communities in the United States. Clements developed models of steady rates of plant succession that assumed static species associations, and clear boundaries between communities, with undisturbed plant communities eventually reaching ‘stasis’ at a climax stage.³⁹ On the other side of this debate, Henry Gleason led a minority of ecologists vigorously opposed to this conception of plant communities beginning in the mid-1920s, claiming that there is no higher order in nature above the individual species and that nature is in a constant state of flux.⁴⁰ A synthesis of these views coalesced with the concept of the ‘ecosystem’, a term coined by British ecologist Sir Arthur Tansley.⁴¹ Tansley was critical of Clements’ ‘holism’ but, parting ways with Gleason, viewed the combination of living and non-living elements in a given place as an integrated mechanical system. This vision of the ecosystem was popularized by the brothers Eugene and Tom Odum’s work in the later half of the twentieth century.⁴²

The ‘ecosystem’ is now the dominant paradigm by which most scientists and policy-makers conceptualize the natural world. For example, the 1992 Convention on Bio-

³⁷ See Ann Clarke, ‘Seeing Clearly: Making Decisions under Conditions of Scientific Controversy and Incomplete and Uncertain Scientific Information’, 46 *Natural Resources Journal* (2006) at 571.

³⁸ See Carl Bruch, ‘The End of Equilibrium’, *The Environmental Forum* (Sept/Oct. 2008) at 30.

³⁹ Frederic Clements, *Plant Succession* (Carnegie Institution of Washington, 1916).

⁴⁰ Henry A. Gleason, ‘The Individualistic Concept of the Plant Association’, 53 *Bulletin of the Torrey Botanical Club* (1926) 7–26 at 7.

⁴¹ Tansley A. G., ‘The Use and Abuse of Vegetational Concepts and Terms’, 16 *Ecology* (1935) 284–307.

⁴² Donald Worster, *Nature’s Economy*, (Cambridge University Press, 1991) at 311.

logical Diversity (CBD) adopts an ‘ecosystem approach’ to managing and protecting biodiversity.⁴³ As a scientific concept, however, the precise contours of the ‘ecosystem’ are by no means settled. The ‘ecosystem’ of the early- to mid-twentieth century both diminished the role of individual species and questioned the view of nature as harmonious groupings of ‘communities,’ emphasizing instead flows of energy between trophic levels.⁴⁴ Sociological critiques of this period of ecology’s history have illuminated the heavy influence of larger cultural and political trends in its development, such as the burgeoning mid-twentieth century fields of cybernetics, quantum physics, and free market economic theory.⁴⁵

Developments since the Odums’ work have called into question whether ecosystems are properly viewed as having any pristine or ‘natural’ arrangement and have suggested that they are, in fact, capable of wide structural and functional fluctuations as a result of human and non-human disturbances.⁴⁶ Concepts of non-equilibrium and non-linearity, self-organization, and chaos theory now drive much of the theoretical ecological literature – if ecosystems are in some sense mechanical, their functions are, nonetheless, a far cry from the pre-determined clockwork of earlier models.⁴⁷

Despite the persistence of scientific uncertainty, ecologists concerned about the policy implications of so-called ‘deconstructionist’ ecosystem theories have continued to assert the importance and utility of a holistic concept of the ecosystem, with all its complexity, nonlinearity, and unpredictability, for informing sound environmental management. Robert O’Neill at Oak Ridge National Laboratory in the United States argues that while many of the primary elements of the ecosystem concept as it developed over the course of the twentieth century have undergone significant criticism, the proper response is not to abandon all hope of understanding ecological systems or protecting their processes. Rather, a new paradigm is needed that accounts for the complexities ecologists have uncovered.⁴⁸ Such a paradigm would include notions of scalar organization and observation, the fluctuation of dispersal-ranges of species populations, the ubiquitous effects of human influence, and the presence of disturbance regimes as natural components of ecosystems.⁴⁹ The risk of treating ecosystems as infinitely malleable, or abandoning the holistic approach outright, how-

⁴³ Arts 2 and 8(d). See also CBD, ‘Ecosystem Approach’, available at <<http://www.cbd.int/ecosystem/>> (visited 1 March 2010). The ‘ecosystem approach’ can be described as an approach to use land, living resources, and water in an integrated manner that promotes conservation and sustainable use. See CBD, Decision VI/6, ‘Ecosystem Approach’.

⁴⁴ Richard Brookes et al., *Law and Ecology: The Rise of the Ecosystem Regime* (Ashgate, 2002) 70.

⁴⁵ See Michael C. Barbour, ‘Ecological Fragmentation in the Fifties’, in William Cronon (ed.), *Uncommon Ground: Rethinking the Human Place in Nature* (W. W. Norton, 1995) at 233.

⁴⁶ See Rene Dubos, *The Wooing of the Earth* (Scribner’s Sons, 1980) at 82–83.

⁴⁷ C. S. Holling and Lance H. Gunderson, ‘Resilience and Adaptive Cycles’, in Lance H. Gunderson and C. S. Holling (eds), *Panarchy: Understanding Transformations in Human and Natural Systems* (Island Press, 2002) at 25; see also Bradley Karkkainen, ‘Panarchy and Adaptive Change: Around the Loop and Back Again’, 7 *Minnesota Journal of Law, Science & Technology* (2006) 59–77 at 59.

⁴⁸ Robert V. O’Neill, ‘Is it Time to Bury the Ecosystem Concept? (With Full Military Honors, Of Course!)’, 82 *Ecology* (2001) 3275–3284, at 3275 and 3279.

⁴⁹ *Ibid.* at 3280–3281.

ever, is that ‘*homo sapiens* is moving ecological systems outside the envelope of conditions that have existed over evolutionary history. This is terra incognita and the assumption that ecological systems will respond stably is unjustified’.⁵⁰

How will climate change affect legal frameworks that do not reflect this more nuanced understanding of ecological processes and that do not incorporate anticipated radical shifts in climate in the coming years? Existing institutional coordination problems will likely be exacerbated as feedbacks and secondary and tertiary effects of global environmental change stochastically rearrange biological relationships. Changed climatic conditions will upset the scientific rationale underlying previous regulatory choices. For example, hunting, fishing, or logging permits guaranteeing yearly or long-term quotas may no longer be appropriate as populations decline or undergo seasonal shifts. Lack of monitoring means that regulators may not be aware of changes resulting from altered climatic conditions, and, consequently, that they might lack a scientific basis for making informed adjustments. Mandates, regulatory experience, and mechanisms for addressing changing habitats, permanent re-allocation of water supplies, relocation of coastal settlements, and other long-term adaptation strategies will remain immature or undeveloped. Piecemeal and reactive approaches will remain the norm. Nonetheless, with its myriad, widespread impacts, climate change may be the best motivator we have for a new approach to environmental law and governance, one that is at once more responsive to the dynamic environment and more effective at achieving sustainable use of resources over the long term.

3 Building adaptive legal frameworks

3.1 Introduction

Laws can create an enabling environment that authorizes or requires consideration of climate-induced or other changes in resource status and management needs. In this conception, a framework for adaptation in the law should not be one more superstructure of regulation, but a revision and revitalization of existing frameworks that a fundamentally altered climate might otherwise push toward irrelevance. A policy evolution of this sort can redirect political and funding mandates to undertake adaptation measures, including experimental management plans or pilot projects, and require the assessment of effectiveness of response measures, while retaining sufficient flexibility to allow ongoing adjustments to improve management. New, more adaptive legal regimes are a key long-term strategy in reducing vulnerability to climate change. What would such regimes look like? What are the critical elements?

⁵⁰ *Ibid.* at 32–82.

Before discussing adaptive frameworks, it is worth briefly noting that not all responses to climate change need take the form of adaptive management frameworks. Adaptations called for in existing laws could include: reducing vulnerabilities and enhancing resilience through, for example, strengthening water infrastructure and governance (water-use controls); (re)-considering insurance, especially for coastal properties; revisiting building and zoning codes (and revamping enforcement and compliance); developing benefit-sharing arrangements for the development of more resilient crop varieties; and undertaking emergency planning for droughts, floods, storms and other extreme weather events. Because climate change is one more stressor on top of many other human-caused stressors (such as habitat fragmentation, pollution, and over-use), reducing these non-climatic stressors is also an important adaptation strategy. For example, with respect to coral reefs, reducing nitrification, point-source pollution, and over-exploitation might build the resilience to climate impacts that are beyond the management control of the country.

3.2 Adaptive management as the model

Adaptive management, though not synonymous with adaptation to climate change, provides a set of principles and protocols that can guide a vast array of adaptation policies and strategies.⁵¹ C. S. Holling and other researchers engaged in environmental analysis and planning developed the method of adaptive management in the 1970s as a response both to ‘front-end heavy’ processes such as EIAs under the US National Environmental Policy Act⁵² and to the advancing understanding of complexity in ecological processes discussed above.⁵³ Holling’s adaptive management approach was intended to improve environmental management and decision-making through overt recognition of the complexity and uncertainty in ecosystems as well as humans’ intended and unintended influences on them. Adaptive management has been illustrated in a variety of ways, but the basic cycle can be understood as containing seven distinct elements:

1. definition of the objective(s);

⁵¹ Joseph Arvai et al., ‘Adaptive Management of the Global Climate Problem: Bridging the Gap between Climate Research and Climate Policy’, 78 *Climate Change* (2006) 217–225 at 217, observing that

There are at least three reasons to believe a priori that adaptive management is a useful way to approach the problem of global climate change. First,... mitigation and adaptation strategies will interact with each other and with natural variables creating a complicated dynamic of cause and effect where most important variables will be both exogenous and endogenous... Second, adaptive management is appealing because of the sheer complexity of the climate change problem coupled with the need to make management decisions under uncertainty... Finally, adaptive management is inclusive and flexible in terms of the precise goals of climate change policy and the means used to achieve them.

⁵² 42 U.S.C. 4321–4327, 1 January 1970. The Act requires environmental values to be integrated into decision-making processes by federal agencies through consideration of potential environmental impacts and potential alternatives. See, for instance, <<http://www.epa.gov/compliance/nepa/>>.

⁵³ See C. S. Holling (ed.), *Adaptive Environmental Assessment and Management* (Wiley, 1978).

2. development and adoption of measures (for example, law, policy, permit, or programme), which are necessarily provisional;
3. implementation of measures;
4. ongoing monitoring and collection of information;
5. periodic assessment of the collected information (to determine the effectiveness of the measures);
6. modification, as appropriate; and
7. continuing the management cycle of implementation, monitoring, assessment, and revision.

This is frequently presented as a cycle of activities that begins with objective-setting (or ‘assessment’), and continues with design, implementation, monitoring, evaluation, and adjustment, which then feed back into the first step, assessment, etc.⁵⁴ Goal setting as an initial step may also be subject to revision in some models; but, generally, too adaptive or flexible an approach to achieving ultimate objectives can weaken the management programme. Special processes for assessing and revising goals can provide some flexibility here while maintaining accountability to show improvements in outcomes over time rather than simply revising expectations downward.

Recent attention to adaptive ‘co-management’ emphasizes the value of participatory, cooperative processes, social learning, and pluralism within an overarching adaptive framework.⁵⁵ This is an especially critical component of adaptive management in developing country or indigenous community contexts.⁵⁶ Adaptive co-management can enhance governance by making it more polycentric, engaging all stakeholders, strengthening checks and balances, and respecting different modes of knowledge (for example, scientific versus indigenous/traditional). Adaptive management will be particularly important in a period of climate destabilization because it provides a method for confronting both anticipated and foreseen or stochastic impacts over varying timeframes by developing new techniques that build on or compliment tradition adaptation strategies.

Where complete information is lacking, the concept of ‘learning by doing’ that adaptive management embodies enables policy implementation even in the face of scientific uncertainty. While mechanisms for adaptive management can generally be found in most existing laws, such as monitoring and periodic review requirements, these authorities are weakly implemented, perceived as ‘extras’, and are not driven by an overarching vision of how adaptive management can improve outcomes through reducing uncertainties over the long term.

⁵⁴ Carol Murray and David Marmorek, ‘Adaptive Management and Ecological Restoration’, in Peter Friederici (ed.), *Ecological Restoration of Southwestern Ponderosa Pine Forests* (Island Press, 2003) at 417–18.

⁵⁵ See Daniel J. Klooster, ‘Toward Adaptive Community Forestry Management: Integrating Local Forest Knowledge with Scientific Forestry’, 78 *Economic Geography* (2002) 43–70. The use of the term ‘adaptive management’ in this paper is not meant to preclude the additional elements of co-management.

⁵⁶ R. Plummer and D. Armitage, ‘Charting the New Territory of Adaptive Co-management: A Delphi Study’, 12 *Ecology and Society* (2007) at 10.

Adaptive management can be viewed as a means by which policy-makers can implement the precautionary principle⁵⁷ in preparing for climate change in multiple sectors. As stated in the Rio Declaration⁵⁸ of 1992, the precautionary principle provides: '[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.⁵⁹ Likewise, adaptive management provides a structured approach for improving decision-making under conditions of uncertainty. Both the precautionary principle and adaptive management do not necessarily call for the most environmentally protective action to be taken; rather, they create a mandate and an approach for responding in an efficient manner to emerging risks, even if there is not full scientific understanding.

In sum, the precautionary principle could be understood to govern initial decisions at the front end of management (making the initial decision about *whether* to act), while adaptive management provides the way forward once a decision has been made to act (informing *how* to address the problem). As one legal scholar has put it: '[c]onspicuously absent from most discussions of the precautionary principle is the concept that the decision to act does not end the opportunity for caution'.⁶⁰ Adaptive management allows affected parties to learn more through implementation of the decision than they knew at the start, so that they are better informed as future directions are charted.

3.3 Adaptive management and the law

3.3.1 Introduction

Historically, adaptive management has been implemented ad hoc or at the project level rather than systematically by law; indeed, occasionally it has been implemented in spite of the literal language of the authorizing legislation. While it has seen some success around discrete resource issues (for example, water management, dams, timber, etc.), it has faced hostility and litigation, particularly in the United States, from both sides of the political spectrum, both environmental groups and resource-use stakeholders. Opponents have expressed concern that adaptive management involves too much flexibility, and that it is not clearly authorized under major environmental

⁵⁷ There is substantial debate regarding whether the precautionary principle has achieved the status of customary international law, or whether it is merely 'soft law'.

⁵⁸ UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

⁵⁹ Principle 15.

⁶⁰ Holly Doremus, 'Precaution, Science, and Learning While Doing in Natural Resource Management', 82 *Washington Law Review* (2007) 547–579 at 547 and 554.

legislation, such as the Administrative Procedure Act,⁶¹ the Endangered Species Act,⁶² and the National Environmental Policy Act.⁶³ Since there are few existing models for designing a law that enables and guides adaptive management of resources in the climate change context, policy experts must begin exploring the key elements of what such a regime might look like. The following sections set forth some basic guiding principles and considerations which might assist in designing these elements of adaptive laws.

3.3.2 Planning

Given the long-term implications of climate change on both human and natural systems, long-term planning is crucial. As one expert on emergency planning put it recently,

... every study shows that whatever we do now is about slowing things in 100 years or more, yet these articles still read like we can clean up our act and solve the problem. The literature should be full of articles on what it means to decommission coastal cities, relocate communities, and plan for the new steady state we will reach in 150 years (with luck)[, when] the oceans are considerably higher than they are now.⁶⁴

While the scenario of decommissioning a coastal city may seem frightening, daunting, or simply politically suicidal, this at least illustrates the enormity of the problems climate change poses at the scale of hundred-year time periods. Due to the long time horizons, it will be important, when developing national adaptation plans, both to envision what the distant future may look like, and to establish tangible subsidiary goals and intermediate 'check-point' reviews along the pathway to that future. The country of Bhutan, for example, has developed an interesting model for that type of long-term sustainable planning. Bhutan's king promulgated the guiding vision of 'gross national happiness' (an alternative to 'gross national product') in the 1970s. Now that vision is made tangible in specific planning requirements, including a constitutional mandate to preserve in perpetuity at least 60 percent of the country's

⁶¹ 5 U.S.C.A. §§ 501 et seq., 1946. This Act governs the processes that federal administrative agencies must follow. See, for instance, <<http://law.jrank.org/pages/4084/Administrative-Procedure-Act-1946.html>> (visited 14 June 2010).

⁶² 16 U.S.C. §1531 et seq., 1973. This Act requires that federal agencies ensure that their actions are not likely to jeopardize the continued existence of any listed species, or the designated critical habitat of such species. Any action that may lead to a 'taking' of any species of fish or wildlife listed as endangered is prohibited; and foreign import or export of such species is likewise prohibited. See, for instance, <<http://www.epa.gov/lawsregs/laws/esa.html>> (visited 14 June 2010).

⁶³ *Supra* note 52. See J. B. Ruhl, 'Regulation by Adaptive Management – Is it Possible?', 7 *Minnesota Journal of Law, Science, & Technology* (2005) 21–57 at 21. For a scholarly debate on adaptive management, see J. B. Ruhl, 'The Pardy-Ruhl Dialogue on Ecosystem Management, Part IV: Narrowing and Sharpening the Questions,' 24 *Pace Environmental Law Review* (2007) 25–34; Bruce Pardy, 'The Pardy-Ruhl Dialogue on Ecosystem Management Part V: Discretion, Complex-Adaptive Problem Solving and the Rule of Law,' 25 *Pace Environmental Law Review* (2008) 341.

⁶⁴ E-mail from Ed Richards, Professor of Law at Louisiana State University, to Disaster-Law Listserv, Wed, 1 Jul 2009 16:53:04 -0500 (on file with ELI).

forested areas.⁶⁵ With this long-term vision of sustainability in mind, management for protection of these areas is accomplished through a landscape level system of protected areas and biological corridors, coupled with reasonable timber permitting and other resource extraction allowances.⁶⁶ Where climate impacts can be predicted with a relatively high level of certainty (and this is by no means always the case), both environmental and economic planning goals can be tailored as appropriate to the anticipated future conditions.

Multi-scalar planning occurs along geographic dimensions in addition to temporal ones as noted above. It can generally be broken into at least three levels, each involving potentially different institutions:

- macro (strategic): for example, where will the coastline be in 150 years?
- meso (tactical): for example, is coastal management top-down or participatory?
- micro (operational): for example, where will this hotel be sited?

Smaller-scale plans would be nested and consistent with one another, while monitoring would track progress and new developments. Periodically, the plans would be reviewed and, if necessary, revised. Plans would expressly incorporate adaptive strategies such as monitoring, assessment, and modification, and would consider exogenous and cumulative factors, such as climatic or other macro-ecological shifts, new scientific understanding, new technology, new conservation approaches, and provide for future conditions expressed as a range of modeled scenarios. Contingency plans or other provisions should be in place for emergency situations well in advance in order to minimize social and economic disruption. In this respect, there is much benefit to be gained from public education campaigns to make people better aware of long-term trends and cycles occurring on a time scale that is decadal or longer. For example, the management response to El Niño⁶⁷ events in Peru has been greatly improved as a result of ‘normalizing’ the event in people’s perceptions – once no longer regarded as a catastrophe, the public began to understand it as part of a larger cycle that can be anticipated and planned for.⁶⁸

⁶⁵ Constitution of Bhutan (2008), Art. 5.

⁶⁶ Bhutan’s Fourth National Report to the Convention on Biological Diversity (2009), available at <<http://www.cbd.int/doc/world/bt/bt-nr-04-en.pdf>> (visited 11 March 2010) at 55.

⁶⁷ A weather occurrence, characterized by unusually heated Equatorial Pacific ocean temperatures, which leads to fluctuations in the balance between ocean and atmosphere. See, for instance, <<http://www.pmel.noaa.gov/tao/elnino/el-nino-story.html>> (visited 14 June 2010).

⁶⁸ ‘Adapting Law and Governance to a Changing Climate in Peru’, Presentation by Manuel Pulgar-Vidal, Executive Director, Sociedad Peruana de Derecho Ambiental, Environmental Law Institute (3 June, 2009), available at <http://www.eli.org/Seminars/past_event.cfm?eventid=469> (visited 11 March 2010).

3.3.3 Management implementation

Adaptive management might involve policy-makers, stakeholders, and managers in thinking through a new conception of management ‘success’ and ‘failure’ that reflects the experimental nature of the undertaking. When policy-makers and managers ‘learn to fail *and* learn from their failures’, real adaptive governance can occur that does not rely on merely publicizing success stories.⁶⁹ At the same time, a balance is to be struck between managers’ ability to respond to changes without always requiring approval from central authorities, and the maintenance of effective procedural oversight. This includes a clear distinction between goals (which may be fixed, although not necessarily so) and means (which may vary in order to determine which is the most effective).

The best management practices will not always be those developed through a rigorously technical process or that rely on sophisticated engineering or technology. The benefits of science and indigenous knowledge should be given commensurate respect. Information collected through interviews with residents of highland communities in the Peruvian Andes have, for example, helped to substantiate as well as to expand scientists’ understanding of climatic impacts.⁷⁰ This is not to value indigenous knowledge more highly than scientific observation (indeed, a localized perspective can lead to inaccurate perceptions of globalized phenomena⁷¹); rather, adaptive co-management systems must be structured in such a way that different modes of knowing are brought into consideration. The resulting complex of information allows managers to develop more robust understanding of the socio-ecological system over time.

3.3.4 Permits, licences, and concessions

Climate change calls into question whether levels of resource use or extraction that are believed to be sustainable under current conditions will continue to be acceptable under future scenarios. There are a number of tools that policy-makers can provide to those overseeing extractive activities to ensure that quotas, catch limits, harvest techniques, and activities that might have serious impacts generally are adjusted as appropriate. For example, permits, licences, and concessions might be limited to specified periods rather than being open-ended or indefinite, and might be reviewed at intervals appropriate to the resource in question. Under Ecuador’s forestry law, for example, development projects on public forested lands cannot extend for fewer than three years or more than ten years, and require re-approval.⁷²

⁶⁹ Barney Dickson and Rosie Cooney (eds), *Biodiversity and the Precautionary Principle* (Earthscan, 2005) 217.

⁷⁰ Kenneth R. Young and Jennifer K. Lipton, ‘Adaptive Governance and Climate Change in the Tropical Highlands of Western South America’, 78 *Climate Change* (2006) 63–102 at 63.

⁷¹ See Arctic Institute of North America, ‘Polar Bears Changing Habitat in Response to Sea Ice Conditions’, *ScienceDaily* (7 January 2010), available at <<http://www.sciencedaily.com/releases/2010/01/100107151657.htm>> (visited 1 March 2010), noting an increase in polar bear sightings near Arctic villages while overall population is threatened by loss of sea ice.

⁷² The Forestry Law of Ecuador (2004), Art. 33.

Providing concessionaires with longer-term permits can actually increase the incentive to the private user to manage the resource sustainably for the long term. For example, changes in Bolivia's forestry law in 1996 extended the period for which permits are held to 40 years, with a twenty-year cutting cycle, for the purpose of reducing the rate at which valuable species are harvested by giving the concessionaire an interest in having those species available far into the future.⁷³ Of course, other rules and oversight mechanisms must accompany this regime in order for it to be effective.

Permits that convey limited access rights and include 're-opener' clauses give officials increased capacity to adjust resource use levels in response to changing conditions. Under the US Clean Water Act, for example, permits to discharge certain types of effluents frequently contain such clauses, allowing regulatory authorities to re-open (and reconsider) the terms of the permit.⁷⁴ Permit conditions may be tied to ecological indicators or to conditions which maximize environmental protection. Too many restrictions or uncertainties in permitting can drive away desirable economic development, of course. Outright cancellation of a major infrastructure project that is already well under construction may be simply untenable both politically and logistically. For some resource activities and projects, therefore, it may be more appropriate to include conditions that impose higher mitigation or remediation requirements if impacts of a project or activity turn out to be more environmental damaging than believed at the outset.

Permits that require information reporting by permittees give officials not only an important perspective on individual resource users, but also on how the system as a whole is responding and changing over time. The reported information can then be synthesized from multiple permitting schemes, thereby improving efforts to track the effects of multiple activities and stressors on the environment. Mexico's innovative scheme for shark fisheries management, for example, calls for a multi-pronged information gathering approach including on-board tracking devices and independent observers, satellite monitoring and localization, and requirements to ensure precise reporting on numbers and species of sharks captured.⁷⁵ Finally, if the broader permit system is made subject to a periodic programmatic review, resource agencies can ensure that permits, licences, and concessions are being managed efficiently and in an environmentally sound manner. Programmatic evaluations give policy-makers the ability to determine whether an entire regulatory scheme is slowly veering off course, or is failing in some systemic way which might go unnoticed by the participants.

3.3.5 Monitoring and information networks

Authorizations, evaluations, and reviews and other back-end adjustment mechanisms only work effectively with sound, up-to-date information. Monitoring for environ-

⁷³ The Forestry Law of Bolivia No. 1700 (1996), Arts 29, 33 and 36.

⁷⁴ 40 C.F.R. Art. 122.62(a) (USA).

⁷⁵ Official Mexican Norm NOM-029-PESC-2006, Responsible Fishing of Sharks and Rays, part 4.3.10.

mental change provides decision-makers with the information they need to make choices and to adjust them over time as systems respond to climate change and knowledge is improved through management implementation. In order for ecological trends to be tracked effectively, however, multiple ecological indicators may need to be monitored that go beyond implementation and compliance with a management plan or project conditions, and include changes to key ecological indicators not caused by project activities. Current legal frameworks for resource management have two key weaknesses that limit the ability of resource monitoring to detect shifts in ecological conditions: first, they tend to treat monitoring as an 'extra', failing to provide adequate funding or institutional support to use information collected through monitoring; and, second, laws tend to contain more stringent requirements for legal compliance monitoring and reporting than for monitoring and reporting of indirect and cumulative impacts, or ecological conditions generally in a project area or managed area.

One way to build capacity for environmental information is to use dedicated authorities to generate, collect, manage, and disseminate such information. In the United States, for example, legislation has been proposed to create a 'National Climate Service' with the specific mission to provide citizens, businesses, organizations, and other agencies with climate information to improve decision-making.⁷⁶ Many countries have established national environmental information systems to monitor and assess the state of the environment.⁷⁷ These authorities could be adapted to the task of climate change impact monitoring, linking a wide range of resource agencies and stakeholders by both collecting and providing information. Feedback mechanisms can then be used to inform whether modifications are necessary; and, if so, how agency policies and practices should be adjusted. It cannot be assumed that agencies will dedicate the necessary resources to utilize sound information without additional incentives, resources, or 'prodding'.⁷⁸

Effective monitoring within legal frameworks requires the coordination of many actors with varying interests and capacities. Governments at a centralized level will have the greatest interest in and capacity for monitoring ambient environmental quality and the overall status of natural resources. Regulated resource-user entities may have an incentive to report their activities accurately if they understand this to contribute to sustainable use (and profits or incomes) over longer time periods in collaboration with regulators and managers.

⁷⁶ See, for example, National Climate Service Act of 2009, H.R. 2407, 111th Cong. (2009); see also US National Oceanic and Atmospheric Administration, Climate Services, available at <<http://www.climate.gov/#climateWatch>> (visited 2 March 2010).

⁷⁷ For example, the National Environmental Protection Act of Bhutan (2007), Arts 82, 83 and 85; the Environmental Protection and Management Law of Liberia (2004), Arts 99–1900; Ley No. 64-00 of Dominican Republic (2000), Arts 51–54.

⁷⁸ See Holly Doremus, 'Precaution, Science, and Learning While Doing in Natural Resource Management', 82 *Washington Law Review* (2007) 547–579 at 547 and 571. ('Unless learning is systematically rewarded by the legislature or the highest levels of the executive branch – which is rare – there is little external incentive for agency leaders to [dedicate resources to increasing environmental understanding].')

The public can also play a role in volunteer monitoring activities in and around local communities, ‘whistleblowing’ when inaccurate information is being presented, or serving as ‘citizen scientists’ in applying local or indigenous knowledge to contribute data on environmental trends. Multiple, overlapping systems of information generation and ways of knowing tend to be viewed as more burdensome than the linear information exchange between agency and regulated entity that defines most current systems. However, by creating multiple pathways for information exchange, policy-makers will set the stage for improved environmental understanding and decrease the likelihood that critical environmental considerations, such as future climate impacts, will be overlooked.⁷⁹

3.3.6 ‘Active’ adaptive management

‘Active’ adaptive management is a variant in which managers are allowed more freely to experiment with different management options using testing and control plots through manipulation of variables. A somewhat ‘active’ system has been proposed in Mexico’s shark fisheries management through the establishment of five distinct management zones in which different techniques are to be tested (though apparently this has not yet been implemented).⁸⁰ This type of adaptive management requires clear monitoring and data usage requirements. Other barriers may need to be lifted to enable managers to experiment in this way; for example, stringent requirements that no harm be done to sensitive areas or threatened species may actually inhibit effective development of management solutions. In the US Northwest, some scientists working within the forest management framework have found themselves frustrated by a requirement that they may not test alternative riparian management approaches for fish habitat until proof is presented that no harm will be caused by the management activities. It has been suggested, by Bormann, that ‘the notion that nothing should be tried until proof [that no harm will occur] contradicts researchers’ understanding of the extent that proof is or can be known’.⁸¹ Given the damage that climate change and other stressors are already causing, it may make more sense to define ‘harm’ to include the damage caused by doing nothing. Under this conception, those trying to understand and restore ecosystems have a much stronger mandate for action.

Experiments in adaptation are in fact taking place all over the world as different governments, communities, and businesses respond to climate change impacts affecting them. This is an opportunity ripe for ‘peer-to-peer’ learning through timely sharing of information on the effectiveness of various response strategies. Adaptation

⁷⁹ For a critique of concerns about overly-burdensome information generating requirements in Canada, see Arlene Kwasniak, ‘Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward’, 20 *Journal of Environmental Law and Practice* (2009) 1–35.

⁸⁰ Comisión Nacional de Acuacultura y Pesca & Instituto Nacional de la Pesca, ‘Plan de Acción Nacional Para el Manejo y Conservación de Tiburones, Rayas, y Especies Afines en México’, [Mexican National Action Plan for the Management and Conservation of Sharks, Rays, and Related Species] (2004) at 41–42.

⁸¹ B. T. Bormann et al., ‘Adaptive Management of Forest Ecosystems: Did Some Rubber Hit the Road?’ 57 *BioScience* (2007) 186–191 at 186.

measures, however, are rarely thought of as experiments that can inform future decisions. Furthermore, the documentation of their progress likely lacks the rigor of more carefully designed experiments which an active-adaptive-management purist might prefer. Nonetheless, it has been suggested that ‘climate scientists and policy-makers ought to take advantage of the happenstance that has created the wide-ranging series of global experiments on climate policy by instituting an intentional, international effort aimed at learning from these experiments’.⁸²

Agencies have obvious financial and institutional interests in reporting accomplishments, not mistakes or the need to make adjustments in policy. These pressures point to a stronger role for independent information-gathering and reporting authorities to make an international peer-to-peer exchange more open. To improve and synthesize climatic data and share ideas on adaptation, more robust, independent, international networks for information-sharing are being established; however, these can be strengthened through a more explicit mandate to evaluate the effectiveness of policy measures. Regional and global information networks include, for example, the Integrated Centre for Integrated Mountain Development (ICIMOD) in the Himalayas;⁸³ the Indian Ocean Research Moored Array for African-Asian-Australian Monsoon Analysis and Prediction;⁸⁴ and the Adaptation Learning Mechanism: Learning by Doing through the Global Environment Facility (GEF).⁸⁵ NGO efforts in this direction include wikiAdapt and the CAKE platform operated by EcoAdapt in the United States. In making these systems more effective at uncovering actual experiences, lessons-learned, failures, and best practices, policy-makers may have to grapple with conflicting policy objectives embodied in, for example, state-secrets laws and confidential business information rules. However, dealing firmly with these issues earlier ought to help to prevent or at least reduce eventual regulatory confusion and potential litigation, and ought to facilitate appropriate and valuable information exchange.

3.3.7 Governance and public participation

Adaptive management schemes not tethered to clear legal mandates and requirements and not constrained by legally enforceable principles of rights and equity may fail to achieve both environmental and social objectives.⁸⁶ The purpose of adaptive management is not to give unfettered discretion to local decision-makers, bureaucrats, or scientists alone, but to grant discretion appropriately to the institutions and stakeholders most competent and able to perform the allocated responsibility.⁸⁷ Trans-

⁸² Joseph Arvai et al., ‘Adaptive Management of the Global Climate Problem’, *supra* note 51, at 217.

⁸³ ICIMOD, ‘Integrated Knowledge Management’, available at <<http://www.icimod.org/?page=23>> (visited 26 August 2009).

⁸⁴ See M. J. McPhaden et al., ‘RAMA: The Research Moored Array for African-Asian-Australian Monsoon Analysis and Prediction’, Pacific Marine Environmental Laboratory Publication No. 3199 (2009).

⁸⁵ GEF, ‘Global Adaptation Learning Mechanism: Learning by Doing’, available at <<http://www.gefonline.org/projectDetailsSQL.cfm?projID=2557>> (visited 27 August 2009).

⁸⁶ See W. Neil Adger, Katrina Brown, and Emma L. Tompkins, ‘The Political Economy of Cross-Scale Networks in Resource Co-Management’, 10 *Ecology & Society* (2005) at 9.

⁸⁷ See generally Jesse C. Ribot, ‘Waiting for Democracy: The Politics of Choice in Natural Resources De-

parent and equitable governance entails addressing issues of ownership, control, use rights, and decision-making authority over a given resource.⁸⁸

Checks and balances established throughout the governance structure at various levels of a decentralized system, including access to courts, civil measures and criminal penalties, and polycentric regulatory authority, ought to assist in building a robust framework for accountability combined with flexibility. There is enormous value to be found in including key stakeholder groups in planning and decision-making. If people are asked to change *how* they use available resources or to change *who* uses them, they will balk unless they are engaged in the process and they understand *why* they are asked to make such changes. Research on the implementation of co-management efforts in Trinidad and Tobago, for example, found that these efforts were undermined when coral reef users developed a belief that officials always held a ‘trump card’ in decision-making, which in turn led to a breakdown in trust.⁸⁹ Attention to these issues is essential for effective management.

The legal frameworks governing access to and use of natural resources – while not generally a structured element of the adaptive management cycle – can be critical to the success of an adaptive co-management effort. The regional impacts of climate change may necessitate redrawing the borders of buffer zones, habitats, and protected areas. Protected areas may have to adjust to shifting ranges of species populations and humans turned into migrants by climate change may move into protected areas in search of resources. Access and property rights disputes arising from climate change impacts include land, plants and animals, seeds and genetic resources, and water rights.

Resource-user and local community buy-in to a management program can be expected to be conditioned on whether the stakeholders perceive that they benefit in tangible ways. This may be done, for example, by limiting access to a resource to those both most dependent on it and who play a significant role in its management. Under Argentina’s sustainable use plan for blue-fronted parrots, for example, only landowners where the birds reside may collect fledgling birds for commercial sale.⁹⁰ Considerations of distributive and social justice are particularly important in the ‘active’ adaptive management context because ‘by the strict definition of an actively adaptive management framework, some [communities] would be asked to pursue

centralization’ WRI Report (2004), available at <http://pdf.wri.org/wait_for_democracy.pdf> (visited 11 March 2010).

⁸⁸ For a discussion of tenure and governance issues related to Reducing Emissions from Deforestation and Forest Degradation, see Lorenzo Cotula and James Mayers, *Tenure in REDD: Start-point or Aftershoot?* (International Institute for Environment and Development, 2009), available at <<http://www.iied.org/pubs/pdfs/13554IIED.pdf>> (visited 11 March 2010).

⁸⁹ See Adger et al., ‘The Political Economy of Cross-Scale Networks’, *supra* note 86, at 9.

⁹⁰ Jorge Rabinovich, ‘Parrots, Precaution, and Project Elé: Management in the Face of Multiple Uncertainties’, in Barney Dickson and Rosie Cooney (eds), *Biodiversity and the Precautionary Principle* (Earthscan, 2005) 173–188 at 173 and 175.

strategies that are designed to produce unknown or even harmful effects... This is especially risky in areas where local communities are fragile and vulnerable'.⁹¹

4 The way forward: introducing adaptation *adaptively*

Many processes are already available for countries to assess their vulnerability to climate change impacts, the foremost example presently being the National Adaptation Programmes of Action (NAPAs).⁹² Those seeking to implement adaptation strategies through changes in the legal or regulatory structure must take into account the needs of all who would be affected by the change. This may be done most effectively through a transparent consultative process with government officials, civil society members, and other stakeholders regarding climate change. Peru's experience in this regard is telling. In the most recent attempt to reform Peru's forestry law, the government included strong transparency and consultation requirements with local communities, because earlier attempts were perceived to lack democratic legitimacy.⁹³ In holding these discussions in the context of climate adaptation, emphasizing the role of adaptive management will help decision-makers, leaders, and stakeholders better to understand the discrete steps in implementation necessary to achieve sustainability objectives that are resilient to changes in climate over the long-term.

Information collection and sharing within countries, within regions, and internationally sets the foundation for building partnerships and creating trust among key stakeholder groups. Information collection can be improved by organizing clearing-houses, launching cooperative monitoring and data sharing within and between governments, conducting surveys and interviews with resource users and local communities, and by other means. Wide publication of periodic assessments regarding the status of natural resources helps stakeholders to understand why a given management adjustment may be necessary. Publicly available guidance materials, reference books, and training resources on adaptation and adaptive management will give individuals and communities the tools they need to begin undertaking more adaptive techniques on their own properties, in common-pool resource areas, or in larger scale resource concessions. Pilot projects can be used to build the trust of the public, policy-makers, and regulated entities.

Cultivating a new community of practice around adaptive management through meetings, conferences, and online networks will help with the creation of a grassroots network of experts and practitioners that could come to play an important motivating role in driving new policies and legislation. The national regulatory and legislative

⁹¹ Joseph Arvai et al., 'Adaptive Management of the Global Climate Problem', *supra* note 82, at 217.

⁹² See, for example, UNFCCC, 'National Adaptation Programmes of Action (NAPA)', available at <http://unfccc.int/national_reports/napa/items/2719.php> (visited 27 August 2009).

⁹³ Personal communication with Manuel Pulgar-Vidal, Executive Director, Sociedad Peruana de Derecho Ambiental (SPDA) (Peru) (May 13, 2010).

process itself can benefit from incorporation of adaptive management principles. As Lord Kennet put it in debating ozone controls in the UK House of Lords: '[p]olitics is the art of taking good decisions on insufficient evidence'.⁹⁴ Legislators as well as managers should frame their adaptation policies as an exercise in 'learning by doing', allowing for flexible approaches to management within an overall governance construct that respects environmental rights and equitable resource access and use.

Existing laws often do provide the legal authority to undertake adaptive management. A driving vision of adaptive governance, however, remains lacking in many frameworks. Those who wish to see that vision incorporated must be opportunistic in building on existing regulatory frameworks; and in taking advantage of ongoing legislative or regulatory updates. This could be done, for example, through developing agency guidance requiring impacts analyses for development projects to include potential climate change impacts in the project area.⁹⁵

There are several ways to restructure laws for a changing climate. One option could be the adoption of a broad-reaching 'National Adaptation Law' or a 'National Adaptive Management Act'.⁹⁶ Such a law would apply to all Ministries, cutting across resources, institutions, and sectors as a means to 'mainstream' adaptation throughout administrative processes. Such a law could give managers and resource users a clear mandate for incorporating resilience to climate change across a wide range of regulatory activities. Defining 'resilience' as an enforceable legal standard poses challenges, and policy-makers will need to consider how such a standard could be made both flexible enough to allow the tools of adaptive management to work smoothly; and, at the same time, stringent enough to ensure accountability in environmental decision-making.⁹⁷ The law could then give regulatory officials and managers the tools to improve management of natural resources, land use and planning, and other sectors affected by climate change by rewarding learning and using lessons learned through past experiences. These tools could include the functional elements discussed above; such as resources for monitoring, authorizations to set up experimental zones, periodic assessments, and a mandate to revise the frameworks based on lessons learned.

Alternatively, in some countries, a broad new law may not be politically feasible or even necessarily appropriate. In such cases, sector-specific laws could be evaluated individually for adaptive capacities and key weaknesses. Adaptive measures could be

⁹⁴ Quoted in Richard E. Benedick (Lead Author) and Peter Saundry (Topic Editor), 'Montreal Protocol in transition', in *Encyclopedia of Earth* (26 May 2007), available at <http://www.eoearth.org/article/Montreal_Protocol_in_transition> (visited 11 March 2010).

⁹⁵ See, for example., Memorandum for Heads of Federal Departments and Agencies from Nancy Sutley, Chair, US Council on Environmental Quality, 'Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions', at 6 (18 February 2010) (According to this Memorandum, '[a]gencies should determine which climate change impacts warrant consideration... because of their impact on the analysis of the environmental effects of a proposed agency action').

⁹⁶ Ruhl, 'Regulation by Adaptive Management', *supra* note 63, at 54.

⁹⁷ Alyson C. Flournoy, 'Protecting a Natural Resource Legacy While Promoting Resilience: Can It Be Done?', 87 *Nebraska Law Review* (2009) 1030–1032 at 1008.

incorporated as amendments to the existing legal authorities; or they could come in the form of cross-cutting decrees, executive orders, or other regulatory instruments that call on one or more resource agencies to use their existing authorities proactively to undertake adaptive management and other measures for adaptation. A good starting point for legal and policy evaluations of this sort would be to build on NAPAs and other national strategies. By looking at laws and policies, national climate change planners can inform policy-makers of ideal priority areas, where adjustments to existing authorities or the introduction of whole new laws would contribute to more resilient regulatory structures.

Both human society and the ecological realm are dynamic, not static. Laws that reflect this dynamism can adapt nimbly to unexpected circumstances or to the import of new information; while at the same time maintaining accountability on the part of managers and regulated entities to show improvements in ecological outcomes from management techniques over time. This, in a word, is what 'resilience' is all about. That the global community finds itself confronting global climates destabilized through its own actions underscores the need for a more proactive approach to be taken to environmental management; with this approach being based on review, learning, and revision fostered through enabling legal structures. The time to start building these new institutions is now.



BIODIVERSITY CONVENTIONS AND THE IEG AGENDA – THE NEED FOR AN INTEGRATED APPROACH BOTH BOTTOM-UP AND TOP-DOWN: A CASE STUDY OF TEMATEA

Ines Verleye¹ and Jorge Ventocilla²

1 The multitude of biodiversity-related conventions

Biological diversity (‘biodiversity’) – the variability within and among living organisms and the ecosystems they inhabit – can, from an anthropocentric viewpoint, be described as the basis upon which human civilization has been built. Biodiversity provides food, fuel, livelihoods, medicines and shelter as well as critical ecosystem services on which development and human well-being depend, including air and water purification, soil conservation, disease control, and reduced vulnerability to climate change and natural disasters (such as droughts, floods and landslides).

The exploitation of biological diversity, as well as the conversion of natural ecosystems to human-dominated ones, has brought about significant benefits to humankind. However, as human exploitation and degradation of natural systems relentlessly advance in many parts of the globe, these benefits are achieved with commensurately increasing costs. More and more, biodiversity loss and the degradation of ecosystem services are a threat to the livelihoods of the poor, diminish sectoral productivity, threaten food security and lower the capacities of countries to deal with the effects of climate change. Biodiversity is important not only in developing countries, but also to sustain development in the developed world and to enhance the capacity to achieve wider development objectives.

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In terms of poverty eradication, it has been widely documented that poor people depend (entirely or at least partly) on natural resources, and that they are severely affected when their environment is degraded, biodiversity is lost and their access to biodiversity is restricted. Therefore, conserving and maintaining healthy ecosystems, genetic resources and ecological processes are essential components of sustainable and effective food production systems; and are key to the eradication of hunger and poverty.

Biodiversity was, therefore, one of the five key areas of the WEHAB³ framework of the 2002 World Summit on Sustainable Development (WSSD),⁴ together with water, energy, health and agriculture. Furthermore, the UN Secretary-General, in his Annual Report to the 61st Session of the General Assembly,⁵ called for the addition of the 2010 Biodiversity target into the Millennium Development Goals (MDGs)⁶ framework, recognizing the essential role of biodiversity in meeting the Millennium Development Goals.⁷

With the consequences of (global) environmental problems becoming more apparent every day, from floods to droughts and new pandemics, the economic and social needs of human populations are increasingly relying on biodiversity and natural resources; which means that these will have to be used in a sustainable way, unlike present usage, if we wish to ensure sustainable development and avoid extinctions in the future.

The real value of biodiversity and ecosystem services needs to be better appreciated by people generally and states in particular; and to be integrated into both international and national economies. Therefore, the various values of biodiversity need to be captured and realized at all levels, starting by giving the right incentives to guard it to those that are nearest to it. However, solutions involve much more than looking at all living things as an economic resource, they are also about changing legal and institutional frameworks as well as individual habits.

³ This acronym stands for the five key areas proposed as Frameworks for Action in an initiative by then Secretary-General of the United Nations Kofi Annan at the World Summit on Sustainable Development (Johannesburg, 2002) in 2002: Water; Energy; Health; Agriculture; and Biodiversity. See <http://www.un.org/jsummit/html/documents/wehab_papers.html>. For the Framework Paper on Biodiversity, see particularly <http://www.un.org/jsummit/html/documents/summit_docs/wehab_papers/wehab_biodiversity.pdf> (both visited 8 September 2010).

⁴ The World Summit on Sustainable Development was held from 26 August to 4 September in Johannesburg, South Africa. See <<http://www.un.org/events/wssd/>>.

⁵ See CBD, 'About the 2010 Biodiversity Target', available at <<http://www.cbd.int/2010-target/about.shtml>> (visited 8 September 2010).

⁶ These eight goals, to be achieved by 2015, were adopted in 2000 during the United Nations Millennium Summit (6-8 September 2000; see <<http://www.un.org/millennium/summit.htm>>). On the goals, see <<http://www.un.org/millenniumgoals/>>.

⁷ See Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), available at <http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm> (visited 8 September 2010).

2 A multilateral political framework

Particularly important for the achievement of the Millennium development goals⁸ is also the sound implementation of global and regional instruments that support national actions to safeguard or restore biodiversity and the integrity of natural ecosystems. The international community has become increasingly aware of this since the beginning of the 1970's when several biodiversity-related conventions were developed for this purpose. Such instruments include, in particular, the Ramsar,⁹ CITES,¹⁰ and CMS¹¹ Conventions; and, later, the Convention on Biological Diversity (CBD).¹²

Such multilateral environmental agreements (MEAs) potentially offer robust international frameworks from which to facilitate coordination and catalyzation of national conservation and climate adaptation actions, as well as increase North-South and South-South cooperation. However, the practical implementation of these agreements at the national level remains a major challenge.

This is due in part to the exponential growth of MEAs over the last 30 years, which has led to an 'implementation deficit' at the national level, where Parties struggle to implement their international obligations and commitments. National actors often miss the necessary capacity comprehensively to review and implement all guidance from different MEAs on issues related to their work. Furthermore, the fragmentation of competencies and limited communication among experts from different MEAs also often cause overlaps or duplication of actions.

This implementation problem is often worsened by lack of human and financial resources, and the difficulty of coordinating measures under relevant MEA commitments, where there is a lack of technical capacity and legal mechanisms for comprehensive planning. Countries have, therefore, repeatedly expressed the need for tools to support and streamline the implementation of different conventions at the national level.

⁸ See <<http://www.un.org/millenniumgoals/>>.

⁹ Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971, in force 21 December 1975, 11 *International Legal Materials* (1972), 963, <<http://www.ramsar.org>>. This Convention is now known simply as the Convention on Wetlands of International Importance, with the original reference to waterfowl having been dropped.

¹⁰ Convention on International Trade in 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>>.

¹¹ 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>>.

¹² 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>>.

3 TEMATEA – Supporting coherent MEA implementation by structuring national obligations

The 2010 target of significantly reducing the current rate of biodiversity loss, as endorsed by the World Summit on Sustainable Development, stimulated activities to increase a more cost-effective and efficient implementation of biodiversity-related agreements. One way to achieve this is by avoiding duplication, increasing cooperation at the national level and mainstreaming biodiversity in relevant national policies, which is essential to ensure sustainability in key sectors such as agriculture, fisheries or trade.

To address this challenge, the TEMATEA Issue-Based Modules were created to provide a web-based capacity building tool to facilitate improved and more coherent implementation of biodiversity commitments on issues identified as national priorities.

TEMATEA provides national experts with the necessary tools to facilitate the formulation and implementation of coherent policies on biodiversity at the national level, using an innovative two-fold approach: the TEMATEA website¹³ and national and regional capacity-building.

The TEMATEA issue-based modules provide an issue-based logical framework to structure the multitude of commitments and obligations under regional and global biodiversity-related agreements. They already exist on six key biodiversity issues, namely: inland water; invasive alien species; protected areas; climate change and biodiversity; access and benefit-sharing; and sustainable use. A seventh module on marine and coastal biodiversity is expected to be ready for an initial peer-review in October 2010. For each one of these issues, relevant decisions from seven global biodiversity-related conventions (CBD, CITES, CMS, Ramsar, UNCCD,¹⁴ UNFCCC,¹⁵ and the WHC¹⁶) have been analyzed and structured according to their relevance for actions to be taken at national level (for example, assessment, legislation, or management of invasive alien species). To improve coherence across the different levels and sectors, sectoral agreements such as the Food and Agriculture Organization of the UN (FAO)¹⁷ and World Trade Organization (WTO)¹⁸ agreements on fisheries, forestry and agriculture (which contain national obligations regarding

¹³ Available at <<http://www.tematea.org>> and on CD (download from website).

¹⁴ 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>>.

¹⁵ 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>>.

¹⁶ 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>>.

¹⁷ See <<http://www.fao.org>>.

¹⁸ See <<http://www.wto.org>>.

forest, marine and agricultural biodiversity) are also incorporated. Furthermore, relevant obligations from regional agreements were equally analyzed and included to allow for a more coherent approach towards their implementation.

By identifying and grouping implementation requirements from different agreements, each module provides *activity-oriented structured information* on the selected issue. The analysis is based on existing articles, decisions, recommendations and resolutions and, as such, does not impose extra requirements on Parties; rather facilitating the formulation and implementation of coherent policies on biodiversity.

To facilitate access to the tool by national experts, the content of the website is currently available in English, French, Russian and Spanish. Arabic and Chinese will follow when budget constraints make this possible.

National capacity-building exercises to support the use of the modules are an integral part of the TEMATEA approach to supporting national work. These TEMATEA National Support Programmes facilitate evaluation of ongoing national implementation and support the development of coherent national strategies, plans and programmes regarding biodiversity and sustainable development. Experience shows that the results of the national support programme with TEMATEA are often shared with other countries and regions, and that the national experts trained serve as multiplying and networking agents. To date, six national Pilot Activities¹⁹ on TEMATEA have taken place on three continents; while more are in the pipeline.

4 Individual use of the TEMATEA Issue-based Modules

The governing bodies of several MEAs²⁰ have welcomed the modules, stressed their importance as a capacity-building tool and invited parties to use them when developing and implementing national plans and strategies. TEMATEA promotes a more strategic use of financial and human resources to improve communication and cooperation across sectors and conventions by highlighting synergies and reducing overlapping of common issues. By grouping all decisions of several conventions, both global and regional, on specific key topics, the formulation and implementation of coherent policies on biodiversity at national level is promoted and integration in sectoral policies facilitated.

The modules facilitate understanding of MEA decisions and resolutions by national experts. They provide simplified information which helps non-MEA experts understand the jargon and promote synergies within and across sectors.

¹⁹ In Cuba on Invasive Alien Species / Inland Waters; in Georgia on Protected Areas; in Norway on Invasive Alien Species; in Peru on Access and Benefit Sharing; and in the Seychelles and Belgium on Climate Change and Biodiversity.

²⁰ Such as the Conference of Parties of the CBD, Ramsar and CMS.

Several national experts²¹ have indicated that they are using TEMATEA in different ways:

- as a reference platform for the national coordination unit dealing with MEAs;
- to improve understanding of how regional and global commitments interact;
- to improve national communication and cooperation between biodiversity experts as well as with other sectors;
- to improve coherence with previous MEA decisions;
- for development of joint project proposals relating to different MEAs;
- as training of new professionals using a holistic approach on specific issues, instead of per convention; and
- for revising and developing national legislation, programmes and planning.

5 Structured use of TEMATEA at national level

Although TEMATEA is being used by individual experts for specific purposes, its main added-value can be found in supporting drivers toward coherence of national activities related to the implementation of MEAs; and, in particular, the mainstreaming of biodiversity concerns across national policies.

The capacity to use the modules at the national level for this purpose is being built through national support programmes, where the existing national implementation of MEAs was identified, evaluated and recommendations for improvements formulated. The national support programmes support the development of concrete plans/project proposals for better and more coherent MEA implementation to achieve better conservation and sustainable use of biodiversity.

The TEMATEA national support programmes are based on extensive stakeholder consultations, involving experts from a wide range of sectors and conventions, to evaluate and improve national MEA implementation on specific issues. This enables countries to assess the value of the modules in their own situation, and to gain experience on how best to apply these tools to suit their own requirements across a range of topics. This, in turn, supports a more coherent and efficient approach towards the implementation of many different global instruments at national level.

The support programmes at national level imply:

²¹ Such as H.E. Ambassador Diann Black-Layne (Antigua & Barbuda); Dr Horst Korn from BfN (Germany); and Rebecca Lalanne, Office of the Principal Secretary (Seychelles).

1. The development of an inventory of all national efforts, using the TEMATEA modules as the structure to work from.
2. Evaluating strengths and weaknesses of implementation at national level.
3. Formulating recommendations towards a more coherent and efficient approach.

Continuous consultation of relevant stakeholders during each step of the process is crucial to engage all experts; and to ensure that the recommendations receive the necessary support to be followed through afterwards.

6 The TEMATEA national support program

Depending on available resources, the TEMATEA Secretariat tries to respond to a maximum of requests for support programs. However, as resources are limited, this essay aims to allow more countries to use TEMATEA by following the different steps. If a country is interested either in funding country support or in applying for a national support program, it is possible to indicate this interest to the authors.

Step 1 Developing the Inventory

When each expert knows how his/her activities fit within the overall picture, this creates possibilities for cooperation and increased efficiency. The development of an inventory which contains all of these related activities is, therefore, the first step toward applying TEMATEA at the national level. The inventory is based on the structure of 'sections-activities-obligations' as contained in the TEMATEA modules; and serves as a check-list for identifying national obligations on a specific issue, coming from those multilateral environmental agreements to which the country is party. By completing the checklist with how these obligations were implemented at national level as well as the relevant actors, the inventory maps out the national efforts towards this issue. Amongst other things, this contributes to:

- providing all experts on an issue with the same information;
- stimulating communication and cooperation on specific issues among experts of different conventions *and* across sectors;
- providing for 'rolling' reporting by systematically updating the inventory with the work carried out at the national level. This in turn streamlines national reporting efforts on a particular issue;
- identifying the gaps, strengths and weaknesses of the national plans, policies, projects etc.;
- offering an overview of how to avoid duplicity of efforts and resources; and
- identifying existing synergies amongst obligations and commitments from different agreements and conventions.

For this purpose, the inventory should incorporate all national legislation, policies, programmes, projects, and so forth, relating to the selected module. Based on past experiences, much of this information is available in national reports, National Biodiversity and Action Plans (where available), thematic reports, studies, etc. However, consultations with national experts from different institutions (agriculture, fisheries, transport, customs, and so forth) are needed to ensure coverage of relevant efforts beyond the biodiversity community. Furthermore, non-governmental organizations and the academic world should ideally also be involved throughout the exercise if a complete picture is to be gained of what is going on in the country; as well as to ensure support from all actors for the proposed changes afterwards.

Example of an Inventory:

Seychelles – TEMATEA Biodiversity & Climate Change Module

Section on Legislative Measures & National Legislation:

Activity 2 – Use relevant information in policy making: Component 1

Obligations & commitments	National activities for implementation	Implementing body
Use information on climate change and wetlands in Conference of the Parties (COP) background papers when integrating climate change considerations into national policy: Ramsar Resolution VIII.3, 16*	This is not reflected in the National Wetlands Conservation and Management Policy. Climate Change has not been identified as one of the six major threats to wetlands (as identified in the National Biodiversity Strategy and Action Plan (NBSAP)). It is recommended that this is included.	- Wetlands Unit - National Climate Change Committee

* Ramsar Resolution VIII.3, 16 ‘Climate change and wetlands: impacts, adaptation, and mitigation’ (2002).

Points to consider when completing the inventory:

- How would you start this exercise?
- Where could you find the necessary information?
- How would you organize the consultations?
- How difficult would it be to get the other experts/sectors involved?

Step 2 Evaluation of Inventory – identification of strengths and weaknesses

After the completion of the inventory, the next step is to analyze activities undertaken at the national level, to identify and evaluate strengths and weaknesses. This will help identify, among other things:

- gaps, inconsistencies and duplication in MEA implementation;
- best practices where the country has particular expertise;
- whether the country's priorities are covered;
- the reasons for the weaknesses and strengths;
- where there is a lack of resources (human, financial, other); and
- how good/bad the national cooperation amongst experts is

Example of an Evaluation document

Peru – TEMATEA Access and Benefit Sharing (ABS) Module

Table with strengths and weaknesses, resulting from the analysis of the inventory in Peru.

Strengths	Weaknesses
Experience with registers for traditional knowledge	In spite of high relevance, there is neither awareness nor activity on ABS among marine experts.
Experience and collaboration agreements between different actors and authorities	Use of available information is limited due to lack of organization and integration.
There is expertise and capacity to discuss and negotiate on access and benefit-sharing (ABS) issues.	Limited distribution of information on ABS to the public.

Step 3 Formulation of recommendations

After evaluating the Inventory and identifying the strengths and weaknesses, these documents are discussed amongst the relevant stakeholders, in order to collect their suggestions and observations regarding the best way forward. Based on these consultations, the country can either confirm or re-evaluate its priorities and develop recommendations to move towards a more coherent approach to strengthening implementation.

All countries therefore developed a list of recommendations for the short, medium and long-term, as well as some concrete suggestions regarding the responsible actors and appropriate timeframe. The recommendations should support a more efficient

use of limited resources; increase the mutual understanding between experts of related activities under different MEAs; better understanding of available funding sources; and cooperation on reporting under different MEAs. These recommendations are, in turn, discussed with all stakeholders during a final workshop to ensure broad support. This way, the workshop serves as the starting point towards more coherent policy and better national cooperation.

In the different pilot countries, this exercise was considered very useful, not just for the Ministry responsible for environmental affairs, but for all experts involved. Most countries decided to keep the inventory updated and available on their Clearing House Mechanism as a basic reference document for all experts. Further recommendations included:

- use of the Inventory for coherent national reporting;
- development of specific action plans on one of the issues;
- involvement of departments, sectors and experts in overall activities;
- development of new coordination mechanisms;
- implementation of projects in a multi-convention way (for example, the Seychelles UNDP²²/GEF²³ project on Sustainable Land Management²⁴); and
- development of the Inventory for other modules.

Example of Recommendations:

Cuba – TEMATEA Invasive Alien Species & Inland Waters Modules

Final workshop attended by about 50 people, decided upon a set of recommendations with a timeline and specific actors. This table includes, among other things, the following:

RECOMMENDATIONS	ACTORS	TIMELINE
The National Biodiversity Group (GNDB) will update the information developed through this exercise annually and for both modules as it represents important reference material to implement the decisions of the different conventions as well as for the development of national reports to those conventions.	GNDB	Permanent
Recommend to the national experts dealing with the different agreements to use the inventory for both modules as the basis for further development and prioritization of work in these areas.	National institutions, Ministries, focal points	Permanent

²² United Nations Development Programme; see <<http://www.undp.org>>.

²³ Global Environment Facility; see <<http://www.thegef.org>>.

²⁴ GEF Operational Program on Sustainable Land Management; see <http://207.190.239.143/Operational_Policies/Operational_Programs/OP_15_English_Revised.pdf> (visited 8 September 2010).

7 Conclusion

The proliferation of multilateral environmental agreements has raised much political awareness in respect of biodiversity at regional and global levels, but it also has overwhelmed the capacity for national implementation. During the last 20 years hundreds of new global and regional agreements as well as amendments to existing agreements, and protocols to these agreements, have been developed. International environmental governance risks being less effective by duplication of effort and the challenge for experts to keep track of the different developments often on similar issues across this multitude of instruments.

In an effort to streamline this situation, a number of processes have tried to reform the system to make the international environmental governance more effective and coherent. Most of these processes have focused on streamlining the instruments themselves but this has had mixed success. However, more attention is now being given to party-driven processes as countries increasingly realize that improved coherence must start at the national level.

Countries have agreed to biodiversity targets and commitments through many international and regional instruments. However, all of this remains without consequence if they are not implemented in a coherent way. Although TEMATEA does not offer a solution to all of the complexities required to achieve a working IEG system, it does provide the basis for a new approach to more coherent national implementation that can be customized, taking into account the realities and priorities of Parties.

It can therefore play an important role supporting a party-driven approach towards IEG that will improve cost-efficient implementation based on national commitments, avoiding duplication and overlaps. This will help the national implementation of biodiversity related commitments, while the approach can equally be applied to support coherent implementation of other clusters such as chemicals, water, etc.

In pragmatic terms, the TEMATEA modules will provide the national experts with the map they need to identify how to comply in an efficient way with those international commitments that fit their national priorities best. Furthermore the insight gained from that, helps countries to engage in more coherent decision-making at the global level. Finally, this creates a lot of useful spin-offs as streamlined reporting and improved sectoral integration. This way TEMATEA supports both bottom-up and top-down synergies and helps to bridge the disconnect between the decision-making and the implementation.



THE AARHUS CONVENTION: A LEGALLY BINDING FRAMEWORK PROMOTING PROCEDURAL ENVIRONMENTAL RIGHTS¹

Jeremy Wates² and Seita Romppanen³

1 Introduction

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁴ (The Aarhus Convention) was adopted on 25 June 1998 at the Fourth Ministerial Conference in the ‘Environment for Europe’⁵ process.

The Aarhus Convention is an innovative international instrument representing a new kind of environmental agreement. Most importantly, the Convention links environ-

¹ The paper is based on a video lecture given by Jeremy Wates on 30 June 2009 on the sixth University of Eastern Finland/UNEP Course on International Environmental Law-making and Diplomacy, Naivasha, Kenya.

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⁴ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, <<http://www.unece.org/env/pp/>>.

⁵ For more information on the ‘Environment for Europe’ process, see <<http://www.environmentforeurope.org/>> and <<http://www.unece.org/env/efe/welcome.html>> (both visited 21 April 2010). See also Eric Dannenmaier, ‘A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums’, 18 *Oxford Yearbook of International Environmental Law* (2007) 32–64.

mental rights and human rights⁶ by upholding the aim that sustainable development can be achieved only through the involvement of all stakeholders. Furthermore, the Aarhus Convention links government accountability with environmental protection, focussing on interactions between the public and public authorities in the context of promoting participatory democracy. Therefore, the Aarhus Convention is not merely an environmental agreement; it is also a convention on government *accountability, transparency* and *responsiveness*.⁷

This paper gives a brief introduction to the Aarhus Convention. The paper first discusses the political significance as well as the origins and evolution of the Convention. Second, it provides an overview of the content of the Convention. Third, it examines challenges attached to the implementation of the Convention and describes some of the mechanisms established and measures taken to address those challenges. Fourth, it discusses the relevance of the Convention as a model in the context of outreach to other regions and other thematic areas, as well as with respect to other international forums. Fifth, the paper gives a short insight into various activities undertaken under the Convention, including the only Protocol to the Convention to have been adopted to date, namely the Protocol on Pollutant Release and Transfer Registers⁸ (the Kiev Protocol). Sixth, it briefly assesses the role of non-governmental organizations in the life of the Convention.

2 Origins of the Aarhus Convention

2.1 Political significance

The question arises as to why we need an agreement dealing with procedural environmental rights issues (environmental democracy)?⁹ Essentially, there are two ra-

⁶ In general on human rights and the environment, see Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & The Environment* (3rd ed., Oxford University Press, 2009) 271–301; John Merrills, 'Environmental Rights, Chapter 28' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 664–680; Nicolas de Sadeleer, *Environmental Principles. From Political Slogans to Legal Rules* (Oxford University Press, 2002) 275–288.

⁷ See also the website of the Aarhus Convention, available at <<http://www.unece.org/env/pp/>> (visited 21 April 2010) and Peter Davies, 'Public Participation, the Aarhus Convention, and the European Community' in Donald Zillman, Alastair Lucas and George (Rock) Pring (eds.), *Human Rights in Natural Resource Development. Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002) 155–157; See also *The Aarhus Convention – An Implementation Guide* (United Nations, 2000), available at <<http://www.unece.org/env/pp/acig.pdf>> (visited 4 May 2010) 1.

⁸ Protocol on Pollutant Release and Transfer Registers, Kiev, 21 May 2003, in force 8 October 2009.

⁹ On 'environmental democracy', see Aarhus Clearinghouse for Environmental Democracy at <<http://aarhusclearinghouse.unece.org/>> (visited 4 May 2010). Tuomas Kuokkanen, 'Legitimacy in International Environmental Law' in Tuula Honkonen and Ed Couzens (eds.), *International Environmental Lawmaking and Diplomacy Review 2008*, University of Joensuu – UNEP Course Series 8 (University of Joensuu, 2009), 6–7; Birgit Dette, 'Access to Justice in Environmental Matters' in Marco Onida (ed.), *Europe and the Environment. Legal Essays in Honour of Ludwig Krämer* (Europa Law Publishing, 2004) 3–5.

tionales for having such an instrument. The first is a rather pragmatic reason, based on the notion that involving the public in environmental decision-making actually leads to better environmental decisions.¹⁰ Environmental sustainability needs the involvement of all actors. Subjecting proposals with environmental implications to public scrutiny enables those proposals to be strengthened before they are adopted; criticism strengthens the *quality* of proposals. After such decisions have been adopted, they are more easily *accepted* by the public since the public feels that it was actually involved in the process of making these decisions. This, on the other hand, leads to better implementation of the decisions and a greater sense of ‘ownership’ and ‘buy-in’ by the public.¹¹

In addition to the essentially environmental argument that public participation generally leads to better environmental decision-making, there is also the democratic argument that people have the right to be consulted over issues that affect their lives. This is a notion of democracy which is distinct from the notion of representative democracy, where certain representatives are elected every few years. The participatory democracy which the Aarhus Convention seeks to promote is characterized by an ongoing relationship between government and civil society. In participatory democracy, the public is actually involved with the decision-making process, rather than just handing over power to elected representatives for an extended period as in the ‘normal’ representative democracy.¹²

The *political* significance of the Aarhus Convention was summarized in 2000 by the former Secretary-General of the United Nations, Mr. Kofi Annan, when he referred to the Convention as the ‘most ambitious venture in the area of “environmental democracy” so far undertaken under the auspices of the United Nations’.¹³ It is this bringing together of the ‘environmental’ component with the ‘democracy’ component in the concept of ‘environmental democracy’ that places the Aarhus Convention at the interface between environment and human rights – it is an environmental agreement, but it may also be seen as a human rights instrument.¹⁴

¹⁰ The Convention itself espouses this principle, stating in the ninth recital of the preamble as follows: ‘Recognizing that in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions...’. See also discussion on the benefits of public participation in Stuart Bell and Donald McGillivray, *Environmental Law* (7th ed., Oxford University Press, 2008) 294–295 and Chapter 10 generally.

¹¹ On participatory rights and sense of ‘ownership’, see also Jona Razzaque, ‘Participatory Rights in Natural Resource Management: the Role of Communities in South Asia’ in Jonas Ebbesson and Phoebe Okowa, *Environmental Law and Justice in Context* (Cambridge University Press, 2009) 117–130.

¹² On participatory rights as human rights in connection with the Aarhus Convention, see also Birnie, Boyle and Redgwell, *supra* note 6, 291–295.

¹³ See the website of the Aarhus Convention, available at <<http://www.unece.org/env/pp/>> (visited 26 April 2010). See also Davies, ‘Public Participation’, *supra* note 7, at 15.

¹⁴ There are also other environmental agreements which grant rights to information and public participation in an environmental context, although these agreements are not as such human rights based agreements. For example, the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991, in force 10 September 1997, 30 *International Legal Materials* (1991) 802) reflects some of the same basic principles as the Aarhus Convention, e.g. the establishment of a reasonable time-frame allowing sufficient time for each of the different stages of public participation in the environmental impact

2.2 From Sofia to Aarhus and on

Originally, the Aarhus Convention emanated from the ‘Environment for Europe’¹⁵ process, a process of Pan-European environmental cooperation¹⁶ that came into being after the division between the two halves of Europe was bridged at the end of the 1980s.¹⁷ The origins of the Convention may also be traced back to principle 10 of the 1992 Rio Declaration on Environment and Development¹⁸.

Principle 10 of the Rio Declaration reads as follows:

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

Principle 10 was taken up within the pan European environmental process, and first of all resulted in the adoption of the non-binding 1995 UNECE Guidelines on Access to Environmental Information and Public Participation in Decision-making¹⁹ (the ‘Sofia Guidelines’) at the Third Ministerial Conference in the ‘Environment for Europe’ process. The Sofia Guidelines provided a basis for governments to begin work on a legally binding convention in negotiations held between 1996 and 1998. The negotiations, conducted with the active participation of civil society representatives, concluded with the adoption of the Aarhus Convention in June 1998 at the Fourth Ministerial ‘Environment for Europe’ conference. The Convention was signed

assessment (EIA). See further the discussion in Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar, 2009) 173–175.

¹⁵ Please see <<http://www.environmentforeurope.org/>> and <<http://www.unece.org/env/efe/welcome.html>> (both visited 26 April 2010).

¹⁶ See more on the Pan-European environmental process at <http://europa.eu/legislation_summaries/environment/cooperation_with_third_countries/l28132_en.htm> (visited 26 April 2010).

¹⁷ See also Svitlana Kravchenko, ‘The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements’, 7 *The Yearbook of European Environmental Law* (2007) 1–35 at 4–6.

¹⁸ UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876. Principle 10 of the Rio Declaration has been widely discussed in the international debate on public participation in environmental matters. See for example Jonas Ebbesson, ‘Introduction: Dimensions of Justice in Environmental Law’ in Ebbesson and Okowa, *Environmental Law and Justice in Context*, *supra* note 11, 1–35, at 13; Birnie, Boyle and Redgwell, *International Law*, *supra* note 6, at 295–298.

¹⁹ UN Doc. UN/ECE/CEP/24/Rev. 1 (1996). See also Jonas Ebbesson (ed.), ‘Access to Justice in Environmental Matters in the EU: Acces a la Justice en Matiere d’Environnement dans l’UE’, (Kluwer Law International, 2002) 10–11; Mikael Hilden and Eeva Furman, ‘Towards Good Practices for Public Participation in the Asia-European Meeting Process’ in Carl Bruch (ed.), *The Next “Public”: The Globalization of Public Participation* (Environmental Law Institute, 2002) 137–145 at 138. See also Aarhus Convention, ‘Archives’, available at <<http://www.unece.org/env/pp/archive.htm>> (visited 26 April 2010).

by 39 countries as well as the European Union (EU). The Aarhus Convention entered into force on 30 October 2001, after relatively rapid progress was made in obtaining the required sixteen instruments of ratification, acceptance, approval or accession.²⁰

There have been three sessions of the Meeting of the Parties (MoP, governing body of the convention) since the adoption of the Aarhus Convention: in 2002 in Lucca, Italy; in 2005 in Almaty, Kazakhstan; and in 2008 in Riga, Latvia. In addition to these, an extraordinary session of the MoP (ExMoP) was held in 2003 in Kiev, Ukraine, to adopt the Kiev Protocol (discussed further later in the paper).²¹ A further ExMoP was held in 2010,²² primarily for the purpose of establishing a Task Force on Public Participation.

As at the end of June 2010, the Aarhus Convention had 44 ratifications.²³ It is important to note the diversity of the Parties; they come from all parts of Europe as well as from Central-Asia. There are both 'rich' as well as 'poor' country Parties to the Convention. Therefore, it would be misleading to think that an instrument such as the Aarhus Convention can work only in wealthy societies, even if poorer ones face some additional challenges.²⁴

When discussing the composition of the Parties, it is also worth mentioning the significance of the ratification by the EU. This goes beyond the ratifications by the individual member states in that it means that EU institutions are also bound by the Convention, since they fall within the definition of 'public authority' in the Convention (except when acting in a judicial or legislative capacity). Therefore, the actual institutions need to provide access to information, allow public participation in decision making, and so forth, in accordance with the provisions of the Aarhus Convention.²⁵

²⁰ See Dannenmaier, 'A European Commitment to', *supra* note 5, at 40–42.

²¹ Information on the MoPs is available at <<http://www.unece.org/env/pp/>> (visited 26 April 2010). See further 'Convention bodies'. See also Dannenmaier, 'A European Commitment to', *supra* note 5, at 56–64.

²² The ExMoP was initially convened in April 2010 but did not achieve a quorum due to the widespread disruption of air travel following the eruption of an Icelandic volcano. It was there suspended and resumed on 30 June 2010.

²³ Status of ratification on 1 July 2010, see <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en> (visited 28 April 2010).

²⁴ In general, see discussion on the significance of participatory rights as a medium for the realization of environmental justice on a global and scale as well as in North-South relations in Ebbesson and Okowa, *Environmental Law and Justice in Context*, *supra* note 11.

²⁵ See the European Commission website on the Aarhus Convention, available at <<http://ec.europa.eu/environment/aarhus/index.htm>> (visited 28 April 10). See further on the access to information held by European institutions in Bell and McGillivray, *Environmental Law*, *supra* note 10, at 324; Jan Jans and Hans Vedder, *European Environmental Law* (3rd ed., Europa Law Publishing, 2008) 332–335; Davies, 'Public Participation', *supra* note 7, at 166–168.

3 Essential content of the Aarhus Convention

3.1 General features of the Convention

As its long title suggests, the Aarhus Convention consists of three main parts or ‘pillars’, namely the access to information pillar (see further Articles 4 and 5 of the Convention), the public participation pillar (see further Arts 6 to 8) and the access to justice pillar (see further Art. 9). Before discussing the pillars in greater detail, this paper first discusses some general features of the Convention (see further Arts 1 to 3).²⁶

First, the negotiators of the Convention agreed upon a ‘rights based approach’. Hence, although the Convention establishes certain procedural requirements, behind those procedures lies a set of *rights*. Specifically, the Convention indicates that the *substantive* right of both present and future generations to live in an environment adequate to their health and well-being exists *behind the procedural rights* to information, to participation and to justice. This objective is set out in Art. 1 of the Aarhus Convention. In practical terms, this could mean that if a judge is interpreting the Convention, and something seems to be falling somewhere ‘between the cracks’ in the procedure, the judge can still interpret the Aarhus Convention in the light of the rights enshrined in the Aarhus Convention – since these rights are the main objective of the Convention.²⁷ However, there are some limits to such judicial discretion, in the sense that Art. 1 only requires a Party to guarantee the rights to information, participation and justice ‘in accordance with the provisions of [the] Convention’.

The very broad definitions of the ‘public’, ‘public authorities’ and ‘environmental information’²⁸ also contribute to the cross-cutting character of the Aarhus Convention.²⁹ First, according to Art. 2(4), the definition of ‘the public’ includes any natural or legal person, and, in accordance with national legislation or practice, also their associations, organizations or groups. This definition is mainly applicable with respect to the access to information pillar. Essentially, it means that the rights to information that are given when a Party ratifies the Convention extend to people all around the planet. The right to request and receive environmental information is not limited within national borders or to citizens or residents of the country in which the information is held – for example, an Argentine based non-governmental organization (NGO) can make an information request to Finnish public authorities,

²⁶ For a general guide to the legal meaning of the provisions of the Aarhus Convention, see The Aarhus Convention – An Implementation Guide, *supra* note 7, at 1–7; David Hughes, Tim Jewell, Jason Lowther, Neil Parpworth and Paula de Prez, *Environmental Law* (4th ed., Butterworths LexisNexis, 2002) 157–160; Davies, ‘Public Participation’, *supra* note 7, at 157–180.

²⁷ See also The Aarhus Convention – An Implementation Guide, *supra* note 7, at 29.

²⁸ For a discussion on the definitions, see Davies, ‘Public Participation’, *supra* note 7, at 159–161; Hughes, et al., *Environmental Law*, *supra* note 26, at 155. See also The Aarhus Convention – An Implementation Guide, *supra* note 7, at 30–41.

²⁹ See also Elli Louka, *International Environmental Law. Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006) 130.

as happened in connection with a controversial pulp mill located in Uruguay close to the Argentine border.³⁰ Regarding this information request, there was no question raised in the Finnish response as to whether they needed to respond to the request or not. This broad definition of ‘the public’ is also applicable to some provisions under the public participation of the Convention. The ratification by a country entails the rights of citizens of other countries being recognized as well.

Second, according to Art. 2(2), of the Aarhus Convention, the definition of ‘public authority’ covers *all sectors* of government and *all levels* of government. Thus, the Convention and the corresponding implementing legislation do not only affect environmental ministries and other environmental agencies, but potentially all government ministries and agencies. Also, various bodies, which might not fall within a narrow concept of a public authority but which are nevertheless somehow under the control of government bodies and/or carrying out public services, are included. Hence, the Aarhus Convention could also from this point of view be seen as a broad and sustainable development oriented instrument, rather than something in a narrow ‘environmental’ box, even when the Convention as such is an environmental instrument.

Third, the Convention also includes a very broad definition of ‘environmental information’.³¹ According to Art. 2(3), environmental information means *any information* in written, visual, aural, electronic or any other material form. The definition of environmental information does not merely cover strictly environmental data, but also factors, activities or measures affecting the environment. The definition covers also human health issues to some extent, when these are related to environmental issues.

There are also provisions in the Convention against penalization, persecution or harassment of people seeking to exercise their rights under the Convention. The Convention establishes that people should be able to exercise such rights without fear of discrimination on the basis of (inter alia) citizenship, nationality or domicile.³²

³⁰ See further the International Court of Justice (ICJ) on the Pulp Mills on the River Uruguay case (*Argentina v. Uruguay*), Judgment of 20 April 2010. See also International Tribunal for the Law of the Sea (ITLOS) on MOX Plant Case (*Ireland v. United Kingdom*), Orders 13 November 2001 and 3 December 2001; European Court of Justice (ECJ) on MOX Plant case C-459/03; Permanent Court of Arbitration on the dispute between Ireland and United Kingdom (‘OSPAR’ Arbitration), Final Award on 2 July 2003; Permanent Court of Arbitration on the dispute between Ireland and United Kingdom (‘MOX plant case’), Order No. 6 on 6 June 2008. Furthermore, discussion concerning access to information, see Daniel Bodansky, ‘The OSPAR Arbitration and the MOX Plant Dispute’, *THE OSPAR ARBITRATION (IRELAND v. UNITED KINGDOM) AWARD OF 2003*, UGA Legal Studies Research Paper No. 08-002, (Asser Institute, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087417> (visited 4 May) 2–20. See also Louka, *International Environmental Law*, *supra* note 29, at 133.

³¹ See also Hughes, et al., *Environmental Law*, *supra* note 26, at 157–158.

³² See also *The Aarhus Convention – An Implementation Guide*, *supra* note 7, at 35.

Another important general feature of the Convention is that it contains the legal possibility for states outside of the UNECE region to become Parties to the Convention (discussed further below).

3.2 Access to information

The first pillar of the Aarhus Convention, the access to information pillar, is divided into two aspects, reflected in Articles 4 and 5 of the Convention respectively. The first of these, the ‘passive’ or ‘reactive’ aspect,³³ concerns the obligations on public authorities when they are presented with a request for environmental information. The essential feature of this part of the Convention is a presumption in favour of access to environmental information by any person; there is no need to prove or even state an interest. The environmental information should be provided as soon as possible, at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request (Art. 4(2)). The public authority may levy charges for the furnishing of the information, but these charges should not exceed a reasonable amount (Art. 4(8)). While this is open to interpretation, it gives the public some grounds to argue against excessive charges.

The Convention allows for certain information to be withheld (Art. 4, paras 3 and 4). Many of these are standard exemptions that are to be found in freedom of information-related legislation all around the world, such as commercial confidentiality or information the disclosure of which could adversely affect international relations. What is somewhat innovative about the Aarhus Convention is the amount of emphasis put on the public interest in disclosure. The Convention requires a public authority presented with a request for environmental information to take account of the public interest in disclosure when making its decision, if it intends to withhold information (restrictive interpretation, see further Art. 4(4)). Essentially, this means that, to justify a refusal to disclose information, it is generally not enough that the public authority establishes that the information request falls within an exempt category. It needs to go a step further; it needs to be able to say that even after it has taken the public interest in disclosure into account, the authority still decides that the information should be withheld. This is something that can be challenged. This particular feature of the Aarhus Convention is a step forward as compared with previous legislation that was in place in many European countries (for example, under Directive 90/313/EC).³⁴

The other part, the so called *proactive part* of the access to information pillar (Art. 5 of the Convention) concerns the active collection of information, management of

³³ On passive and active access to information, see also Hughes, et al., *Environmental Law*, *supra* note 26, at 157–159.

³⁴ See also Davies, ‘Public Participation’, *supra* note 7, at 162–164; Louka, *International Environmental Law*, *supra* note 29, at 132.

the information in a transparent and accessible way and public dissemination of the information. Immediate dissemination is required in cases where this could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to health or the environment. Information regarding international agreements, laws, policies, strategies, programmes and action plans relating to the environment are also to be disseminated. This second aspect includes quite a number of different elements, such as obligations on Parties to produce reports on the state of the environment at least every four years, to develop mechanisms concerning the public availability of product information so that consumers can make informed environmental choices and to take steps to develop pollution inventories, some of which have been developed further.³⁵

3.3 Public participation

The second pillar of the Aarhus Convention is the ‘public participation’ pillar. This pillar deals with public participation in several different contexts: first, with respect to decision-making on projects (Art. 6), second, with respect to decision-making on plans, programmes and policies (Art. 7), and third, with respect to decision-making on legally binding instruments such as rules and regulations (Art. 8).³⁶

The more detailed provisions in this area of the Convention apply to project-level decision making, i.e. decisions on whether to permit certain specific types of environmentally significant activities. Annex I of the Convention lists the types of activities are covered by these more specific and detailed procedures. They include power stations, chemical factories, waste management facilities, and oil and gas extraction facilities, amongst others. According to Art. 6, the procedures themselves include timely and effective notification of the public concerned, reasonable timeframes, possibilities of free inspection of relevant information by the public concerned, the possibility for the public to provide comments in writing or at a public hearing, an obligation on the public authority to take into account the outcome of the public participation, and finally the requirement promptly to publicize the decision and the argumentation on which it is based.

With respect to decision-making on programmes and plans, some of the same elements apply as in the case of decision-making on projects. According to Art. 7, the Parties shall make ‘appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment’. These are to include reasonable timeframes, possibilities for early participation when all options are open and an obligation to ensure that due account is taken of the outcome of the public participation. In respect of policies, there is a less prescriptive formulation according to which ‘[t]o the extent appropriate, each Party shall

³⁵ See the discussion on the Pollutant Release and Transfer Registers later in this paper.

³⁶ See also Davies, ‘Public Participation’, *supra* note 7, at 168–174; *The Aarhus Convention – An Implementation Guide*, *supra* note 7, at 85–122.

endeavour to provide opportunities for public participation in the preparation of policies relating to the environment’.

With respect to rules and regulations, in line with Art. 8, there is again a more general obligation to strive to promote effective public participation in the preparation of such legally binding instruments where these might have a significant effect on the environment.

3.4 Access to justice

The third pillar of the Aarhus Convention is the ‘access to justice’ pillar.³⁷ One component of this pillar requires Parties to ensure possibilities for access to justice with respect to information requests. Specifically, Art. 9(1), of the Convention provides that where an information request is refused or simply ignored, there should be review procedures³⁸ in place to enable the person who made the request to challenge the handling of the information request. Where a Party provides for such a review by a court of law, the Party should ensure that the requester has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.³⁹

Second, the Convention provides access to justice in connection with project level decision-making. According to Art. 9(2), the Party should ensure that members of the public concerned, either having sufficient interest or whose rights are impaired, have access to a review procedure to challenge the substantive or procedural legality of project-level decisions requiring opportunities for public participation pursuant to Art. 6. The scope of the concerned public’s right to such access should be interpreted in a manner consistent with the objective of wide access to justice within the scope of the Convention, with environmental NGO’s being generally included.⁴⁰

There is also a more general form of access to justice envisaged in the Convention. Art. 9(3) requires that the Parties should have in place administrative or judicial review procedures enabling members of the public to challenge general violations of national law relating to the environment. This covers acts and omissions by private persons and public authorities. However, the Party has a rather broad discretion to establish standing. It is open to discussion just how broad that discretion actually is, but it is not unlimited. The Compliance Committee of the Aarhus Convention has

³⁷ See discussion on the concept of ‘environmental justice’ in Ebbesson, ‘Introduction’, *supra* note 18, at 1–11.

³⁸ See the extensive discussion on the *review procedures* in *The Aarhus Convention – An Implementation Guide*, *supra* note 7, at 125–136. Furthermore, for discussion, see Davies, ‘Public Participation’, *supra* note 7, at 164.

³⁹ See also Dette, ‘Access to Justice in Environmental Matters’, *supra* note 9, at 3–7.

⁴⁰ On NGOs, see also Jan Darpö, ‘Environmental Justice Through Environmental Courts?’ in Ebbesson and Okowa, *Environmental Law and Justice in Context*, *supra* note 11, 176–194 at 190–192.

deemed that if a Party establishes standing criteria that are so restrictive that effectively no, or almost no, members of the public have standing, this would not be in compliance with the Convention.⁴¹

Each of these types of procedure – access to justice in relation to information requests, in relation to project-level decision-making subject to public participation requirements and in relation to more general violations of national law relating to the environment – should meet certain standards. According to Art. 9(4) and (5) of the Convention, the procedures should provide adequate and effective remedies, including injunctive relief as appropriate, and should be fair, equitable, timely and not prohibitively expensive. Decisions resulting from the review procedures should be in writing, and court decisions should be publicly accessible. Mechanisms to remove or reduce financial barriers should also be considered. This is especially important in countries where the costs of going to court are very high and create a de facto barrier, even when the law as such provides for the theoretical possibility of challenging a matter in court.⁴²

4 Mechanisms and measures promoting effective implementation

4.1 Challenges of implementation

It is one thing to negotiate and agree on the text of a treaty and then adopt it. It is another for each government to return home and ensure ratification so that the treaty can enter into force. It is yet a third challenge for the government then to implement the treaty by introducing the required domestic legislation, where such domestic legislation is required. The fourth challenge is to ensure practical application of that legislation. Of these four stages, the biggest challenges for the Aarhus Convention at the present time appear to concern implementation and the application of the implementing legislation (or the treaty itself, where this has direct effect).

There are different sources of information about the extent of these challenges. First, there are the official reporting and compliance mechanisms under the Convention. These have been supplemented by various information-gathering exercises involving questionnaires, for instance under the auspices of the Task Forces on electronic information tools, on access to justice and on public participation in international forums. In addition, there have been various independent studies on the level of

⁴¹ See for example the Committee's findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice, adopted by the Committee at its twelfth meeting. UN Doc. ECE/MP.PP/C.1/2006/4/Add.2 (2006) paras 35–36.

⁴² See also Davies, 'Public Participation', *supra* note 7, at 164, 174–184; Darpö, 'Environmental Justice Through Environmental Courts?', *supra* note 40, at 181–185.

implementation. These sources of information tend to indicate that the implementation of the information pillar is the least problematic. There are more problems with the public participation pillar. The greatest number of problems occur with the access to justice pillar. However, there are several means under the Aarhus Convention to monitor and improve implementation: capacity-building, the reporting mechanism and the compliance mechanism are discussed in the following paragraphs.⁴³

4.2 Capacity-building

An international treaty, such as the Aarhus Convention, and the domestic legislation introduced to implement it together provide a legal framework establishing minimum requirements. However, effective implementation is only possible if the relevant actors have sufficient capacity to take the actions needed to fulfil those requirements. In the case of the Aarhus Convention, there are (broadly speaking) two types of actors involved. On the one hand, there are the public officials involved in responding to requests from the public for access to environmental information, establishing environmental information systems, managing licensing and permitting procedures involving public participation or servicing appeals mechanisms (including judges). On the other hand, there are the members of the public (including NGOs) seeking to gain access to environmental information, to participate in environmental decision-making processes or to have access to administrative or judicial procedures. Capacity-building for the first group is needed in order to ensure that public authorities fulfil their obligations under the Convention towards the public; whereas capacity-building for the second group is needed to ensure that the intended beneficiaries of the Convention, namely members of the public, and those representing their interests (including public interest lawyers) have the capacity and expertise to effectively exercise their rights under the Convention.

A number of organizations in Europe have joined together and are coordinating with each other to help countries to build their capacity to implement the Convention. These organizations include, for example, the United Nations Institute for Training and Research (UNITAR);⁴⁴ the United Nations Environment Programme (UNEP);⁴⁵ the Organization for Security and Co-operation in Europe (OSCE);⁴⁶ a number of regional environmental centres (RECs);⁴⁷ and the European Commission through its programme for Technical Assistance to the Commonwealth of Independent States and Mongolia (the TACIS programme). Through this, the Aarhus Convention has been able to be more effective in terms of avoiding duplication and trying to cover

⁴³ See also Kravchenko, 'The Aarhus Convention and Innovations in Compliance', *supra* note 17, at 1–3; 'Together with article 15 on review of compliance, this paragraph (article 10, paragraph 2) establishes a two-tier review mechanism...', see further *The Aarhus Convention – An Implementation Guide*, *supra* note 7, at 140.

⁴⁴ See, generally, <<http://www.unitar.org/>>.

⁴⁵ See, generally, <<http://www.unep.org/>>.

⁴⁶ See, generally, <<http://www.osce.org/>>.

⁴⁷ See, generally, <<http://www.rec.org/>>.

gaps to support countries, in particular those countries whose economies are more challenged, to implement the Convention more effectively.⁴⁸

In addition, there is a fairly new phenomenon which has contributed to building capacity: over the past few years, a number of so called 'Aarhus centres'⁴⁹ have been established in several countries, in most cases with the support of the OSCE. The Aarhus centres are akin to environmental information centres, but they generally go further than that, endeavouring to support implementation of the participation pillar (and even the access to justice pillar in some cases) through training and similar activities.

4.3 Reporting mechanism

Most international environmental treaties have reporting mechanisms,⁵⁰ and the Aarhus Convention is no exception to this respect. The essential core of such reporting mechanisms is that each Party reports periodically to the governing body on its efforts to implement the treaty. According to Art. 10(2) of the Aarhus Convention, the Parties should keep the implementation of the Convention 'under continuous review [...] on the basis of regular reporting by the Parties'. The reporting mechanism was adopted through decision I/8 on reporting requirements at the first session of the MoP (MoP-1) in Lucca in October 2002.⁵¹

What makes the Aarhus reporting mechanism somewhat different and innovative is that the decision establishing the mechanism requires that the reports be prepared through a transparent and consultative process involving the public.⁵² So, the Aarhus principles are reflected in the mechanism itself. This has quite an interesting effect because it means that there is public pressure on governments, first of all, not to forget the reporting mechanism, but also then to listen to the views of the public about the progress in implementation when they are preparing their implementation reports. This has probably had a significant impact on the level of reporting, which is very high. At MoP-2, 26 Parties (out of the 30 Parties subject to the reporting requirements at that time) reported before the meeting, and the other four reported afterwards. Therefore, the eventual result was 100 percent reporting by the Parties. This also happened at MoP-3. The reports have to some extent taken into account

⁴⁸ On capacity building, see also *The Aarhus Convention – An Implementation Guide*, *supra* note 7, at 44–45.

⁴⁹ For more information on the Aarhus Centres, see <<http://www.unece.org/env/pp/acintro.htm>> (visited 29 April 10).

⁵⁰ Lal Kurukulasuriya and Nicholas A. Robinson (eds), *Training Manual on International Environmental Law* (UNEP, 2006) 42.

⁵¹ See Decision I/8 on Reporting Requirements, UN Doc. ECE/MP.PP/2/Add.9 (2002). See also Decisions II/10 and III/5 on Reporting Requirements UN Docs ECE/MP.PP/2005/2/Add.14 (2005) and ECE/MP.PP/2008/2/Add.7 (2008).

⁵² See the Aarhus Convention website for reporting requirements, available at <<http://www.unece.org/env/pp/Reports.htm>> (visited 4 May). For discussion on the national reports and NGO participation, see Kravchenko, 'The Aarhus Convention and Innovations in Compliance', *supra* note 17, at 24.

the views of members of the public, usually NGOs, who have commented on the draft reports.

4.4 Compliance mechanism

According to Article 15 of the Aarhus Convention, the MoP should establish optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. The arrangements should allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to the Convention. The compliance mechanism was later established through Decision I/7 on review of compliance adopted at MoP-1.⁵³

The compliance mechanism, like the reporting mechanism, also has special 'Aarhus features' in the sense that whereas a number of international environmental agreements have compliance mechanisms these days, the Aarhus Convention compliance mechanism is rather unusual in the extent to which it provides for involving the public in the mechanism. First of all, the public – any member of the public, anywhere – under the Aarhus mechanism has the possibility to submit a communication to the Compliance Committee and thereby to trigger a review of a given Party's compliance. With many other compliance mechanisms, this possibility of triggering the review process is reserved to Parties, either concerning compliance by other Parties or concerning their own compliance. With some mechanisms, the secretariat has the possibility of triggering the review process. Under the Aarhus Convention, all of these are possible in addition to the so-called public trigger. Thus a review of compliance by an individual Party may be triggered by a submission by a Party about another Party, a submission by a Party about itself, a referral by the secretariat or by a communication by a member of the public (see further Decision I/7).⁵⁴

Under the Aarhus Convention, the public trigger has actually generated the majority of the Committee's workload. By June 2010, 50 communications had been submitted to the Compliance Committee. While the Committee found some communications to be inadmissible and with respect to others found that there was no non-compliance, in several cases it found the Parties in question to be non-compliant. In each of these cases the MoP agreed with the finding of the Compliance Committee, and thus three Parties were found to be non-compliant at MoP-2 and six at MoP-3. The Committee has expressed its conviction that such cases of non-compliance would not have necessarily come to light if they had not been brought to its

⁵³ See also Decision I/7 on Review of Compliance, UN Doc. ECE/MP.PP/2/Add.8 (2004). Minor revisions were made through Decisions II/5 (UN Doc. ECE/MP.PP/2008/2/Add.7 (2008)) and III/6 (UN Doc. ECE/MP.PP/2008/2/Add.8 (2008)).

⁵⁴ See further discussion on the compliance mechanism in Kravchenko, 'The Aarhus Convention and Innovations in Compliance', *supra* note 17, at 3–35.

attention by the public.⁵⁵ Thus, it is difficult to overstate the importance of the public trigger.

The other somewhat unusual or distinguishing feature of the Aarhus Convention compliance mechanism is that the Compliance Committee is made up of members serving in their personal capacities, so that it is not a committee made up of Parties or even representatives of Parties. The Committee consists of nine independent people who are supposed to be chosen for their individual expertise. Specifically, the Committee is to be composed of nationals of the Parties and Signatories to the Convention who are 'persons of high moral character and recognized competence in the fields to which the Convention relates'. The Committee may not include more than one national of the same state (see further the Decision I/7).

Thus, the Compliance Committee is an independent body. This independence goes quite beyond the kind of independence found in some other compliance review bodies, where the members are still paid by their governments for their travel, for instance, and report back to their governments on the proceedings. In the case of the Aarhus Convention Compliance Committee, the members' travel and subsistence costs are financed through the Convention's trust fund, supporting the idea that the Committee truly is independent.⁵⁶

Perhaps in order to compensate for these two quite innovative features – that any member of the public can trigger the review process and the fact that the review process is carried out by an independent committee – the powers of the Committee are rather limited. During the intersessional period, it may only with the agreement of that Party make recommendations to a Party it finds to be in non-compliance. Even the issuing of advice and facilitation of assistance to such a Party may only be done in consultation with the Party during the intersessional period. That said, it is usually in the interests of the Party concerned to respond positively to an approach from the Committee during the intersessional period, so that the Committee will be able to refer to positive developments when it reports to the MoP at the end of the intersessional period.

In terms of dealing with non-compliance, there have been different levels of success. On the one hand, there have been some cases of repeated non-compliance where only limited progress has been made toward resolving the issues. On the other hand, there have also been some 'success stories': one even involving a situation where the Committee found that a Party was actually not in non-compliance, but that it would go into non-compliance unless certain steps were not taken or if certain practices

⁵⁵ In its report to MoP-2, the Committee stated that the possibility for the public to submit communications 'provides a unique and valuable channel of information on matters relevant to compliance, which would otherwise not necessarily come to [the Committee's] attention or to that of the Meeting of the Parties'. UN Doc. ECE/MP.PP/2005/13 (2005), para. 56.

⁵⁶ On the compliance committee, see also <<http://www.unece.org/env/pp/ccBackground.htm>> (visited 29 April 10).

dating from prior to the Convention's entry into force were to continue. The Parties concerned have, for the most part, responded positively to the Committee. As signalled in Art. 15, the Committee should conduct its work in a supportive way, not as a Convention 'police force'.⁵⁷

To summarize, the Convention's compliance mechanism has apparently been fairly effective, in particular due to its innovative features. However, the mechanism requires the commitment of many working hours by Committee members (whose time is unpaid) and the secretariat staff, notably in connection with the processing of communications from the public.

5 New frontiers

5.1 Aarhus as a model for other regions and in other thematic areas

In 2005, the MoP adopted Decision II/9 on accession to the Convention by non-ECE Member States.⁵⁸ Decision II/9 emphasizes the Parties' support for accession to the Aarhus Convention by states outside the ECE region, development of global guidelines on the application of Principle 10 of the Rio Declaration⁵⁹ under UNEP and development of appropriate regional instruments on the issues covered by the Convention. The secretariat was requested to provide assistance and advice in each of these areas. Similar points have been made in high-level declarations at successive sessions of the MoP⁶⁰ and in the strategic plan for 2009–2014, which sets the goal of having some states from outside the ECE region become Parties to the Convention by 2011.⁶¹

To date, no states from outside of the ECE region have acceded to the Convention, though some have expressed interest in doing so.⁶² One potential obstacle is the requirement in Art. 19(3) of the Convention that such states may only accede to the Convention 'upon approval by the Meeting of the Parties'. Whereas decision II/9 established that such approval should not be taken to imply 'a substantive review, by the Meeting of the Parties, of that [s]tate's national legal system and administrative practices', it is unclear what criteria the MoP should apply in deciding whether to approve accession by a non-ECE state. Nor is it clear at what stage in the process of a non-ECE state preparing to accede to the Convention the MoP approval should

⁵⁷ See also *The Aarhus Convention – An Implementation Guide*, *supra* note 7, at 150.

⁵⁸ II/9 on Accession by non-ECE Member States, UN Doc. ECE/MP.PP/2005/2/Add.13 (2005).

⁵⁹ UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) 876.

⁶⁰ See Lucca Declaration, UN Doc. ECE/MP.PP/2002/CRP.1 (2004), para. 32; Almaty Declaration, UN Doc. ECE/MP.PP/2005/2/Add.1 (2005), para. 24; and Riga Declaration, UN Doc. ECE/MP.PP/2008/2/Add.1 (2008), para. 23.

⁶¹ Decision III/8 on the Strategic Plan 2009–2014, UN Doc. ECE/MP.PP/2008/2/Add.16 (2008), para. 10(d).

⁶² For example, Cameroon and Guinea Bissau.

be sought or granted, or at what level an expression of interest from the interested state should be made in order to merit a response from the MoP. These issues are currently under active consideration by the Parties, with a view to the matter being clarified at MoP-4 (Chisinau, June 2011). The option of amending the Convention to remove the requirement for MoP approval of accession by non-ECE states has been suggested, but current indications are that there is a reluctance to pursue this option.⁶³

More progress has been made with respect to the second route for promoting Principle 10 outside the ECE region, namely global guidelines. At its eleventh special session (Bali, February 2010), the UNEP Governing Council adopted guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters.⁶⁴ The Aarhus Parties played a generally supportive role in the process, with the Chair of the Aarhus MoP chairing the negotiations over the draft guidelines and various experts from the Aarhus processes, including from the secretariat, lending their expertise in the drafting process.

To date, no other major world regions have embarked on a process of developing a legally binding regional instrument equivalent to the Aarhus Convention. To some extent, the Aarhus Convention could serve as a model for other regions interested in carrying out a similar exercise. It should not, however, be viewed as a perfect template or as a blueprint – the text of the Aarhus Convention does, after all, represent a series of compromises, as with any other international agreement. Rather, it could serve as an important reference point, looked at from the point of view of what lessons can be learned and what has been achieved under the Convention.

The Aarhus Convention could serve also as a model for participatory democracy in thematic areas other than the environment. For example, the Council of Europe has recently negotiated and adopted a treaty on freedom of access to official documents.⁶⁵ In the drafting process, the negotiators were able to take account of the Aarhus Convention – even though the Aarhus Convention deals only with environment-related information – and draw lessons from it. Another example of the Aarhus Convention being valued as a model is in relation to the ‘governance of the internet’ and the issues of access to information, transparency and participation in that context. The Aarhus Convention secretariat has been invited to share the developments under the Aarhus Convention within the Internet Governance Forum, an international group working on this issue. The group’s work on the governance of the internet is not specifically

⁶³ See Report of the twelfth meeting of the Working Group of the Parties, UN Doc. ECE/MP.PP/WG.1/2010/2 (2010, in preparation at the time of writing).

⁶⁴ UNEP Governing Council decision SS.XI/5: Environmental law (part A), annexed to the proceedings of the special session, can be reached through <http://www.unep.org/gc/GCSS-XI/proceeding_docs.asp> (visited 18 July 2010).

⁶⁵ Council of Europe Convention on Access to Official Documents, Tromsø, 18 June 2009, Council of Europe Treaty Series No. 205, available at <<http://conventions.coe.int/Treaty/en/treaties/html/205.htm>> (visited 11 July 2010).

related to the environment, but the group has been able to draw upon what is happening in the environmental sphere through the Aarhus Convention.

Through the strategic plan that the Parties adopted in June 2008 at MoP-3, as well as through the Riga Declaration, the Parties expressed their interest in giving support to other areas that have expressed their interest in promoting participatory democracy in thematic areas other than environment.⁶⁶

5.2 Promoting the Aarhus principles in international fora

Another important development under the Convention concerns the promotion of the Aarhus principles in international fora. The main thrust of the Convention is about what happens at the national and sub-national level within the jurisdiction of the Parties (the special case of the EC should be noted separately). However, during the negotiations toward the Convention, it was recognized that a large number of decisions with significant environmental implications are taken at the international level, and that at that level there is the same need for transparency and accountability as at the national and sub-national levels. There was a concern that even if the public had perfect access to information, public participation and access to justice up to the national level, if there were no such arrangements when governments are making decisions as a group, this would represent a democratic deficit.

This recognition led to the inclusion of a provision in the Convention, Art. 3(7), according to which each Party is required to promote the application of the principles of the Convention in international fora dealing with the environment. It is noteworthy that Art. 3(7) creates obligations on the Parties to the Aarhus Convention concerning how they should behave when they participate in such international fora. It does not, and could not, create obligations for the international forums themselves, since they have their own governing bodies and could encompass non-Parties to the Aarhus Convention as well. It is also noteworthy that the fora covered by the provision are not limited to those with an obvious environmental mandate (such as UNEP or the 'Environment for Europe' process), but extend to those whose decisions may have environmental implications (such as the World Trade Organization,⁶⁷ when it is taking such decisions).

Even though the language of the aforementioned provision is somewhat vague, requiring each Party only to *promote* the application of the *principles* of the Convention, not to *apply its provisions*, it is nonetheless legally binding and was arguably the most that could be achieved within the time constraints of the negotiating process. Most important, it served its purpose in introducing the idea into the Convention and thereby putting the issue onto the agenda. Thus, Art. 3(7) later provided the

⁶⁶ Riga Declaration, para. 24; and Decision III/8 on the Strategic Plan 2009-2014, Objective III.7.

⁶⁷ See, generally, <<http://www.wto.org/>>.

basis for developing a set of guidelines, the Almaty Guidelines on Promoting the Application of the Principles of the Convention in International Forums, that were adopted at MoP-2 in 2005.⁶⁸ The Almaty Guidelines, while non-binding, go further in elaborating the modalities of how the principles of the Convention could be taken up and acted on in international fora. These guidelines have been disseminated to a wide range of international fora. A Task Force, led by France, was established to look further at the issue of how international fora deal with the issues of access to information, public participation and access to justice.⁶⁹ For example, a questionnaire was sent out by the Task Force to collect such information.

6 Activities under the Aarhus Convention

6.1 The Kiev Protocol on Pollutant Release and Transfer Registers

The Kiev Protocol on Pollutant Release and Transfer Registers was adopted at an extraordinary MoP to the Aarhus Convention on 21 May 2003. The meeting took place within the framework of the Fifth Ministerial Conference 'Environment for Europe' held in Kiev, in May 2003. The Kiev Protocol is the first legally binding international instrument on pollutant release and transfer registers (PRTRs). Its objective, set out in Art. 1 of the Protocol, is 'to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers'. PRTRs are inventories of pollution from industrial sites and other sources. Although regulating information on pollution, rather than pollution directly, the Kiev Protocol is expected to exert a significant downward pressure on levels of pollution, as polluting companies are likely to strive to avoid the negative publicity associated with being identified as being among the biggest polluters. Like the Aarhus Convention itself, any UN Member State can become a Party to the Protocol, including those which have not ratified the Aarhus Convention and those which are not members of the ECE. It is by design an 'open' global protocol, and has some features of an independent treaty since it has its own governing structure as well.⁷⁰

According to Art. 4 on core elements of a pollutant release and transfer register system, the Protocol requires each Party to establish a PRTR which is publicly accessible through the internet and is maintained through mandatory annual reporting of emissions to air, water and soil, and transfers, of certain listed pollutants from certain types of environmentally significant activities.

⁶⁸ Decision II/4 on the Application of the Convention in International Forums, UN Doc. ECE/MP.PP/2005/2/Add.5 (2005).

⁶⁹ See further the website of the Task Force on Public Participation in International Forums, available at <<http://www.unece.org/env/pp/ppif.htm>> (visited 30 April 10).

⁷⁰ See UNECE. 'Kiev Protocol', available at <<http://www.unece.org/env/pp/prtr.htm>> (visited 30 April 10). See also Louka, *International Environmental Law*, *supra* note 29, at 135–136.

The Kiev Protocol addresses an issue which the Convention only touches on lightly, namely that of information held by the private sector. The information provisions in the Convention mainly concern the right of the public to have access to information and the corresponding obligation on public authorities to provide information to the public. There are very few provisions dealing with information held by the private sector. The Kiev Protocol effectively creates, albeit indirectly, reporting obligations for companies dealing with large environmentally significant activities, requiring them to report annually and on a mandatory basis on their releases and transfers of the 86 types of pollutants listed in the Protocol, including amongst others the main greenhouse gases, ozone depleting substances, persistent organic pollutants, heavy metals and so on. By bringing in the private sector in this way, the Protocol represents a new departure. The reporting is facility-specific, yielding data on how much each facility is emitting into the environment. Essentially, it means that anyone living in a certain town will be able to see what quantities of the major pollutants are being emitted each year from the main factories in their neighbourhood, provided of course that the factories are on a scale that is covered by the obligations. All of this information should be available through the internet.

The Kiev Protocol could thus be described as a real ‘right-to-know tool’, following to some extent the model of the US Toxics Release Inventory Program⁷¹ developed in the 1980s. The Kiev Protocol became international law binding on its Parties when it entered into force on 8 October 2009. However, it had an important effect in Europe even before entering into force. For example, the EC had already put in place the necessary implementing legislation before the Protocol entered into force, in the form of a Regulation having direct effect through the European Union.⁷²

6.2 Other Activities

The topic of genetically modified organisms (GMOs) proved to be one of the most controversial during the negotiations over the draft Aarhus Convention. There was a recognition by the Member States at the time they adopted the Convention that more work was needed in this area, as reflected for example in the Resolution of the Signatories that was adopted in June 1998.⁷³ A process was set up which ran for several years. The discussions were first held in a Task Force and then in a Working

⁷¹ See also US Environmental Protection Agency, ‘Toxics Release Inventory (TRI) Program’, available at <<http://www.epa.gov/TRI/>> (visited 30 April 10).

⁷² Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC.

⁷³ The Resolution of the Signatories to the Convention states as follows:

[the Signatories] recognize the importance of the application of the provisions of the Convention to deliberate releases of genetically modified organisms into the environment, and request the Parties, at their first meeting, to further develop the application of the Convention by means of inter alia more precise provisions, taking into account the work done under the Convention on Biological Diversity which is developing a protocol on biosafety.

Group,⁷⁴ with a particular focus on the issue of public participation in decision-making related to GMOs. The reason for this was that Convention itself, through Art. 6(11), deals with public participation in GMO decision-making in a somewhat lighter way than it does with decision-making on other environmentally significant activities. The outcome of the work in the Task Force and Working Group was that in 2002, at MoP-1, a set of guidelines on GMOs,⁷⁵ as they relate to the Aarhus issues, was introduced. This was followed in 2005 by the adoption of an amendment to the Convention. This amendment effectively aims to strengthen the rights of the public to participate in decision-making on GMOs by introducing a new Art. 6 bis and Annex I bis.⁷⁶ This is an important area of activity, although the amendment has not entered into force yet. Twenty-seven ratifications, acceptances or approvals by State Parties that were Parties at the time of the adoption of the amendment are required in order for the amendment to enter into force.⁷⁷ As of June 2010, there have been 21 such ratifications, acceptances and approvals.

As regards other activities, for each of the pillars there is an ongoing set of activities: since MoP-1, there have been Task Forces on access to justice and electronic information tools. At MoP-3, an Expert Group dealing with public participation was established. This was upgraded to a Task Force at the ExMoP held in 2010. The Aarhus Convention thus has Task Forces to support the implementation of each of the pillars of the Convention. There is also a Clearinghouse on environmental democracy providing access to a wide range of information on procedural environmental rights, whether directly related to the Convention or not.⁷⁸

7 NGO participation

A key factor in the success of the Convention has been the participation of non-governmental organizations (NGOs) in the Convention processes. From the very start, the negotiation process involved full and active participation of NGOs. This meant that the Convention was put to a 'relevance test' during every step of the negotiating process, with feedback being provided by what might be considered the principal 'clients' of the Convention, namely the environmental NGOs on behalf of the wider public wishing to exercise rights to information, participation or justice.

Resolution on access to information, public participation and access to justice in environmental matters, UN Doc. ECE/CEP/Add.1/Rev.1 (1998), para. 15.

⁷⁴ See further actions on GMOs at <<http://www.unece.org/env/pp/gmo.htm>> and the website of the Working Group on GMOs at <<http://www.unece.org/env/pp/gmowg.htm>> (both visited 30 April 10).

⁷⁵ Decision I/4 on Genetically Modified Organisms, UN Doc. ECE/MP.PP/2/Add.5 (2002).

⁷⁶ Decision II/1 on genetically modified organisms, UN Doc. ECE/MP.PP/2005/2/Add.2 (2005).

⁷⁷ The conditions for the entry into force of amendments were clarified by the MoP through decision III/1 on the interpretation of Article 14 of the Convention, UN Doc ECE/MP.PP/2008/2/Add.3 (2008). According to this decision, ratifications, acceptances and approvals by Parties that were not Parties at the time of the adoption of the amendment do not count towards its entry into force.

⁷⁸ See <<http://www.unece.org/env/pp/welcome.html>> and Aarhus Clearinghouse for Environmental Democracy at <<http://aarhusclearinghouse.org>> (both visited 30 April 10).

The governments were of course the final ones to decide as to what was included in the Convention and what was left out, and this was where compromise was found.

The involvement of NGOs in the implementation of the Convention continues to be crucial, both at the international level and at the 'ground level' of national implementation. At the international level, NGOs have been involved as observers in the sessions of the MoP and its various subsidiary bodies, including the Bureau. Some aspects of their participation are reflected in legal or quasi-legal texts (for example, the rules of procedure), whereas others have evolved as a matter of practice (for example, the practice of routinely funding the participation of NGO representatives at meetings of the Convention bodies from the Convention's trust fund).

8 Conclusion

The Aarhus Convention strengthens the relationship between government and civil society, by establishing certain rights and procedures that aim to guarantee in practical ways the transparency and accountability of government institutions. As already mentioned, the Convention is not a blueprint or a perfect text, but is rather a practical compromise that takes into account the needs of government as well as those of civil society. More than a decade after the Convention was adopted, it can be declared to have been a success. It has either transformed or begun to transform the situation in many European countries, particularly further to the East where legislation has been or is being introduced or upgraded to reflect the requirements of the Convention.

Obviously, many challenges and problems still persist with respect to the Aarhus Convention. On the one hand, there have been and continue to be failures in implementation or application of the Convention; on the other, there are aspects of the text of the Convention itself which are regarded by some of those seeking to exercise their rights under the Convention as weaknesses or loopholes.⁷⁹ The general picture, however, is that introducing this international treaty has brought about beneficial changes that would not otherwise have taken place.

The Convention has tremendous potential to serve as a model for other parts of the world to follow. The relatively recent adoption of the Bali Guidelines provides a good basis for further work around the world on procedural environmental rights. Such work could proceed on a regional basis, for example through the development of

⁷⁹ It is beyond the scope of this paper to examine which parts of the Convention text could usefully be strengthened. It has however become clear, not least through the work of the Compliance Committee, that the Convention does not establish meaningful public participation rights with respect to various types of environmentally significant decisions, either because they fall below the rather high thresholds established in annex I (and the wording of Art. 6(1)(b) does not provide an adequate safety net) or because they are not decisions of a type covered by Articles 6, 6 bis, 7 or 8. The newly established Task Force on Public Participation could prove a useful forum to look into this issue.

regional instruments, or at global level. The United Nations Conference on Sustainable Development scheduled for 2012 (known as ‘Rio plus 20’) provides an opportunity for new initiatives to come onto the global agenda and the possibility of a global convention has already been raised in this connection.⁸⁰ One of the two themes of the Conference will be the institutional framework for sustainable development – including global environmental governance – which would clearly embrace the issues addressed by Principle 10, the Bali Guidelines and the Aarhus Convention.

⁸⁰ For example, a multi-stakeholder meeting convened by the Stakeholder Forum for a Sustainable Future in November 2008 to explore the possibility of a world summit on sustainable development in 2012 resulted in the Donostia Declaration, which states as follows: ‘The development of a global convention on access to information, participation and justice (Principle 10 of the Rio Declaration) could be an important contribution to ensuring the delivery of future agreements’. See <http://www.stakeholderforum.org/fileadmin/files/Earth_Summit_2012/Earth_Summit_2012_Donostia_Declaration__2_.pdf> (visited 10 October 2010), at 15.



PART III

**PARTICULAR SUBJECTS INFLUENCING
GOVERNANCE
IN INTERNATIONAL ENVIRONMENTAL LAW**



THE ROLE OF MAJOR GROUPS AND STAKEHOLDERS IN ENVIRONMENTAL NEGOTIATIONS AND GOVERNANCE

*Olivier Deleuze*¹

1 Definition

There is no agreed definition within the United Nations System of ‘Civil Society’. Indeed, representatives of the business community are considered by some to be part of civil society because of their non-governmental character; while others object that the ‘for profit’ nature of business community activities cannot be reconciled with the nature of civil society organizations proper. In a similar way, the question of whether parliamentarians are part of civil society also remains unsolved. This is why the United Nations Conference on Environment and Development (UNCED),² agreed to avoid this debate about who is part of the civil society and who is not, by using another term: ‘the Major Groups’.

After lengthy discussions during UNCED, consensus was reached on the existence of nine major groups; these being:

1. Workers and Trade Unions.
2. Business and Industry.
3. Indigenous Peoples and their Communities.
4. Local Authorities.
5. Women.
6. Non-Governmental Organizations (NGOs).
7. Farmers.

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² The United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 1992. See <<http://www.un.org/geninfo/bp/enviro.html>> (visited 8 September 2010).

8. The Scientific and Technological Community.
9. Children and Youth.

This immediately raises the issue of why these groups, and not others like disabled persons, faith groups, consumers, and so forth, have been given the status of a major group. The solution adopted by the United Nations Environment Programme (UNEP)³ has been to add the concept of 'stakeholders' to the discussion. This includes potentially every group that is not fully governmental. The present paper therefore discusses the roles and potential roles that are, or can be, played by major groups and stakeholders in environmental negotiation and governance.

2 Rules

UNEP, since its creation in 1972,⁴ has warmly welcomed the engagement of the 'Major Groups and Stakeholders' in its activities because, clearly, they are strategically valuable allies. By bringing in their scientific and technical expertise, by mobilizing the public opinion in favour of taking care of the environment, by helping UNEP to define under which conditions the environment concerns and constraints can be an asset for development, growth and social justice, these groups may help the United Nations Environment Programme to fulfil its mandate.

The Rules of Procedure⁵ of UNEP's Governing Council (GC)⁶ related to this engagement are quite broad. Indeed, Rule 69⁷ states that:

³ See <<http://www.unep.org/>>.

⁴ On the establishment and early operational years of the UNEP, see Donald Kaniaru, 'The Stockholm Conference and the Birth of the United Nations Environment Programme', in Marko Berglund (ed.), 2005 *International Environmental Law-making and Diplomacy Review*, University of Joensuu – UNEP Course Series 2 (University of Joensuu, 2006) 3–22; and Shafqat Kakakhel, 'The Role of the United Nations Environment Programme in Promoting International Environmental Governance', in Marko Berglund (ed.), 2005 *International Environmental Law-making and Diplomacy Review*, University of Joensuu – UNEP Course Series 2 (University of Joensuu, 2006) 23–42.

⁵ For the UNEP Governing Council's Rules of Procedure, see <<http://www.unep.org/resources/gov/Rules.asp>> (visited 8 September 2010).

⁶ The UNEP Governing Council, established in accordance with UNGA Res. 2997 on 15 December 1972, reports to the General Assembly on its functions and responsibilities: these being the promotion of international cooperation; the provision of general policy guidance; the review of periodic reports from UNEP; review of the World environmental situation; continual review of the impacts of national and international measures and policies on developing countries; and review and approval of the programme of utilization of resources of the Environmental Fund. Importantly for the argument in the present paper, the Governing Council must also promote the contribution of the relevant international scientific and other professional communities to the acquisition, assessment and exchange of environmental knowledge and information and, as appropriate, to the technical aspects of the formulation and implementation of environmental programmes within the United Nations system. See <<http://www.unep.org/resources/gov/overview.asp>> (visited 8 September 2010).

⁷ Chapter XIV – 'Observers of Internation[al] Non-Governmental Organizations'. See <<http://www.unep.org/Documents.Multilingual/Default.asp?Documentid=77&Articleid=1155&L=En>> (visited 8 September 2010).

[i]nternational non-governmental organizations having an interest in the field of the environment, referred to in Section IV, paragraph 5, of General Assembly resolution 2997 (XXVII), may designate representatives to sit as observers at public meetings of the Governing Council and its subsidiary organs, if any. The Governing Council shall from time to time adopt and revise when necessary a list of such organizations. Up the invitation of the President or Chairman, as the case may be, and subject to the approval of the Governing Council or of the subsidiary organ concerned, international non-governmental organizations may make oral statements on matters within the scope of their activities.

Written statements provided by international non-governmental organization referred to in paragraph 1 above, related to items on the agenda of the Governing Council or of its subsidiary organs, shall be circulated by the secretariat to members of the Governing Council of the subsidiary organ concerned in the quantities and in the languages in which the statements were made available to the secretariat for distribution.

Because of the common views between UNEP and the Major Groups and Stakeholders, these provisions have been implemented by the Governing Council in quite an extensive way. These observers are not only allowed to attend and participate in the plenary sessions of the Governing Council and the Committee of the Whole,⁸ but also in the closed Ministerial Roundtables, the Ministerial Plenaries of the Global Ministerial Environment Forum (GMEF)⁹ as well as the various working groups and contact groups that are gathering in parallel with these plenary sessions.

The interactions in the various subsidiary organs of the GC/GMEF have been described by the Secretary of the Governing Council as follows:

[s]essional committees and working groups established by the Governing Council during the session are its subsidiary organs. There will be subsidiary bodies of those subsidiary organs, like contact groups and drafting groups, and for the operations of its work, the rules of procedure will apply, *mutatis mutandis* (i.e. with necessary changes made), to them.¹⁰

The import of Article 69 of the Rules of Procedure is that in an open-ended meeting (i.e. a meeting where observers can attend), observers including international non-

⁸ See [unep.org, 'About UNEP: The Organization'](http://www.unep.org/About%20UNEP%20The%20Organization), available at <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43>> (visited 8 September 2010).

⁹ Convened by UNEP for the first time on 31 May 2000, the GMEF is a gathering of Environmental Ministers from around the world. More than 100 Ministers attended the first meeting, at which a Declaration was adopted (the Malmö Declaration, available at <<http://www.unep.org/malmo/>>). On the GMEF, see generally <<http://www.grida.no/news/press/2087.aspx>> and <<http://www.grida.no/news/press/2088.aspx>> (both visited 8 September 2010).

¹⁰ See 'GC/GMEF Processes and Major Groups and Stakeholders: A guide on how to participate in the GC/GMEF sessions', available at <http://www.unep.org/civil-society/LinkClick.aspx?fileticket=VnZQTCvqI_0%3D&tabid=2632&language=en-US> (visited 12 October 2010).

governmental organizations (INGOs), may provide useful information relevant to the specific topics under consideration by the Council or its subsidiary organs, upon the invitation of the President or Chair. In some of the meetings, for instance those of drafting groups when their proceedings are no longer on a 'statements' mode but enter in a mode of concrete negotiations of texts, INGO will not have any role (except for informal discussions with GC members).

3 Case Study: The Mercury Design

The full engagement of Major Groups and Stakeholders in UNEP's policy design can be illustrated by describing the role of the NGOs in the genesis of the decisions taken during the recent Governing Council of February 2009 in Nairobi on Mercury.¹¹ By Decision 25/5 the countries agreed 'to further international action consisting of the elaboration of a legally binding instrument on Mercury, which could include both binding and voluntary approaches, together with interim activities, to reduce risks to human health and the environment'.¹²

This role has been particularly realized through the work of the European Environmental Bureau and the Mercury Policy Project.¹³ The European Environmental Bureau (EEB)¹⁴ and the Mercury Policy Project (MPP)/Tides Center¹⁵ are organizations accredited by the United Nations Environment Programme since 2004.¹⁶ The European Environment Bureau is the largest federation of environmental citizens' organizations in Europe, with more than 140 members, mainly based in the European Union, increasingly in the countries working towards accession, and with some members in other parts in and around Europe.¹⁷

The Mercury Policy Project was formed in 1998 in the USA with the objective of promoting policies to eliminate mercury uses, reduce the export and trafficking of mercury, and significantly to reduce mercury exposures at the local, national, and

¹¹ See, generally, coverage by UNEP <<http://www.unep.org/civil-society/GlobalCivilSocietyForum/PastSessions/10thGlobalCivilSocietyForum/tabid/2759/language/en-US/Default.aspx>> and by IISD (<http://www.iisd.ca/unepgc/25unepgc/>) (both visited 12 October 2010) on the event.

¹² Decision 25/5 'Chemicals management, including mercury', in UN Doc. A/65/25, available at <http://www.chem.unep.ch/Pb_and_Cd/GC25/GC25Report_English_25_5.pdf> (visited 8 September 2010).

¹³ On the Mercury Policy Project, see <<http://mercurypolicy.org/>>. See also <<http://www.zeromercury.org/>>.

¹⁴ See <<http://www.eeb.org/>>.

¹⁵ See <<http://www.tidescenter.org/projects-impact/project-directory/project-directory-single/project/mercurypolicyproject/index.html>> (visited 8 September 2010). See also <http://www.zeromercury.org/Zero_Mercury_Policy_Paper_EN.pdf> (visited 12 October 2010) for an example of a report released by the EEB, et al.

¹⁶ See UNEP, List of accredited organizations with observer status to UNEP Governing Council/Global Ministerial Environment Forum (GC/GMEF) as of 23 April 2010, available at <http://www.unep.org/civil_society/PDF_docs/accreditation_NGOs.pdf>.

¹⁷ For a list of members, see <<http://www.eeb.org/index.cfm/members/>> (visited 8 September 2010)

international levels.¹⁸ The ‘Ban Mercury Working Group’¹⁹ was started in 2002 by the Mercury Policy Project and the Basel Action Network²⁰ and evolved into the ‘Zero Mercury Campaign’²¹ which started in November 2004, run by the EEB in close collaboration with MPP, with the aim of achieving ‘zero’ emissions, demand and supply of mercury, from controllable sources, and with a view to reducing to a minimum mercury in the environment (both within the EU and globally).²² Under the campaign, the international Zero Mercury Working Group (ZMWG)²³ was co-created in 2005 by EEB and MPP and now has more than 80 public interest environmental and health non-governmental organizations from 42 countries working on mercury.²⁴

While the Mercury Policy Project began actively following the mercury work of the UNEP Governing Council in 2002, the EEB began following actively the UNEP Governing Council meetings in February 2005, since mercury was again on the agenda.²⁵ In May 2004, MPP and the Natural Resources Defense Council (NRDC)²⁶ entered into an agreement with UNEP to coordinate NGO participation in several UNEP sponsored workshops on mercury in 2005 and 2006.

In February 2005, the MPP, EEB, NRDC and Greenpeace,²⁷ submitted to UNEP the Proposed Governing Council Decision submitted by NGOs, based upon a more extensive position paper which had been submitted to UNEP in July 2004. EEB/MPP coordinated the participation of the NGOs to the 23rd UNEP Governing Council, held from 20–25 February 2005 in Nairobi. In addition to EEB, NRDC, MPP and Greenpeace, a number of (other) NGOs attended the 6th Global Civil Society Forum²⁸ and the 23rd UNEP Governing Council, held from 18–25 February 2005 in Nairobi.²⁹

In a letter to the world’s governments, and which was also sent to the NGOs in March 2006, UNEP requested information relating to the supply in, trade of and demand for mercury, with such information to be included in a report which was being developed for the UNEP Governing Council meeting to be held in February 2007 (again in Nairobi). The request for the report emanated from a decision that

¹⁸ See <<http://mercurypolicy.org/>>.

¹⁹ See <<http://www.ban.org/ban-hg-wg/>>.

²⁰ See <<http://www.ban.org/>>.

²¹ See <<http://www.zeromercury.org/>>.

²² *Ibid.*

²³ See <http://www.zeromercury.org/about_us/zeroHgWG.html> (visited 8 September 2010).

²⁴ *Ibid.*

²⁵ On the developments at UNEP level, see also, generally, <http://www.zeromercury.org/UNEP_developments/index.html> (visited 8 September 2010).

²⁶ See <<http://www.nrdc.org/>>.

²⁷ See <<http://www.greenpeace.org>>.

²⁸ For a list of participants, see <<http://www.unep.org/civil-society/LinkClick.aspx?fileticket=UDjfr5s04Yg%3D&tabid=2763&language=en-US>> (visited 8 September 2010).

²⁹ For more information, see <<http://www.unep.org/gc/gc23/index-flash.asp>> (visited 8 September 2010).

the UNEP Governing Council made at their prior meeting, which had been put forward for decision by Canada at the request of the NGOs.

Responding to the above call, in May 2006, the NRDC submitted comments to UNEP after collaborating with the Chemical Registration Centre (CRC)³⁰ of China's State Environmental Protection Administration (SEPA)³¹ in order to develop improved estimates in respect of China's mercury supply and consumption. In October, the Zero Mercury Working Group submitted comments to UNEP on the draft Trade report.³²

Also in 2006 and into 2007, MPP assisted UNEP in the development of a 'Mercury Awareness Raising Toolkit'.³³ The aim of the toolkit is to assist developing countries, and countries with economies in transition, to educate their own policymakers and populations in respect of both the nature and the extent of the mercury problem. More specifically, the toolkit is expected to assist these countries to raise awareness of the sources and effects of mercury exposure on human health, wildlife and the environment, and to build capacity in these countries to reduce and eliminate anthropogenic mercury uses and releases, as well as exposure to mercury.

In preparation for the 24th UNEP Governing Council meeting in February 2007, the NGOs drafted a one-page working document containing the NGOs' Proposals for a Global Mercury Strategy. The NGOs submitted their proposal on a Mercury Decision to UNEP GC in January 2007.³⁴

The EEB/MPP/Zero Mercury Working Group organized and coordinated the NGO participation in the First Open Ended Working Group (OEWG) on Mercury, in November 2007, Bangkok, Thailand.³⁵ Twenty-five NGOs participated to the OEWG and related meetings.³⁶ In preparation and before the OEWG, an NGO meeting on global mercury strategies was organized in November 2007 in Bangkok, Thailand.

The official Global Mercury Partnership meeting took place in Geneva, Switzerland, from 1-3 April 2008.³⁷ The NGOs were represented by the ZMWG, MPP, WWF

³⁰ See <<http://www.crc-mep.org.cn/weihua/eweihua.htm>> (visited 8 September 2010).

³¹ See <http://www.chinacp.org.cn/eng/cporg/cporg_sepa.html> (visited 8 September 2010).

³² Position papers submitted by the ZMWG can be found at <http://www.zeromercury.org/position_papers/index.html> (visited 8 September 2010).

³³ See <<http://www.unep.org/hazardoussubstances/Mercury/MercuryPublications/ReportsPublications/AwarenessRaisingPackage/tabid/4022/language/en-US/Default.aspx>> (visited 8 September 2010).

³⁴ See <http://www.zeromercury.org/UNEP_developments/2007UNEPGCNGOGLOBALPROPOSAL-8NovemberWorkingDoc.pdf> (visited 8 September 2010).

³⁵ For more information, see <<http://www.chem.unep.ch/mercury/OEWG1/Meeting.htm>> (visited 8 September 2010).

³⁶ *Ibid.*

³⁷ See <<http://www.unep.org/hazardoussubstances/Mercury/GlobalMercuryPartnership/tabid/1253/Default.aspx>> (visited 8 September 2010).

Guianas,³⁸ Health Care without Harm (HCWH)³⁹ and others. The NGOs arguably played a catalytic role, together with UNEP, in developing a commonly agreed paper which was adopted by the governments.⁴⁰

This constant engagement led to the above-mentioned decision⁴¹ which also states that an ‘intergovernmental negotiating committee’ should be established to prepare the legally binding instrument on Mercury, and that this committee ‘should be open (to 3 relevant non-governmental organizations)’.⁴²

It can be argued that, while a work in progress, efforts so far represent a success story.

Efforts to control the effects of mercury are ongoing. In 2009 the UNEP GC took a decision which the UNEP Deputy Executive Director Angela Cropper, speaking on behalf of the Executive Director Achim Steiner, described in June 2010 as being ‘historic’.⁴³ In this Decision,⁴⁴ the Governing Council, ‘[a]cknowledging the widespread concerns over the serious adverse effects of mercury on human health and the environment and the urgent need for international action’, requested that the Executive Director:

convene an intergovernmental negotiating committee with the mandate to prepare a global legally binding instrument on mercury, commencing its work in 2010 with the goal of completing it prior to the twenty-seventh regular session of the Governing Council/Global Ministerial Environment Forum, in 2013.⁴⁵

It was further agreed that the intergovernmental negotiating committee will develop a ‘comprehensive and suitable approach’ to mercury management, including provisions as to reduction of both supply and demand; reduction of international trade; reduction of atmospheric emissions; remediation of contaminated sites; increased knowledge-building and information exchange; capacity-building and technical and financial assistance; and the addressing of compliance issues.⁴⁶

³⁸ See <<http://www.wwfguianas.org/>>.

³⁹ See <<http://www.noharm.org/>>.

⁴⁰ See UNEP, ‘Expanding the number and scope of partnership areas within the United Nations Environment Programme Global Mercury Partnership’, UN Doc. UNEP(DTIE)/Hg/Partnership.1/3 (2008).

⁴¹ Decision 25/5, see *supra* note 12.

⁴² On the work of the Committee, see <http://www.chem.unep.ch/mercury/INC/INC1/INC1_homepage.htm> (visited 8 September 2010).

⁴³ See [unep.org](http://www.unep.org), 7 June 2010, ‘Cropper on Negotiating a Legally Binding Agreement on Mercury’, available at <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=629&ArticleID=6619&l=en>> (visited 14 October 2010).

⁴⁴ *Supra* note 12.

⁴⁵ *Ibid.* at III.26.

⁴⁶ *Ibid.* at III.27(a)–(i).

The Governing Council further *urged*:

[g]overnments, intergovernmental organizations, industry, non-governmental organizations and academic institutions to continue and enhance their support for the activities set out in ... the present decision and for the Global Mercury Partnership through the provision of technical and financial resources, such as by supporting the implementation of country-based projects that tackle mercury risk reduction and risk management.⁴⁷

The importance of NGOs, Major Groups and Stakeholders was therefore acknowledged in the 'historic' decision.

4 Policy implementation and global engagement

The engagement of Major Groups and Stakeholders in UNEP's activities is not limited to policy design. It is also strongly encouraged in the implementation of UNEP's Programme of Work.⁴⁸

This is the reason why UNEP is currently developing a methodology systematically and strategically to foster the engagement of non-governmental actors in the implementation of its 2010–2011 Programme of Work. This is possible because the decision has been taken to structure this Programme of Work along six cross-cutting priority areas; these being:

1. Climate change.
2. Disasters and conflicts.
3. Ecosystems management.
4. Environmental governance.
5. Harmful substances and hazardous waste.
6. Resource efficiency and sustainable consumption and production.⁴⁹

For each of these areas, a programme framework has been drafted, which includes a proposal for key partners to be involved.⁵⁰

⁴⁷ *Ibid.* at III.35. The Chemicals Branch of UNEP was requested to act as the secretariat for the intergovernmental negotiating committee. *Ibid.* at III.38.

⁴⁸ UNEP's Programme of Work includes activities in the field of environmental law, including the provision of technical legal assistance; training and other capacity-building activities; the development of international environmental law; capacity strengthening through the 'judges' programme'; the provision of information; regional activities; and the promotion of compliance and enforcement. See <http://www.unep.org/law/Programme_work/index.asp> (visited 8 September 2010).

⁴⁹ See UNEP, 'Proposed biennial programme and support budgets for 2010–2011, Report by the Executive Director', UN Doc. UNEP/GC.25/12 (2008).

⁵⁰ *Ibid.* at 29.

Finally, while working with these non-governmental actors, UNEP is eager to link environment with development in a geographically balanced way. This task requires special efforts in two domains:

1. Capacity building for Major Groups and Stakeholders coming from G77 countries.
2. Sponsoring to allow these actors to participate in the meetings where the decisions are taken, and thereby to allow them to influence such meetings.

It is indeed essential for success and justice that the environmental concerns take into account the right to development and are not used as a tool for politically correct protectionism. What is needed, ultimately, is obviously an appropriate balance between these.

5 Conclusion

In conclusion, it ought to be clear from the foregoing that the involvement of the various groups discussed, as well as the coordinating efforts of UNEP whose duty it is, has the potential to provide a major contribution to – or might even be essential for – improved international environmental governance. This might be more obvious in reverse, if one considers how successful governance efforts are likely to be *without* the inclusion of, and input from, these groups.

Arguably, successful international environmental governance is so difficult to achieve because of the need to reconcile the views of so many different actors, some of which views may be diametrically opposed to each other. There are, of course, caveats which must be raised as to the inclusion of non-state actors in international negotiating fora. These caveats include that the international legal system remains rooted in the base concept of state sovereignty. Another would be the difficulty of choosing suitable representative actors from amongst the sometimes bewildering array of NGOs and other groupings. A third, fairly obvious, concern would be that many groups and lobbies might not be ‘impartial’ participants but might instead drive narrow interests.

These concerns aside, however, the involvement of the Major Groups and Stakeholders, and the involvement of NGOs, should be welcomed, given the benefits they bring of greater public participation; increased ‘buy in’ of relevant actors; and increased overall acceptance, acumen, involvement and knowledge.



GENDER AND INTERNATIONAL ENVIRONMENTAL GOVERNANCE¹

Patricia Kameri-Mbote²

1 Introduction

The gender dimensions of environmental management have been well documented. That women perform many tasks associated with environmental management and play major roles in the agricultural sector, which sector provides the economic foundation of many developing countries, is not a contested fact. It is now widely accepted that investing in women is an effective strategy for promoting sustainable development.³ It is also accepted that women's roles have been inadequately acknowledged in legal instruments. With regard to water, for instance, Principle 3 of the Dublin Principles⁴ points out that the:

pivotal role of women as providers and users of water and guardians of the living environment has seldom been reflected in institutional arrangements for the development and management of water resources. Acceptance and implementation of this principle requires positive policies to address women's specific needs and to equip and empower women to participate at all levels in water resources programmes, including decision-making and implementation, in ways defined by them.

¹ This paper is based on a Background Document presented at the UNEP/Network of women ministers Gender forum held in Nairobi on 15 February 2009. See 'Report of the Network of Women Ministers and Leaders for the Environment and United Nations Environment Programme high-level gender forum', 25th session of the Governing Council/Global Ministerial Environment Forum, Nairobi, 16–20 February 2009, available at <<http://www.unep.org/GC/GC25/Docs/Report-gender-ENG.pdf>>.

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³ Athena Peralta, *Gender and Climate Change Finance: Case Study from the Philippines* (The Women's Environment and Development Organization (WEDO) and Heinrich Boell Foundation, 2008).

⁴ Dublin Statement on Water and Sustainable Development of 1992, adopted by the International Conference on Water and the Environment, held in Dublin, Ireland. See <<http://www.gdrc.org/uem/water/dublin-statement.html>>.

The broad purview of environment makes gender interventions in different environmental sectors, such as biological diversity, water, energy and climate, challenging. Yet, the United Nations Environment Programme (UNEP),⁵ as the global body charged with realizing sustainable environmental management, must enlist as many actors at as many levels as possible if it is to realize its objectives. The principles of common but differentiated responsibility (CBDR)⁶ and inter- and intra-generational equity, which have been integrated into different multilateral environmental agreements, undergird the entry points for gender mainstreaming. CBDR underscores our varying responsibilities and capabilities in addressing issues such as biological diversity loss and climate change. Gender differences can be factored into any lists of criteria used for determining whether differential treatment exists. While inter-generational equity is premised on the idea of fairness to future generations,⁷ intra-generational equity is concerned with fairness amongst current generations. Gender, social-economic class and age are examples of factors that should be taken into account in ensuring such fairness.

Feminist critiques of development have identified the marginalization of women from central control of the means of production, such as land and environmental resources, as a critical factor contributing to the subordination of women.⁸ Women are under-represented in institutions that govern environmental resources, and their rights to environmental resources are often tenuous owing to their linkage to land which is largely owned and controlled by men. For instance, that access to water is often pegged to land ownership has the effect of excluding women, most of whom do not own land.⁹ Even in instances where the state controls environmental resources, equitable access is not guaranteed for all. Similarly, where resources (such as grazing areas and forests) may be vested in communities, equitable access might not be guaranteed for all members of the community.

Different formal and informal norms are used in governance and management of environmental resources. These norms can either empower or disempower subjects seeking to participate in the management of the resources or to access these. For instance, where law is used, legal equality may result in substantive inequality where

⁵ See <<http://www.unep.org>>.

⁶ See, for instance, Tuula Kolari, 'The Principle of Common but Differentiated Responsibility in Multilateral Environmental Agreements' in Tuula Kolari and Ed Couzens (eds), *International Environmental Law-making and Diplomacy Review 2007* University of Joensuu – UNEP Course Series 7 (University of Joensuu, 2008) 21–54.

⁷ See, generally, Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational, 1989) at 219 for a discussion of the concept of inter-generational equity.

⁸ Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Zed Books, 2003).

⁹ Ingunn Ikdahl et al., *Human rights, Formalisation and Women's Land Rights in Southern and Eastern Africa*, Studies in Women's Law No. 57 (Institute of Women's Law, University of Oslo, 2005). See also Sara Ahmed, 'Mainstreaming Gender Equity in Water management: Policy and Practice', in V. Ratna Reddy and S. Mahendra Dev (eds), *Managing Water Resources: Policies, Institutions, and Technology* (Oxford University Press, 2006), 250– at 262 on the situation in India.

the prevailing situation of legal subjects (states and individuals) is not taken into account. It is noteworthy that gender-neutral environmental laws appear not to have resulted in more women owning these resources or being more involved in decision-making over the resources. Patriarchal social ordering exacerbates the inequity. Laws which on their surfaces grant equal access for men and women may yield very different outcomes when applied in a gendered context.¹⁰ Access to environmental resources may, for instance, be allowed only to a certain group by the owner or controller of the land on which the resources are found. This is critical because these resources constitute essential means to achieve both social and political autonomy; which, for women, would provide the means of moving from reproductive roles to production.¹¹

At another level, globalization and technological development may have impacts on all of access, control, management and ownership of environmental resources. For instance, as new technologies are created and adopted, women's traditional ways of managing resources (such as by saving seed) may be sidelined; without the new technologies being made readily available to women.¹² The net effect of this is the alienation of important environmental managers from the environmental resources;¹³ which may have impacts on both food security and sustainable environmental management. Vandana Shiva poignantly points out that:

[f]or more than two centuries, patriarchal, eurocentric, and anthropocentric scientific discourse has treated women, other cultures, and other species as objects. Experts have been treated as the only legitimate knowers. For more than two decades, feminist movements, Third World and indigenous people's movements, and ecological and animal-rights movements have questioned this objectification and denial of subjecthood.¹⁴

It is within this context that gender and international environmental governance should be considered. It may be argued that the development of environmental law at the international level, with states being the primary actors, has resulted in the exclusion of gender discourses in the governance norms and institutions supporting the international framework. This ignores the fact that environmental resources are found at local levels where human beings interact with it as men and women. While state agency is necessary for enforcing environmental governance norms, the failure to carry critical actors along in framing and enforcing these norms may have significant impacts on their effectiveness. Seager and Hartmann aver, probably correctly, that gender *mediates* environmental encounter, use, knowledge, and assessment; and

¹⁰ Tove Stang Dahl (transl. by Ronald L. Craig), *Women's law: An Introduction to Feminist Jurisprudence* (Norwegian Univ. Press, 1987). See also Catharine Mackinnon, *Women's Lives, Men's Laws* (Harvard University Press (2005).

¹¹ Mies, *Patriarchy and Accumulation*, *supra* note 8.

¹² Vandana Shiva, *Staying Alive: Women, Ecology and Development* (Zed Books, 1989).

¹³ Maria Mies and Vandana Shiva *Ecofeminism* (Zed Books, 1993).

¹⁴ Vandana Shiva, *Stolen Harvest, The Hijacking of the Global Food Supply* (South End Press, 2000).

that gender divisions of labour, expectations, norms, responsibilities and roles shape all forms of human relationships to the environment.¹⁵

The present paper is divided into six parts. The first is introductory; the second provides a conceptual framework which canvasses the meanings of gender and environmental governance; while the third looks at the gender variable in environmental governance and links it to the use of differential treatment provisions in multilateral environmental agreements. This paves the way for the discussion in the fourth part which explores windows of opportunity for creating more nuanced environmental governance norms and institutions with equality and equity norms. The fifth and sixth parts comprise the conclusion and recommendations respectively.

2 Conceptual framework

2.1 Gender

Feminism explains the manifestations of women's oppression, its causes and consequences with a view to identifying ways of tackling the oppression. Liberal, Marxist and radical feminism have nuances that can be used to analyse the exclusion of women from environmental management at the international, national and local levels. 'Ecofeminism', a term used to describe women's ability and power to stimulate an ecological revolution and ensure human survival on earth by bringing about a radical change in relations between women and men and between humans and nature, seeks to combine different feminist theories and to relate them to environmental issues. Ecofeminists explore the links between gender oppression and environmental degradation, mainly caused by men, and argue that women have a responsibility to combat male domination over both. The philosophy was born out of disillusionment with prevailing discourses on the environment which lacked a feminist analysis.¹⁶ Ecofeminists are, consequently, at the forefront of developing a deeper analysis of the woman/nature dynamic and are challenging all kinds of subjugation which might lead to environmental degradation.

Elaborating on the woman/nature relationship, Bina Agarwal describes four overlying precepts in ecofeminism. First, gender oppression and environmental degradation are caused mainly by male western dominance. Second, men are traditionally more related to culture, and women to their environments. Culture is arguably then seen as being superior to the environment and, hence, both women and the environment become subjugated to men and share a common inferior position. Third, oppression of women and the oppression of nature have occurred simultaneously, which

¹⁵ Joni Seager and Betsy Hartmann, *Mainstreaming Gender in Environmental Assessment and Early Warning*, (UNEP/DEWA, 2005).

¹⁶ Carolyn Merchant, 'Ecofeminism & Feminist Theory', in Irene Diamond and Gloria Orenstein (eds), *Reweaving the World: The Emergence of Ecofeminism* (Sierra Club Books, 1990) 100.

imposes on women a responsibility to combat male domination over both. Fourth, ecofeminism seeks to combine feminist and ecological thought, as both of these thought constructs aim at the creation of egalitarian, non-hierarchical structures.¹⁷ Ecofeminists argue that both women and nature could be liberated together.

Besides ecofeminism, various theories which emerged in the 1970s and 1980s focused on women's role in development; and these have influenced studies of, and discourse on, the role of gender factors in considering and understanding environmental management and governance. These theories acknowledged women's productive and reproductive roles and questioned the existing power structures.¹⁸ The 'Women in Development' (WID)¹⁹ approach, for instance, assumed that women would benefit automatically from the development process; and did not question the mode of development, seeking merely to integrate women into the development process on the assumption that the institutions, laws and policies in place served both men and women equally.²⁰ Boserup's²¹ work underscored the way in which development had marginalized women, blaming male planners and practitioners of development for excluding women. The 'Women *and* Development' (WAD) approach²² was therefore developed to address problems emerging from the WID perspective, adding a women's angle to economic dependence theory by analyzing the role of class and gender relations. The conceptualization of work in this perspective mainly focused on work done by women outside of households.

Both the WID and the WAD approaches were perceived, however, as being anthropocentric (human-centred) with little inherent regard for the environment and sustainability. This is how the 'Women, Environment and Development' (WED) approach²³ was developed as a tool to scrutinize correlations between the oppression of women and the oppression of the environment. Apart from characterizing women as being the main victims of environmental degradation, WED emphasizes the special bond that exists between women and the environment. The approach postulates women as being the privileged bearers of a special knowledge imported to them by nature. According to this view, women are assumed to be caring, nurturing and selfless beings, committed to both future generations and the environment. In the words of Diamond and Orenstein:

¹⁷ Bina Agarwal, 'Gender Inequalities: Neglected Dimensions and Hidden Facets', Malcolm S. Adiseshiah Memorial Lecture Series, (Madras Institute of Development Studies, 1997).

¹⁸ Shahrashoub Razai and Carol Miller, *From WID to GAD: Conceptual Shifts in the Women and Development Discourse* (United Nations Research Institute for Social Development (UNRISD) Occasional Paper No. 1 (1995); and Hazel Reeves and Sally Baden, *Gender and Development: Concepts and Definitions*, BRIDGE Report No. 55 (Institute of Development Studies, University of Sussex, 2000).

¹⁹ Lourdes Benería, *Gender, Development and Globalization. Economics as if All People Mattered* (Routledge, 2003) and Diane Elson, 'Male Bias in the Development Process: An Overview', in Diane Elson (ed.), *Male Bias in the Development Process* (Manchester University Press, 1995) 1–15.

²⁰ *Ibid.*

²¹ Ester Boserup, *The Role of Women in Economic Development* (St. Martins Press, 1970).

²² *Ibid.*

²³ Ruth S. Meinzen-Dick et al., 'Gender, Property Rights and Natural Resources', 25 *World Development* (1997) 1303–1315.

[b]ecause of women's unique roles in the biological regeneration of the species, our bodies are important markers, the sites upon which local, regional or even planetary stress is played out. Miscarriage is frequently an early sign of the presence of lethal toxins in the biosphere.²⁴

Environmental laws, policies and interventions created or implemented without consideration of the gender dynamic may contribute to environmental degradation whilst increasing women's poverty and their workloads. Similarly, tenure arrangements that favour men over women may have impacts on conservation efforts where women lack rights to resources due to their not owning land.²⁵

Constrained access to resources, lack of ownership rights and the vesting in men of control of land and resources has potentially serious implications for women's performance of their duties. In a similar vein, the marginalization, outlawing or demeaning of women's ways of managing environmental resources (saving seed, shifting cultivation and slash and burn agriculture) as well as the introduction of technologies that might override women's roles may have impacts both on women's work and on their political leverage as they become more dependent on new forms of knowledge that are owned and controlled by others.²⁶

Interestingly, the women's rights movement and the quest for environmental rights can be seen as having developed together. One can trace watershed women's rights instruments alongside watershed international environmental instruments. For instance, the United Nations Conference on the Human Environment (UNCHE)²⁷ in 1972 was held three years before the First World Conference for Women held in Mexico in 1975.²⁸ This meeting was followed by the second and third United Nations' international women's conferences in Copenhagen (1980)²⁹ and Nairobi

²⁴ Diamond and Orenstein (eds), *Reweaving the World*, *supra* note 16.

²⁵ Dianne Rocheleau and David Edmunds, 'Women, Men and Trees: Gender, Power and Property in Forest and Agrarian Landscapes', 25 *World Development* (1997) 1351–1371 at 1356.

²⁶ Sandy Thomas, *Gender and Biotechnology*, Nuffield Foundation, UKA Paper for the Gender Advisory Board, United Nations Commission on Science and Technology for Development (2003).

²⁷ The United Nations Conference on the Human Environment, UN Doc. A/CONF/48/14/Rev.1 (1972). See, generally, <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97>> (visited 12 October 2010).

²⁸ This Conference, which was attended by 133 Member State delegations, is billed as having 'launched a new era in global efforts to promote the advancement of women by opening a worldwide dialogue on gender equality'. According to the United Nations website, the first Conference (Mexico City) was initiated by the United Nations General Assembly to focus international attention onto the development of future goals, strategies and plans of action for the advancement of women. To this end, the General Assembly highlighted three essential objectives intended to become the basis for the United Nations' future efforts on behalf of women; these being: the creation of full gender equality and the elimination of gender discrimination; the integration and full participation of women in development; and an increased contribution by women in the strengthening of world peace. See UN Division for the Advancement of Women, 'The Four Global Women's Conferences 1975–1995: Historical Perspective', available at <<http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm>> (visited 12 October 2010).

²⁹ The second Conference, which was attended by 145 Member State delegations, met in Copenhagen in 1980. The Copenhagen Conference recognised that if the goals of the Mexico City Conference were to

(1985).³⁰ At the same time the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³¹ came into force. Between 1972 and 1985, the 1982 World Charter for Nature,³² a non-binding but important soft law instrument was adopted by the United Nations General Assembly. The 1992 United Nations Conference on Environment and Development (UNCED),³³ held in Rio de Janeiro, closely preceded the women's conference held in Beijing in 1995.³⁴ Despite this trend, there has been no concerted effort to bring gender as a focal issue into environmental governance – beyond the introduction of normative provisions in both environmental and women's rights instruments. There does appear to be, however, a common perception that environmental issues are 'elite' issues and therefore not 'women's' issues in the way that political participation and the right to health, work and education are seen as being. On the environment side, ironically perhaps, there appears to be also a perception that environmental concerns are 'human' concerns and not 'women's' concerns. Yet, herein lies a paradox because the state of environmental resources generally has impacts on women's education, health and work, and the gendered social ordering of society significantly influences human encounters with the environment.

This is understandable from Christopher Stone's explanation in his seminal article written in 1970 titled 'Should Trees Have Standing?: Toward Legal Rights for Natural Objects'.³⁵ He drew an analogy between the quest for recognition of legal rights of natural objects and things to that for women's rights and the resistances that such

be attained then three areas (equal access to education, employment opportunities and adequate health care services) needed greater attention. Stronger future measures were called for. *Ibid.*

³⁰ The third Conference, which was attended by 157 Member State delegations, met in Nairobi in 1985. Data gathered by the United Nations, and presented at the Conference, revealed that improvements in the status of women, and efforts at reduction of discrimination, had benefited only relatively small minorities of women. In the developing world Improvements in the situation of women had been marginal at best. The Conference decided therefore to suggest a series of measures for achieving equality at national level. Governments were tasked with setting their own priorities, with these being based on their development policies and resource capabilities. Three basic groupings of measures were identified; these being: constitutional and legal steps; equality in social participation; and equality in political participation and decision-making. *Ibid.*

³¹ Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, into force 3 September 1981, 1249 *United Nations Treaty Series* 13.

³² UNGA Res. 37/7 (1982) 'World Charter for Nature'.

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

³⁴ In 1995, the fourth Womens' Conference, held in Beijing with representation from 189 governments, was to recognise that what was needed was to shift the focus from women to the concept of gender; and to recognise that the entire societal structure, and all relations between men and women within this, needed to be re-evaluated. Only through such a fundamental restructuring, both of society itself and of its institutions, could women be fully empowered in all aspects of life. The Platform for Action, agreed on, specified twelve areas of concern in which there were considered to be impediments to womens' advancement and to require concret action; these being: women and poverty; education and training of women; women and health; violence against women; women and armed conflict; women and the economy; women in power and decision-making; institutional mechanisms for the advancement of women; human rights of women; women and the media; women and the environment; and the girl child. See <<http://www.un.org/womenwatch/daw/followup/session/presskit/hist.htm>> (visited 12 October 2010).

³⁵ Christopher Stone, 'Should Trees Have Standing?', 45 *South California Law Review* (1972) 450.

quests elicit from the entities which have the power to bestow such legal rights. Stone explained this resistance as stemming from the point of view that 'until the rightsless thing receives its rights, we cannot see it as anything but a thing for the use of us. It is hard to see it and value it for itself until we can bring ourselves to give it rights'.³⁶ He also explained that each time there is a movement to confer rights on a new entity the prospect is likely to be seen as 'frightening, odd and laughable'; and that until the rightsless thing receives its rights, it is seen as a thing only for use by humans.³⁷

2.2 Environmental governance

Environmental governance arguably emerged from efforts to establish and understand links between general governance issues and environmental management; based on the assumption that the absence or presence of democratic good governance determines how well a society manages its natural environment.³⁸ Goran Hyden defines governance as being 'conscious management of regime structures with a view to enhancing legitimacy in the public realm'.³⁹ Drawing on Hyden, Mugabe and Tumushabe define governance as norms and values being institutionalized at global, national, regional and local levels; and defining the engagement between the governors and the governed.⁴⁰ These norms and values may be expressed in all of informal policies, laws and rules founded on custom and practice; or in formal laws and policies deposited in written forms and established agencies.⁴¹

The benefit of the mosaic that comprises environmental governance norms is that it should serve to keep the governors in check, make them responsive, and restrain them from injuring the interests of the governed in the use, control and management of the natural environment.⁴² It has been suggested that:

[t]he rules, rights and responsibilities may either flow from custom and practice or be codified in such instruments as conventions, treaties or statutes and managed by different organizational forms ... clans, women's groups, ... national agencies and international organizations.⁴³

It is, therefore, clear that environmental governance can be used to manage the relationships between states within the framework of multilateral environmental agreements; between states in the same region or sub-region; between states and their

³⁶ *Ibid.* at 450–501.

³⁷ *Ibid.* at 455.

³⁸ J. Mugabe and G. Tumushabe, 'Environmental Governance: Conceptual and Emerging Issues', in H.W.O. Okoth-Ogendo and G. Tumushabe, *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa* (ACTS Press, 1999) 11–25 at 12.

³⁹ Goran Hyden, (1992), cited in *ibid* at 59,

⁴⁰ Mugabe and Tumushabe, 'Environmental Governance', *supra* note 38, at 3.

⁴¹ *Ibid.* at 14.

⁴² *Ibid.*

⁴³ *Ibid.* at 15.

citizens at the national level; and between decentralized organs and the citizenry at the local level.

At the international level, some principles have evolved which may be seen as comprising the building blocks of environmental law; and as permeating multilateral environmental agreements to ensure proper governance of the environment. These principles provide:

- the framework for negotiating and implementing new and existing agreements;
- the rules for resolving transboundary environmental disputes;
- the framework for development and convergence of national and sub-national environmental laws; and
- assistance with the integration of environmental law with other fields such as trade and human rights.

These principles have permeated other spheres of environmental governance at the regional, sub-regional, national and local (local government and community) levels. Formal and informal institutions are key actors in environmental governance as they are the carriers and enforcers of rules by which societies govern themselves.

As a facet of good governance and the rule of law, environmental governance is linked to respect for human rights, democratization and accountability in the conduct of affairs. It is concerned with efficient and effective distribution of governmental goods and services amongst the citizenry; comprising men and women, be they old or young, rich or poor, rural or urban. Environment governance therefore calls for the management of regime structures in a way that enhances legitimacy of the public realm by bringing all actors on board. Different legal mechanisms, such as the common law, criminal sanctions and public trust, are used to give effect to environmental governance. Normative provisions for environmental management intersect with organizational structures, and there is a need – if there is to be proper understanding – to excavate the gender dimensions of these interactions. At the formal level, norms and institutional arrangements are provided for in national constitutions, statutes, regulations, plans and policies. Informal institutional arrangements are manifested in the expectations and rules governing relationships within clans, communities, families, or firms vis-à-vis the environment, including social norms which influence the management of the environment through societal expectations. Synergy between formal and informal norms and institutions is needed if environmental governance is to be effective.

3 Environmental governance and gender

3.1 Gender as a variable in environmental governance

The term gender means the state of being either female or male, a characteristic of all human beings. The two genders are distinguished from one another by biological, physical, reproductive and sexual differences. The term 'gender' has, however, increasingly acquired a social meaning defining how the female and the male gender relate to each other within society. The social meaning refers to social characteristics which include gender-based division of labour. For example, the female gender is often allocated duties such as cooking, washing and other domestic chores, which belong to the private rather than the public sphere. The male gender is often allocated non-domestic duties such as bread-winning decision-making, and others, which belong to the public sphere.⁴⁴ Gender thus defines the socially constructed identities, responsibilities and roles of men and women. As an analytical tool, it serves to illustrate inequality between men and women in different spheres.

Gender roles and realms of operation translate into power/powerlessness in entitlements and engagement in environmental matters. The results are often the exclusion of women from participation in decision-making; deprivation of their access to resources; silencing of their voices; and restrictions on their entitlements to resources, even where these resources may be critical to their performance of their roles.

It is notable that women's access to and control over water has come into sharp focus as it has become clear that access to water is often fundamental to the performance of women's day to day chores. For instance, it is often incumbent upon women, even in times of drought, to provide food and water for their families.⁴⁵ Lack of safe water has a significant impact on women, whose responsibility it often is to provide water for their families.⁴⁶ In addition to collecting and managing water for household uses, women are very often tasked with child rearing, nurturing and caring for other members of the family and collecting fuel wood.⁴⁷ It is in this context that independent and effective rights to natural resources for women have been identified by researchers and policy makers as vital for family welfare, food security, empowerment, economic efficiency, gender equality, and poverty elimination.⁴⁸

⁴⁴ Centre For Law And Research International, *An Introduction to Gender, Law and Society*, Constitutional Debate No. 11 (Claripress Limited, 2001) at 2.

⁴⁵ See, for example, Barbara P. Thomas, 'Household Strategies for Adaptation and Change in Kenyan Rural Women's Associations', 58 *Africa* (1988) 401–422; and Barbara P. Thomas-Slayter, 'Politics, Class and Gender in African Resource Management: Examining the Connections in Rural Kenya', 40 *Economic Development and Cultural Change* (1989) 809–828.

⁴⁶ Subhrarag Mukherjee and Lakshmi Ravindran, 'Access to Clean Water: A Gender Perspective', 1 *Indian Juridical Review* 231.

⁴⁷ *Ibid.*

⁴⁸ Patricia Kameri-Mbote et al., 'Pathways to Real Access to Land and Related Resources for Women: Challenging and Overturning Dominant Legal Paradigms', in Amy Tsanga et al., *Women and Law in Africa: Innovative Regional Approaches to Teaching, Researching and Analysing* (Weaver Press, forthcoming 2009).

Concerns about gender and environmental resources (which concerns might include access to, control over and ownership of environmental resources and exclusion from participation in decision-making) are manifest at different levels. *First*, access to environmental resources such as community resources such as grazing areas; fish stocks; forests; genetic resources; water; and wildlife may be determined on a gendered basis. *Second*, there is an apparent disjuncture between the role of women as environmental managers and their participation in decision-making over environmental resources.⁴⁹ Women's participation in environmental governance institutions at the national and international levels is generally minimal. A study of women's participation in water users' associations in Andhra Pradesh, India, where the primary objective of the Participatory Irrigation Management programme is equity in resource sharing, farmer empowerment and social justice, found that women occupying positions in water users' associations were often not independent actors but under the control of male members.⁵⁰ With regard to environmental governance, there are different instruments used by polities at different levels to allocate and manage environmental resources. Participation in framing environmental governance norms at the international level may be hampered by political or economic factors. For instance, inability to have effective representation due to capacity, competing needs for resources at the national level, or distance can be real barriers to participation. *Third*, at the national and local levels, cultural gender and generational biases that influence representation and input in decision-making process also compound deprivation of access and exclusion.

Both the Nairobi Forward Looking Strategies (NFLS)⁵¹ and the Beijing Platform for Action (BPFA)⁵² put women at the centre of the quest for sustainable environmental management while underscoring the importance of re-allocation of resources for women's empowerment. Paragraph 12 of the NFLS underscores the need for a holistic approach to development, taking into account all aspects of human life including material resources and the physical environment. It is interesting to note that this paragraph points to the need to have environmentally sustainable technology be responsive to the needs and rights of the individual. This seems implicitly to affirm the nature-women connection promoted by ecofeminists. A number of specific paragraphs of the NFLS may be highlighted for bringing out the role of women in envi-

⁴⁹ Patricia Kameri-Mbote, 'Engendering Environmental Management for Sustainable Livelihoods', in Jacinta Muteshi, Sara Ruto and Patricia Kameri-Mbote (eds), *Promises and Realities: Taking Stock of the 3rd UN International Women's Conference* (African Women & Child Feature Service, Ford Foundation & ACTS Press, 2009).

⁵⁰ C. Vijaya Shyamala and C. Sithapathi Rao, 'Role of Women in Participatory Irrigation Management: A Study in Andhra Pradesh', in Rakesh Hooja, Ganesh Pangare and K. V. Raju (eds), *Users In Water Management: The Andhra Model and Its Replicability in India* (Rawat Publications, 2002) at 260.

⁵¹ Nairobi Forward-looking Strategies for the Advancement of Women, adopted by the World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace, held in Nairobi, Kenya, 15–26 July 1985, UN Doc. A/CONF.116/28/Rev. (1985).

⁵² Beijing Platform for Action, adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 15 September 1995, UN Doc. A/CONF.177/20/Add.1 (1995).

ronmental management.⁵³ On science and technology, the requirement at paragraph 200 of full and effective participation of women in decision-making, priority-setting for research and development, and choice and application of technologies would avoid instances where technology has adverse impacts on women's performance of their tasks or where it leads to their marginalization. This has relevance in the realm of genetic engineering where new varieties of food may be developed and promoted without taking into account the time and the fuel required to cook the food. While new food varieties may be high yielding, their use may lead to more demands on women's time.

On energy, women's participation in energy needs assessment, energy conservation management, maintenance and technology will ensure that women's energy needs are taken into consideration in planning.⁵⁴ Additionally, the initiation of farm woodlot development involving men and women, proposed at paragraph 222 of the NFLS, would balance the needs of women for fuel wood on the one hand and sustainable development on the other. Paragraphs 224–227 deal explicitly with the interface between environmental management and women's empowerment.⁵⁵

⁵³ Paragraph 62 specifically points out that: agrarian reform measures have not always ensured women's rights even in countries where women predominate in the agricultural labour force. Such reforms should guarantee women's constitutional and legal rights in terms of access to land and other means of production and should ensure that women will control the products of their labour and their income as well as benefits from agricultural inputs, research, training, credits and other infrastructural facilities. Paragraph 74 requires that all women, particularly married women, be vested with the right to own, administer, sell or buy property independently as an aspect of their equality and freedom under the law. This provision has implications for ownership, control, access and management of environmental resources by women. Paragraphs 174–188, dealing with food, water and agriculture, underscore the need to recognize and reward women for their performance of tasks hereunder; to equip them with resources necessary to perform the tasks; and ensure that they actively participate in planning, decision-making and implementation of programmes. Paragraph 182 specifically requires that rural women's rights to land be secured to ensure that they have access to land, capital, technology, know-how and other productive resources that they need. This action is critical for women's access to environmental resources. Paragraph 188 requires governments to pay greater attention to the preservation and the maintenance free from pollution of any kind of sources of water supply for irrigation and domestic consumption, applying special remedial measures to relieve the burden placed on women by the task of fetching water; they should construct wells, boreholes, dams and locally-made water catchment devices sufficient for all irrigation and domestic consumption. In addition, women should be included by governments and agencies in all policy planning, implementation and administration of water supply projects.

⁵⁴ Para. 220.

⁵⁵ Para. 224 recognizes that:

deprivation of traditional means of livelihood is most often a result of environmental degradation resulting from such natural and man-made disasters as droughts, floods, hurricanes, erosion, desertification, deforestation and inappropriate land use...Most seriously affected are women...These women need options for alternative means of livelihood. Women must have the same opportunity as men to participate in ... irrigation and tree-planting...

Other issues addressed include improvements in sanitary conditions and drinking water and the home and work environment. Paragraph 226 points to the need for

'Awareness by individual women and all types of women's organisations of environmental issues and the capacity of men and women to manage their environment and sustain productive resources...All sources of information dissemination should be mobilised to increase the self-help

Considering that the NFLS predates the major international policy pronouncements that are contained in multilateral environmental agreements, there is no doubt that the realization that women's empowerment is predicated on sustainable management of environmental resources has informed the quest for women's rights for a long time. Pursuant to the NFLS and in preparation for the 1995 Beijing conference, the United Nations Environment Programme hosted an International Seminar on Gender and Environment at which it was urged that environmental policies and programmes should reflect gender equality and empowerment as both the means and the goals of sustainable environment and development. This has been followed by calls to foster and encourage the ability of women to contribute to effective environmental management in line with the strategies announced at the Fourth World Conference on Women in Beijing in 1995. In seeking to engender environmental work, UNEP has worked with the Women's Environment and Development Organization (WEDO)⁵⁶ in convening meetings of female environmental activists and scholars.

The Beijing Platform for Action (BPFA) clearly articulates the linkage between women's empowerment and sustainable environmental management. It reiterates the principle that human beings are at the centre of concerns for sustainable development.⁵⁷ More specifically, the BPFA points out that:

- women's empowerment is being sought against the background of resource depletion, natural resource degradation and pollution of the environment by dangerous substances. These conditions are displacing communities, especially women, from productive activities (para. 246);
- women have a role to play in sustainable development as consumers, producers, caretakers of families, and educators for current and future generations; there is a commitment by governments to integrate environmental sustainability with gender equality and justice (para. 248);
- environmental degradation has specific impacts on women (para. 247);
- poverty eradication and peace are integral to sustainable development (para. 247);
- women's work related to natural resources is often neither recognized nor remunerated (para. 247);

potential of women in conserving and improving their environment. National and international emphasis on ecosystem management and the control of environmental degradation should be strengthened and women should be recognised as active and equal participants in this process';

Para. 227 requires environmental impact assessment of policies, programmes and projects on women's health and activities.

⁵⁶ According to WEDO's website, the Organization has as its mission the empowerment of women, as decision-makers, in order to achieve economic, gender and social justice, a healthy, peaceful planet, and human rights for all. WEDO 'emphasises gender equality and women's critical role in social, economic and political spheres'. See <<http://www.wedo.org/>>.

⁵⁷ Sustainable development is defined as development that meets the needs of current generations without compromising those of future generations. See World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987) at 8.

- women remain largely absent at all levels of policy formulation and decision-making in natural resource and environmental management, conservation, protection and rehabilitation, and their experience and skill in advocacy for and monitoring of proper natural resource management are marginalized in policymaking and decision-making bodies, educational institutions and environment-related agencies (para. 249);
- women are rarely trained as natural resource managers and, even where trained, they are underrepresented in formal institutions with policy-making capacities at the national, regional and international levels (para. 249);
- women's non-governmental organizations have weak links with national environment management institutions (para. 249); and
- women play leadership roles in environmental conservation and management; are well placed to influence sustainable consumption decisions; are involved in grass-roots campaigns to protect the environment; and have (especially in the case of indigenous women) particular knowledge of ecological linkages and fragile ecosystem management (para. 250).

The BPFA recognizes that there is a need for a holistic, inter-sectoral approach to be taken to environmental management. It is also imperative that both men and women be involved in the formation of sustainable development policies (para. 251). It calls for recognition of the need for gender to be mainstreamed into all policies and programmes; and for an analysis of the gender differentiated impacts of such policies and actions before decisions are taken (para. 252).

Similarly, Art. 14(2)(h) of the Convention on Elimination of All forms of Discrimination Against Women (CEDAW) states that rural women have a right to enjoy adequate living conditions, particularly in relation to communication, electricity supply, housing, sanitation, transport and water supply on an equal basis with men.

At the regional level there is, for instance, the African Charter on Human and People's Rights,⁵⁸ which articulates a number of basic rights and fundamental freedoms and entrenches the applicability of these to African states. Article 18(3) provides that 'the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'. Elaborating on this provision, the African Union has concluded the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.⁵⁹ In the preamble, it notes that 'women's rights and women's essential role in development, have been reaffirmed in the Unit-

⁵⁸ African Charter on Human and People's Rights, Banjul, 27 June 198, into force 21 October 1986, 21 *International Legal Materials* (1982) 58.

⁵⁹ Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, Maputo, 11 July 2003, into force 25 November 2005, available at <http://www.achpr.org/english/_info/women_en.html> (visited 27 February 2010).

ed Nations Plans of Action on the Environment and Development in 1992, on Human Rights in 1993, on Population and Development in 1994 and on Social Development in 1995'. It also reaffirms the principle of gender equality as enshrined in the Constitutive Act of the African Union⁶⁰ as well as the New Partnership for Africa's Development (NEPAD).⁶¹ It pays particular attention to the rights of women to land and environmental resources. At Article 15, the right to land is linked to food security, and provision to women of access to clean drinking water is underscored.⁶² Article 19, dealing with sustainable development, exhorts state parties to promote 'women's access to and control over productive resources such as land and guarantee their right to property'.⁶³

3.2 International environmental agreements

3.2.1 Differential treatment

At the international level, the concern about differently placed states has been addressed through ingraining the principle of differential treatment in multilateral environmental agreements. The realization that some developing countries may not be in a position to commit substantial resources to environmental management, due to other more pressing domestic concerns, has resulted in the introduction into international environmental law of the principle of common but differentiated responsibilities. The major thrust of this principle is that while all states have common responsibilities to protect the environment and to promote sustainable development; countries must shoulder different responsibilities because of their different ecological, economic and social situations. It is based on equity considerations.⁶⁴

International environmental agreements negotiated since the 1990s contain provisions guided by this principle; and many seek to induce the participation of, and to facilitate compliance by, poor states. These measures fall broadly into three categories, namely financial co-operation; technology transfer; and differentiated implementation schedules and obligations. Financial capacity is a major hindrance to developing countries' implementation of international agreements. Beginning with the Montreal Ozone Protocol,⁶⁵ major environmental agreements (such as the United Nations Framework Convention on Climate Change⁶⁶ and its Kyoto Protocol⁶⁷ and the Con-

⁶⁰ Constitutive Act of the African Union, Lomé, 11 July 2000, available at <http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm> (visited 27 February 2010).

⁶¹ Established in 2001 by the NEPAD Strategic Framework that was adopted at the 37th Summit of the Organization for African Unity (OAU).

⁶² See <<http://www.achpr.org/english/women/protocolwomen.pdf>>.

⁶³ *Ibid.*

⁶⁴ Philippe Cullet, *Differential Treatment in International Environmental Law* (Ashgate, 2003).

⁶⁵ 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/>>.

⁶⁶ 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>>.

⁶⁷ 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.

vention on Biological Diversity⁶⁸) have required developed country Parties to provide financial assistance to developing countries; both to ensure that there are adequate resources for implementation and to ease the socio-economic burdens associated with implementation. The Global Environment Facility,⁶⁹ launched in 1991, provides funding for developing countries on a grant or concessional basis to meet the incremental costs of measures to protect the global environment in four areas; namely, biodiversity, climate change, international waters and ozone depletion.

Since international environmental law governs relations between states, the challenge of engendering environmental law remains because states are not gendered; and because gender is manifested at lower levels within states at national and local levels. International environmental law, however, provides the basis for bringing in gender at the normative level. Differential treatment is akin to affirmative action and can be used at both national and local levels to bring on board disadvantaged subjects of law. Gender can be a factor in the differentiation.

3.2.2 Gender in international environmental law instruments

Beyond the normative recognition for differential treatment for subjects of international environmental law, international instruments such as Agenda 21⁷⁰ outline the role of women in environmental management.⁷¹ It identifies the following actions as being critical to sustainable development:

- full, equal and beneficial integration of women in all development activities including national ecosystem management and control of environmental degradation;
- increase in the proportion of women decision-makers, planners and technical advisers, managers, extension workers in the environment and development fields;
- elimination of constitutional, legal, administrative, cultural, behavioural, social and economic obstacles to women's participation in sustainable development;
- passing relevant knowledge to women through curricula in formal and non-formal education;
- valuation of roles of women; and
- ensuring women's access to property rights and agricultural inputs

⁶⁸ 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>>.

⁶⁹ See <<http://www.thegef.org>>.

⁷⁰ Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, 13 June 1992, A/CONF.151/26/Rev.1 (1992). Agenda 21 is a global blueprint for implementing sustainable action programmes.

⁷¹ See, for instance, 'Women and Sustainable Development', United Nations Development Fund for Women (UNIFEM), on the website <<http://www.iisd.org/women/unifema.htm>>, for easy reference to the specific recommendations on women in Agenda 21.

The Convention on Biological Diversity also recognizes the role that women play in the management of biological resources, and calls for this role to be facilitated.⁷² Similarly, Principle 20 of the Rio Declaration⁷³ states that women have a vital role in environmental management and development. Their full participation is therefore essential to the achievement of sustainable development.

The Stockholm Declaration⁷⁴ at Principle 2 brings out concerns for intra- and inter-generational concerns in the management of natural resources, including water, in the following words:

[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

The World Summit on Sustainable Development (WSSD) Plan of Action⁷⁵ in 1992 also identified women as being key to the attainment of sustainable development. It explicitly states that women need to be provided with access to agricultural resources; and that land tenure arrangements should recognize and protect indigenous and common property resource management systems. This is in recognition of the critical role that agriculture plays in addressing the needs of a growing global population; of its inextricable link to poverty eradication, especially in developing countries; and the realization that enhancing the role of women at all levels, and in all aspects of agriculture, food security, nutrition, and rural development, is imperative.⁷⁶

Paragraph 38(i) points to the need to:

[a]dopt policies and implement laws that guarantee well defined and enforceable land and water use rights, and promote legal security of tenure, recognizing the existence of different national laws and/or systems of land access and tenure, and provide technical and financial assistance to developing countries as well as countries with economies in transition that are undertaking land tenure reform in order to enhance sustainable livelihoods; ...

Paragraph 38(f) identifies the need to enhance the participation of women in all aspects and at all levels relating to sustainable agriculture and food security. With

⁷² Biodiversity Convention (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>>), Preamble, Arts 8(j) and 10(c).

⁷³ Rio Declaration (UN Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, A/CONF.151/5/Rev.1 (1992), 31 *International Legal Materials* (1992) p. 876), Principle 20.

⁷⁴ 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.

⁷⁵ Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/20 (2002).

⁷⁶ *Ibid.*, para. 38.

regard to women's knowledge on environmental conservation and natural resource management, paragraph (g) and (h) are relevant. They point to the need to:

[i]ntegrate existing information systems on land-use practices by strengthening national research and extension services and farmer organizations to trigger farmer-to-farmer exchange on good practices, such as those related to environmentally sound, low-cost technologies, with the assistance of relevant international organizations; and

Enact, as appropriate, measures that protect indigenous resource management systems and support the contribution of all appropriate stakeholders, men and women alike, in rural planning and development.

In the quest for recognition of a right to water, human rights based approaches (HRBA) have been found to avail an easy route because they have been used over the years and provided avenues for articulating the right to a healthy environment.⁷⁷ HRBA have been adopted in analyses of the market based approaches to both land and water to illustrate conflicts, modifications, overlaps and supplementations.⁷⁸ An explicit exposition of the human right to water can be found in General Comment No. 15 adopted at the 29th session of the Committee on Economic, Social and Cultural Rights in November 2002.⁷⁹ The Committee, providing guidelines for states on the interpretation of the right to water under articles 11 (the right to an adequate standard of living) and 12 (the right to health) of the ICESCR,⁸⁰ affirmed that this right is a prerequisite for the realization of other human rights; entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses; and that it is indispensable for leading a life in human dignity.⁸¹ General Comment 15 stresses the importance of ensuring that water is adequate for human dignity, life and health; guaranteeing freedom from interference through disconnections or contamination;⁸² and equality of opportunity for all people.⁸³ Most significantly, the Comment notes that water should be treated as a social and cultural good, and not primarily as an economic good; and that the manner of the realization of the right to water must be sustainable.⁸⁴

⁷⁷ Alan Boyle and Michael Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996).

⁷⁸ Ingunn Ikdahl et al., *Human rights, Formalisation, supra* note 9.

⁷⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 15 'The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2002/11 (2003).

⁸⁰ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in force 3 January 1976, 6 *International Legal Materials* (1966) 360.

⁸¹ *Ibid.*, paras 1 and 2.

⁸² *Ibid.*, paras 21 and 44.

⁸³ *Ibid.*, paras 12, 13 and 14.

⁸⁴ *Ibid.*, para. 11.

4 Nuancing environmental governance with equality and equity norms: windows of opportunity

International instruments on environmental and women's rights issues have acknowledged the importance of incorporating women in both environmental management and decision-making. Gender justice is predicated on equality of rights and of opportunities in the economic, political and social realms. While formal equality is important and is probably an implicit aim of most laws, it is also true that equality of treatment does not automatically give rise equality in outcomes because of disparities in resource and opportunity.⁸⁵ Equality is the most important goal to be pursued in the pursuit of justice. Formal equality gives all individuals similar choices and, therefore, does not impede them from maximizing their well being.⁸⁶ For instance, the legal mandate of equal treatment may be interpreted as being the treatment of likes in a similar manner and unlike in a corresponding manner. In the realm of gender, however, such a distinction fails to take into account distinctions that result from social constructions, rather than from differences as such.⁸⁷ It is noteworthy that gender-neutral laws (laws using 'he' to mean both men and women) concerning land and environmental resources appear generally not to have resulted in more women owning these resources; probably because of structural barriers such as access to credit, and the prevalence of myths that women ought not to own land. Women seem generally to be under-represented within institutions that deal with environmental and land issues, which might allow men to dispose of family land freely. It appears that relatively few women have land registered in their names. The effect of such application of laws, ostensibly without discrimination, may in fact result in discrimination.

The achievement of substantive equality requires the addressing of shortcomings of formal equality. The quest for substantive equality will necessarily lead, however, to some forms of discrimination or differential treatment arising. These can be justified on the basis of 'levelling of the playing field', it being recognized that the mere provision of equal rights that does not take into account structural distinctions will not deal with past injustices occasioned by formal equality. Indeed, even if national laws dealing with participation in political affairs provide for the equal treatment of the sexes, women will continue to be relatively disadvantaged on account of the impediments which have historically blocked their entry into the political realm. As Aristotle pointed out:

if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints—when either equals have and are awarded unequal

⁸⁵ Cullet, *Differential Treatment*, *supra* note 64.

⁸⁶ Mary Becker, et al., (eds), *Feminist Jurisprudence: Taking Women Seriously, Cases and Materials* (West Publishing, 1994) at 68–81.

⁸⁷ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) at 32.

shares, or unequals equal shares. Further, this is plain from the fact that awards should be ‘according to merit’; for all men agree that what is just in distribution must be according to merit in some sense.⁸⁸

Differential treatment is allowed under Article 4 of CEDAW, which decrees that adoption, by states parties, of:

temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Substantive equality constitutes one means of implementing principles of distributive justice to foster substantive equality and should inform environmental governance at the national and local levels. It should be complemented by initiatives to empower women to appreciate and benefit from sustainable environmental management, through procedural rights (namely, access to justice; the right to information; and public participation in environmental decision-making). The participation of women should be recognized and implemented since it is critical in environmental governance frameworks at all levels.

The Beijing Platform of Action lays out three strategic objectives for action by governments, regional and international organizations, and non-governmental organizations.⁸⁹ These, it may be argued, would go a long way toward engendering proper environmental governance. First, they include the need to involve women actively in environmental decision-making at all levels through:

- granting them opportunities as managers, designers, planners, implementers and evaluators of environmental projects;
- availing requisite information and education;
- protecting their knowledge, innovations and practices, especially for indigenous women and local communities, and promoting its wider application with the involvement and approval of the knowledge holders;
- protecting the intellectual property rights of women relating to traditional knowledge;
- encouraging and ensuring fair and equitable sharing of benefits arising from the utilization of women’s traditional and indigenous knowledge, innovations and practices;
- reducing environmental hazards within and outside the home;

⁸⁸ Aristotle, *The Nicomachean Ethics* (trans. By David Ross, revised by J. L. Ackrill and J. O. Urmson, 1991), quoted in Philippe Cullet, *Differential Treatment in International Environmental Law: A New Framework for the Realisation of Sustainable Development*, (Ann Arbor, MI: UMI Dissertation Services, 1998).

⁸⁹ Paras 253–256.

- application of clean technologies;
- integrating a gender perspective in the design and implementation of environmentally sound and sustainable resources management mechanisms;
- promoting participation of local communities particularly women in the identification of urban and rural environmental needs;
- empowering women to take effective environmental actions at home, within the communities and at the workplace;
- integrating gender into the work of international environmental organizations; planning projects funded by the global Environment Facility (GEF); and
- facilitating advocacy for environmental issues of concern to women and access to environmentally sound technologies.

Secondly, integrating gender concerns and perspectives in policies and programmes for sustainable development through:

- integrating a gender perspective in all national and international environmental initiatives and facilitating capacity building for women in resource management.
- evaluating the environmental impacts of programmes and policies on women's access to and use of natural resources;
- researching impacts of environmental hazards on women;
- integrating women's traditional knowledge and practices of sustainable resource use and management in environmental management programmes;
- eliminating obstacles to women's full and equal participation in sustainable development;
- involving female professionals and scientists in environmental management; and
- ensuring that clean water is accessible and plans are in place to restore polluted water systems and rebuild damaged watersheds.

Thirdly, strengthening or establishing mechanisms at the international, regional and national levels to assess the impact of development and environment policies on women through:

- providing technical assistance to women involved in agriculture, fisheries and small enterprises;
- developing gender sensitive databases, information and monitoring systems and participatory action-oriented research on: women's knowledge and experience on environmental management and conservation; the impact of environmental degradation on women; the structural links between gender relations, environment and development; and gender mainstreaming in development and monitoring of programmes;

- ensuring full compliance with international obligations under multilateral environmental agreements; and
- coordination within and among institutions implementing BPFA and Agenda 21.

These proposed interventions proceed from the premise that women have been generally excluded from available opportunities; and from the premise that such exclusion has negative impact not just for women but for society and on resources. To deal with this problem, the mainstreaming of gender issues is needed at different levels. First, there is a need for gender mainstreaming to take place in the normative legal and policy frameworks governing these natural resources. The aim here is to include women's concerns within the laws and policies of their countries. Second, women need to be more involved in the institutions charged with shepherding these norms. An effective mainstreaming strategy, according to Seager and Hartman,⁹⁰ would seek to bring women into positions where they can take part on an equitable basis with men in determining the institution's values, directions and the allocation of resources. It would also seek to ensure that women have the same access as men to resources within the institution. Effective gender mainstreaming facilitates participation of women as well as men to influence agendas, cultures and priorities within the institutions.

5 Conclusion

Environmental governance at the international level provides the basis for engendering governance frameworks. Nation states that have agreed to, and some that are beneficiaries of, differential treatment at the international level, have not generally cascaded the principle downwards to environmental governance at national and local levels.⁹¹ Further, while most countries have vibrant gender justice platforms which provide an opportunity for engendering environmental governance at national and local levels, these appear not to have been effectively used. Effectiveness in engendering environmental governance can be greatly facilitated by interfacing gender responsiveness platforms at national levels with environmental governance norms and institutions. Indeed, the gender justice movement is replete with opportunities for engendering environmental governance such as land and resource rights (for instance, rights to use trees, or rights to use water for domestic use and for women's gardens) and the quest for women's participation in politics and decision-making. The strategies identified in the NFLS, BPFA and Agenda 21 provide entry points for engendering environmental governance. Further, decentralization of environmental

⁹⁰ Seager and Hartman, *Mainstreaming Gender*, *supra* note 15.

⁹¹ This is the general position. Some countries *have* specifically included gender-related issues in their legislation. For instance, in South Africa's National Environmental Management Act 107 of 1998, the general principles in s 2 (which are justiciable and with which all other laws must be congruent) contain a number of principles dealing with gender equality.

management functions and the putting in place of institutional mechanisms for decentralization also assists in bringing gender on board.

Another entry point is through the development of tools for mainstreaming gender into environmental management and developing expertise in gender and environment issues. Such expertise should relate to knowledge and understanding of the issue and validation of women's roles in sustainable development; women's rights to environmental goods and services; ways of promoting full participation of women at all levels, particularly in decision-making; and identifying the impact of the macro-context on women and their participation in sustainable environmental management.

Engendering environmental governance calls for actions across the board as well as enlistment of diverse partners – such as governments; the United Nations and international organizations dealing with women's issues and the environment; development partners and civil society groups. Environmental justice may be a useful tool for addressing women's environmental entitlements, environmental management, and human vulnerability generally.⁹² This is based on the idea that everyone is entitled to live in a clean, safe and healthy environment and to manage their own resources; and on ensuring that the most vulnerable people in society, the poorest in particular, should not suffer the disproportionate, negative effects of environmental actions, laws, omissions or policies.

6 Recommendations

There is no need to reinvent the wheel: the NFLS, BPFA and Agenda 21 have identified ways of engendering environmental governance. Their proposals should be implemented. The following would also assist:

- making gender inform and be the basis of assistance to governments in law and policy formulation. This can be done by requiring gender integration at substantive/normative and procedural levels in multilateral environmental agreements, in the support, coordination and cooperation with scientific and technical bodies;
- creating demand for gender impact assessments and measures in preparation, implementation and monitoring of national poverty reduction strategies; environment sector strategies and action plans;
- creating greater understanding of the links between gender and environment through commissioned studies dealing with different environmental governance frameworks. For instance, the study on gender and climate change

⁹² Patricia Kameri-Mbote, 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention', *Kenya Law Society Digest* (2005).

financing in the Philippines has identified very concrete ways of bringing gender on board in the area of mitigation and adaptation financing;⁹³

- building capacity:
 - in gender and environment studies to enable interrogation of gender-neutral data through gendered lenses and to engender environmental management laws initiatives and institutions;
 - for gendered capacity needs assessments;
 - to use gender perspective in training courses (coverage of substantive gender issues in the content of training; gender representation in training; identification of training methods that reach both genders);
- generating appropriate gender disaggregated indicators and gender sensitive data of environmental integrity, vulnerability and sustainable trends;
- ensuring women's participation in environmental decision-making by moving from tokenism in women's engagement:
 - participation of women in the framing and implementation of environmental governance norms at the international and national levels;
 - special attention should be given to indigenous women, women in rural areas, and urban slum dwellers who are the most deprived of opportunities in decision-making processes, in spite of their important roles in safeguarding the environment, community and family;
- securing environmental management chores that women perform through rights to environmental resources; and
- ensuring environmental information is disseminated in gendered spaces and fora.

There are some emerging issues that must be taken into account in engendering sustainable environmental management. These issues require further research and need to be taken on board in engendering sustainable development:

- globalization and its impacts on women's access to environmental resources – the interconnectedness between different countries economically, politically and socially entails complex interlinkages between local domains and international markets. The impacts of these are likely to impact on women as environmental managers at the local level;⁹⁴

⁹³ The idea is to create mechanisms that guarantee women's equal access to negotiating, developing, managing and implementing adaptation and mitigation financing. These mechanisms include disaggregated indicators on mitigation and adaptation funds for targeting and monitoring benefits to women; developing principles and procedures to protect and encourage women's access to national adaptation programs and projects; conducting gender impact assessments of adaptation and mitigation strategies; implementing the 'polluter pays' and 'shared but differentiated' principles; ensure mitigation strategies include both financing new, green technologies and development and enforcement of necessary regulations of greenhouse gas emissions. See Peralta, *Gender and Climate Change Finance*, *supra* note 3, at 4.

⁹⁴ See, generally, Mies, *Patriarchy and Accumulation*, *supra* note 6.

- privatization of natural resources and the movement of control of public goods from state to private actors largely excluding women. This is happening rapidly in the area of water and needs to be studied closely to ensure that women's performance of their daily tasks is not made more onerous by policies that are gender blind;
- new technologies such as genetic modification and their impacts on women's management of resources. Considering that the acreage of land under biotechnology crops has increased exponentially since the 1990s as more countries invest in biotechnology, the benefits and risks of the new technologies need to be looked at through a gender lens. In so far as gender is concerned, the intimate engagement of women in environmental management and their use of GMO products in the form of food that they cook requires their participation in decision-making processes;⁹⁵
- gender asymmetries in access to empowering information and training caused by changes in information management and dissemination through information and communication technologies; and
- conflicts and their impacts on the environment and women's lives.

Ultimately, ensuring that recommendations such as these are embodied in the institutions, laws and policies which will constitute the world's international and national governance regimes in the future, can only serve to enhance the effectiveness of such governance.

⁹⁵ See Thomas, *Gender and Biotechnology*, *supra* note 26.



NATIONAL ENVIRONMENTAL GOVERNANCE: ROLE OF NATIONAL ENVIRONMENTAL TRIBUNALS

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1 Introduction

Lately, discussion of the issue of governance has become fashionable. This paper will not, therefore, engage in defining ‘governance’; such analysis features prominently in different parts of this publication² and solidly in publications devoted to the subject.³ Every organization, private or public, is nowadays seeking to show how well-structured, well-managed and transparent it is. Simply put, ‘good governance’ refers to sound management and running of a body whereby the body is open to scrutiny and all its actions can be accounted for. This is the ideal situation, of course. Many organizations, governments, and indeed individuals, do not rise to these standards. Yet public bodies, many of which themselves are inadequate in this respect, bay for the shutdown of institutions that fall short of this immaculate level.

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² See, for instance, Louis Kotze, ‘Towards a Tentative Legal Formulation of Environmental Governance’, Chapter 1 in this publication.

³ The book W. Bradnee Chambers and Jessica F. Green (eds), *Reforming International Environmental Governance From Institutional Limits to innovative Reforms* (United Nations University Press, 2005) stands out.

The environmental world and its plethora of institutions is no exception. This 'governance bug' has caught on in this area with a good reason. Indeed, no other area exceeds environment in scope and significance; no field has a more immanent or imminent impact on our livelihood and our survival than that of the environment. Therefore, to bring home the declarations, guidelines, policies, principles, and treaties which may be found both as soft law and as binding legal instruments, national implementation from the grassroots level all the way to regional and global levels must take place. The principles⁴ of 'sustainable development', 'precaution' and even 'prevention' are likely to remain ineffective unless they are adopted and implemented nationally and locally. They are, in fact, part of national law in many countries.

It is worth noting that the global environmental community has, over the last three decades, experienced phenomenal growth in the establishment and strengthening of institutions at the international level, with regard to different aspects of the environment.⁵ After all, there is an undeniable link between national and global environmental governance.⁶ National environmental institutions have thus been established in various countries. The purpose of such institutions is to provide adequate policy impetus and enforcement mechanisms to support existing environmental laws and, ultimately, to prevent damage, further damage, or, in some cases, even to reverse existing environmental degradation.⁷ Although it is widely recognized that most environmental problems, challenges and solutions are transboundary (regional or global) in nature; national solutions have their firm place as the 'binding glue' in the process.

2 The role of National Environmental Tribunals

Part of 'sound environmental governance' requires not only addressing executive and legislative arms of governance but the setting up of institutions and mechanisms for protecting the environment and resolving disputes. Formal and informal dispute settlement is an accepted mechanism or institution in the modern society, taking the form of permanent or ad hoc institutions dealing in a specialized form with specific economic, social, commercial, cultural and natural resource issues. Many issue-based mechanisms have been formally established through specific Acts of Parliament,

⁴ It is not easy to be definitive about the status in international law of these 'principles'. While 'sustainable development' has probably been accepted as a binding principle, it arguably exists more as a 'goal' than as a 'principle'. The principles of 'precaution' and 'prevention' are potentially more effective justiciable principles, but it is less easy to find that they have binding status in international law.

⁵ Durwood Zaelke, Donald Kaniaru and Eva Kruzikova (eds), *Making Law Work: Environmental Compliance and Sustainable Development*, vol. 2 (Cameron May, 2005) at 427.

⁶ By 'governance', the International Court of the Environment Foundation (ICEF) means 'institutions and mechanisms for protecting the environment and resolving disputes'; pointing out that 'to achieve better global governance, there must be an integrated legal and institutional response as well as a careful design of sustainable environmental policies'. See <http://www.icef-court.org/uploads/file/Draft%20programme-22_02.pdf> (visited 26 April 2010).

⁷ 'Environmental Jurisprudence', presentation by Iwona Rummel-Bulska, then Principal Legal Officer and Chief, Environmental Law Branch, UNEP, at the Kenya National Judicial Colloquium for High Court Judges on Environmental Law, held on the 17– 26 April 2006.

which have come into existence as needs have arisen.⁸ Furthermore, there are customary laws and practices that come into play in settling disputes. The environmental field is no different.

Tribunals addressing environmental matters have evolved differently in different countries and regions.⁹ Among developing nations, many countries, such as Uganda, handle environmental disputes in ordinary courts. This underlines an important principle: that it is up to each country to decide whether and how or under what circumstances to establish an environmental tribunal. Other African countries, such as Mauritius, Tanzania, Kenya and, recently, Lesotho, have established environmental tribunals; each, of course, possessing particular features. Beyond Africa, there are the Appeals Tribunal in Guyana,¹⁰ the Commission in Trinidad and Tobago,¹¹ the Land and Environment Court in New South Wales, Australia,¹² the Vermont Environmental Court, USA,¹³ New Zealand¹⁴ as well as the Environmental Courts in India and Pakistan. These address environmental issues in their countries.¹⁵ A comprehensive list of countries with environmental Courts and Tribunals is also available.¹⁶ Environmental tribunals play a significant role in the settlement of environment disputes, as enumerated below.

⁸ Informal mechanisms for a range of issues are, or have existed, under clans, chiefs or villages. While they contribute to societal stability, these informal mechanisms have hardly been systematically studied and assessed in Kenya's jurisprudence.

⁹ In Scandinavia (Sweden, Finland), environmental tribunals originally focused on water issues. At present, water and environment have been consolidated, and the matters are handled under environmental courts, which are regional courts with an environmental Supreme Court at the apex. In Australia, (in particular, New South Wales) the Land and Environment Court was established in the 1980s, and it has made its name globally with well-established decisions. Its Chief Judge, Brian Preston, did full justice in his presentation and substantial paper on the Role of the Judiciary in Promoting Sustainable Development: the experience of Asia and the Pacific (2006) circulated at the Kenya National Judicial Colloquium for High Court Judges on Environmental Law, held on the 17 – 26 April 2006.

¹⁰ See, generally, Guyana's Environmental Protection Act No. 11/1996.

¹¹ See, generally, Trinidad and Tobago's Environmental Management Act (2000). The Commission carries out essentially the same functions as Guyana's Appeals Tribunal.

¹² See the homepage, available at <<http://www.lawlink.nsw.gov.au/lec>>.

¹³ For decisions of the Court, see <<http://libraries.vermont.gov/law/envcourt>> (visited 6 March 2010).

¹⁴ The NZEC is an independent and specialized court which 'consists of Environment Judges and Environment Commissioners acting as technical experts'. These persons are appointed (by the Governor-General) for five-year terms, on recommendation from the Minister of Justice. The design is to ensure a mix of experience and knowledge in 'commercial and economic affairs, local government, community affairs, planning and resource management, heritage protection, environmental science, architecture, engineering, minerals and alternative disputes resolution processes'. See Raghav Sharma, 'Green Courts in India: Strengthening Environmental Governance?', 4 *Law, Environment and Development Journal* (2008), available at <<http://www.lead-journal.org/content/08050.pdf>> (visited 11 July 2010), 50–71 at 62.

¹⁵ The Appeals Tribunal and Commission are strongly founded. They are chaired by current or retired Judges appointed by respective Presidents with secure remuneration, and have equal standing to the High Court. Appeals from their ruling(s) go to their respective Courts of Appeal. In Tanzania, the Chair of the Environmental Appeals Tribunal is appointed by the President while the Registrar is designated by the Chief Justice and an appeal goes to the High Court but is heard by three High Court Judges (section 209 (2)), not one as in the case of Kenya. See Tanzania's Environmental Management Act (2004), Part XVII, sections 204(1)(a) and 212(1). Its Tribunal has, however, not yet been operationalized. Lesotho's Environment Act (2008), which came into effect in June 2009, establishes its Environmental Tribunal in Part XIV, sections 98–101, and it is yet to take off. See Kaniaru, 'Environmental Tribunals', *supra* note 1.

¹⁶ George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, (The Access Initiative, 2009), Appendix 1 at 106.

Where environmental tribunals exist, they assist in the development of environmental law. This is because they provide opportunities to review, analyze and address environmental issues, which cut across many areas and in which a range of laws, regulations in practicing social and cultural areas are considered. Global environmental issues can be extremely complex at all levels (local, national, regional and international), thus tribunal decisions offer a first opportunity to apply principles and concepts to defined sets of facts that can pioneer the way forward. Tribunals can access experts or assessors, including in customary practices and law, in the various fields traversed for consultation. In this way, any disputes or areas of uncertainty are unequivocally adjudicated upon. In doing so they bring justice home at the very local level where impact on environment is crucial but may not be so appreciated. They are also likely to promote practices that have worked for generations at that level that may increasingly be threatened with extinction.

Furthermore, despite the procedure of choosing the members of a tribunal varying from state to state, a clear trend in the mix of expertise has emerged: most importantly, the appointees must be experts in their own right in environmental law. This is the case in Kenya and Lesotho,¹⁷ (addressed below) and elsewhere. The Land and Environment Court in New South Wales, Australia, established under the Land and Environment Court Act (1979),¹⁸ is a superior court of record having the same jurisdiction as the Supreme Court of New South Wales.¹⁹ It is composed of Judges and nine technical and conciliation assessors. The Judges and Commissioners are appointed by the Governor, and the Commissioners are required to have qualifications in town planning, environmental planning, environmental science – including matters relating to protection of the environment and environmental assessment, architecture, engineering, surveying or building construction, management of natural resources and urban design or heritage. New Zealand has an environmental court (NZEC)²⁰ established under the Resource Management Act (RMA) of 1991.²¹

With tribunals benefiting from such vast expertise and appointed in like manner to superior courts, they should be integrated into mainstream superior courts. Thus appeals against rulings of such Tribunals should go, not to High Court, but to the

¹⁷ Section 125(1) of EMCA (appointment of National Environmental Tribunal chair by Minister following nomination by the Judicial Service Commission) vis-à-vis Guyana's Environmental Protection. Section 56 where the President appoints the Chairman of the Tribunal. In Kenya, there are four other members, two of whom are environmental lawyers and the other two scientists. According to the Environmental Act 2008 of Lesotho (see <http://www.environment.gov.ls/legislation/show_law.php?dcID=DOC5c6de5> (visited 11 July 2010)), the Chairman, appointed by the Minister in consultation with the Chief Justice, should be a legal practitioner while the other two members should, in one case, hold a degree in law and have experience in environmental issues, and, in the other case, be experienced in environmental issues as well. These two are also appointed by the Minister.

¹⁸ See 'New South Wales Consolidated Acts', available at <http://www.austlii.edu.au/au/legis/nsw/consol_act/laeca1979274/> (visited 11 July 2010).

¹⁹ Australia, Land and Environment Court Act (1979) (NSW), section 20(2).

²⁰ The NZEC is an independent specialized court consisting of Environment Judges and Environment Commissioners acting as technical experts. See *supra* note 14.

²¹ See 'Ministry for the Environment' at <<http://www.mfe.govt.nz/rma/index.html>>.

next level, the Court of Appeal. In any case appeals should be on points of law; not facts. KNET, as stated has five members who are experts broadly in environmental management and of whom three are appointed on the basis of their skills in environmental law. In any case, suits must be determined conclusively and appeals from KNET, under section 130, go to the High Court as the final Court. For avoidance of doubt in the future, section 130 of EMCA should, be amended to align the Tribunal with the High Court with appeals proceeding to the Court of Appeal on points of law borrowing a leaf from the Industrial Court which is a tribunal on the same status as the High Court.²²

Specialized tribunals are often speedy and relatively inexpensive; that is, much less costly than the ordinary Courts. Speed can be an important element in the environmental field, bearing in mind that the nature of damage visited upon the environment is often irreversible. The only way properly to deal with such damage is either to prevent it or, in the event that the damage has begun, to get rid of it at a relatively low cost. These are crucial aspects which the KNET is alive to in its work. Advocates and the National Environmental Management Authority (NEMA) appearing before the KNET are increasingly appreciating this point.

Another illustration is the Australian NSW Land and Environment Court (LEC). The efficient and timely disposal of cases by the LEC is apparent, and the available figures reveal that the Court has an ideal clearance ratio of 100 per cent.²³

The labyrinthine routes provided for review, recourse or even appeals in regular courts are made even slower by the backlog of other cases in the court systems. The examples of India and Kenya conspicuously demonstrate the situation. The Indian Constitutional Courts are faced with the Herculean task of clearing a burgeoning docket of cases reaching them through multifarious appellate routes under the Constitution and other statutes. The high pendency rate of cases in the High Courts has been described as 'catastrophic, crisis ridden, almost unmanageable, imposing an immeasurable burden on the system'.²⁴ The Kenyan scene is little different. Honourable Justice Richard Kuloba (as he then was) stated that there was a backlog of up to one million cases. More recently, the assessment has come down to 850 000 cases with an improved balance (500 000) in favor of Uganda and Tanzania, respectively. In the Report of the Task Force on Judicial Reforms, while admitting the actual figures are still being audited gave startling figures as; pending as at October 2007: 4 069 before the Court of Appeal; High Court stations 68 825 and 723 321 before

²² The Labour Institutions Act, 2007, section 12(6).

²³ Annual Review 2005 of the Land and Environment Court of NSW, available at <http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/pages/LEC_annualreviews> (visited 6 March 2010). For comment on the overall performance of the LEC, see B. Preston, 'Foreword from Chief Judge', *Annual review 2005*, available at <[http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/vwFiles/Annual_Review_2005.pdf/\\$file/Annual_Review_2005.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/vwFiles/Annual_Review_2005.pdf/$file/Annual_Review_2005.pdf)> (visited 25 May 2010), at 1–2.

²⁴ Law Commission of India, '124th Report on a Fresh Look at High Court Arrears', available at <<http://lawcommissionofindia.nic.in/101-169/Report124.pdf>> (visited 6 March 2010).

Magistrates' Courts: a total of 769 215.²⁵ The Final Report of the Task Force on Judicial Reforms provides updated figures as: cases pending as at December 2009: 2 372 before the Court of Appeal; 115 344 at the High Court stations and 792 297 at Magistrates Courts; a total of 910 01326.²⁶ The Federation of Women Lawyers - Kenya (FIDAKenya) recently gave figures as follows: as of February 2010: a total of 998 263 at the High Court and Magistrates' Courts.²⁷ The point is, save for the situation mentioned above of 100 percent clearance ratio in Australia, there is virtually no country that is backlog free in matters pending in courts. However the number of actual pending environmental cases is not identified in these figures.

Environmental tribunals offer potential escape from the rigidity that is common in court processes. Trinidad and Tobago's Environmental Management Act of 2000²⁸ not only provides for the establishment of the Environmental Commission²⁹ but also gives the Commission power to apply mediation as an alternative dispute resolution method.³⁰ The KNET on its part, under its founding law, is not to be bound by rules of evidence as set in Evidence Act (Cap 80). Per its rules of procedure,³¹ the Tribunal 'shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to *the just handling of the proceedings* and shall, so far as appears to it appropriate, *seek to avoid legal technicality and formality in its proceedings*' [author's emphasis]. This has been strictly observed, and advocates who have been tempted to invoke regular Court procedures have been consistently reminded before the Tribunal that technical and tactical manoeuvres are not welcome. However, principles of natural justice and due process generally are inherent in the work of the KNET. Indeed, an important ingredient of environmental litigation is the element of procedural convenience.

Environmental Tribunals have the potential to enhance environmental jurisprudence. In their work they are able to examine the entire gamut of law and policy, take evidence, and – taking into account the varied expertise of their members – do formulate conclusions that, especially when upheld on appeal by superior courts, chart the way for sound environmental jurisprudence. Different jurisdictions have different specific provisions regarding the final determination of matters brought before the tribunals. The decision of the Commission (Trinidad and Tobago) is final on a question of fact, damages, or compensation. However, an appeal lies to the

²⁵ Report of the Task Force on Judicial Reforms (Initial), Chairman the Hon. Justice William Ouko, presented to the Hon. Chief Justice E. Gicheru, Hon. Minister for Justice National Cohesion and Constitutional Affairs, Mutula Kilonzo and the Attorney General S. Amos Wako (Government Printer, 2009) at 24.

²⁶ Final Report of the Task Force on Judicial Reforms, Chairman the Hon. Justice William Ouko, presented to the Hon. Chief Justice E. Gicheru, Hon. Minister for Justice National Cohesion and Constitutional Affairs, Mutula Kilonzo and the Attorney General S. Amos Wako (Government Printer, 2010) at 33.

²⁷ *The People Daily*, Friday 25 June 2010.

²⁸ Act 3 of 2000. See <http://www.ema.co.tt/docs/legal/cur/Act_3_of_2000.pdf> (visited 25 May 2010).

²⁹ Section 81.

³⁰ Section 84(3).

³¹ Rule 26(2) LN 191 of 2003.

Court of Appeal on any question of law upon entry of final judgment by the Commission.³² In Guyana, the law provides for the Court of Appeal to hear and determine any question(s) of law arising on the case and that the Court of Appeal can affirm, reverse or amend the determination in respect of which the case was stated. It could also remit the matter to the Tribunal with the opinion of the Court of Appeal thereon.³³ The Vermont Environmental Court³⁴ provides for an appeal to the Supreme Court. This appeal does not stay an order, but if there is to be payment of a penalty then this is stayed. If a respondent wants the order stayed then he/she has to make a specific application to the Supreme Court in this regard.³⁵

Environmental tribunals in several jurisdictions avail every person with the opportunity to safeguard the environment. Indeed, previously the locus standi requirements had diluted environmental actions. Presently, one is not required to prove locus standi or be an advocate to appear before the KNET. Environmental problems do not, in their nature, respect political boundaries, and may need to be challenged far from their origins or their perceived origins. Therefore, in some of the existing environmental tribunals anyone can appear – in person or represented by an advocate. This is the case in Guyana,³⁶ Trinidad and Tobago,³⁷ and appears also in Tanzania's Environmental Management Act (2004)³⁸ as concerns that country's environmental tribunal. Furthermore, there is no requirement to show interest or injury. However, in the case regarding an appeal to the Commission of Trinidad and Tobago,³⁹ the qualification of an 'interested person' appealing the decision of their Environmental Management Authority is one who has 'submitted a written comment on the proposed action during the public comment period' of the given decision.⁴⁰ While such 'accessibility' to the Commission or Tribunal may seem flawed or even amorphous, one should be reminded through the Kenyan context that 'every person... is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment'.⁴¹ Indeed, before the KNET, the common law requirement of locus standi, in the past revered in Kenya, has no place in environmental matters expressly regulated by a statute. Even without a statute, the challenge to follow other jurisdictions (India and South Asia generally) in environmental matters

³² Trinidad and Tobago's Environmental Management Act, section 86(5).

³³ Guyana's Environmental Protection Act, section 57(5).

³⁴ See <<http://www.vermontjudiciary.org/gtc/environmental/default.aspx>> (visited 26 May 2010).

³⁵ Vermont Statutes Annotated, Judge Meredith Wright Provision 8013. Section 22 of the Australia, Land and Environment Court Act (NSW), empowers the Court to grant all remedies of any nature, conditionally or unconditionally, so that all controversy is completely and finally determined and multiplicity of proceedings is avoided.

³⁶ See Guyana's Environmental Protection Act 11 of 1996, Part VIII, section 54; see <http://www.gina.gov.gy/gina_pub/laws/Laws/cap2005.pdf> (visited 25 May 2010).

³⁷ See Trinidad and Tobago's Environmental Management Act, section 69.

³⁸ Tanzania's Environmental Management Act 20 of 2004, section 207(5); see <<http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwetan.htm>> (visited 25 May 2010).

³⁹ Part VIII of the Act deals with Appeals to the Commission.

⁴⁰ Section 30(2).

⁴¹ Kenya's Environment Management and Co-ordination Act (EMCA), section 3(1); which right is, per section 3(3), addressed to the High Court.

would have been great. In the case of Tanzania (mainland), a decision of the High Court preceded the enactment of the 2004 Environmental Management Act (EMA).⁴²

Environmental tribunals appear generally to have flexibility and they may exercise this quality easily within their mandates. For instance, Guyana's Environmental Protection Act makes provision⁴³ for grounds previously excluded from appeal to be included. The KNET has generally observed flexibility and has, routinely, either on its motion or on invitation by a party, visited sites in issue in order to appreciate issues better. This practice has been useful in all such cases.⁴⁴

Another measure of flexibility, mentioned earlier, is that the tribunals can be assisted by assessors (who probably will be experts). Within the KNET, over-generous invocations have been observed of the use of preliminary objections or motions by advocates and environmental impact assessment (EIA) experts. Often it was clear that opinions or documents were prepared or virtually formulated to respond fully to the positions of their clients – oblivious to the state of the environment. In the case of the Australian LEC, a consultative committee in the form of the 'Court Users Group' has been established whose main function is to make recommendations to the Chief Judge on improvements in the functioning and services provided by the Court and to act as a communication channel for disseminating court-related information. The Group's membership includes engineers, architects, planners, surveyors as well as legal experts.⁴⁵ Indeed, tribunals are multifaceted and multi-skilled. Such flexibility and openness is a rarity in regular courts.

An important aspect of flexibility, however, is missing in some tribunals. Ordinarily, a tribunal should manage its work and be able to proceed with its activities, and, if it does not have a vice chair (as some do not), to select one of its members to chair a specific meeting or consideration of a matter in the absence of the Chair as would be the case in Lesotho.⁴⁶ This is, however, not the case in Kenya, where neither vice-chairman nor election of a member or nomination of a member by the others or by the Chair is provided for in the statute or rules. Business must be conducted under the Chair who should be one of the three constituting a quorum. Both the Guyana tribunal and the Trinidad and Tobago Commission make provision for a vice-chairperson.

⁴² Rev. Christopher Mtikila v. the Attorney General, Civil Case No. 5 of 1993, High Court of Tanzania. This case decided in 1993 was also well ahead of the enactment of EMA and Kenya's EMCA in 1999. The Nigerian case, FHC/B/CS/53/05 also underscores this position.

⁴³ Section 55(6).

⁴⁴ This has been the experience of the Chairman and the members of the Tribunal. For example, once an appeal is filed, all activity at site should stop. On occasion, however, where a party denied activity was going on, site visits established that the contrary was true.

⁴⁵ Dennis A. Cowdroy, 'The Land and Environment Court of New South Wales – A Model For The United Kingdom', *J.P.L.* (2002) at 59.

⁴⁶ Per section 98(6)(b) of the Kingdom of Lesotho; Environment Act (Act No. 10 of 2008).

The independence of the environmental tribunals is key to their success and should ensure that they hand down decisions impartially, even should these affect the public authorities – or powerful private interests. The tribunals would, then, be seen to be Courts for all practical purposes. The law can, and ought to, provide the backbone for a democratic, transparent and accessible system of environmental governance. Increasingly, legal rights, including legal standing, are being granted to citizens whose environmental concerns compel them to seek information on environmental matters or access to environmental justice. States should simply organize competent informed bodies to implement the law and decide over disputes. It is also incumbent upon individuals as well as varied organizations to take collective action on constitutional law, public law, private law and criminal law, making it possible for ordinary people to ensure that justice is administered effectively.⁴⁷ In India, a three judge bench of the Court, known as the ‘Green Bench’ or the ‘Forest Bench’, issued a ‘continuing mandamus’⁴⁸ operative for past twelve years, and has been using it to deal with prominent issues including conversion of forest land for non-forest purposes. Such huge positive developments in law are only possible at the national level.

Tribunals, whether in administrative, commercial, intellectual property-related or environmental matters are not an end in themselves and do not have solutions to offer in all matters. They are facilitative, but face challenges and problems that affect a country as well. Funding is a challenge; policy and law may be weak and similar challenges. But there can be no true ‘good governance’ if they are ignored or not integrated in overall local and national governance.

3 The Kenyan National Environmental Tribunal (KNET)

The National Environmental Tribunals are quasi-judicial institutions. With special attention to the Kenyan National Environment Tribunal (NET), these tribunals are not integral to the executive in a government. This is to avoid the perception of their being partial from the outset. Furthermore, National Environmental Tribunals work for the good of the public. As the report of the Justice William Ouko Task Force on Judicial Reforms⁴⁹ has observed, national environmental tribunals are meant, ‘to provide more specialized, cheaper, speedier and more accessible Justice’.⁵⁰ Consequently, operations, akin to the executive arm of the government in settling disputes, would be contrary to their innate character since the executive is often shrouded in mystery.⁵¹

⁴⁷ Sharma, ‘Green Courts in India’, *supra* note 14, at 70–71.

⁴⁸ The orders of the Court are available at <<http://www.forestcaseindia.org//f2/>> (visited 7 March 2010).

⁴⁹ See <http://www.kenyalaw.org/profiles/justice_ouko.php> for biographical details of Mr Justice Ouko; and <http://www.hackkenya.org/index.php?option=com_docman&task=doc> (both visited 26 April 2010) for the Task Force’s Report.

⁵⁰ Report of the Task Force on Judicial Reforms (Initial), *supra* note 25, at 51.

⁵¹ The Kiswahili name for Government can be loosely translated as ‘(siri kali)’ meaning ‘high secret’.

Being quasi-judicial, National Environmental Tribunals are, or should be, closely related to the judiciary. This is as far as making decisions, delivery of judgments and their natural follows-through are concerned. In the appointment processes, as noted below, a mix of the executive, civil society and judiciary is apparent. While the process can be adjusted or strengthened depending on a country's needs and circumstances, embracing a broad spectrum of governance interests simply emphasizes the interlinked nature of the environment.

However, in an attempt adequately to 'govern' the environment, the National Environmental Tribunals dispense with some of the aspects of the judiciary that render the system opaque, slow, congested and, to some extent, associated with corruption. For example, several persons form a quorum; unlike normal courts at Magistrate or High Court level which are presided over by a single judicial officer: a magistrate or judge with only the highest court having three judges. In KNET the quorum is three, and most often four or five members hear a matter. They reflect different skills (environmental law, science), can act speedily, avoiding some of the pitfalls of ill-governance. They are also different from courts in that unlike the courts that apply codes of procedure, they are not so obliged.⁵²

In their respective mandates, tribunals are to avoid technicalities, and focus on substantive considerations of the issues. National Environmental Tribunals thus open themselves up to expert advice as well as the use of assessors in order to serve the public good. It is arguably as a result of this 'good governance' that there has been fresh impetus in the importance attached to environmental management in an integrated manner at the national level. However, this positive trend is, from time to time, threatened by the problem of 'fragmentation'. There may be internal administrative structures (ministries, departments, and local and national spheres of government) responsible for different environmental parts, for instance forests, water and wildlife. These are elements of the whole of the environment and natural resources, but the administrative structures may be in competition and pulling, not together, but apart. On the other hand, tribunals or courts can encourage or order departments and institutions to work together: a good example of this being the decision of the Manila Supreme Court ruling of 18 December 2008.⁵³

⁵² Section 126 (1) of the Environmental Management and Co-ordination Act, 1999 provides: 'The Tribunal shall not be bound by the rules of evidence as set out in Evidence Act.'

⁵³ Republic of the Philippines, Manila Supreme Court decision of 18 December 2008, available through <<http://www.thelawofnature.org>>. This case, on appeal from a Regional Trial Court case brought by a citizens' group (the 'Concerned Residents of Manila Bay'), saw the Supreme Court dismiss the appeal and consequently order a group of appellant ('petitioner') government agencies (including the Metropolitan Manila Development Authority, Department of Environment and Natural Resources, Department of Education, Department of Health, Department of Agriculture, Department of Public Works and Highways, Department of Budget and Management, Philippine Coast Guard, the Philippine National Police Maritime Group, and the Department of the Interior and Local Government) to coordinate the cleanup, restoration, and preservation of the water quality of the Manila Bay. See <<http://sc.judiciary.gov.ph/news/courtnews%20flash/2008/12/12180801.php>> (visited 26 April 2010).

Environmental rights and principles are part of national law also in Kenya.⁵⁴ It is in this spirit that National Environmental Tribunals have been set up to help implement national and regional environmental laws and, in the wider context, international environmental laws, particularly where dispute settlement is required.

The Kenyan Environment Management and Coordination Act (EMCA) became operational in January 2000. It is, therefore, a decade old. However, this does not apply to all of its organs, one of which took off much later: all of the National Environment Management Authority (NEMA) and its Committees; the National Environment Council (NEC); the Public Complaints Committee (PCC); the National Environmental Tribunal (KNET); the National Environment Trust Fund (NET-FUND); the Restoration Fund; the National Action Plan Committee and the National Environment Tribunal. Some took time for a variety of reasons, including lack of finances and, therefore, of personnel and equipment. The Act establishes several organs and is rather comprehensive. It is in 13 parts, three schedules and has been fleshed out with about ten legal instruments in subsidiary legislation. The KNET is

⁵⁴ Environmental Management and Co-ordination Act No. 8 of 1999, Section 3. Subsections (1), (3) and (5) are specially relevant. They state:

- (1) Every person in Kenya is entitled to a clean and healthy environment and has duty to safeguard and enhance the environment.
- (3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to-
 - a) prevent, stop or discontinue any act or omission deleterious to the environment;
 - b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
 - c) require that any on-going activity be subjected to an environment audit in accordance with provisions of this Act;
 - d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
 - e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (5) In exercising the jurisdiction conferred upon under subsection (3), the High Court shall be guided by the following principles of sustainable development;
 - a) the principle of public participation in the development of policies, plans and processes for the management of the environment;
 - b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
 - c) the principle of international co-operation in the management of environmental resources shared by two or more states;
 - d) the principles of intergenerational and intragenerational equity;
 - e) the polluter-pays principle; and
 - f) the precautionary principle.

embraced in part XII.⁵⁵ Some organs, such as the NEMA (but not all of its committees) became effective almost immediately, and others, such as the KNET, not until 2002 to 2005 when the first Chairman, currently Lady Justice F. N. Muchemi of the High Court, and members were appointed, with the present writer being the second Chair from 2005 to date.

The Kenya National Environmental Tribunal 'KNET' is granted jurisdiction by two Acts: the Environment Management and Co-ordination Act (EMCA)⁵⁶ Part XII, and the Forests Act.⁵⁷ As an umbrella Act, EMCA brings on board other players, such as lead agencies, which are subject to other laws but which, in KNET's work, must be addressed coherently and with consistency. A Backup Legal Notice on its Procedure Rules⁵⁸ is in place as well as a rich body of subsidiary legislation on environmental impact and audit regulations;⁵⁹ water quality regulations;⁶⁰ waste management regulations;⁶¹ fossil fuel emissions regulations;⁶² conservation of biological diversity and resources, access to genetic resources and benefit-sharing⁶³ and controlled substances.⁶⁴ The Environmental Management and Coordination (Wetlands River banks, Lake Shores and Sea Shores Management) regulation⁶⁵ and Noise and Excessive Vibration Pollution Control regulations⁶⁶ could also be mentioned.

KNET's jurisdiction is appellate and referral. Administrative decisions, actions or omissions of the National Environment Management Authority and its committees are appealable to the KNET.⁶⁷ Appeals can also arise from decisions of the Kenya Forest Service or its Director under the Forests Act (Act No. 5 of 2005).⁶⁸ The KNET has appellate jurisdiction but a case cannot start there. Thus it has no original jurisdiction as the mainstream courts do. It might be asked whether the KNET *should* be given original jurisdiction. In other words: should the KNET be made integral to the national court system? Such actions would, of course, require Parliament to enact the necessary statutes. However, no such discussions or consultations between pertinent branches of governance have taken place, as far as the author is aware. If enacted, such a law would also settle issues of personnel, modality of operations and

⁵⁵ Sections 125–136 of the EMCA.

⁵⁶ The Environment Management and Co-ordination Act 8 of 1999. See <<http://www.nema.go.ke/images/stories/pdf/EMCA.pdf>> (visited 11 July 2010) for the text of the Act.

⁵⁷ The Forests Act 7 of 2005. See <<http://www.fankenya.org/downloads/ForestsAct2005.pdf>> (visited 11 July 2010) for the text of the Act.

⁵⁸ Legal Notice 191 of 2003.

⁵⁹ Legal Notice 101 of 2003.

⁶⁰ Legal Notice 120 of 2006.

⁶¹ Legal Notice 121 of 2006.

⁶² Legal Notice 131 of 2006.

⁶³ Legal Notice 160 of 2006.

⁶⁴ Legal Notice 73 of 2007.

⁶⁵ Legal Notice 19 of 2009.

⁶⁶ Legal Notice 61 of 2009.

⁶⁷ Section 129 of the EMCA. The NEMA can also make a referral to the NET for an opinion on a complex legal issue under the Act. See section 132.

⁶⁸ Act No. 5 of 2005. See sections 33(3) and 63 thereof.

financing. However, it is noted that in the tribunals in developing countries, none, unlike those in the developed countries (such as the LEC in New South Wales, Australia; and Vermont, USA) have original jurisdiction.

Regarding the final determination of a suit, the Kenyan context, however, leaves room for ambiguity. This is due to the overlapping of various laws. Appeals through the KNET would be facilitative until the law in place is reviewed to different effect. In one of the appeals before it, the appellant had first gone to the High Court⁶⁹ but by consent among the parties the Judge referred the matter to KNET. The High Court, correctly in the view of the present author, declined to deal with the case and referred the proponent to the procedure available via the EMCA. This approach can be commended; it should administratively be followed in the Courts and the matters that had been handled by the NEMA should be turned over to the KNET to first challenge those issues per EMCA provisions.

A problem may arise in KNET where a party has not observed the time limits set in the EMCA, but the Tribunal has handled many such appeals. A matter might also be filed in the High Court because an advocate might be unfamiliar with EMCA and its procedures or might do so to be able to charge the client a great deal more in the High Court than in KNET. A matter having been heard and filtered through the KNET would have the benefit of a fast decision and of a review by experts at the KNET level before an appeal to the High Court whose decision 'shall be final'.⁷⁰ However, in the event that the matter is first filed in the High Court and is heard and determined and a party was dissatisfied, that party could proceed to the Court of Appeal to challenge the decision. In effect, therefore, an unfortunate parallel process would have been sanctioned; through the KNET, with final decision from the High Court on the one hand and the other originating in the High Court, and final determination by the Court of Appeal on the other hand.⁷¹

In terms of harmonizing the various aspects of procedure, appointments, terms of reference and appeals from tribunals or appeal boards, these aspects should be reviewed and streamlined as well. It should be underlined and settled plainly that the appeal would be on law only (not facts); how many judges⁷² should hear a case; and what should happen if the Chair presiding over a tribunal is at the level of a judge (or is a retired judge) as is the case in one environmental tribunal. Several laws among the Commonwealth countries have been mentioned, and these offer the way forward

⁶⁹ Civil Suit No. 738 of 2003 filed in the High Court, Nairobi.

⁷⁰ Section 130(5) of EMCA.

⁷¹ EMCA, Part XII, section 130(5).

⁷² Judges Kimaru and Visram (as he then was) mentioned that the practice in such appeals as from the KNET would be heard by two Judges and that in the event of disagreement among them, the appeal would be dismissed. Judge Waweru, in his closing speech, responded to concerns expressed by the author and others, stating: 'there is really no proper basis for this disquiet.' In the case of Tanzania, appeals from the Appeals Tribunal would be heard by a panel of three Judges of the High Court. (Section 209(2)). However, it is yet to be operationalized.

in the future. One specialized tribunal, actually referred to as a ‘Court’, is the Industrial Court of Kenya.⁷³ Appeals from this Court go to the Court of Appeal, currently the highest Court in Kenya.

Should the jurisdiction of the KNET be enhanced, like the Kenyan Industrial Court in the new 2007 Act?⁷⁴ The Labour Institutions Act effective 20th December 2007 and relevant section(s), states that the Tribunal would actually be at the level of the High Court, and that its decisions are appealable, on points of law, to the highest Court, the Court of Appeal,⁷⁵ in the land? This is another important issue that would have to be resolved in other fora.

Another issue is the scope of decisions that should be appealable. For the EMCA, unlike the EMA of Tanzania, the decisions of the Minister are not appealable – the question is whether they should be but if so, the Act should be amended to define that. Environmental problems are interconnected, but environmental management may be splintered across sectoral and multisectoral laws, departments and ministries. Better management should be central to ensure that the environment does not lose out. In a recent judgment, the Supreme Court of the Philippines directed all agencies to work in a concerted manner to implement environmental laws.⁷⁶ This common-sense approach could hardly be faulted if applied in other developing jurisdictions.

The issue of financing is important. Parliament should directly vote and allocate adequate funds for an environmental tribunal. The funding should provide for funds to cover all staffing necessary; operational funds; equipment et cetera. The law should provide for how recruiting of staff should be done. States must avail funds for environmental causes. In the Caribbean mechanisms,⁷⁷ remuneration is akin to that of the judiciary and, hence, funding from the consolidated fund is preferred. This is definitely an important issue in those countries that institute tribunals. Without adequate funding tribunals could be crippled and their effectiveness dashed.

The mode of appointment of the members, their deployment and the operation of the tribunal are matters of critical importance if a tribunal is to function effectively. Currently, the KNET has a Chair, and four members,⁷⁸ all arising from three sources: the Chair is nominated by the Judicial Service Commission (JSC); another lawyer nominated by the Law Society of Kenya, and yet another nominated and appointed by the Minister who also nominates and appoints two ‘persons who have demon-

⁷³ Act No. 12/2007.

⁷⁴ The Labour Institutions Act (2007).

⁷⁵ In answering a question at the State Law Counsel Symposium, held 2–6 September 2009, at Nyali Beach Hotel, Mombasa: Justice M. Ibrahim expressed a personal view that raising the profile of the KNET would enhance it and would reduce the potential conflict inherent in appeals to the High Court.

⁷⁶ The ‘Concerned Residents of Manila Bay’ case. See *supra* note 57.

⁷⁷ Funding is foreseen in the stable source of consolidated fund. It is not on yearly vote in parliament.

⁷⁸ Section 125(1) of the EMCA.

strated exemplary academic competence in the field of environmental management'.⁷⁹ While the Minister appoints all five, he has full authority over appointment of three of the five; that is, one lawyer with professional qualifications in environmental law and two scientists. This has not caused any problem, to date; but the question is whether it should change and, if so, in what direction? Besides the members, an establishment of eleven staff has been approved⁸⁰ by the relevant department of government, of which staff only three are currently on board. In the EMCA, already some appointments and tasks are the responsibility of the President.⁸¹ It might be argued that the Chair should be nominated by the JSC and appointed by the President, thus bringing the Chair's appointment to the same level and procedure as that of appointing a Judge of the High Court unless the appointee is already a judge in which case is reassigned to position of chair, or a retired judge who has already gone through the formal process of appointment and thereafter continues to carry out judge functions as chair.

The EMCA envisaged there being more than one tribunal;⁸² even though currently only one tribunal has been *Gazetted* and is operational. Looking to the future, a related question arises: do we need *Gazettement* of more tribunals or more members so that different quorums can function at different centres, where cases originate in significant numbers. The current tribunal is located in Nairobi. If such were the case, it might be asked under whose management the different quorums would function. Under the EMCA, only 55 appeals have been filed to date,⁸³ and these come from five provinces. So far, one Act, the Forests Act of 2005, mandates the KNET to hear appeals against the Kenyan Forest Service (KFS) and its Director; but, since the Act became effective in February 2007, no case has been filed with the KNET. Assuming more Acts move in this direction, for example under a new mining law,⁸⁴ new wildlife law⁸⁵ or the revised water law,⁸⁶ should not a panel of numerous members with different skills and qualifications be envisaged so that a quorum in appeals touching on these aspects would include relevant expertise or skills? This would be critical as opposed to new tribunals per se. Clearly additional funding, support staff and equipment would need to be provided also.

From 2005 to date, some 55 appeals have been filed and most of them dealt with. Some of the appeals, per section 130 of the EMCA, have been appealed to the High Court for final determination. In three appeals to the KNET, judicial review applica-

⁷⁹ Section 125(1)(d).

⁸⁰ Approved in 2007.

⁸¹ Section 10(1)(a) Chairman, NEMA Board; 10(1)(c), D-G NEMA; determination of salary from time to time for the D-G and Directors.

⁸² Section 136(1). The number is not indicated but consideration of finances, cost of equipment and caseload would be considered before the Minister decides on such a development.

⁸³ As of the end of June 2010: most of Nairobi, Coast and Rift Valley, and one each from Eastern and Western provinces.

⁸⁴ A bill has been formulated but not yet approved by Parliament.

⁸⁵ A bill has been formulated, but it is not yet enacted.

⁸⁶ Water Act (No. 8 of 2002); part VI has an appeals board.

tions in the High Court have interrupted the timely completion of the matters in the KNET. In one of the three, the Tribunal has appealed to the Court of Appeal against a decision it contested on jurisdiction to access the tribunal, a matter not yet heard and determined.⁸⁷ In the next, the High Court, Mombasa, ordered the application for judicial review to be struck out; and, accordingly, the matter reverted to the tribunal. In this review, the appellants had concluded their evidence when the respondent went to the High Court.⁸⁸ In the third, the Tribunal had just ruled on issues of preliminary objection when a party went to the High Court for judicial review and the matter is in that Court awaiting ruling set to be delivered on 30 September 2010.⁸⁹

After the few years for which the Tribunal has existed and the EMCA has been in operation, it is apparent that there are minor amendments which could be made which would streamline the Act. If done, these, along with subsidiary legislation, should be the second set of amendments, the first having taken place in accordance with Act No. 5 of 2007 deleting extensive section 42 and sections 104 to 107 of the EMCA. Act No. 5, of 2007, section 77, renders sections 12 and 19 of the Legal Notice Number 19 of 2009 incurably defective. This instrument is the Environmental Management and Coordination (Wetlands, River Banks, Lake shores and Sea Shores Management) Regulations.⁹⁰ The proposed development through amendments affects not only the KNET but also the NEMA and the PCC in a process involving the KNET, NEMA, Ministry of Environment and the Attorney General Chambers chaired by the Chair of the KNET and presented to the Permanent Secretary. It may also be necessary to clarify, in the proposed amendments, the relations and modality of work between the NEMA and NETFUND. These minor points have been raised with the Minister for Environment and Natural Resources, and in due time may reach Parliament for consideration and possible action.

However, there are also more fundamental changes and directions that could be raised in discussion of challenges to be met; and the process would require broader consultations, including, for example, the judiciary. These challenges include: whether the KNET should have original jurisdiction; should have the status of the High Court with appeals from KNET going to the next senior court; should be funded like the judiciary; and so forth. Such changes should only be undertaken provided they would not compromise the EMCA, a key statute under which an integrated approach to environmental management is not only required, but should be enhanced. Section 148 supersedes sections/provisions of statutes older than the EMCA that conflict with, or are inconsistent with, the EMCA. However, the statutes enacted after the EMCA ought to uphold and not override or affect the status of the

⁸⁷ Appeal filed by KNET arising out of Court's ruling in Misc. Application No. 391 of 2006.

⁸⁸ Misc. Civil Application 295 of 2008, High Court, Mombasa,.

⁸⁹ High Court Misc. No. 111 of 2008 – *Exparte Ol Keju Ronkai Limited and Emuny Mara Camp Limited*.

⁹⁰ Available through <http://www.kenyalaw.org/kenyalaw/klr_app/frames.php> (visited 11 July 2010).

EMCA. In this respect, the Water Act of 2002⁹¹ would need to be reviewed to bring the two statutes into harmony. Clearly, sight should not be lost of the fact that environment remains a single entity; irrespective of how many units, departments or ministries have impacts on its management. The first required area of cooperation is among the 'children' of EMCA, that is, the organs it has created; and, in the second instance, the lead agencies, named in the schedule whose functions have impacts on the environment and which may take a long time to clean up or to streamline with the EMCA. Luckily, however, courts would be able to safeguard the EMCA provisions where old statutes impinge on provisions of EMCA.

4 International law

Focus in environmental compliance and enforcement has gained impetus in the recent past from many players: the United Nations system, with UNEP in the lead, and governments and their experts involved in binding and non-binding instruments in their efforts to develop Multilateral Environmental Agreements (MEAs), principles and guidelines – these efforts are producing results, but often progress is slow. UNEP has further produced MEA materials in a series of Registers of Treaties and publications on principles from Stockholm Declaration, 1972; Rio Declaration, 1992 and others, for use by governments and the international community. Its decision⁹² in Cartagena, Colombia, approved guidelines on environmental compliance and enforcement in 2002 in the Seventh Special Session.

All of these MEAs call for reports on implementation at national level by the parties, and that process entails, on the part of national governments, legislation or administrative decisions domesticating international obligations at national level. This legislation should, at local level, be addressed by national tribunals which should also take cognisance of principles to which governments have committed themselves. In Kenya the legislature recognizes international treaties, conventions and agreements in the field of the environment;⁹³ thus it is evident that multilateral environmental agreements created/drafted at the international level go a long way in facilitating national implementation/incorporation. Recognition of international conventions is also evident in the mainstream Courts where a two judge bench of the High Court made a finding that '[i]nternational Human Rights Instruments and other Treaties apply even without specific domestication where there are ambiguities or gaps in the

⁹¹ Section 148 of EMCA states that '[a]ny written law, *in force immediately before the coming into force of this Act*, [emphasis added] relating to the management of the environment shall have effect subject to modifications as may be necessary to give effect to this Act, and where the provisions of any such law conflict with the provisions of this Act, the provisions of this Act shall prevail'. Clearly the Water Act of 2002 was enacted after 1999 and, therefore, it is not covered in this provision of the Act.

⁹² 'Seventh Special Session of the Governing Council/Global Ministerial Environment Forum, Report of Decisions', UN Doc. UNEP/GC SS.VII/2 (2002).

⁹³ Part XI of EMCA.

domestic law and where the instruments are not inconsistent with the Constitution'.⁹⁴ The Court here gave direction and its decision is binding and one to be emulated by tribunals. In KNET players are engaged as experts, assessors, prosecutors, defenders, etc in matters before it.

Besides the UN and governments there are other players that influence law-making in international non-government organizations. These include the IUCN: World Conservation Union; the Centre for International Environment Law and the International Network on Environmental Compliance and Enforcement, which are also partnered by UNEP; the World Bank; OECD; the European Communities; and such governments as the Netherlands, USA, UK (England and Wales). Key publications, such as *Making Law Work*,⁹⁵ the *Manual on Compliance with and Enforcement of Multilateral Environment Agreements*⁹⁶ and UNEP's *Compendium of Summaries of Judicial Decisions in Environment Related Cases*,⁹⁷ just to mention a few, have been inspirational in this process. Tribunals are a ready forum to test whether the effects of the emerging and prevailing international law through treaties (MEAs), etc, have reached different players locally. Decisions and rulings delivered by tribunals are reflected in a series of publications by UNEP⁹⁸ which are useful and used for judicial training, in which the author has taken part, starting with Mombasa, Kenya in 1996, thereafter in Uganda, Tanzania and other countries.

5 Conclusion

Whether a given country requires an environmental tribunal or not is a matter for the country concerned to decide for itself. It should provide for the institution, how they work, who mans them, and how they relate to other laws and mechanisms in the country. Decisions on environmental matters have repercussion for investments, require urgent attention, and have far-reaching implications for the future of the environment and for its sustained development for generations. Environmental sustainability and environmental attention cannot, nor should be, taken for granted. These things underline the survival of humanity as a whole; and so deserve to be considered in an integrated manner, with full engagement of stakeholders, and accountability in the realization that certain areas of all environments are vulnerable and require intervention and protection urgently, if environmental resources are to be safeguarded for present and future generations. It could be argued that in some

⁹⁴ *R v RM* suing through Kavindo High Court Civil Case no. 1351 of 2002. This was reiterated in a recent judgment, 18 April 2007 in High Court (Nairobi) Case No. 1652 of 2004; *Republic v Minister for Home Affairs and others ex parte Sitamze*, East Africa Law Reports (2008) EALR Vol. 2 at 326.

⁹⁵ *Supra* note 5.

⁹⁶ *Manual on Compliance with and Enforcement of Multilateral Environment Agreements* (UNEP, 2006).

⁹⁷ *UNEP Compendium of Summaries of Judicial Decisions in Environment Related Cases* (UNEP, 2002).

⁹⁸ *Ibid.* at 97.

contexts, the worst enemy of sustainable development is bureaucratic competition for 'turf' and resources; followed closely by the second, the underlying greed found among shortsighted, potential or actual, beneficiaries, whose primary concerns are immediate rather than long-term.

Naturally each country should devise how best to overcome the said 'enemies' and in the process each country would need clear law, policy and procedures, dedicated institutions and committed personnel. Desired capacity should be developed and public awareness as well as participation enhanced. Access to environmental courts and tribunals should be open to all, and costs to present or question matters be minimized. Then these mechanisms should make it their business to act swiftly and to signal clear messages of sustained reinforcement and utilization of common goods and services in the field of the environment.

Thus, if the environment is secured from the grassroots, and challenges are well managed at the Tribunal and subsequent levels of a judiciary friendly to the environment, then the future of generations would be pillared in an unshakable foundation. Concrete examples shared at regional and global levels could be beneficial to the international community which on an ongoing is tackling questions of realizing environmental justice. The time to lodge this form of governance is *now*, and it is time for diplomats to spread the message of best practice in all of their tasks.



THE IMPORTANCE OF ALLIANCES, GROUPS AND PARTNERSHIPS IN INTERNATIONAL ENVIRONMENTAL NEGOTIATIONS

Elizabeth Mrema¹ and Kilaparti Ramakrishna²

1 Introduction

Negotiation skill and experience are arguably underacknowledged as essential components of the world's efforts to build an effective international environmental governance framework. Key to such negotiation skill is the ability to create appropriate and effective alliances, groupings and partnerships. This paper considers first the identification of significant individuals in negotiating teams; then considers different approaches which might be undertaken in negotiations; then the issues of building networks and coalitions; before offering suggestions as to the attributes of a skilled negotiator. The paper concludes with comment on the importance of good negotiation skills for effective international environmental governance.

2 Key negotiators in multilateral environmental meetings

Contrary to the popular belief that a negotiator is a person specially trained to be a diplomat, often times representing a foreign ministry, every national delegate – whether coming with a scientific, environmental or any other background – to an international conference called to adopt any document with legal consequences – that a government is involved in as a negotiator. Often these individuals are expected to play a range of roles within their delegations and with members of other delegations and with the UN entities.

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However, the effectiveness of the role played by such individuals depends on the nature of preparations undertaken at the national level for the delegation's participation at each conference; they may be going to attend in terms of identifying national interests and needs and thus developing their position around these, to mention but few.³ While these preparations are vital in adequately representing national interest, and sometimes even global interest, the person best prepared to articulate these issues may be called on also to perform other tasks. These include being a leader of like-minded countries, regional groupings, or even being entrusted with the responsibilities of shepherding the negotiations as Chair/co-Chair, etc. While the holding of such positions might be seen as potentially valuable tools for furthering national positions, the expectation of other delegations that support such nominations is that these negotiators will maintain neutrality and impartiality, as well as being familiar with issues being discussed at a particular conference. Sometimes it might happen that a person will come from a country which is expected to identify a person to fill a potential regional position in a bureau in accordance with the rules of procedure on the distribution of bureau members for the particular conference. All of this makes it imperative for all members of a national delegation to be fully conversant with, not to mention substantively engaged with, the procedures and formalities of the particular negotiations.

Host governments normally play a critical and influential role in any multilateral negotiation and that is one of the reasons why countries seek to host major international conferences despite the additional cost (both human and financial) covered by the host countries as a result either of creating a new treaty or of moving the meeting from where the secretariat is hosted.⁴ There are often gains to be made, such as the economic gain of showcasing a country, increases in political influence, the raising of popular awareness in the country's own population on critical issues to be debated, and the possibility of raising the international profile of issues of national interest and priority. Within the multilateral environmental negotiation process, there often may be found chairs of subsidiary bodies, chairs of contact groups, friends of the chair, members of experts groups, and rapporteurs, to mention but a few possible positions which might arise. There are of course huge costs as well, and many gains might be lost if other countries' perception at the end of the meeting is that the host country has been inept in arrangements, or incompetent in managing the process. Sometimes matters that are completely out of the country's control, such as extreme weather conditions, etc, also play havoc. However, more often than not, the general

³ For detailed expose of how to prepare for negotiations for multilateral environmental meetings, see UNEP and FIELD, *Guide for Negotiations of Multilateral Environmental Agreements*, (UNEP, 2007), available at <<http://www.unep.org/dec/docs/Guide%20for%20Negotiators%20of%20MEAs.pdf>> (visited 4 October 2010) at 20–21.

⁴ Cities sometimes compete with each other for hosting rights. In 2001, for example, Bali and Johannesburg vied for the opportunity to host the World Summit on Sustainable Development in 2002. The Summit was eventually held in Johannesburg, but Bali hosted the final PrepCom meeting at which significant negotiation steps were expected to be taken.

perception is that hosting such events shows off the country in a positive light to the international community.⁵

In view of the growing number of states involved in multilateral negotiations and debates, more and more different types of coalitions continue to emerge, or to be established, to facilitate development and defences of common positions on different agenda items in negotiation processes. Such coalitions are based, among others, on either geographical and regional bases,⁶ power bases, issue-specific bases,⁷ institutional bases,⁸ or political bases,⁹ Spokespersons for such coalitions need, and are normally expected, to represent the interests of their constituencies effectively.

Within each country delegation to an international conference, be it a one person delegation or a larger one,¹⁰ the senior official in that delegation is likely to serve as the head of that country's or government's delegation. Such a person may play a crucial role in negotiating his/her country's negotiation positions in multilateral conferences; and thus be key to achieving compromise in negotiations as an issue negotiator as well as a facilitator by working between different groups or coalitions and helping to reach consensus.

3 Approaches to multilateral environmental negotiations

There are different approaches which may be taken to achieve effective negotiations. Principal such approaches, however, include the proactive/integrative approach and the reactive/distributive approach.

With regard to the proactive/integrative approach, countries are permitted to submit in advance of negotiations specific views or proposals on specific agenda items of a negotiating conference. To do so, a country needs to be, itself, thoroughly prepared on the issues at stake for the specific negotiations, to have a country position on which it would like to gain the support of other countries, and to follow through the issues both before and during the negotiation meetings. Such advance preparations will allow the country and/or delegation to table draft texts or proposals, as well as

⁵ This may particularly be the case where a Convention or Protocol comes to be known by the name of the city which hosted its first meeting.

⁶ Chairs of the African Group, European Union (EU) Group, Arab League Group, Small Island Developing States Group, to mention but a few

⁷ G 77 Coordinator for Agenda item 4(1), EU Coordinator for Agenda item 6 etc.

⁸ An institutionalized body such as EU for which a country holding the Presidency at any particular period becomes the spokesperson and country for the EU on any and all conference agenda items.

⁹ African Union for Africa, EU for the Europe and others, G 77 and China, to mention but a few.

¹⁰ How many delegates attend on behalf of particular countries may reflect a range of factors, such as the significance of the subject matter to that country, geographical location, expense, etc. At the 62nd Annual Meeting of the International Whaling Commission, for instance, many countries sent only one delegate – Japan sent 40. (See IWC/62/3 'Delegates and Observers', available at <http://www.iwcoffice.org/_documents/commission/IWC62docs/62-3.pdf> (visited 1 October 2010).

proposing alternative texts or drafts depending on the consultations undertaken during the negotiations, so as to acquire the necessary consensus or agreement on the proposals made. This approach allows delegations to make concessions in the different areas of interests and concerns to ensure that at the end of such debates each delegation reaches an acceptable result.

Advance submission or tabling of draft suggestions or draft texts (decisions or resolutions) will normally enable the delegation to propose alternative or amended texts and achieve compromise texts which are more acceptable to other delegations. By doing so, the delegation is enabled to seek support and make alliances with other delegations supporting the draft text. This will also provide an opportunity, in case of difficulties on the proposed text, to bridge gaps between different negotiating parties by proactively linking a range of different issues; and/or enabling parties to make concessions in different areas of interest so as to reach a satisfying overall result to all concerned parties.

With respect to the reactive/distributive approach, delegations ought to be listening carefully to interventions made in the meeting and to rely principally on group spokespersons to speak and defend their positions as agreed in the specific group consultations. Such delegations in fact will want to achieve their goals and interests at the expense of other delegations – which is potentially likely to face more opposition.

4 Networking with other colleagues

For a national delegation or delegate to prepare itself or oneself effectively for upcoming negotiations, the identified or composed delegations need to know, meet and consult with national colleagues who participated in the previous negotiating meetings or conferences. This is especially the case where the national delegation has a new team or individual but is participating in an on-going negotiation process. Institutional memory is vital in facilitating such involvement. It can be nurtured by identifying colleagues and consulting with them on their experiences and lessons learned from their participation in the last meetings or conferences and recording the same for future use. There should also be careful review of the mission or of national reports prepared after participation in previous conferences, in order for delegates to acquaint themselves with the nature of the debate, different national and regional or block positions on various agenda items, their own national positions in past meetings and whether they were accepted or not and reasons for either outcome, to mention but a few. Continuity of national delegations in negotiations is often crucial and is an important factor which countries need to take into consideration when composing national delegations to participate in negotiations. Such delegates ought then to serve as useful tools for training and empowering new negotiators in the upcoming negotiation meetings.

The national delegation needs to know beforehand the nature of the negotiation they are preparing to attend, as such knowledge will have an impact on the nature of the national preparations they will need to undertake while still at home. It might be, for instance, that the negotiation is the Conference or Meeting of the Parties to an MEA; or it might be a meeting of the Subsidiary Bodies/Committees of an MEA; or it might be an Ad Hoc Open-ended Working Group or an Expert Workshop. Furthermore, the national delegation needs equally to know where the session fits within, for example, the MEA's institutional structure.¹¹ To participate effectively in the negotiations and present national position or proposal optimally, the delegation should know and understand well the rules of procedure and be able to use them effectively for its purpose. It needs to understand how the decisions at a particular negotiation are taken in order to be able to lobby and to gauge adequate support for its proposals, or for the proposals of others which it seconds, associates itself with or supports. For instance, decisions might be required to be taken by consensus;¹² or by a two-thirds majority;¹³ or by a three-fourths majority;¹⁴ or by a double majority,¹⁵ to mention but a few of the common decision making modes.

In consultation with their colleagues from other delegations, national delegations need to ascertain the issues which had been particularly significant and/or controversial, and the reasons for such significance or controversy. For instance, if the ne-

¹¹ For instance, the CBD COP meets every two years and Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) twice or thrice intersessionally before COPs; the UNFCCC (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>>) COP meets each year; and Subsidiary Body for Implementation (SBI) and SBSTA (Subsidiary Body for Scientific and Technological Advice) meet twice a year; the 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>>) COP meets once every three years and its Standing Committee (StC) and Scientific Council (ScC) meet intersessionally every year; the CITES (Convention on International Trade in 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>>) COP also meets once every two-and-a-half to three years and its Standing Committee has met sometimes once (1992, 1995, 1998, 2001, 2003, 2005, 2006, 2008) and sometimes up to four times (1994) a year, while its Animal and Plants Committees meet twice between every COP.

¹² For example in CMS COPs, AEWa (Agreement on the Conservation of African-Eurasian Migratory Waterbirds, The Hague, 16 June 1995, in force 1 November 1999, <<http://www.unep-aewa.org>>) MOPs, CBD COPs, Cartagena Biosafety Protocol (Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027, <<http://bch.cbd.int/protocol/>>) MOPs and many other MEAs' decision-making bodies.

¹³ For example CITES COPs. At its last COP 15 in March 2010, key decisions were defeated for failing to get the required two thirds majority votes required to downlist African elephant from CITES Appendix I to II or list blue tunafish, porbeagle and spiny dogfish to its Appendix II despite the latter two being listed as threatened species in CMS Conservation of Sharks MOU adopted in February 2010.

¹⁴ For example, in the International Whaling Commission a 75% majority vote is needed in order to amend the Schedule to the International Convention for the Regulation of Whaling (International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 10 November 1948, 161 *United Nations Treaty Series* 72).

¹⁵ For example, the EU has introduced a new system of voting where both a majority of Member States *and* a majority of the population of the Union may be required – in other words, successful votes are required in two different categories before certain decisions are taken.

gotiation in question relates to the Convention on Biological Diversity's (CBD)¹⁶ ongoing negotiations on the access and benefit sharing regime (ABS), it must be established whether the critical issues are related to market access or access to genetic resources or to access and benefit-sharing (ABS), or to all of these and/or others. Negotiators need to be aware of the key issues which their colleagues followed at the previous sessions, and of whether or not any specific positions were adopted which the present negotiators now need to be aware of or to be familiar with and to promote and/or defend. Such information and knowledge should enable the team to be consistent in their position and, if they intend to modify or change their position after further reflections at home, to enable them to ensure that they are cautious and strategic and do not embarrass their country during the negotiations. In the event that there are still open texts, information as to which delegations supported which particular language or phrasing at the last or previous negotiations will be important for the national delegation to be aware of. National delegations ought also to be aware of which other delegations were particularly active in the previous negotiations, and on which specific agenda items, and which delegations shared their positions or allied with them. It is crucial to be apprised ahead of the negotiations as to which countries shared the national delegation's position or views, and to be able to continue to ally and consult with these as the delegation is likely to be trying to win more supporters to their side at future negotiations.

National delegations need to be aware, even before the agenda is released, of items and priority issues to be focused upon in the negotiations they are preparing to attend. Equally, they should know the expected outcomes of the negotiations they are going to attend. For instance, the outcome might be expected to be in the nature of conclusions, or recommendations, or resolutions, or decisions. If the meeting is likely to adopt more than one outcome, then the difference in content of those outcomes needs to be known in advance so as to ensure that interventions and proposals are made that are conducive toward the appropriate outcome. In cases where there are undecided issues or elements from the previous negotiation meeting, the delegation needs to know about these – especially in situations where they had proposals still to be debated upon, and thus need to be ready to follow these to their logical conclusions. In this regard, the delegation needs to be aware of the different positions on the undecided issues or elements on a proposed text – especially where this text has been left in square brackets.¹⁷

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 On the significance of square bracketing to denote lack of agreement on the text contained, see Cam Carruthers (ed.), *Multilateral Environmental Agreement Negotiator's Handbook*, University of Joensuu – UNEP Course Series 5 (2nd ed. 2007, University of Joensuu) at 3.4.1.5.1. (Available at <<http://www.joensuu.fi/UNEP/envlaw>> and link to 'Publications and materials'.)

5 Coalitions in the negotiation process

In view of the ever-increasing numbers of issues, and the corresponding increases in numbers of states and negotiators in multilateral negotiations, coalitions continue to emerge in response to the issues of the time. Such coalitions have particularly been used as useful mechanisms for smaller delegations to be able to participate effectively in negotiations by reducing transaction costs and saving on human and financial resources. It also reduces required bargaining time and enhances trade-offs and possible agreements on negotiation packages. Coalitions and commonly identified negotiating groups have taken different forms, but the common ones include the following: power-based,¹⁸ interest-based or issue-specific,¹⁹ and regional groupings,²⁰ to mention key ones.

For smaller-sized delegations, often with negotiation skills challenges in many of the complex negotiations, such coalitions become useful to focus the level of their participation and for them to use to their appropriate benefit. It is important, however, to be aware that such coalitions tend to change or shift depending on the nature of the agenda items for negotiations. For instance, the EU and OPEC, while considered a power-based coalition, can also be institutionalized-based as well as interest-based. The regional groupings as recognized by the United Nations can also be grouped to follow specific common issues of interest to all its members. For specific MEA negotiations, different and specific coalitions have emerged and, over time, have played significant roles in the negotiation process. For instance, such roles have been played in biodiversity-related conventions,²¹ climate change-related conventions,²² chemical and hazardous wastes-related conventions,²³ or land-related conventions.²⁴

A major challenge, however, is for national delegations to be able to identify which of the many and overlapping coalitions they fit into in terms of membership – and

¹⁸ For instance: Umbrella Group-JUSSCANNZ composed of 14 developed and non-EU member states; or the EU composed of 27 member states also referred to institutionalized coalition; or Group of 77 and China totaling 132 member states; and LDC (least-developed countries) Group composed of 47 member states.

¹⁹ For example: Small Island Developing States/Alliance of Small Island States (SIDS/AOSIS) composing of 43 States; or Like Minded Mega-diverse Countries (LMMC) composed of 17 member states; or Environmental Integrity Group of 8 member states; and Organization for Petroleum Exporting Countries (OPEC) composed of 11 member states.

²⁰ For instance: Western Europe and others (WEOG) composing of 28 member states (EU, USA, New Zealand, Canada and Australia); or Latin America and Caribbean Group (GRULAC) composed of 33 member states; or African Group composed of 53 member states; or Countries with Economies in Transition (CEIT) composed of 22 states; and Asian Group including China, Japan, Niue and Saudi Arabia all together 52 states.

²¹ For instance: LMMC as an issue-specific group playing a significant role in the international region for access and benefit sharing negotiations. The same role has also been played by the Group of 77 and China, GRULAC, Asia and Pacific and Africa groups.

²² For example: SIDS/AOSIS, OPEC, and EU, Group of 77 and China, LDC, JUSSCANNZ, to mention but a few.

²³ For example: African Group, GRULAC, and EU, to mention but a few.

²⁴ For instance: African Group, GRULAC, and Group of 77 and China, to mention but a few.

how to utilize those groupings to fulfil their objectives. In other words, a delegation needs to be aware of which coalition or regional group their country belongs to, so as to identify the correct spokespersons for each of the coalitions to which the delegation might consider adhering. Delegations need also to know when and where such coalitions meet to discuss common positions, so as to participate and ensure that specific national positions or proposals are spelt out for consideration; and, if possible, to be part of the group position since the delegation will be interested to ensure their country's concerns are equally addressed and reflected in positions taken by their coalition. It may not be adequate for the delegation to assume that its concerns will be taken on board merely because of its position in the coalition. It may need to use other negotiating strategies and techniques to ensure that their national concerns are addressed by the coalition. In the event that the delegation is a member of more than one coalition, it will need also to ensure that there are no inconsistencies between the positions taken by different coalition groups.

Many times during negotiations, specific issues may be referred for further deliberation and compromise to a smaller contact group, or informal working group, or friends of the chair group, etc. In such a situation, the delegation needs to ensure that there is somebody, either a spokesperson from their own delegation or a specific coalition spokesperson, to represent their interests in such smaller negotiating groups. After all, it is in such smaller groups that issues are often digested, discussed and agreed upon for formal presentation and adoption by the negotiation conference. Delegations need equally to know where and when such groups will meet to ensure that their concerns are well represented; and thus to be able to influence the eventual outcomes of such issues in the negotiations.

There are several advantages to forming negotiating coalitions, which is why they are becoming increasingly important in negotiation conferences. For instance, digesting issues in smaller negotiating groups not only saves time but usually creates an atmosphere of closeness and friendship; hence making it easier to negotiate and agree on controversial issues or subject matters. The smaller the negotiating group, the better the voice for discussing and agreeing on common concerns as cognitive complexity is reduced and communication and information dissemination are made more manageable. Transaction costs are likely to be reduced. For smaller delegations, such coalitions ensure and guarantee that their interests and priorities are considered; since, within such coalitions, delegations are able to gain trust and respect and thus gain support for their ideas. It is always easier to sensitize negotiating partners to the delegation's needs; and the atmosphere may create room for compromises and trade-offs.

Despite the advantages of negotiating coalitions, there are challenges or disadvantages that are unique to the group dynamic. At times, notwithstanding the size of the groups, it may still be difficult or impossible for smaller delegations to move between coalitions; since, by the very nature of major negotiations and the restricted time

limits inherent in each meeting, there may be a number of groups established to negotiate specific but different issues, and these may be meeting at the same times. It is also not always easy to reach consensus within a coalition; and it is equally true that once a consensus position is taken or agreed within a group, it may be difficult to shift from that position.

6 Attributes of a good negotiator

Being a good negotiator is a skill that does not necessarily come from specific training; but is more likely honed over time with practice and experience. With regular participation and built-up experience over a period of time in negotiation processes, one will realize that a good negotiator needs to be well-prepared for any negotiation one is about to attend or follow through. Good language skills and strong analytical skills are needed. If one is given the honour of chairing a negotiation process, then experience as a chair, including the ability to be both authoritative and diplomatic, are arguably prerequisites for the chair's success. He/she should know his/her own country's interests and positions thoroughly, as well as the positions of other states and coalitions including knowledge of prior negotiations and their outcomes. He/she should be able to recognize when it is appropriate to compromise, and be willing to do so. He/she needs to show patience and be a good listener with the ability to see the bigger picture and sieve through all positions, concerns and proposals made by the other national negotiators; so as to be able to make acceptable assessments and summaries, and to be able to suggest suitable and timely compromise proposals. In so going, importantly, the negotiator needs to have the ability to control personal emotions; since in practice some negotiators and delegations may lose their tempers while trying to ensure that their positions are reflected in the final negotiation outcomes. Emotional outbursts might be either genuine or strategic, depending on the circumstances, and both need to be handled with tact.

Good negotiators, whether in positions of authority or not, will have the ability to break bigger and more difficult issues down into smaller, more manageable ones, focusing on interest-based decisions while rejecting weak solutions which make it difficult to achieve necessary agreements or compromises. The good negotiator needs to be able to be both respectful and diplomatic when presenting positions or when commenting on another delegation's position. A skilled negotiator will, therefore, have the ability to build a package as an outcome of the negotiation discussions; which may have been antagonistic, have gone off topic, or to have revealed fundamental differences of interpretation or understanding, to mention but a few factors which would make resolution difficult. In other words, the skilled negotiator will be able to define the problem, find some implementation options and be flexible in dealing with them during the discussion. As a skilled negotiator, or if he/she happens to chair the negotiation process, he/she may form a small core group (perhaps even a 'friends of the chair' group) or join alliances so as to find tradeoffs by using excep-

tions, or by creating a narrow start, or by offering a 'broad brush' approach, or by providing a 'compensation clause'. In so doing, the skilled negotiator will be trying to find or identify an appropriate and ripe moment to propose a solution, or option, or compromise (even if this takes time and becomes 'negotiation by exhaustion').²⁵

7 Conclusion

It can be argued that effective international environmental governance is imperative if the world is to achieve the goals of environmental protection, intra- and intergenerational equity, and sustainable development – goals with which few would argue. It can further be stipulated that a realistic foundation for an effective international environmental governance regime is one that rests on a bedrock of solid textual drafting; in other words, treaty texts which have been adopted in a consensual spirit, are inclusive of a wide range of interests, are responsive to all major concerns, are unambiguous (although sometimes the only way of reaching an agreement is to allow for some 'constructive ambiguity', it still narrows the scope for confusion), and are widely agreed upon. It can only be conducive to treaty texts as described becoming the norm, rather than being the exception, if negotiation skills worldwide improve. An important aspect of improving such skills is the building of networks and relationships of experienced negotiators, whose abilities and insights are trusted by both their allies and their opponents. It is in this that the importance of studying and understanding alliance and coalition building, and negotiation techniques, is to be found.

²⁵ Ripe moments could occur during the last days of the negotiating meeting when most delegations are exhausted and ready to leave; or even during late night extended sessions when some delegations (particular smaller delegations) might already have left the meeting venue, giving space in practice to a few delegations to make final decisions and adopt them. This is not, of course, to suggest taking advantage of other delegations' limitations – a great deal of trust might even be built by taking such delegations' concerns into account in their absence. The real point is that the skilled negotiator should be alive to 'ripeness' as representing opportunities which should not be missed.

PART IV

INTERACTIVE EXERCISE



THE NAIVASHA EX-COP: A MULTILATERAL SIMULATION EXERCISE OF A JOINT EXTRAORDINARY CONFERENCE OF THE PARTIES TO THE BASEL, ROTTERDAM AND STOCKHOLM CONVENTIONS¹

Cam Carruthers² and Kerstin Stendahl³

1 Overview

1.1 Introduction

This paper sets out the elements and structure of a simulation exercise which took place at the sixth University of Joensuu – UNEP Course on International Environmental Law-making and Diplomacy. The scenario for the exercise was focused on synergies, and involved both substantive and structural/procedural issues. In the exercise, issues related to joint decision-making and officers, joint services, joint activities and a joint review mechanism were negotiated. These issues were among the

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.

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many that were still to be resolved at the actual simultaneous or joint Extraordinary Conference of the Parties to the Basel,⁴ Rotterdam⁵ and Stockholm Conventions.⁶

In the exercise, work was organized in a Joint Contact Group with four drafting groups. This scenario and the issues were based on recent actual work of the ad hoc joint working group on enhancing cooperation and coordination among the three conventions (the AHJWG) and by decisions of the Parties to the three conventions. Decisions by each treaty body, each conditional on the others, provided for the 'Ex-COP' and have already identified the issues (see below). The most recent decision at the time, by the Parties to the Stockholm Convention, was reached in Geneva in May 2009.

This paper reviews the general instructions and supporting material of the negotiation exercise. Confidential individual instructions were provided separately to participants and are not reproduced or revealed in detail here. Note that, due to events external to the simulation, only the first day and a half of the two day exercise were completed. The negotiations had almost been completed, although the final plenary and adoption of agreed texts was not possible. Nonetheless, a substantive debriefing session was conducted which provided feedback to the participants and the organizers.

1.2 Importance of synergies in the MEA context⁷

Environmental policy-making at the international, regional, and national levels has generally approached problems in a case-by-case manner, addressing individual problems as they arose. This has led to a substantial increase in the number and scope of multilateral environmental agreements (MEAs), each one addressing a separate issue, and to a growing number of international and national institutions. Since most environmental issues are rarely isolated from other issues, environmental and otherwise, there is the potential for both synergy on the one hand and overlap and duplication on the other.

⁴ 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>>.

⁵ 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>>.

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

⁷ This section is based on text on 'Avoiding Overlaps and Encouraging Synergies with Existing MEAs', in the *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, found on the UNEP web site at <<http://www.unep.org/dec/onlineManual/Compliance/PreparingforNegotiations/SynergiesAmongMEAs/tabid/420/Default.aspx>> (visited 8 September 2010). See also Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (UNU Press, 2008); and, Joint Inspection Unit Report, Management Review of Environmental Governance within the United Nations System, UN Doc. JIU/REP/2008/3 (2008), available at <http://www.unjiu.org/data/reports/2008/en2008_3.pdf> (visited 1 June 2010).

The potential for achieving synergies and avoiding overlaps and duplication among agreements should be considered and addressed at the outset, during negotiation of a new international legal instrument (a Convention or a Protocol) or during implementation, during negotiation of decisions taken by decision-making bodies created by legal instruments. MEAs often are international legal instruments which are generally considered to be 'living' documents. Once they are adopted, there is an ongoing discussion among the Parties — as well as other interested institutions — to determine whether implementation is taking place as expected, to exchange experiences, to assess progress toward the stated goals of the agreement, and to identify successes and outstanding gaps. Many of these discussions take place at the Conferences of the Parties and Meetings of the Parties (MOPs). At most COPs and MOPs, there are negotiations regarding the implementation of the agreement.

Such negotiations generally do not re-open the commitments that Parties have made. In most instances, the negotiations relate to administrative aspects of implementation or to unresolved issues. This can lead, for example, to decisions or resolutions of the COP or MOP. The negotiations can also lead to the creation of new MEAs, such as the Cartagena Protocol on Biosafety,⁸ which is a protocol to the Convention on Biological Diversity.⁹

Negotiations related to synergies may take place at the international level, for example facilitating cooperation among MEA secretariats and between UN organizations (particularly at the request of Parties). Alternatively, they may be at the regional and national level. Capacity-building, legislative development, and awareness raising activities may be considered.

In addition to synergies among MEAs, a number of states and organizations are considering the potential relationship between existing multilateral environmental agreements and new legally binding instruments in other sectors (such as bilateral, regional, and global trade agreements). MEAs frequently intersect with other regimes, especially in particular contexts. Examples include:

- trade (through the World Trade Organization as well as regional institutions);
- health (through the World Health Organization (WHO));
- food and agriculture (through the Food and Agriculture Organization (FAO) and WHO);
- labour (with the International Labour Organization (ILO));
- customs;

⁸ Cartagena Protocol on Biosafety, Montreal, 29 January 2000, in force 11 September 2003, 39 *International Legal Materials* (2000) 1027.

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>>.

- investment (with the International Monetary Fund (IMF) and the proposed Multilateral Agreement on Investment (MAI))¹⁰;
- millennium development goals (MDGs); and
- human rights.

The relationships between these different regimes and specific MEAs — whether there are synergies, overlaps, or both — vary from minor to significant, from potential to actual.

1.3 Importance of procedures and rules of procedure in MEA negotiations

In MEAs, procedures and/or rules of procedure (rules) are set up to govern activities in decision-making bodies. They generally regulate subjects such as agendas, amendments to the rules, conduct of business, decision-making, languages, membership, officers, and secretariat functions. Among other things, the rules generally 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 for the forum in which a negotiator works is invaluable. Knowing the rules means knowing what one can do to advance or protect one's position, and how to achieve this.¹¹

However, all too often 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 they may have a profound influence on outcomes. A key example is that of 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.

¹⁰ Among other things, some MEAs include provisions designed to promote sustainable development, including investment in sustainable activities. In 1995, the Organization for Economic Co-operation and Development (OECD: see <<http://www.oecd.org/>>) began negotiations toward providing a wide multilateral framework for facilitating international investment, which would be open to non-OECD members. However, negotiations appear to have been stalled since 1998. (See, for instance, OECD, 'Multilateral Agreement on Investment', available at <http://www.oecd.org/document/22/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html> (visited 8 September 2010).

¹¹ 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.

Indeed, ignorance of the rules can lead to major failures and frustrations with the process, especially since problems may be discovered only after key decisions have been taken. It is difficult, if not practically impossible, to undo multilateral process decisions once taken. It is therefore 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.

The present negotiation simulation was designed to open up the procedural issues so that participants could 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 Parties and which 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 attain common objectives.

1.4 Simulation objectives

The simulation exercise was focused on the negotiation of issues related to synergies and procedures in an MEA context, in this case the joint Ex-COP of the Basel, Rotterdam and Stockholm Conventions. The general objectives were to promote among participants, through simulation experience:

1. understanding of the challenges and opportunities related to synergies among MEAs, both in general and in a specific MEA context;
2. understanding of the principles and practices of multilateral negotiation and appreciation of the value of familiarity with the rules of procedure;
3. familiarity with specific substantive and drafting issues; and
4. appreciation of different perspectives on both MEA synergies and multilateral procedures.

Within the exercise, the specific objective of the Ex-COP was to produce agreement on four issues related to joint activities by the Parties to the three MEAs, including joint decision-making elections and officers, joint services, joint activities and a joint review mechanism.

1.5 Scenario

The scenario was set as the first Ex-COP of the Basel, Rotterdam and Stockholm Conventions. The premise was that there is agreement for the three Convention Bodies to meet effectively as one, in a process governed by the rules of procedure of all three conventions simultaneously, *mutatis mutandis* (that is, with such changes as may be necessary, given the Ex-COP context). The exercise began in COP plenary, and proceeded to the joint contact group and then drafting group level. Informally, the Joint Presidency had already identified four priorities, different in kind but susceptible to be negotiated together as part of a Strong-start package on synergies. The drafting groups each had one facilitator and one rapporteur, while the contact group had three co-chairs, and the COP had three Presidents and one rapporteur. At the beginning of the exercise, the Ex-COP formally elected its Presidents. At the request of the joint Presidents, the Parties then consulted among themselves to choose their co-chairs, followed by election by consensus (acclamation) in the Ex-COP. The Parties then consulted among themselves to choose the facilitators for each group, which (in the simulation context) took place in the first meeting (although some participants had clearly consulted ahead of time, as suggested).

Draft decisions and conclusions were prepared by the Secretariat for the consideration of the Parties, and are found below in section 3.2. The draft decision texts addressed issues of synergies in implementation, as well as procedure related to the joint operation of the Parties in the context of one extra-ordinary conference, as opposed to three separate conferences of the Parties. The draft decision texts also address issues of synergies in implementation. Another area of focus is procedural issues related to the joint decision-making and other operations of the Parties in the context of one extraordinary conference (as opposed to three separate conferences of the Parties). Specifically, the content of the draft decisions was drawn from the text of Item 5(l) of the provisional agenda: ‘Matters for consideration or action by the Conference of the Parties: synergies: Enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm conventions’.

Each drafting group needed first to address the issue of the substance and content of the text, and possibly the form (decision or conclusion). Four drafting groups were set up, based on the following issue clusters:

- A) joint activities;
- B) joint services;
- C) joint review mechanism; and
- D) joint procedural matters.

1.6 Introduction to the exercise

Each participant played a specific role, representing either a Party or a Convention Secretariat or UNEP Department. Some participants representing Parties were given a background focused on one particular Convention, but represented their national interests on all three agreements. Participants were encouraged to play their part in the overall scenario for the simulation, following general and individual instructions. Where possible, it was suggested that they make alliances and develop coordinated strategies to intervene in support of others, or to take the lead in other cases. Some roles, including the three co-Chairs and the Secretariat officials, played a resource function, and were useful to participants. Those playing such roles served all participants and worked for a positive outcome.

Participants were encouraged 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. As suggested, the groups worked to narrow their focus as quickly as possible to identify issues to be addressed, and to dispose of issues quickly. Participants worked hard to obtain their objectives, observing and using the applicable decision-making rules, and were kept under pressure by the possible consequences of being identified by the ex-COP as the cause of failure to reach agreement.

Participants were encouraged to follow their instructions, and to elaborate interventions with a compelling rationale to advance their positions (drawing on context provided by their twin);¹² but also to take the initiative, to 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 strongly encouraged to seek support from other participants for their positions and to identify opposition to their positions, including positions discussed in working groups in which they do not participate. To this end, as suggested, some participants sought to develop joint drafting proposals and to make interventions on behalf of more than one Party, and often used regional and negotiation groups as a point of departure. Participants were also asked to think about issues for discussion in the post-mortem session which would follow the exercise.

The simulation was designed to focus on the negotiation process more than on the substantive issues; and it was designed to be difficult, with failure to reach agreement a real possibility. Finally, while the scenario was based on a real and current situation, the specific Ex-COP meetings for this exercise and the positions in individual instructions were entirely hypothetical, and were not intended to reflect specific positions of particular Parties or the views of individuals.

¹² See section 2.3 below.

It was noted that individual delegates often face situations similar to this exercise, where they have little opportunity to prepare, but still have to define objectives and develop a strategy. Informal diplomacy was highlighted as the area where most progress toward agreement on concepts is made, while drafting group and plenary discussion is often required for agreement on specific texts. Also noted was the dilemma of drafting, which often involves a fine balance between accommodation and clarity. Participants were warned that although decision-making in plenary may be pro forma, there can be surprises – that decisions in the plenary are critical and can sometimes move very quickly, at times moving back and forth on an agenda, so that being prepared with an effective intervention at any moment is essential.

The three co-Chairs, drafting group facilitators and the Secretariat played an important role, setting up and managing the process – and managing time – toward producing an agreement. They were encouraged to consult whenever they felt it was appropriate. Thoughtful organization of the work of the groups was noted as being essential to success, with this organization including strategic management of how smaller drafting groups and the plenary sessions function and are linked.

2 Instructions

2.1 Individual instructions

The key to the simulation was to be found in the confidential instructions provided to individuals. Most individual instructions were one page in length, while key roles had additional pages. They provided very brief positions and fall-back positions on each of the four issues under discussion, but no rationale or strategy (this needing to be developed by each participant). In some cases, the instructions intentionally contained apparent internal contradictions (which is not entirely uncommon in real life). For the exercise, instructions were provided in a simplified form rather than that of official delegation instructions. In some cases, instructions stipulated that a position could not be abandoned for a fall back without consulting a designated senior official in the state's capital. For further guidance in dealing with procedural and strategic issues, participants were referred to the *MEA Negotiators' Handbook*.¹³

2.2 General instructions

Participants were also given a list of roles and group memberships, as well as the following general instructions:

¹³ Cam Carruthers (ed.), *Multilateral Environmental Agreement Negotiator's Handbook*, University of Joensuu – UNEP Course Series 5 (2nd ed. 2007, University of Joensuu).

- 1) *At a minimum, please review the general and individual instructions, the background (III.1), draft texts by the secretariat (III.2) and the report of the AHJWG Chairs (IV.1). The remaining material is for reference use as needed.*¹⁴
- 2) *Please do your best to achieve the objectives in your instructions.* Develop a strategy and an integrated rationale to support your positions. Do not share your individual instructions with other participants. Do not concede to a fall-back position without a serious effort to achieve your primary objective (and not on the first day!). Consider consulting with others before the session, to identify and coordinate with those who have similar instructions, and even prepare joint interventions. *You should try to support anyone with a similar position who is outnumbered. At any time, you may receive supplementary instructions.*
- 3) You have been assigned a role with specific instructions as the representative of a government or as a Secretariat official. JA Similarly, co-Chairs will play only their co-Chair roles in the Contact Group and the COP, and only their Party or Secretariat roles in the drafting groups. JA In the plenary, the three Presidents/co-Chairs sit at the head of the room, with the secretariat officials.
- 4) The Joint Presidents will play only their Presidency roles in the Ex-COP and only their roles as Party delegates or Secretariat officials in the Contact and Drafting groups. Similarly, co-chairs will play only their Co-Chair roles in the Contact Group and the COP, and only their Party or Secretariat roles in the drafting groups. In contrast, once elected, facilitators will play their roles throughout, and will therefore refrain from openly promoting a position.
- 5) Secretariat officials will support the Presidency, the co-chairs and facilitators, and join specific drafting groups, in an advisory role only. They will work to support the process and the Parties in any appropriate manner.
- 6) 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!).
- 7) The Contact Group will work in plenary, to organize itself and decide what to recommend to the Contracting Parties. It will break into drafting groups to work on text. The first task of the group is to elect three co-chairs (one from each Convention). The usual practice for such groups is that one is from a developing country, the other from a developed country. For this exercise, selection should be based on informal consultations, and decided by consensus, or a vote by show of hands if needed.
- 8) In the plenary, the three Presidents/co-chairs sit at the head of the room, with the secretariat officials. Participants will be provided with a 'flag': a secretariat or country nameplate (fold it twice, so the name is in the mid panel).

¹⁴ See *ibid* at, in particular, sections 3.1, 3.2, 3.3, 3.6, 2.4, 4.3 and 5.

If you are in the role of a Party delegate, select the flag of the country of origin of your 'twin'. If it has been taken, select the flag of a country from the same region or negotiating group (if known). To speak, please raise your 'flag' and signal the secretariat official keeping the speakers list.

- 9) When the plenary breaks into drafting groups, please join the group identified in your individual instructions. The group will operate much like an informal drafting group (see the *MEA Negotiator's Handbook*).
- 10) Drafting groups should be run on an informal basis, with reference to participants by name not country. The facilitator manages the meeting while the rapporteur records textual proposals (see the *MEA Negotiator's Handbook*, on drafting, especially use of brackets).
- 11) Presidents must play only their Presidency role in the Ex-COP and only their role as a Party delegate or Secretariat official in the Contact and Drafting groups. Once elected, co-Chairs and facilitators must play their roles throughout, and refrain from openly taking positions.
- 12) Please follow the rules of procedure of all three Conventions provided in these materials, *mutatis mutandis*.

2.3 Roles and twinning

Participants were cast in governmental or Secretariat roles; and some of the former were also subsequently chosen by the group to play the role of one of the Ex-COP Presidents, Contact Group co-chairs, drafting group facilitators or rapporteurs. All but the co-chairs and Secretariat officials were assigned to a drafting group. It was underlined that participants were all bound to follow their instructions.¹⁵

Participants were cast in governmental or Secretariat roles; and some of the former were also subsequently chosen by the group to play the role of one of the Ex-COP Presidents, Contact Group co-Chairs, drafting group facilitators or rapporteurs. All but the co-Chairs and Secretariat officials were assigned to a drafting group. It was underlined that participants were all bound to follow their instructions. JA Those in Secretariat official roles supported the process, and the groups, working directly with the Presidents, co-Chairs, facilitators and rapporteurs, but also responded to requests from any Party. All participants also played roles based on the personal background and experience of one or more co-participant with whom they had been 'twinned'. Participants were encouraged to consult their 'twin' or twins, in order to draw on each other's actual perspectives to develop the rationale of their interventions and put their negotiation instructions in the context of the country they represented. Twinning was also intended to promote general understanding of how different perspectives may affect approaches to substantive and process issues – and to add

¹⁵ There were no IGO or NGO roles in this exercise, based largely on feed-back from participants in other simulations who indicated that they found such roles very limited (except in the case of an exercise based on the Strategic Approach to International Chemicals Management, where NGOs and IGOs do participate in decision-making under the unique rules of procedure of that forum).

some dramatic interest to the scenario. As there were proportionally more participants from southern, developing country and African countries in the simulation, some participants had more than one 'twin' to ensure that all had at least one twin from another region.

In order further to encourage cross-cultural discussion, participants were encouraged to draw on a cultural reference, local saying or an anecdote from their twin to illustrate a point related to the substance or process of the negotiations, as negotiators often do. At the same time, participants were advised to remember always to be respectful of each other's views and background. In addition, all participants were provided with 'flags' or nameplates for use in the formal meeting. Participants in the role of a government official selected the flag of their 'twin' or the flag of a country from the same region or negotiating group (if known). Individual instructions were developed without reference to actual country positions, and it was not necessary for this simulation that participants attempt to follow such positions. It was suggested, however, that participants develop their positions and interventions with the interests 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. So, for example, as many developing country participants as possible took on a developed country roles and perspectives, or vice-versa. Instruction sets and roles were also adjusted for regional, gender and sectoral balance but otherwise assigned randomly. Participants were 'twinned' and assigned roles and positions using numbered instruction sets which could be adjusted easily depending on actual course participation. The Simulation Coordinators (Kerstin Stendahl, Osvaldo Álvarez-Pérez, Masa Nagai and Cam Carruthers) occasionally stepped in to play the role of Deputy Executive-Director of UNEP; and/or of the designated senior government official in a state's capital authorized to provide supplementary instructions to their delegations.

3 Key simulation documents

Participants were provided with a number of documents for the simulation, including the following official (actual) documents:

- a. Report of the co-Chairs of the AHJWG;¹⁶
- b. Note by the Stockholm Secretariat;¹⁷

¹⁶ See <<http://ahjwg.chem.unep.ch/>>.

¹⁷ UN Doc. UNEP/POPS/COP.4/1; Report of the Conference of the Parties of the Stockholm Convention on the work of its first meeting (UNEP/POPS/COP.1/31), annex I, decision SC-1/18; Report of the Conference of the Parties of the Stockholm Convention on the work of its second meeting (UNEP/POPS/COP.2/30) annex I, decision SC-2/15; and Report of the Conference of the Parties of the Stockholm Convention on the work of its third meeting (UNEP/POPS/COP.3/30), annex I, decision SC-3/21.

- c. key Stockholm Convention Decision (SC-4/34);¹⁸
- d. selected rules of procedure of the Basel Convention;¹⁹
- e. selected rules of procedure of the Rotterdam Convention;
- f. selected rules of procedure of the Stockholm Convention;²⁰
- g. key Provisions of the Conventions;
- h. Stockholm Convention, Article 19;
- i. Rotterdam Convention, Article 18; and
- j. Basel Convention, Articles 15 and 37.

They were also provided with the texts set out below in sections 3.1 and 3.2 (not including the actual texts which are referenced and footnoted).

3.1 Backgrounder²¹ for the negotiators

UNEP²² works towards making the world a safer place from toxic chemicals by supporting governments to take needed global actions for the sound management of chemicals, by promoting the exchange of information on chemicals, and by helping to build the capacities of countries around the world to use chemicals safely.

UNEP maintains a website aimed at providing information on key activities at both the global and regional levels, including information on the Basel Convention, the Rotterdam Convention, the Stockholm Convention, and the Strategic Approach to International Chemicals Management. Information is also provided on specific UNEP programmes and activities related to chemicals.²³

UNEP Department of Environmental Law and Conventions (DEL/C) objectives

To promote the progressive development and implementation of environmental law to respond to environmental challenges, in particular by supporting states and the international community in strengthening their capacity to develop and implement legal frameworks; and [t]o support the implementation of Multilateral Environmental Agreements (MEAs) by parties, and facilitate interlinkages and synergies, while respecting the legal autonomy of MEAs and the decisions taken by their respective governing bodies.

In negotiations on a number of recent MEAs, negotiators have often been furnished with a background paper that sets out the relevant international legal instruments in

¹⁸ The Basel and Rotterdam Conventions also produced similar decisions (see references above), but for simulation purposes only one such text is included in these materials.

¹⁹ As adopted by the First Meeting of the Conference of the Parties (decision I/1), and amended by the Seventh Meeting of the Conference of the Parties (decision VII/37).

²⁰ SC-1/1

²¹ More information on synergies among the three conventions is available at the website of the AHJWG, <<http://ahjwg.chem.unep.ch/>> – including the AHJWG meeting reports.

²² The United Nations Environment Programme. See <<http://www.unep.org/>>.

²³ For more information, see <<http://www.unep.org/themes/chemicals/?page=home>> (visited 8 September 2010).

existence and the potential implications. This was the case, for example, for the 'chemical conventions' that include the Stockholm Convention on Persistent Organic Pollutants (POPs) and the Rotterdam Convention on Prior Informed Consent (PIC).

UNEP website text on Chemicals synergies:

When states decided to negotiate new MEAs addressing persistent organic pollutants and prior informed consent on the importation of certain hazardous chemicals and pesticides, negotiators considered how the new agreements would relate to the existing Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal. While the Basel Convention primarily addresses wastes, and the other two topics would not necessarily address wastes, there were some overlaps and synergies. By taking the Basel Convention into consideration, the negotiators were able to facilitate what has become a relatively collegial relationship between the Stockholm Convention (on POPs), the Rotterdam Convention (on PIC), and the Basel Convention.

Negotiation workshop on synergies between the Basel, Rotterdam and Stockholm conventions

The Conferences of the Parties to the Basel and Rotterdam conventions have adopted the recommendation commendation of the contact group on enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions in 2008 and the Stockholm COP-4 adopted it in May 2009 (attached).

Through these decisions the Parties to the three conventions decided to convene simultaneous extraordinary meetings of the Basel, Rotterdam and Stockholm Conventions. The Executive Director of the United Nations Environment Programme, in consultation with the Director General of the Food and Agriculture Organization,²⁴ have been asked to organize the meetings in coordination with the eleventh special session²⁵ of the Governing Council/Global Ministerial Environment Forum²⁶ of the United Nations Environment Programme.

²⁴ See <<http://www.fao.org/>>.

²⁵ See UNEP, 'Eleventh Global Major Groups and Stakeholders Forum (GMGSF -11)', available at <http://www.unep.org/civil_society/GCSF/indexGCSF11.asp> and Nusa Dua Declaration and Governing Council decisions adopted by the Governing Council/Global Ministerial Environment Forum at its eleventh special session, available at <<http://ipbes.net/meetings/Documents/GCSSXI/Declaration%20and%20decisions%20adopted%20by%20GCSS-XI.pdf>> (both visited 8 September 2010).

²⁶ According to UNEP's website, the Governing Council was established in 1972 (UNGA Res. 2997) and comprises 58 members elected (on an equitable regional representation basis) by the General Assembly to four-year terms. The Governing Council reports to the General Assembly (through the Economic and Social Council). The Global Ministerial Environment Forum (established in 1999 by UNGA Res. 53/242) meets annually to review important policy issues in the environmental field, constituted through the Governing Council. See <<http://www.unep.org/resources/gov/overview.asp>> (visited 8 September 2010).

At these simultaneous meetings, which are aimed at giving high-level political support to the process of enhancing cooperation and coordination among the three conventions, the Conferences of the Parties would consider:

- decisions on joint activities;
- decisions on joint managerial functions;
- final decisions on joint services established on an interim basis;
- decisions on synchronization of the budget cycles of the three Conventions;
- decisions on joint audits of the accounts of the Secretariats of the three Conventions;
- decisions on a review mechanism and follow up of the work on enhancing coordination and cooperation processes between the three Conventions;
- reports or information received from the Executive Director of the United Nations Environment Programme and the Secretariats of the three Conventions on any other activity or proposed joint institution resulting from the present decision.

In addition, UNEP and FAO have been requested to prepare proposals for the extraordinary meetings on:

- a common arrangement for staffing and financing joint services of the three Conventions, including financing shared posts; and
- synchronizing the budget cycles of the three Conventions as soon as possible to facilitate coordinated activities and joint services, bearing in mind the implications for the timing of future meetings of the Conferences of the Parties of the three Conventions and for facilitating auditing.

The recommendation of the ad hoc joint working group on enhancing cooperation and coordination among the Basel, Rotterdam and Stockholm conventions (AHJWG) is being hailed as a breakthrough and success as the first process to make real progress within the International Environmental Governance (IEG) discussions.

The international community has for the last decade called generally for more efficiency and coherence to an increasingly fragmented international environmental law setting. Active and bold international law-making and regime creation over the last 40 years has led to a situation characterized by inconsistencies in rules and norms, duplication of efforts and conflicting agendas, a cluttered and overwhelmed international meetings schedule and incoherent systems of solutions to international environmental problems.

Therefore the AHJWG recommendation is significant, even if it only addresses a small sliver of the IEG system. It points to several crucial parts of the process which

need to be handled correctly if a solid platform is to be built for reforming international environmental governance. This is illustrated below:

Trust- and confidence-building for one. The idea of setting up the AHJWG through decisions of three separate COPs was born out of a complete breakdown of trust. Stockholm COP-2 had to respond to what was felt to be an overly heavy-handed top-down order ‘to cooperate or else...’. Contracting Parties felt strongly for ‘their’ conventions and wanted to be a part of a process discussing future cooperative mechanisms and management involving more than one autonomous legal entity. It made sense to attempt to have each of the three Conventions’ COPs adopt the same decisions to set up the group and thereby also nominate their set of 15 regionally nominated experts to be part of that group. UNEP participated in the group’s work through resource persons taking part in the meeting, thus enabling the group to have informed discussions.

Transparency was another key feature. Much effort was put in to prepare and disseminate information in an open and transparent manner; through regional consultations, the group’s web-site accessible through all three Conventions’ homepages, the co-chairs actively spreading the word. The AHJWG managed to maintain this high degree of transparency even if, during its first meeting, it decided to keep its meetings solely to itself and to allow no observers to take part. The AHJWG decision was taken after having carefully weighed pros and cons. The pros were considered to be that a closer knit group would allow for more frank, open discussions and enhanced trust-building.

Keeping it short and sweet. The AHJWG’s life span from the first to the third meeting was exactly one year. During this year the group produced its background documents itself, resisted the temptation to negotiate until the last meeting, and entrusted its three co-chairs to draft a text on which to base its negotiations.

Keeping it together. Whether this is a process that could be duplicated elsewhere is not clear. Even if the AHJWG’s period of work was contained, the process itself from start to finish will be exactly three years and run from Stockholm COP-2 in May 2006 (being the first COP agreeing to the setting up of the group) to Stockholm COP-4 in May 2009 (being the last of the COPs agreeing to the recommendation of the AHJWG and officially launching the interim period leading up to the extraordinary COPs in 2010). Such a process will have to be based on the expectation that countries and regions take part in it in a very coordinated manner.

A bold and pioneering process. It was always recognized by the constituencies to the process that in order to make it possible and worth-while the end result will need to contain increased political visibility and clout. The simultaneous extraordinary meetings of the COPs will provide an excellent opportunity to cement the process at a high-level in a unique manner.

3.2 Draft texts prepared by the Secretariat

3.2.1 Draft EX-COP decision text for Group A on joint activities:

The Conference of the Parties,

1. Calls upon the United Nations Environment Programme and the Food and Agriculture Organization of the United Nations, working together with other bodies of the United Nations, in particular the United Nations Development Programme,²⁷ multilateral environmental agreements and other international bodies, to include programmatic cooperation in the field in their work programmes;
2. Decides to prioritize activities that would support implementation of the three conventions in the areas of environment, agriculture, customs and public health;
3. Declares their aim to strengthen capacity-building and technical support to developing countries and countries with economies in transition for coordinated national implementation;
4. Requests the Secretariats of the Basel, Rotterdam and Stockholm Conventions to promote programmatic cooperation on cross-cutting issues, including in the area of technology transfer and capacity-building, in the development of their respective work programmes and to report thereon to the conferences of the Parties to the three Conventions;
5. Decides to include support to all three Conventions in the work plans of the Basel and Stockholm Convention regional centres to promote the full and coordinated use of regional centres to strengthen the regional delivery of technical assistance under all three conventions and to promote coherent chemicals and waste management;
6. Decides that the work carried out by the regional centres should promote the sound management of chemicals throughout their lifecycles and of hazardous wastes for sustainable development as well as for the protection of human health and the environment;
7. Decides that five (5) regional “focal centres”, with the responsibility to facilitate coordinated activities in the regions covering both chemicals and waste management, shall be selected from among the existing Basel and Stockholm Convention regional centres;
8. Request Parties to reach regional agreement on the designation of focal centres through consultations and in accordance with the relevant procedural provisions of the respective conventions;
9. Decides that the focal centres should:
 - (a) Ensure that the regional centres deliver their work in accordance with defined priorities and serve as entry points for countries needing assistance or

²⁷ See <<http://www.undp.org/>>.

- guidance on which centre in a region could provide assistance for a specific purpose;
- (b) Strengthen regional centres to enable them to exercise a more synergistic approach as delivery mechanisms under the Basel, Rotterdam and Stockholm Conventions;
 - (c) Play a special role in providing an overview of their activities and results to the conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions as examples of lessons learned on enhanced practical implementation of the Conventions.
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3.2.2 Draft EX-COP decision text for Group B on joint services:

The Conference of the Parties,

1. Calls upon the United Nations Environment Programme and the Food and Agriculture Organization of the United Nations, working together with other bodies of the United Nations, in particular the United Nations Development Programme, multilateral environmental agreements and other international bodies, to include programmatic cooperation in the field in their work programmes;
2. Decides to prioritize activities that would support implementation of the three conventions in the areas of environment, agriculture, customs and public health;
3. Declare their aim to strengthen capacity-building and technical support to developing countries and countries with economies in transition for coordinated national implementation;
4. Requests the secretariats of the Basel, Rotterdam and Stockholm Conventions to promote programmatic cooperation on cross-cutting issues, including in the area of technology transfer and capacity-building, in the development of their respective work programmes and to report thereon to the conferences of the Parties to the three Conventions;
5. Decides to include support to all three Conventions in the work plans of the Basel and Stockholm Convention regional centres to promote the full and coordinated use of regional centres to strengthen the regional delivery of technical assistance under all three conventions and to promote coherent chemicals and waste management;
6. Decides that the work carried out by the regional centres should promote the sound management of chemicals throughout their lifecycles and of hazardous wastes for sustainable development as well as for the protection of human health and the environment;
7. Decides that five (5) regional “focal centres”, with the responsibility to facilitate coordinated activities in the regions covering both chemicals and waste management, shall be selected from among the existing Basel and Stockholm Convention regional centres;

8. Requests Parties to reach regional agreement on the designation of focal centres through consultations and in accordance with the relevant procedural provisions of the respective conventions;
9. Decides that the focal centres should:
 - a. Ensure that the regional centres deliver their work in accordance with defined priorities and serve as entry points for countries needing assistance or guidance on which centre in a region could provide assistance for a specific purpose;
 - b. Strengthen regional centres to enable them to exercise a more synergistic approach, as do the delivery mechanisms under the Basel, Rotterdam and Stockholm Conventions;
 - c. Play a special role in providing an overview of their activities and results to the conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions as examples of lessons learned on enhanced practical implementation of the Conventions.

3.2.3 Draft EX-COP decision for Group C on a joint review mechanism:

The Conference of the Parties,

1. Decides that a joint advisory body of the three Conventions, to be known as the Joint Advisory Board, is hereby established;
2. Decides that the Joint Advisory Board shall consist of 15 members from each of the three conventions chosen with due regard for regional and gender balance;
3. Decides that the functions of the advisory board shall be:
 1. To review the implementation of the synergies decision;
 2. To further elaborate joint services and functions;
 3. To develop joint decision-making procedures;
 4. To advise on joint activities in the field and their implementation in accordance with the One UN initiative;
 5. To prepare further extraordinary meetings of the conferences of the Parties to the three conventions.
4. Decides that the meetings of the Joint Advisory Board shall be serviced jointly by the secretariats of the three Conventions;
5. Decides that the Presidents of the Conferences of the Parties of the three Conventions shall take it in turns to chair the meetings of the Joint Advisory Board on a rotating basis, the President of the Basel Convention Conference going first, that of the Rotterdam Convention going second and that of the Stockholm Convention going third;
6. Decides that the Joint Advisory Board shall meet annually.

3.2.4 Draft EX-COP decision and conclusion text for Group D on joint procedures:

Establishment of a joint open-ended expert group on procedural matters for the Stockholm, Basel and Rotterdam Conventions

The Conference of the Parties,

1. *Calls for* continued improvement in cooperation and coordination between the Basel, Rotterdam and Stockholm Conventions;
2. *Decides* to establish a joint open-ended expert group on procedural matters for the Stockholm, Basel and Rotterdam Conventions. The group is requested to consider the report of the [AHJWG] of [XX. . .][relevant outcomes from other drafting groups] and prepare joint recommendations on procedural matters for any subsequent meetings of the Extraordinary Joint Conference of the Parties;
3. *Decides* that the joint open-ended group shall consist of members elected by the Extraordinary Conference of the Parties, and be comprised of ten members to represent the perspective of each participating convention;
4. *Invites* Parties and others to make contributions through the special trust fund to ensure the participation of representatives of developing country Parties and Parties with economies in transition in joint expert group;

[X]. Joint conclusions on procedural matters under the Stockholm, Basel and Rotterdam Conventions

Procedural matters under the Stockholm, Basel and Rotterdam Conventions

Draft Conclusions of the Parties

1. The Extraordinary Conference of the Parties noted the report of the AHJWG, including in particular [XX].
2. The COP concluded that, in order to operationalize joint procedures in a way that would be consistent with the stated objectives of the Parties in relation to synergies, for purposes of Extraordinary joint Conferences of the Parties, the rules of procedure of the Basel, Rotterdam and Stockholm conventions concurrently as far as possible, *mutatis mutandis*.
3. Accordingly, the Parties further concluded that, for purposes of Extraordinary joint Conferences of the Parties, one joint President would be elected, while an expanded joint bureau will be constituted, including the sitting members of the bureau of each participating Convention, including the [President of the Conference of the Parties of each Convention].
4. Accordingly, the Parties also concluded that, for purposes of Extraordinary joint Conferences of the Parties, joint decisions will be prepared.

4 Evaluation

4.1 Evaluation questionnaire

Following the course, participants were asked to respond to a course evaluation which included the questions below on the simulation.

- 1) What is your nationality or UN regional group (see the *MEA Handbook for Negotiators* for UN regional group country listing)?
- 2) What is your profession/education?
- 3) What is your current position/occupation?
- 4) Please briefly indicate what experience you have had in an MEA negotiation(s), if any?
- 5) Please indicate on a scale of 1-10 the level of your knowledge on issues related to rules of procedure for MEAs before this exercise (1 being very little, 10 being complete understanding).
- 6) Please indicate on a scale of 1-10 the level of your knowledge on issues related to rules of procedure for MEAs after this exercise (1 being very little, 10 being complete understanding).
- 7) What role (number) did you play in this simulation?
- 8) Do you have any comments or suggestions on the instructions for the role?
- 9) Did you have the opportunity to read the materials before the exercise?
- 10) Do you have any comments or suggestions on the materials?
- 11) Do you have any comments or suggestions on the facilitation of the exercise?
- 12) Do you have any other comments or suggestions on the simulation or the MEA Negotiator's handbook?

4.2 Review of the exercise

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 forms and notes from additional verbal feedback. There were 28 official participants in all, not including the facilitators and other resource people who played various roles in respect of the simulation.

In the debriefing session, the focus was on the first objective of the simulation, the understanding of the challenges and opportunities related to synergies among MEAs, both in general and in a specific MEA context. There was considerable positive feedback about the substantive support and information provided by facilitators.

Key simulation related issues raised and discussed included:

- Strategic and procedural issues;
- perspectives and issues of different types of roles; and
- twinning of roles.

With respect to procedural and strategic issues, both participants and facilitators offered their views and perspectives based on their experiences. Most of the questions involved subjective assessments of different kinds of negotiation tactics and strategies.

Participants overcame many of the numerous challenges in the scenario and were able to reach agreement on most of the necessary texts, with only a few issues remaining for the final plenary. This is the fourth time that a simulation exercise based on the same organizational model has been run in a Joensuu/UNEP course and published in this Review. In each case there has been a different substantive focus, while at the same time each has included key issues related to the rules of procedure. This is the first time that it was set to run over two full days. The positive results achieved were largely the product of the creativity of participants, though the facilitators, who controlled final instructions ‘from capitals’ gradually allowed increased room for agreement. Each working group was able to come up with a revised text to present to the plenary, with only a few issues and little text left to resolve.

The results were considered to be a success by the facilitators and by all of the participants who provided feedback. Indeed, it should be emphasized that the simulation was explicitly designed to produce a situation where agreement was very difficult if not impossible; where participants would be confronted with results that would be untenable within the terms of their instructions; and where they would be forced to grapple with the constraints of the rules of procedure, as well as the frustrations of being unable to reach agreement. 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. It should be noted that this kind of situation does not reflect the reality for most negotiators in most MEA fora, most of the time.

However, it needs to be understood that although such instances might be rare and not reflect typical negotiations, the techniques conveyed through the exercise remain both useful and valid. It is relatively common for a few Parties to have serious difficulties at some point in any MEA meeting, often having 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 are ill-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, all were based on real issues, and only a few of the instructions were somewhat unrealistic. One of the main concerns raised by participants was the lack of detailed explanations for positions, some of which contained internal contradictions. Apparent internal contradictions appear to be relatively common in MEA fora, and so were purposefully included in the simulation. There may be room in the future to improve the way in which these contradictions are organized and presented.

In response to feedback from a previous simulation exercise, participants 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. Similarly, again in response to feedback from a previous simulation exercise, there were no NGO or IGO roles. Some participants noted this absence, and discussed how the simulation might be adapted to bring in these perspectives.

Specific comments were received which highlighted the importance of being confronted with a demanding and frustrating situation, in that this helped the participants to recognize the importance of abstract-sounding rules. It was also apparent that the participants appreciated being ‘pushed’. While the objective of the simulation was not to explore any MEA rules *per se*, some participants also indicated an interest in being provided with more background information.

Participants agreed overwhelmingly that the twinning of roles and the mutual mentoring between roles was a particularly useful way of exploring and learning about different perspectives; as well as of initiating further discussion on the issues, on regional and country-specific views. Twinning was also conducive to improving social interaction by enabling participants to get to know their fellow participants. However, a number of participants expressed concerns about the limited explanation given as to how ‘twinning’ should work and the limited time they had to discuss with their ‘twins’. It was noted and recognized that advance reading of the simulation materials would be useful in this regard, and that the extended two-day format also helped to strengthen the twinning aspect of the simulation. In general, there was strong support for the extended two-day format.

In this simulation, it was clear that those in Chairing roles 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. Based on comments from previous simulations, the Chairs in this simulation were given greater flexibility to design the process and to respond to developments in the simulation. 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 agreed strongly that the simulation exercise achieved its objectives with respect to promoting engagement and familiarity with the principles of multilateral negotiation and related issues within the context of negotiation on rules of procedure; putting the rules and principles into practice, in simulation context; and participants strongly agreed, above all, that the exercise met its objectives with respect to promoting discussion of the issues from different perspectives. Many participants suggested that the exercise was one of the most useful components on the agenda of the 2009 Course programme.