ISPRA
Istituto Superiore per la Protezione e la Ricerca Ambientale

International Conference on

Global Environmental Governance

Rome - Ministry of Foreign Affairs
20-21 May 2010

Atti

International Conference on

Global Environmental Governance

A cura di A. Postiglione

Rome - Ministry of Foreign Affairs
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In collaborazione con

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Coordinamento tipografico
Daria Mazzella
ISPRA – Settore Editoria

Amministrazione
Olimpia Girolamo
ISPRA – Settore Editoria

Distribuzione
Michelina Porcarelli
ISPRA – Settore Editoria

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INTRODUZIONE

ICEF CONFERENCE GLOBAL ENVIRONMENTAL GOVERNANCE 20-21 MAGGIO 2010

Giovanni Conso
Presidente Onorario Fondazione ICEF

Indirizzo di Saluto

Gentili Signore, egregi Signori, Autorità straniere e Autorità italiane, a cominciare dal Ministro degli Affari Esteri on. Franco Frattini e dal Ministro dell'Ambiente, della tutela del territorio e del mare on. Stefania Prestigiacomo
Spetta a me, anzitutto, il gradito compito di porgere un cordiale e grato benvenuto a tutti coloro che prenderanno parte a questa Conferenza internazionale, dedicata al sempre più delicato tema della "Governance globale per l'Ambiente", che si terrà oggi e domani in questa sala messa cortesemente a disposizione dal Ministero degli Affari Esteri. Ovviamente, l'organizzazione di incontri su una tematica di tanta ampiezza non può non richiedere una preparazione molto laboriosa, da iniziare per tempo, con costante attenzione ad ogni possibile fatto nuovo. Ebbene, quando la preparazione dell'attuale incontro fu avviata dall'ICEF e dal suo Direttore Generale Amedeo Postiglione, che ringrazio vivamente per l'appassionato, determinante impegno, al centro di tutto vi era il conturbante problema dell'inquinamento atmosferico, con particolare riguardo ai deludenti risultati della Conferenza di Copenhagen dello scorso autunno. Ma ecco che due eventi assolutamente inattesi sono venuti, per un'amara, quasi beffarda, coincidenza, a sovrapporsi con urgenza immediata a tutto il resto.
Il primo evento, risalente proprio ad un mese fa, è legato all'eruzione improvvisa del vulcano islandese, poi ripetutasi più volte, anche negli ultimi giorni, con le sue sottilissime ceneri, fonte insidiosa di pericoli e disagi che possono mettere a repentaglio la salute, l'agricoltura e i viaggi aerei, come accaduto ancora ieri tra l'aeroporto di Roma e quelli dell'Inghilterra e della Olanda. Il secondo evento, ancora più pernicioso, ha colpito, quasi negli stessi giorni, il Golfo del Messico con il disastro ambientale causato dall'esplosione e conseguente affondamento della piattaforma adibita all'estrazione di petrolio nel Mar dei Caraibi, causando addirittura la morte immediata di ben undici persone. Qui non è l'atmosfera a soffrirne, ma i sottofondi marini, colpendo tantissima flora e tantissima fauna, l'una e l'altra preziosissime per la sopravvivenza economica di una vastissima regione. Ed altri guai si aggiungeranno se non si riuscirà ad evitare che la marea di nero catrame e colla rossiccia giunga a toccare terra provocando danni ancora maggiori. Purtroppo - nonostante i tentativi, ahimé troppo improvvisati, di coprire con cilindri e cupole le tre

bocche sul fondo marino rimaste scoperte in seguito all'esplosione (finora una soltanto è stata chiusa) - i danni, già da subito gravissimi, stanno continuando a crescere con conseguenze imprevedibili.
Certo, se difendersi dai vulcani, così come dai terremoti, è impresa praticamente impossibile, salvo l'immediato apprestamento dei soccorsi, i "disastri sottomarini" sono assolutamente imperdonabili. Ben a ragione, il Presidente Obama ha chiamato in causa i petrolieri, denunciandone gli eccessi produttivi troppo spregiudicati. Di questo passo la "Governance globale per l'Ambiente", vista globalmente, minaccia di diventare sempre più un'utopia, spingendo il mondo verso l'irreparabile. Anche l'istituzione, auspicata dall'ICEF, di una Corte internazionale per giudicare e punire i più gravi oltraggi ambientali, ammesso che si riuscisse a darle vita, correrebbe il rischio di non produrre frutti, visto l'avvilente insuccesso a cui sinora è andata incontro la Corte criminale internazionale permanente. C'è un solo raggio di luce, sia pure circoscritto alla tutela dei diritti umani di prima generazione, cioè i diritti civili e politici: è quello che promana dal nobile funzionamento della Corte europea fortemente impegnata a Strasburgo, anche se estenderne le competenze al fronte dei diritti economico-sociali appare compito ben difficilmente attuabile.
L'auspicio è che questa nostra Conferenza riesca a richiamare tutti, petrolieri *in primis*, a consapevolezze più rispettose dei valori umani. Come prima cosa, si tratta di rendersi conto che è interesse generalissimo, senza eccezioni, far assurgere la difesa dell'ambiente ad obiettivo predominante sempre e dovunque.

ICEF CONFERENCE GLOBAL ENVIRONMENTAL GOVERNANCE 20-21 MAY 2010

Giovanni Conso
Honorary President of ICEF Foundation

Welcoming addresses

Your excellencies from abroad and from Italy beginning with the Minister of Foreign Affairs, the Hon. Franco Frattini and the Minister for the Environment, Land and Sea, the Hon. Stefania Prestigiacomo, distinguished guests, ladies and gentlemen

It is my pleasure to wish you a cordial and appreciative welcome to all those participating in the International Conference dedicated to the increasingly delicate theme of 'Global Environmental Governance' which will take place today and tomorrow in this conference room that has kindly been made available by the Ministry of Foreign Affairs. Obviously, the organisation of meetings like this with such a wide subject require a great deal of preparation, beginning with sufficient time and with constant attention to anything new that may arise. Well, when this meeting was planned by ICEF and its Director General Amedeo Postiglione, whom I warmly thank for his enthusiastic, determined commitment, at the centre of it all was the devastating problem of air pollution and climate change, especially in relation to the disappointing results of the Copenhagen Conference held last December. But then two completely unexpected events occurred, thanks to a bitter, almost ironic coincidence, to superimpose themselves with immediate urgency over all the rest.

The first event, which happened just over a month ago (on 16 April), is linked to the sudden eruption of the Icelandic volcano, which has been repeated several times over the last few days, with its very fine dust, the source of risks and hardship that can puts health, agriculture and air travel in jeopardy, as seen only yesterday between the airport in Rome and those in England and Spain.

The second, still more harmful event, struck, only a month ago today (on 20 April), the Gulf of Mexico with an environmental disaster caused by the explosion and consequent sinking of the rig used for the extraction of crude oil from the Caribbean Sea. It even directly caused the death of eleven people. Here, it is not the atmosphere that is suffering but the sea bed, affecting many, many species of flora and fauna, which are both extremely valuable for the economic survival of a very vast region. And additional trouble will occur if the sea of black tar and reddish glue is allowed to reach land provoking even greater harm. Unfortunately, despite somewhat too makeshift attempts to cover the three

leaks on the sea bed that remained open after the explosion with funnels and domes (so far only one leak has been closed) – the already very serious damage suffered is continuing to grow with unpredictable consequences.
Certainly, if defending ourselves from volcanoes, just like earthquakes, is a practically impossible task, except for the immediate arrival of aid, "underwater disasters" are absolutely unforgivable. President Obama was right when he cited the oil companies, blaming them for being unscrupulous in their production excesses. At this rate, "Global Environmental Governance", seen globally, is in danger of increasingly becoming a utopia, pushing the world towards the irremediable. Also the institution, sought by ICEF, of an International Court of the Environment to judge and punish the most serious environmental offences, assuming it comes into being, would run the risk of not bearing fruit, given the demoralising lack of success that the International Criminal Court has faced up until now. There is only one ray of sunlight, even if it is confined to human rights of the first generation, namely political and civil rights: it is those rights which the noble role of the European Court of Human Rights in Strasbourg is strongly committed to, even though extending its competence to economic and social rights appears to be a much more difficult feat to achieve.
I hope that our Conference will be able to bring everyone, oil companies *in primis*, to be more respectfully aware of human values. Above all, it means taking into account that it is in the widest possible general interest, without exceptions, to make environmental protection become a prevailing objective - always and everywhere.

MESSAGGIO DEL MINISTRO DEGLI AFFARI ESTERI

On. Franco Frattini

Saluto con piacere la pubblicazione degli atti della Conferenza "*Global Environmental Governance*", tenutasi il 20 e 21 maggio 2010 presso il Ministero degli Affari Esteri, e apprezzo l'iniziativa congiunta di ICEF e ISPRA di dare divulgazione a temi di grande attualità sul piano internazionale.

L'ambiente è difatti a pieno titolo un tema globale con rilevanti implicazioni di ordine politico, economico e sociale, quali il cambiamento climatico, la perdita di biodiversità, la desertificazione, la crisi dell'acqua e del cibo in vaste aree del mondo.

Allo stesso tempo, esso si lega sempre più ad altre importanti questioni internazionali, tanto che il concetto di *governance* dell'ambiente può dirsi ormai strettamente connesso a quello di *governance* economica, laddove misure a tutela degli ecosistemi possono tradursi in efficaci strumenti economici in grado di sfruttare le opportunità dischiuse dalla cosiddetta *Green Economy*.

Anche in questo ambito, l'Italia riveste un ruolo di grande impulso: nel 2009, in qualità di Presidente di turno del G8, ha infatti favorito il riconoscimento della necessità di contenere entro i 2°C l'aumento della temperatura globale (obiettivo fatto proprio dall'intera comunità internazionale in occasione della recente Conferenza sui cambiamenti climatici di Cancún) e in qualità di co-Presidente dell'IEG - *International Environmental Governance* - ha promosso la riscrittura delle regole della *governance* internazionale sull'ambiente dell'ONU, culminata nell'ottobre 2009 nella "Dichiarazione di Roma", che ha ricevuto il pieno sostegno dell'UNEP. Nel contesto dell'Unione Europea, l'Italia ha inoltre sostenuto le misure tese a mitigare gli effetti nocivi dei cambiamenti climatici, anche con sostanziali impegni in favore dei Paesi in via di sviluppo, e promuove con convinzione quelle strategie comunitarie (quale "Europa 2020") che legano il concetto di "crescita verde" a quello dell'efficienza sotto il profilo delle risorse.

Altro aspetto da considerare è poi quello relativo ai temi della sicurezza e della pace. L'ambiente unisce i popoli e non li divide, quando viene considerato - come è giusto - in una visione positiva e aperta. A tale riguardo, l'Italia segue con grande attenzione le nuove iniziative di collaborazione, anche economica, che si stanno sviluppando nell'area del Mediterraneo, mirate allo sviluppo sostenibile comune di un'area dalle forti potenzialità.

In questa prospettiva, il progetto dell'ICEF può rappresentare un interessante arricchimento della riflessione portata avanti dalla comunità internazionale, che nel corso dell'ultimo decennio ha promosso numerose misure a tutela dell'ambiente in molteplici contesti negoziali: la Convenzione quadro sui cambia-

menti climatici, la Convenzione sulla diversità biologica, la Commissione sullo sviluppo sostenibile, per citare solo i casi più importanti.
Sul piano poi strettamente giuridico, l'evoluzione del diritto internazionale ha fatto emergere anche la possibilità che alcuni atti di particolare gravità, con conseguenze disastrose per l'ambiente, possano configurarsi come crimini internazionali, sebbene non esistano norme internazionali di carattere penale generalmente accettate in materia ambientale. L'ipotesi di dare vita a una corte penale specializzata si collegherà pertanto all'esigenza, sempre più sentita dalla comunità internazionale, di proteggere l'ambiente dalle aggressioni cui è sottoposto. E' un'iniziativa i cui sviluppi seguiamo con attenzione, tenendo tuttavia in conto le più recenti prese di posizione in ambito comunitario.
L'ICEF propone prudentemente, con gli atti della Conferenza di maggio, l'inizio di un percorso politico che possa avere come interlocutori alcuni Governi e i fori internazionali già esistenti: la proposta di creare un gruppo di studio della problematica è quindi ragionevole e interessante, perché devono essere valutate tutte le implicazioni per ottenere un risultato condiviso rispetto all'attuale modello.
Formulo, in conclusione, i miei migliori auguri all'ICEF per il prosieguo delle sue attività, anche alla luce della fruttuosa collaborazione con il Ministero degli Affari Esteri che, sono certo, potrà proseguire anche in occasione di iniziative future.

MESSAGGIO DEL MINISTRO DELL'AMBIENTE

Stefania Prestigiacomo

Desidero esprimere i miei ringraziamenti all'ISPRA per la pubblicazione degli atti della Conferenza "Global Environmental Governance", tenutasi a Roma nel maggio 2010, occasione di grande rilievo per confrontare una serie di percorsi e individuare i più alti contributi che possono derivare dalle diverse discipline scientifiche, giuridiche e umanistiche per la riforma della *governance* internazionale dell'ambiente. I miei ringraziamenti si estendono all'ICEF, per il prezioso lavoro portato avanti negli anni su questa materia, e a tutte le istituzioni, le amministrazioni pubbliche, gli istituti di ricerca e le organizzazioni che hanno contribuito e stanno contribuendo a dare maggiore sostanza al dibattito e a sensibilizzare una platea più vasta sulla materia.

A quasi vent'anni di distanza dal Vertice della Terra di Rio de Janeiro e a quasi dieci anni dal Vertice di Johannesburg, le sfide della sostenibilità ambientale e della riforma della *governance* sono diventate ancora più urgenti, perché nel frattempo il livello di interdipendenza tra i fattori e le interrelazioni tra le cause sono aumentati drasticamente. La gestione sostenibile delle risorse naturali, la lotta ai cambiamenti climatici, la salvaguardia del territorio e delle sue ricchezze costituiscono necessità ormai irrinunciabili per le quali la comunità internazionale è chiamata ad impegnarsi, dando risposte concrete nel più breve tempo possibile.

Vi è la necessità di gestire questi problemi attraverso una più stretta cooperazione a livello globale, ma l'attuale architettura della *governance* non consente di compiere i passi necessari per raggiungere questi obiettivi e gestire le sfide più urgenti: è necessario rafforzare l'impegno internazionale e indirizzare i Governi verso un'azione collettiva che permetta di dare nuova linfa al sistema internazionale di gestione dell'ambiente e di rinnovare le istituzioni che lo governano sia nella forma che nelle funzioni.

Già da tempo alcuni organismi, tra cui l'Unione Europea, sostengono la necessità di rafforzare il ruolo dell'UNEP e arrivare a trasformarlo in un'agenzia specializzata, che possa favorire il rafforzamento del peso politico delle decisioni ambientali in seno all'ONU e affrontare con maggiore determinatezza ed efficacia i problemi ambientali del pianeta. La Conferenza delle Nazioni Unite sullo sviluppo sostenibile (UNCSD) che si terrà a Rio de Janeiro nel 2012 (Conferenza di Rio+20) rappresenta un'occasione unica per ripensare il funzionamento di questi meccanismi e il ruolo delle istituzioni internazionali entro cui la comunità e i singoli Governi si trovano in genere a operare.

Uno dei due temi della Conferenza, infatti, verterà proprio sul quadro istituzionale per lo sviluppo sostenibile e consentirà di centrare l'attenzione sulla

rotta da seguire sia per riformare l'intero sistema di *governance* internazionale dello sviluppo sostenibile sia per dare maggiore peso alle istituzioni che si occupano di ambiente in un quadro rinforzato della *governance* internazionale. Nel contesto dello sviluppo sostenibile è innegabile che regni attualmente un sostanziale squilibrio e una sostanziale frammentazione tra le istituzioni per l'ambiente e quelle per gli aspetti economici e sociali. Una frammentazione che ha generato debolezza nella capacità di attuare politiche concrete di sviluppo sostenibile, difficoltà di integrazione con le altre politiche e, a volte, impossibilità di definire scadenze e obiettivi chiari.
Lo sviluppo sostenibile assume, inoltre, un significato più forte e preciso se i tre pilastri che lo sorreggono sono equilibrati tra di loro e se il quadro istituzionale li rafforza reciprocamente. In questo senso, il secondo tema della Conferenza, incentrato sulla diffusione di un'economia verde nel contesto dello sviluppo sostenibile e della lotta alla povertà, consentirà di individuare le metodologie più idonee per integrare efficacemente gli obiettivi di politica economica, sociale e ambientale e incentivare la cooperazione internazionale in quest'ambito.
Io credo che alle sfide ambientali che sia i Paesi industrializzati sia quelli in via di sviluppo devono affrontare occorra rispondere con una voce autorevole e un impegno comune di cui una più forte *governance* dell'ambiente è espressione. L'Italia ritiene che gli investimenti per migliorare la *governance* globale sullo sviluppo sostenibile siano investimenti per il nostro futuro.

INTERVENTO

del Cardinale Renato Raffaele Martino

Ringrazio il Direttore dell'ICEF, il Giudice Amedeo Postiglione per avermi invitato a questo interessante ed importante incontro sulle responsabilità che tutti quanti abbiamo verso la creazione o l'ambiente come si dice in termini correnti. Nel corso del mio incarico, come Rappresentante della Santa Sede alle Nazioni Unite a New York, ho avuto modo di impegnarmi a lungo delle questioni ambientali, specialmente nella preparazione e nella partecipazione alle due ultime Conferenze delle Nazioni Unite sull'ambiente: quella di Rio de Janeiro, nel 1992, e quella di Johannesburg nel 2002. Dopo la mia nomina come Presidente del Pontificio Consiglio della Giustizia e della Pace, nello stesso anno 2002, ho lavorato alla redazione del Compendio della Dottrina sociale della Chiesa, che era in cantiere da ben quattro anni e fu pubblicato nell'ottobre del 2004. Ho contribuito, tra l'altro, alla redazione del decimo capitolo del Compendio, che è interamente dedicato all'Ambiente.
Il Consiglio Giustizia e Pace abitualmente suggerisce al Santo Padre i temi da scegliere per il Messaggio, che Egli, ogni anno, dirige ai Capi di Stato e a tutte le persone di buona volontà in occasione della Giornata Mondiale della Pace che si celebra ogni primo gennaio. Giovanni Paolo II dedicò al tema del}' Ambiente il suo Messaggio per l'anno 1990, che aveva per titolo *Pace con Dio Creatore, pace con tutto il Creato*, mentre Benedetto XVI ha firmato il Messaggio di quest'anno, che reca il titolo *Se vuoi coltivare la pace, custodisci il Creato*.
Come mio contributo a quest'incontro, vorrei commentare questo Messaggio, che si inserisce in maniera coerente nel "Magistero di Pace" che Benedetto XVI ci va donando coi Suoi Messaggi annuali. Il Santo Padre, infatti, dopo essersi soffermato sul tema della pace intesa come dono di Dio nella **Verità** (2006); come frutto del rispetto della *persona umana* (2007); come espressione della comunione della **famiglia umana** (2008); chiamata ad eliminare ogni forma di **povertà**, materiale ed immateriale (2009) - seguendo un ideale itinerario di pace -giunge al contesto in cui l'umanità riceve la vocazione alla pace: il **creato.**

Una "visione cosmica" della pace

Emerge allora un primo essenziale aspetto del Messaggio di Benedetto XVI, il quale ci propone una *visione cosmica* della pace, intesa cioè come *tranquillitas ordinis* (tranquillità dell'ordine stabilito da Dio), che si realizza in uno stato di armonia tra Dio, l'umanità e il creato.
In tale prospettiva, il degrado ambientale esprime, non solo, una rottura dell'equi-

librio tra l'umanità e il creato, ma un più profondo deterioramento dell'unione tra l'umanità e Dio. *Riflettere sulla crisi ecologica, significa allora riflettere su una "crisi interiore" al creato*, che interpella direttamente l'uomo, al quale Dio ha affidato il mandato di "custodire e coltivare" il creato (*Gen* 2.15).

L'urgenza di agire

Nel solco della *dottrina sociale della Chiesa* e, in particolare, del Magistero di Paolo VI e di Giovanni Paolo II, Benedetto XVI denuncia una vera e propria crisi ecologica: «Come rimanere indifferenti di fronte alle problematiche che derivano da fenomeni quali i cambiamenti climatici, la desertificazione, il degrado e la perdita di produttività di vaste aree agricole, l'inquinamento dei fiumi e delle falde acquifere, la perdita della biodiversità, l'aumento di eventi naturali estremi, il disboscamento delle aree equatoriali e tropicali? Come trascurare il crescente fenomeno dei cosiddetti "profughi ambientali": persone che, a causa del degrado dell'ambiente in cui vivono, lo devono lasciare - spesso insieme ai loro beni - per affrontare i pericoli e le incognite di uno spostamento forzato? Come non reagire ai conflitti in atto e a quelli potenziali legati all'accesso alle risorse naturali? Sono tutte questioni che hanno un profondo impatto sull'esercizio dei diritti umani, come ad esempio il diritto alla vita, all'alimentazione, alla salute, allo sviluppo» (n. 4).
Dinanzi a tali sfide, il Santo Padre non propone tuttavia soluzioni tecniche e non si intromette nelle politiche governative. Egli richiama piuttosto l'impegno della Chiesa nella difesa della terra, dell' acqua e dell' aria, che sono doni del Creatore all'umanità, ed esorta ad un riequilibrio del rapporto tra il Creatore, l'umanità e il creato (n. 4).

Prospettive per un "comune cammino" dell'umanità

Benedetto XVI indica perciò alcuni punti essenziali di un possibile cammino per la costruzione della pace nel rispetto del creato.

a) Una visione non riduttiva della natura e dell'uomo

Il Santo Padre invita anzitutto a coltivare una visione non riduttiva della natura e dell'uomo: «Quando la natura e … l'essere umano vengono considerati semplicemente frutto del caso o del determinismo evolutivo, rischia di attenuarsi nelle coscienze la consapevolezza della responsabilità. Ritenere, invece, il creato come dono di Dio all'umanità ci aiuta a comprendere la vocazione e il valore dell'uomo» (n. 2). La bellezza del creato è un permanente invito a riconoscere l'amore del Creatore. quell' Amore che "*move il sole e l'altre stelle*" (n. 2). «Quando l'uomo» -prosegue Benedetto XVI. «invece di svolgere il suo ruolo di collaboratore di Dio, a Dio si sostituisce, finisce col provocare la ribellione della natura, "piuttosto tiranneggiata che governata da lui"» (n. 6).

Ciò spiega la perplessità della Chiesa dinanzi ad una concezione dell'ambiente ispirata all'ecocentrismo e al biocentrismo, poiché «tale concezione elimina la differenza ontologica e assiologica tra la persona umana e gli altri esseri viventi. In tal modo, si viene di fatto ad eliminare l'identità e il ruolo superiore dell'uomo, favorendo una visione egualitaristica della «dignità» di tutti gli esseri viventi» (n. 13).

b) Un profondo rinnovamento culturale

Il Messaggio Pontificio esorta poi ad un profondo rinnovamento etico e culturale. «Le situazioni di crisi -afferma Benedetto XVI - siano esse di carattere economico, alimentare, ambientale o sociale -, sono, in fondo, anche crisi morali» (n. 5). Esse -prosegue il Santo Padre - «chiamano in causa i comportamenti di ognuno di noi, gli stili di vita e i modelli di consumo e di produzione attualmente dominanti, spesso insostenibili» (n. 11). «Solo cosi la crisi diventa *occasione di discernimento e di nuova progettualità*» (n. 5).

c) Tutti siamo responsabili della cura del creato

«Tutti siamo responsabili della protezione e della cura del creato. Tale responsabilità non conosce frontiere. Secondo il *principio di sussidiarietà*, è importante che ciascuno si impegni al livello che gli corrisponde» (n. 11). *In tale contesto riveste una fondamentale importanza l'educazione all'ecologia, da svolgere anzitutto nel contesto della famiglia* (n. 12). Il Santo Padre sottolinea inoltre il prezioso contributo delle Organizzazioni non governative: «che si prodigano con determinazione e generosità per la diffusione di una responsabilità ecologica» (n. 11).

d) Una revisione profonda del modello di sviluppo

Una speciale responsabilità grava tuttavia sui responsabili a livello nazionale ed internazionale. L'invito del Santo Padre è perciò quello di: «operare una revisione profonda e lungimirante del modello di sviluppo, nonché riflettere sul senso dell'economia e dei suoi fini, per correggerne le disfunzioni e le distorsioni» (n. 5).
Già nella *Caritas in veritate*, Benedetto XVI ha sottolineato che: «Ogni decisione economica ha una conseguenza di carattere morale» [1]. Egli auspica perciò: <d'adozione di un modello di sviluppo fondato sulla centralità dell'essere umano, sulla promozione e condivisione del bene comune, sulla responsabilità, e … sulla prudenza» (n. 9).
Nel fare ciò, l'uomo è chiamato a impiegare la sua intelligenza nel campo della ricerca scientifica e tecnologica» (n. 10). La scienza e la tecnica non sono, tuttavia, capaci, da sole, a risolvere la crisi ecologica, che ha profonde radici culturali ed etiche. Anche esse vanno collocate nel contesto del «*mandato di «coltivare e custodire la terra*» (cfr *Gen* 2.15), che Dio ha affidato all' uomo, e va orientata a rafforzare quell'alleanza tra essere umano e ambiente che

deve essere specchio dell'amore creatore di Dio» [2].

e) Coerenza alla destinazione universale dei beni

«Purtroppo -osserva Benedetto XVI - si deve constatare che una moltitudine di persone, in diversi Paesi e regioni del pianeta, sperimenta crescenti difficoltà a causa della negligenza o del rifiuto, da parte di tanti, di esercitare un governo responsabile sull'ambiente» (n. 7). «L 'eredità del creato appartiene - prosegue il Santo Padre - all'intera umanità. Invece, l'attuale ritmo di sfruttamento mette seriamente in pericolo la disponibilità di alcune risorse naturali non solo per la generazione presente ma soprattutto per quelle future» (n. 7).

f) Necessità di una rinnovata solidarietà inter- ed intra-generazionale

La crisi ecologica mostra allora la necessità di una solidarietà che si proietti nello spazio e nel tempo: «i costi derivanti dall'uso delle risorse ambientali comuni non possono essere a carico delle generazioni future …*Si tratta di una responsabilità che le generazioni presenti hanno nei confronti di quelle future*» (n. 8). In maniera speculare vi è inoltre l'urgente necessità di una *solidarietà intra-generazionale*, specialmente nei rapporti tra i Paesi in via di sviluppo e quelli altamente sviluppati, *senza alimentare visioni parziali che tendano ad estremizzare alcune responsabilità rispetto ad altre*.
Come afferma Benedetto XVI, «è infatti importante riconoscere, fra le cause dell'attuale crisi ecologica, la responsabilità storica dei Paesi industrializzati. I Paesi meno sviluppati e, in particolare, quelli emergenti, non sono tuttavia esonerati dalla propria responsabilità rispetto al creato, perche il dovere di adottare gradualmente misure e politiche ambientali efficaci appartiene a tutti» (n. 8).

g) Uno utilizzo equilibrato delle risorse energetiche

«Uno dei principali nodi da affrontare, da parte della comunità internazionale», afferma il Santo Padre, «è quello delle risorse energetiche, individuando strategie condivise e sostenibili per soddisfare i bisogni di energia della presente generazione e di quelle future» (n. 9). A tale scopo: «occorre promuovere la ricerca e l'applicazione di energie di minore impatto ambientale e la «ridistribuzione planetaria delle risorse energetiche, in modo che anche i Paesi che ne sono privi possano accedervi» (n. 9).

Speranza nell'intelligenza e nella dignità nell'uomo

In sintesi, Benedetto XVI ci offre una lettura realistico e assai problematica, eppure mai catastrofica del/a realtà e de//'attuale crisi ecologica. Il Santo Padre sottolinea gli effetti negativi della condotta umana, ma senza mai perdere la speranza nell'intelligenza e nella dignità dell'uomo, che, insegna Tommaso d' Aquino, «*significa quanto di più nobile c 'è nell'universo*» [3].
In maniera illuminante, Benedetto XVI osserva che: «La questione ecologica

non va affrontata solo per le agghiaccianti prospettive che il degrado ambientale profila all'orizzonte; a motivarla deve essere soprattutto la ricerca di un'autentica solidarietà a dimensione mondiale, ispirata dai valori della carità, della giustizia e del bene comune» (n. 10).
Il Santo Padre rigetta quindi i due estremi dell'ego-centrismo, che consentirebbe all'uomo di tiranneggiare sul creato, e dell'eco-centrismo, che priverebbe l'uomo della sua trascendente e superiore dignità. Quello indicato dal Santo Padre è un percorso di profondo equilibrio, interiore ed esteriore, tra il Creatore, l'umanità e il creato.

San Francesco d'Assisi testimone di armonia nel creato

La scelta di Benedetto XVI di dedicare il Messaggio al tema dell'ecologia non è casuale, Quest'anno ricorre infatti il *30° anniversario* della proclamazione di San Francesco d' Assisi a *Patrono dei cultori dell'ecologia* [.4.], «Amico dei poveri, amato dalle creature di Dio», affermò Giovanni Paolo II. «Egli invitò tutti -animali, piante, forze naturali -a onorare e lodare il Signore. Dal Poverello di Assisi ci viene la testimonianza che, essendo in pace con Dio, possiamo meglio dedicarci a costruire la pace con tutto il creato, la quale è inseparabile dalla pace tra i popoli» [5].
Il *Cantico delle creature* di San Francesco offre una testimonianza attuale anche nella complessità di oggi. L 'amore per il creato, se proiettato in un orizzonte spirituale, può condurre l'uomo alla fratellanza con il prossimo e all'unione con Dio.
Guardando all' esempio del Poverello di Assisi, impariamo ad amare il creato, ed a scorgere in esso l'amore infinito del Creatore: *«Laudato sie, mi' Signore cum tucte le Tue creature; Laudato si', mi Signore, per quelli che perdonano per lo Tuo amore; Laudate et benedicete mi Signore et rengratiate e serviateli cum grande humilitate»*.

Se vuoi coltivare la pace, custodisci il creato!

[1] BENEDETTO XVI, Lett. enc. *Caritas in veritate. 37*.
[2] Id. supra nota 1.69.
[3] TOMMASO D' AQUINO, *S. Th.*, I, q. 29. a. 3.
[4] GIOVANNI PAOLO II, Lett. ap. Inter Sanctos.
[5] GIOVANNI PAOLO II, *Messaggio per la celebrazione della Giornata Mondiale della Pace. 1990*, 16.

LA GOVERNANCE GLOBALE DELL'AMBIENTE[1]

di Amedeo Postiglione

1. Utilità del concetto di "governance"

Quando alcuni problemi sociali, quali quelli del rapporto economia-ambiente, presentano difficoltà di soluzione, occorre cominciare a ragionare insieme in termini di governance complessiva, definendo i ruoli e le responsabilità di tutti i soggetti coinvolti.

La governance serve ad una visione dinamica integrata, che non lascia spazi vuoti.

Il principio di integrazione non può essere invocato in astratto con riferimento solo alle regole giuridiche, ma occorre esaminarlo contemporaneamente in relazione alla loro attuazione giurisprudenziale (ruolo dei giudici), all'attività delle Autorità Pubbliche Amministrative (prassi e procedimenti amministrativi), al ruolo delle imprese ed a quello della società civile.

Si ritiene necessaria una definizione il più possibile precisa di cosa si intenda per "**Environmental governance**".

Accettabile per la sua semplicità e chiarezza concettuale è la seguente: "*insitutions and mechanisms for protecting the environment and resolving disputes*", intendendo i meccanismi in senso ampio oppure *"a coherent and transparent machinery for the discussion and elaboration of rules, policies and plans for the protection of the environment, as well as procedures to implement them and ensure compliance with them".*

I meccanismi di governance richiedono dunque di essere concordati in modo strutturale, anche se flessibile, per verificare i progressi e comparare – in senso anche quantitativo – i risultati.

Il territorio deve costituire il quadro concreto di riferimento degli indicatori della governance nei vari settori (atmosfera, acqua, suolo, rifiuti, protezione della natura e dei beni culturali, ecc.).

L'agenda delle priorità va verificata e seguita da tutti i soggetti della governance, secondo i principi di una vera democrazia partecipativa.

L'economia non può operare in modo svincolato e separato dall'ambiente e ciò anche per una esigenza di giustizia: il soggetto economico che opera correttamente riceve un danno dagli operatori economici che violano i principi di prevenzione e responsabilità.

[1] Conferenza internazionale Icef, Global Environmental Governance 20-21 maggio 2010 Roma, Ministero Affari Esteri.

2. Finalità della governance ambientale

Si può definire la finalità della governance ambientale come: "assicurare la concreta attuazione del principio dello sviluppo sostenibile, attraverso un equilibrato soddisfacimento dei bisogni delle generazioni attuali, senza compromettere le possibilità delle generazioni future".
In questa interpretazione il ruolo della politica costituisce dunque una sintesi ed è decisivo, soprattutto in una visione temporale anche di medio e lungo periodo (visione dinamica della governance). Naturalmente una dilatazione eccessiva del concetto di sviluppo sostenibile fino a ricomprendere lo sviluppo economico e lo sviluppo sociale, può creare problemi alla *good governance* di fenomeni globali ambientali drammatici oggi emergenti come il mutamento climatico, la perdita di bio-diveristà, la desertificazione, la crisi dell'acqua, l'uso indiscriminato delle risorse naturali non rinnovabili: non si tratta di stabilire una concezione separata dell'ambiente rispetto alla giusta integrazione con la realtà economico-sociale ma occorre evitare che il valore "ambiente" (riferito alla sostenibilità primaria della vita sulla Terra) sia sacrificato. Di conseguenza la governance ambientale non può non dare priorità – quando è necessario – ai valori ambientali.

3. Oggetto della governance ambientale

L'oggetto della governance ambientale riguarda le *attività umane giuridicamente rilevanti sull'ambiente*. Resta il problema di una comparazione, caso per caso, dell'interesse ambientale con gli altri interessi pubblici, onde evitare forme di radicalismo e fondamentalismo ecologico non accettate dal corpo sociale complessivo. Occorre riconoscere che la governance applicata all'ambiente è fortemente condizionata proprio dalla natura del suo oggetto, ovvero dalle caratteristiche che presenta l'ambiente ai vari livelli: nella sostanza la governance attiene da una parte alle condotte umane e dall'altra ad una realtà che presenta la caratteristica di un ecosistema integrato vivente su scala globale. L'aspetto più delicato dell'ambiente riguarda addirittura la vita delle persone e delle altre componenti della natura. Governare i fenomeni naturali può essere estremamente complesso e difficile come dimostra ad esempio il fenomeno del mutamento climatico.
La materia ambientale si presenta con un forte contenuto tecnico ed interdisciplinare oltreché con aspetti scientifici ancora incerti.
La stessa definizione di ambiente si presenta in modo dinamico a seconda dell'evoluzione culturale e politica.
Volendo approfondire questo aspetto può essere utile qualche ulteriore riflessione sul ruolo fondamentale che gioca il principio di integrazione dei sistemi giuridici in materia di ambiente.

4. Insufficienza del metodo tradizionale di "command and control"

Il fenomeno "ambiente", manifestatosi in tempi recenti, è stato affrontato nelle prima fase secondo un criterio parziale, fondato sulla moltiplicazione delle leggi e sul solo ruolo di controllo delle Istituzioni.
I risultati finora sono stati insoddisfacenti.

Due realtà fondamentali sono rimaste sostanzialmente fuori dal modello: **la realtà economica** e **la realtà sociale.**
Un primo risultato insoddisfacente riguarda la lotta all'inquinamento: l'osservanza della norme ambientali che imponevano limiti di accettabilità in materia di aria, acqua, suolo ecc. ha potuto assicurare solo una base minima di protezione. I soggetti economici non sono incoraggiati ad utilizzare migliori tecnologie se l'obbligo giuridico riguarda solo l'osservanza di limiti minimi di accettabilità. La filosofia della Governance assicura livelli elevati di protezione sicché sono necessari anche strumenti economici per ottenere questo risultato. Lo stesso discorso vale per i controlli che sono episodici e non riguardano la vita reale delle singole imprese, considerate come possibili soggetti passivi del controllo e non come protagonisti di un diverso modello di protezione. Anche le sanzioni, se applicate in modo episodico e solo come immagine, non hanno un potere deterrente reale di prevenzione e riparazione economica: il danno ambientale purtroppo è molto diffuso nella realtà ed occorre *ex-post* affrontare spese imponenti per il recupero mentre la Governance opera *ex-ante* coinvolgendo tutti i possibili attori pubblici e privati oltre che sociali.
Un secondo risultato insoddisfacente riguarda l'uso delle risorse naturali, la protezione della biodiversità e del paesaggio e dei beni culturali: in questi casi accanto ai limiti e ai divieti occorre prevedere interventi positivi di pianificazione e gestione sostenibile, inconcepibili senza coinvolgere la realtà economica, la realtà sociale ed il mondo scientifico.

5. Perché operare secondo il criterio della "governance"

La ragione è evidente. La crisi ecologica ai vari livelli si è rivelata più complessa e grave del previsto anche in termini economici e sociali, sicchè si rende necessario associare in ogni momento (prima, durante e dopo) tutti i soggetti nella "governance", ossia nella **gestione razionale e unitaria del fenomeno.** I meccanismi tradizionali di *command and control* come si è detto non bastano. Occorre definire bene i ruoli e le responsabilità di tutti i soggetti coinvolti per assicurare soluzioni nuove e risultati certi e misurabili.

6. Principi della Governance

Nel White Paper della "governance europea" [Bruxelles, 5/08/2001 com (2001) 428] vengono individuati alcuni principi di buona governance, che è bene considerare:

- Apertura:
  tutte le istituzioni devono operare in modo più aperto per accrescere la fiducia delle persone.
- Partecipazione:
  occorre che la politica ambientale in tutto il suo percorso, dall'elaborazione all'esecuzione, possa contare sulla più ampia informazione e partecipazione dei cittadini.
- Responsabilità:
  ogni istituzione pubblica (locale, nazionale, comunitaria ed internazionale) deve chiarire il suo ruolo ed assumere le sue responsabilità.

- Efficacia:
  la politica ambientale ha un senso se raggiunge risultati compatibili calcolati sulla base di precisi indicatori.
- Coerenza:
  la politica ambientale deve essere integrata all'interno di un sistema complesso.
- Proporzionalità:
  ogni azione pubblica deve tenere conto della proporzionalità rispetto agli obiettivi, comparando in modo equilibrato gli interessi pubblici coinvolti e la sostenibilità economica e sociale.
- Sussidiarietà:
  ogni livello (locale, nazionale, comunitario e intenzionale) della governance è importante ma non separato, e deve esservi integrazione nell'azione comune, senza vuoti, con un regime a scalare più forte e mai più debole

7. Soggetti della governance ambientale

La responsabilità di una buona governance ambientale ricade, come si è già detto, su una pluralità di soggetti, in quanto l'ambiente è un bene comune dell'interna società.
A titolo esemplificativo si indicano i soggetti comunque coinvolti o da coinvolgere in una *good governance* ambientale:
Soggetti pubblici:
Comunità internazionale, Organizzazioni internazionali, Stati, Regioni ed Enti locali, Autorità legislative, Autorità amministrative, Corti di giustizia, altri;
Soggetti economici:
prevenzione e riparazione del danno ambientale quale danno illecito economico e sociale; obbligo di adozione delle migliori tecnologie disponibili; sviluppo delle opportunità nuove offerte dall'ambiente; dialogo con le istituzioni e la realtà sociale per l'adozione di "nuove regole" di integrazione tra economia ed ambiente; ecc.
Società Civile:
attuazione del diritto di informazione ambientale; attuazione del diritto di partecipazione ambientale; allargamento del diritto di accesso alla giustizia in tema di ambiente delle persone e delle ONG; ruolo positivo in generale delle ONG ma ripudio assoluto di ogni forma distruttiva di violenza o di fondamentalismo ecologico; ecc
Mondo Scientifico:
assicurare "indipendenza", "obbiettività", "verità", "spirito di servizio" della vera ricerca per il bene comune, tenendo distinte le applicazioni tecnologiche da valutare caso per caso nelle loro implicazioni ambientali; ecc.
Scuola, Università, Stampa, Strumenti di comunicazione di massa:
doveri di corretta informazione anzi di formazione ed educazione ai valori comuni ambientali;
Autorità Religiose:
l'ambiente come valore etico e religioso; le violazioni gravi contro l'ambiente come "peccati" contro il dono della creazione;etica laica esigente per la tutela degli interessi generali della comunità.

8. I Pilastri della Governance

1) Occorre riconoscere che il primo pilastro è costituito dalla scienza.
Ritenuto che per la complessità e delicatezza dei fenomeni globali dell'ambiente, vi è assoluto bisogno di una base certa e solida di conoscenze scientifiche e di dati oggettivamente comparabili e costantemente aggiornati, raccolti con indipendenza e spirito di servizio alla verità, senza interferenze improprie del mondo politico ed economico; che le scelte della Governance ambientale, proprio per il loro profondo impatto sui modelli economici di produzione e consumo, richiedono ai Governi che si tenga conto dei più recenti studi scientifici (es. in tema di cambiamenti climatici, biodiversità, deforestazione, biotecnologie, etc.) e che questi studi proseguano più efficacemente con il sostegno anche economico di tutti i soggetti interessati, si raccomanda*:*

a) di valorizzare il ruolo della scienza indipendente nella valutazione dei rischi ambientali e per la salute umana (ad esempio, il livello accettabile di rischio degli OGM in agricoltura; il livello accettabile di rischio residuo nel recupero dei siti inquinati; l'autorizzabilità o meno di insediamenti produttivi ad alto rischio; la biomedicina e il suo impatto ambientale; i rischi connessi al mutamento del clima del Pianeta; i rischi della perdita di biodiversità; i rischi della desertificazione; la biosicurezza; ecc.);
b) di realizzare la gestione del principio di precauzione con la dovuta prudenza e senza pregiudizi ideologici;
c) di evitare che le ricerche scientifiche siano confuse con le applicazioni tecnologiche, talora dannose;

2) Occorre riconoscere che il secondo pilastro è costituito dall'etica, dalla religione e dalla cultura.
Ritenuto che una più matura etica sociale ed economica costituisce un presupposto per un diverso equilibrio ed integrazione economia-ambiente;che solo se l'ambiente viene interiorizzato quale grande valore comune e umano di ogni persona sulla terra, diviene possibile esigere quei doveri forti di nuovi comportamenti economici e sociali che sono necessari per affrontare le nuove sfide globali dell'ambiente;che si sviluppano iniziative positive delle tre grandi religioni monoteiste (Cristiana, Ebraica e dell'Islam) e delle altre Religioni per una sensibilizzazione e promozione di una strategia comune in nome dell'ambiente, perché l'ambiente è frutto della creazione, unisce e non divide le persone ed i popoli nel segno della pace, si raccomanda:

a) di far crescere una più matura coscienza etica;
b) di porre al centro della questione ambientale non solo i diritti, ma soprattutto i doveri e le responsabilità di tutti i soggetti della governance ambientale;
c) di dare spazio a nuovi principi etici di equità e giustizia nell'attività economica di produzione e consumo e nel commercio internazionale, formulando apposite regole almeno per alcuni aspetti fondamentali;
d) di accogliere la proposta avanzata autorevolmente dal Santo Padre Benedetto XVI per la costituzione di una Autorità Politica Mondiale per il governo

dell'economia e dell'ambiente, ed auspica che i Governi ne tengano conto adeguatamente.

3) Occorre riconoscere che il terzo pilastro è costituito dall'economia.
Ritenuto che tutti i soggetti devono collaborare per un cambio dell'economia in tutte le sue fasi dall'interno, in modo strutturato e profondo; che sono necessarie nuove regole economico-ecologiche in sede globale da inserire in apposita Convenzione internazionale stipulata dagli Stati, con efficacia vincolante; che non si può affidare questo ruolo solo agli enti internazionali economici (talora con competenze indirette ambientali) poiché tali enti – al di là delle benemerenze acquisite – sono disarticolati e non coordinati e sono essi stessi parte di un sistema che finora ha visto economia e ambiente in modo separato; che non appare realistico un adattamento graduale senza l'intervento di una volontà politica forte dei Governi; che è necessario un governo mondiale dell'economia, come dimostrato anche dalla recente crisi; che occorre operare dal basso per preparare le condizioni opportune moltiplicando le iniziative nel settore economico a favore dell'ambiente, si raccomanda:
a) di sviluppare tutte le opportunità economiche offerte dall'ambiente favorendo il dialogo con le imprese sul territorio;
b) di utilizzare la più ampia gamma di strumenti economici e fiscali e di accordi volontari con le imprese, superando la sola logica tradizionale finora utilizzata di "command and control";
c) di rendere efficaci le norme ambientali esistenti a tutti i livelli, curandone la corretta applicazione, estendendo altresì l'obbligo giuridico della adozione delle migliori tecnologie per la protezione dell'ambiente;
d) di favorire la logica premiale per le imprese virtuose e di prodotti compatibili con l'ambiente (Ecoaudit; Emas; etc.);
e) di favorire l'efficienza energetica e lo sviluppo di energie alternative;
f) di favorire l'immissione in consumo di biocarburanti;
g) di riformare la tassazione per i prodotti energetici e per altri settori ambientali;
h) di favorire lo scambio di quote di emissione di gas ad effetto serra;
i) di stabilire alcune regole in materia di pubblicità economica, in modo da favorire la trasparenza e la veridicità delle informazioni;
j) di orientare le risorse pubbliche disponibili verso l'effettivo utilizzo in settori vitali per la nuova economia;
k) di evitare lo scandalo dei paradisi fiscali;
l) di applicare le regole esistenti in materia di commercio internazionale inserendo ulteriori criteri a favore della protezione dell'ambiente;

4) Occorre riconoscere che il quarto pilastro è costituito dalla Società Civile.
Si raccomanda inoltre
a) di conservare e rafforzare il legame tra Diritti umani in generale e Diritto umano all'Ambiente;
b) di creare le condizioni per l'adozione di una Convenzione specifica in sede mondiale in materia di accesso di giustizia ambientale davanti agli organi di giustizia internazionali poiché i diritti di informazione, partecipazione e

accesso se sono attributi fondamentali di ogni persona, non possono valere solo su base nazionale e regionale;

c) di considerare la società civile come una risorsa fondamentale per l'effettiva protezione dell'ambiente in nome dei comuni valori umani per realizzare una vera democrazia economica e ambientale;

d) di rendere effettivo lo spazio di informazione, partecipazione ed accesso alla giustizia in materia ambientale;

e) di rendere effettivo il nuovo diritto umano all'ambiente di ogni persona, perché non ha senso questo diritto se non è giustiziabile a tutti i livelli senza dover provare l'esistenza di un pregiudizio personale e diretto: eventuali filtri servono solo per evitare l'inflazione, ma il principio deve poter trovare applicazione;

f) di fare fronte comune contro ogni forma di violenza, lavorando per il rispetto delle decisioni delle istituzioni in materia di ambiente, quando gli spazi di informazione, partecipazione e accesso siano stati garantiti in precedenza, perché questo è essenziale per la certezza delle iniziative economiche e per un principio di democrazia;

g) la semplificazione delle procedure amministrative e la loro trasparenza perché ogni persona comune possa conoscere la sostanza dei problemi e quali decisioni siano state adottate;

h) di sviluppare, soprattutto in sede locale, il rapporto con la società civile, superando gli attuali ostacoli di deficit di informazione e partecipazione;

i) di sviluppare ulteriormente la rete delle Agenzie di Protezione ambientale, sia a livello nazionale, sia a livello comunitario, sia in sede internazionale, assicurando ai dati comparabilità e la facile comprensione anche da parte del pubblico non tecnico;

j) di sviluppare i programmi di formazione e comunicazione nelle scuole, nelle università e nei centri di ricerca in favore dell'ambiente.

5) Occorre riconoscere che il quinto pilastro è costituito dalle Istituzioni.

Si raccomanda

a. di adottare decisioni, piani e programmi di vera e buona governance economico-sociale ed ambientale per una elevata protezione ambientale;

b. di assicurare la integrale e corretta applicazione delle norme esistenti – sia quelle internazionali sia regionali che nazionali – in materia di protezione ambientale in stretto raccordo con la realtà economica e sociale

c. di rivedere profondamente le procedure preventive di autorizzazione, il sistema dei controlli e il sistema sanzionatorio;

d. di riconoscere il ruolo positivo dei giudici nella difesa dell'ambiente in considerazione della loro indipendenza; per un servizio giustizia forte ed equilibrato è necessario operare in armonia con gli sforzi delle Istituzioni amministrative e politiche;

e. di valorizzare le esperienze di **governance locale** nei comuni, nelle province, nelle regioni dei singoli Stati per far crescere dal basso il metodo di dialogo fra istituzioni, imprese economiche e società civile, verificando la reale applicazione dei principi dell'Agenda 21 approvata a Rio de Janeiro nel 1992.

A tal fine si chiede agli Stati e alla Comunità internazionale di attivare meccanismi semplici di verifica e di conoscenza per comparare le esperienze realizzate, dandone periodica pubblicità. Sono particolarmente importanti le esperienze degli enti locali sul territorio in materia di lotta la mutamento climatico, bio-diversità, desertificazione, tutela delle acque, gestione dei rifiuti, tutela del suolo, protezione del paesaggio e dei beni culturali, recupero dei siti degradati, ecc.;

f. di migliorare la **governance nazionale,** ossia dei singoli Stati, secondo indicatori comuni chiari e misurabili nelle principali priorità, creando anche in questo caso un meccanismo semplice e comune di conoscenze e comparazione dei dati per verificare il raggiungimento degli obiettivi prefissati. Occorre rendere pubblici periodicamente i risultati della governance nazionale complessiva.
g. di valorizzare e sviluppare le esperienze di **governance regionale** a partire dall'Unione Europea (in cui la governance ambientale è già molto strutturata): bacino Mediterraneo - Mar Nero; delta del Danubio; Carpazi; Alpi; Ande; Himalaya; Artico; Antartico; Centro Africa e sub - Sahara; isole del Pacifico; altri modelli di collaborazione come Messico - USA, Canada – USA; grandi sistemi fluviali; ecc.
h. di programmare una linea di condotta comune di **governance globale** dell'ambiente per assicurare la sostenibilità dello sviluppo ed una risposta globale unitaria ai fenomeni ambientali emergenti.
i. di estendere il processo di *compliance* degli impegni assunti da ciascun Paese a tutti i settori ambientali. Deve essere resa chiara e conoscibile la interconnessione fra impegni e propositi a livelli di sistema-Paese rispetto alla transizione economica in atto nel complesso internazionale.
j. di trovare una risposta al problema degli Stati che non fanno parte dei trattati multilaterali accettati dalla maggior parte degli altri Stati: occorre evitare che questi Stati siano "liberi approfittatori" (*free riders*) e che possano trarre vantaggio dalle misure di autolimitazione concordate da altri Stati, con gravi ripercussioni economiche nell'epoca della globalizzazione.

STRATEGIA PER UNA GOVERNANCE AMBIENTALE GLOBALE

Appare importante accelerare i processi di decisione politica relativamente alla governance globale attraverso:

b) la revisione condivisa del modello di governance dall'attuale sistema delle Nazioni Unite in materia di ambiente, attraverso la riforma del modello che fa capo all'UNEP e la sua trasformazione in un ente nuovo denominato ONUE (Organizzazione delle Nazioni Unite per l'Ambiente): la disarticolazione attuale non favorisce la programmazione, gestione e controllo della politica ambientale globale su alcuni punti decisivi (mutamento climatico; perdita della biodiversità; desertificazione; crisi dell'acqua; ecc.). Si tratta di una prima tappa necessaria al fine di una ulteriore semplificazione e razionalizzazione del ruolo unitario delle Nazioni Unite in tema di risposta alla crisi ecologica globale. I Governi devono concludere con il maggior consenso possibile l'iter di riforma in atto. L'ICEF esprime piena adesione a questa scelta;

c) la revisione condivisa del ruolo degli Enti internazionali economici (tra cui la Banca Mondiale, l'Organizzazione Internazionale del Commercio, Fondo Monetario Internazionale, ecc.) nel settore ambientale appare non solo opportuna, ma necessaria. Una mera razionalizzazione all'interno della cornice delle Nazioni Unite non può produrre frutti importanti se grandi Enti economici internazionali non trovano una cornice comune di programmazione e decisione a favore dell'ambiente. Occorre che il governo dell'economia in sede mondiale si accompagni strutturalmente alle questioni ambientali, intese quali questioni economiche. L'attuale disarticolazione ed autoreferenzialità degli Enti internazionali economici non sembra soddisfacente, al di là dell'apprezzamento per gli sforzi positivi finora compiuti da questi Enti in materia di ambiente;
d) di valorizzare il modello dei Forum Internazionali dei Governi per la materia ambientale.
   Questi Forum si sono significativamente estesi nel tempo: G6 nel 1975; G7 nel 1976; G8 nel 1998; G20 nel 1999; senza contare le iniziative più vaste di Governi su base continentale. Essi hanno dimostrato di legare economia e ambiente in una visione comune, anche per la partecipazione della Banca Mondiale e del Fondo Monetario Internazionale.
   Si sono moltiplicate le riunioni ad alto livello di Capi di Stato e di Governo, ed anche incontri operativi dei Ministri dell'Ambiente: sono stati affrontati temi come il cambiamento climatico, le energie rinnovabili, le sfide del cibo e dell'acqua soprattutto in Africa e la necessità di un impegno crescente nella comunità internazionale di alcuni grandi economie come Cina, India e Brasile.
   I Ministri dell'Ambiente, come è emerso anche nel Summit di Siracusa tenutosi il 22-24 aprile 2009 sotto la presidenza del Ministro dell'Ambiente italiano On. Stefania Prestigiacomo, hanno lavorato per trovare soluzioni graduali e reali;
e) la costituzione di un **gruppo di lavoro** dei Governi, cioè di un Forum **Giustizia e Ambiente globale**, nell'ambito dei Forum dei Governi già esistenti.

Vi è l'esigenza di una razionalizzazione anche nel settore delicato della Giustizia internazionale in materia di ambiente:
- occorre identificare le istituzioni ed i meccanismi esistenti per la prevenzione e risoluzione dei conflitti ambientali in una visione integrata ai vari livelli promuovendo un approccio innovativo;
- si moltiplicano i casi davanti alle Corti nazionali e regionali, con un significativo aumento di Corti specifiche per l'Ambiente;

A livello internazionale, la situazione è differente e non appare favorevole per alcuni motivi:
- la persistente ritrosia degli Stati a rinunziare ad una parte di sovranità, concepita in termini di esclusività, anche a fronte di problemi globali ambientali che interessano la comunità internazionale nel suo insieme e l'avvenire del pianeta;
- il ruolo molto limitato che gioca l'accesso alla giustizia in ambito internazio-

nale, non solo da parte delle persone e delle formazioni sociali, ma perfino da parte delle organizzazioni internazionali;
- la disarticolazione degli organi esistenti (Corte internazionale di giustizia dell'Aja; Tribunale Internazionale del diritto del mare; Corte permanente di arbitrato; Tribunali arbitrali ad hoc; WTO dispute settlement body; Interamerican Commission on Human rights; African Commission on Human rights; European Court on Human rights; North American Free Trade Agreement; Multilateral Environmental agreement and treaty based non compliance mechanisms; ecc.);
- il rischio di un *gap*, cioè di una rottura del vincolo di interrelazione ed integrazione tra esperienze molto ampie di *Regional and domestic courts* e limitati casi davanti agli organi internazionali esistenti;
- il rischio sostanziale di una giurisprudenza non coerente e frammentata su problemi complessi (nozione di dispute di rilevanza ambientale internazionale; nozione di danno ambientale di rilevanza internazionale; nozione di responsabilità giuridica degli Stati per omessa prevenzione e riparazione del danno ambientale transfrontaliero; responsabilità comune e differenziata; principi applicabili come prevenzione, precauzione, chi inquina paga, equità e generazioni future, ecc.);
- il rischio di limitare solo alla sfera nazionale e regionale l'attuazione dei principi di trasparenza, partecipazione pubblica ed accesso alla giustizia;
- il rischio soprattutto di lasciare fuori dalla "giustizia" i reali conflitti sulle risorse ambientali comuni (ad esempio la risorsa acqua, la risorsa foresta, la risorsa della biodiversità, ecc) lasciando in tal modo uno spazio allo sfruttamento delle risorse non equo a livello socio-economico in una economia globalizzata.

Conclusione

Si raccomanda, in conclusione:
- di accelerare l'*iter* iniziato nel 2003 per la trasformazione dell'UNEP in ONUE;
- di creare un apposito gruppo di lavoro, non solo di esperti, ma anche di rappresentanti di Governi più sensibili sul tema della riforma del modello di giustizia internazionale per l'ambiente, elaborando con calma una strategia condivisa, coinvolgendo in tal senso l'UNEP ed anche le Istituzioni giudiziarie e arbitrali internazionali già esistenti per arrivare ad una riforma condivisa, salvaguardando l'unitarietà del sistema del diritto internazionale ed il principio dell'accesso alla giustizia.

ALLEGATO A

Nuove regole" per l'economia sostenibile

Un adattamento dell'economia alle esigenze dell'ambiente è già in atto da parte dei soggetti economici più sensibili, che anticipano le domande del pubblico nel medio e lungo periodo.
Questo adattamento è però troppo lento e parziale, perché non interessa ancora l'intera economia e l'intera finanza ai vari livelli.
In un'epoca di globalizzazione (anche per prevenire nuove crisi economico-sociali) oggi appaiono necessarie "nuove regole" economico-ambientali.
Definire queste regole non è facile, ma si può tentare di individuare un percorso realistico e condiviso su alcuni punti:

- La libertà economica rimane un valore positivo, ma ogni decisione economica deve tenere conto delle conseguenze sull'ambiente comune;

- La considerazione anticipata delle conseguenze ambientali deve riguardare tutte le fasi dell'attività economica : il reperimento delle risorse, i finanziamenti, il tipo di produzione, il modo di produzione, il consumo e tutte le altre fasi del ciclo economico (compresi i rifiuti ed il loro riutilizzo; i trasporti; il consumo energetico; le localizzazioni; ecc.);

- Tutti i soggetti, che a vario titolo "fanno" economia, sono tenuti a valutare le conseguenze ambientali, trasformando i "limiti" (pur necessari) in "opportunità": le imprese pubbliche; le imprese private; le imprese no profit; i lavoratori; i clienti; i fornitori; i consumatori; gli azionisti; le comunità di rifornimento; i manager; le organizzazioni sociali, i sindacati; ecc.;

- I principi e le regole nuovi su "economia – ambiente" possono valere soltanto in un quadro comune di trasparenza, onestà, responsabilità, solidarietà ai vari livelli (locale, regionale, nazionale, internazionale), dal basso verso l'alto e viceversa;

- La promozione dello sviluppo integrale delle persone e dei popoli è certamente un'esigenza etica reale e fondamentale di giustizia, che è facilitata dalla emergenza ambientale, la quale oggi domanda agli stati e alle organizzazioni internazionali risposte nuove e coraggiose ed appare realistico ottenere un ampio consenso sociale;

- La "governance ambientale" non è un'esigenza diversa dalla "governance economica", se economia e ambiente vengono considerate strutturalmente in modo unitario, in un'ottica di medio e lungo periodo;

- La "governance ambientale" presuppone una visione comune dinamica, una interazione ed integrazione dei diversi livelli del sapere umano e delle appli-

cazioni tecnologiche, una interdisciplinarietà ordinata e finalizzata, una sintesi orientativa chiara, la individuazione di strumenti e procedure per la verifica degli adempimenti concordati da parte di tutti i soggetti che "fanno" l'economia reale (compresi i consumatori).

- Divieto dei "paradisi fiscali" (o introdurre almeno una disciplina di mitigazione: obbligo di trasparenza sul pagamento nel Paese d'origine di almeno una parte delle tasse, proporzionata alla cifra depositata; obbligo di trasparenza sulla durata minima dei depositi presso banche estere; scambio obbligatorio di informazioni tra Stati e tra banche, legittimità di percezione dei vantaggi differenziali entro limiti da concordare a livello internazionale, coperti dal segreto bancario; ecc.);

- Divieto di delocalizzazioni produttive dannose per l'ambiente di riferimento e la realtà sociale;

- Divieto di commercio di prodotti pericolosi per l'ambiente;

- Divieto di pratiche protezionistiche, non giustificate da gravi ragioni sociali;

- Sviluppo del sistema delle certificazioni etiche a favore delle imprese che assumono l'ambiente come una propria responsabilità sociale;

- Sviluppo del sistema di conti e fondi etici da parte di banche ed istituzioni sensibili ai valori ambientali;

- Dovere di trasparenza e sobrietà degli organismi internazionali che si occupano della cooperazione in tema di economia e ambiente, nel senso di evitare apparati burocratici inutili e costosi ed obbligo di monitoraggio dei risultati;

- Dovere di reprimere gli abusi della "pubblicità" nel senso di accertare la reale rispondenza dei prodotti ai requisiti di rispetto ambientale vantati;

- Dovere delle organizzazioni internazionali che si occupano di economia e di ambiente di lavorare in forte collaborazione tra loro, con un reale coordinamento, senza autoreferenzialità, con trasparenza ed indipendenza rispetto ai poteri forti, onde favorire l'economia reale e non le speculazioni;

- Dovere di evitare visioni ideologiche od utopistiche: il cambio delle regole di economia-ambiente giova oggi allo sviluppo umano delle persone e dei popoli e va affrontato con serietà e realismo senza vagheggiare una intangibilità assoluta della natura e senza fare affidamento esclusivamente sullo sviluppo tecnologico, pur necessario;

- Se esistono sul mercato tecnologie migliori per la protezione ambientale occorre stabilire un obbligo giuridico generale di utilizzazione, indicando con

precisione i criteri di riferimento (temporali, quantitativi, ecc.);

- La responsabilità primaria di uscire dal sottosviluppo è degli stessi popoli colpiti da fame, miseria, malattie endemiche, analfabetismo, che devono evitare forme di illegalità o regimi corrotti e non democratici: gli aiuti internazionali sono necessari e utili se ubbidiscono a criteri di assoluta trasparenza e controllo dei risultati;

- Occorre promuovere in loco lo sviluppo agricolo nei Paesi più poveri, migliorando i sistemi tradizionali di coltivazione ed utilizzazione dell'acqua, con una formazione specifica delle nuove generazioni, evitando piani di finanziamento disarticolati e di pura immagine: sono i Paesi poveri a dover soddisfare i bisogni primari di cibo, acqua, medicinali per i propri cittadini utilizzando gli aiuti internazionali non solo per l'assistenza, ma per lo sviluppo, rivendicando uno sbocco adeguato delle produzioni sul mercato internazionale;

- Occorre affrontare le problematiche energetiche con determinazione e realismo accrescendo e diversificando le fonti energetiche diverse dal petrolio, migliorando l'efficienza energetica in tutti i settori, riducendo i consumi eccessivi: in particolare occorre valorizzare l'energia nucleare a scopo civile e pacifico secondo le più avanzate tecnologie; aiutare i popoli privi di risorse energetiche con un'azione internazionale efficace e continuata; resistere al ricatto petrolifero di alcuni paesi, dominati da oligarchie autoritarie e comunque non democratiche;

- Occorre responsabilizzare la società civile ed i consumatori nel controllare dall'interno i processi di produzione, distribuzione e consumo, onde assicurare la salute e l'ambiente, nel segno della democrazia economica: i diritti umani sono anche doveri umani e conseguentemente vanno esercitati non come arma politica o forme di violenza, ma in spirito collaborativo e propositivo con la realtà economica e con le istituzioni, considerando anche il "consumo di massa" una forma delicata e complessa di economia;

- È vero che le istituzioni da sole non possono garantire la governance economico-ambientale, ma sono pur sempre necessarie: orbene se a livello internazionale esiste un vuoto di gestione e giustizia, occorrerà subito provvedere a colmarlo. Il ruolo degli Stati rimane fondamentale secondo il principio di sussidiarietà, ma occorre un consenso non solo su nuove regole, ma anche su istituzioni di governance internazionale capaci di applicarle.

- Il fenomeno delle migrazioni (anche dovuto a cause ambientali) è un problema economico e sociale enorme, destinato per anni a condizionare la vita sociale e politica delle aree del Pianeta più avvantaggiate: occorre evitare il buonismo irresponsabile degli ingressi indisciplinati, come pure barriere rigide di non integrazione. Occorre riequilibrare alla fonte – nei limiti del possibile – il problema, evitare fenomeni di sfruttamento di organizzazioni criminali, rico-

noscere i diritti ed i doveri solo alle persone in grado di integrarsi con la lingua, il lavoro ed il rispetto delle altre culture. Costituisce un errore gravissimo considerare in termini di "assolutezza" i diritti umani solo nel segmento finale della immissione di migranti irregolari.

- La "reciprocità" nei diritti umani non è una concessione perché si riferisce alla loro stessa essenza: se tali diritti sono "universali", il loro esercizio deve accompagnarsi a precisi doveri ed obblighi anche nei Paesi di origine: un diritto-dovere universale è tale in ogni luogo e non può costituire un'arma impropria e assoluta di lotta politica.

- Occorre riconoscere un dato di fatto: la cultura islamica dei diritti umani non è uguale a quella dell'occidente. Una nuova intesa è possibile per tutti gli aspetti, gravi e complessi, che presentano discordanza, in modo da assicurare condivisioni e reciprocità di trattamento dovunque sul Pianeta. Questi aspetti delicati riguardano anche la governance ambientale ed economica ai vari livelli.

- La cultura dei diritti umani e quella della protezione dell'ambiente hanno già elaborato una serie di principi comuni, che richiedono già una reale applicazione e soprattutto la gestione nella logica di una governance unitaria "economia-ambiente".
  Il concetto unitario di ambiente richiama quello unitario di economia:
  a) il principio di prevenzione non può riguardare solo l'inquinamento, ma anche l'uso delle risorse;
  b) il principio di precauzione non può essere invocato in modo generico e massimalista, danneggiando l'economia;
  c) il principio del danno ambientale deve essere legato a quello dell'obbligo di adozione delle migliori tecnologie e di prevenzione dei rischi, tipici di una seria valutazione dell'impatto ambientale, sociale ed economico;
  d) i principi di informazione, partecipazione ed accesso non rispondono solo ad esigenze ecologiche, ma anche a quelli di democrazia economica;
  e) i cosiddetti diritti delle generazioni future in campo ambientale sono in realtà una esigenza di economia sana di medio e lungo periodo, secondo la logica dello sviluppo sostenibile.

GLOBAL ENVIRONMENTAL GOVERNANCE[1]

by Amedeo Postiglione

1. The utility of the concept of "governance"

When it becomes hard to find solutions for certain social issues, such as the relationship between the economy and the environment, it is time to start reasoning together in terms of overall governance, defining the roles and responsibilities of all the stakeholders.

Governance is useful for building an integrated dynamic vision that allows for no empty spaces.

The principle of integration cannot be abstractly invoked only with regard to juridical rules, it must be simultaneously examined in relation to its practical judicial implementation (the role of judges), the activities of Government authorities (administrative practices and procedures), and the role of businesses and the civil society.

It is necessary to define "**Environmental governance**" as accurately as possible.

An acceptable definition, due to its plainness and conceptual clarity is "*insitutions and mechanisms for protecting the environment and resolving disputes*", using the word 'mechanisms' in its broadest possible meaning, or *"a coherent and transparent machinery for the discussion and elaboration of rules, policies and plans for the protection of the environment, as well as procedures to implement them and ensure compliance with them".*

The mechanisms of governance, therefore, must be agreed to in a structural – albeit flexible – manner, so that we can verify progress and compare results, quantitatively as well.

The land must form the backdrop/be used as the benchmark against which to measure governance in the various sectors (the atmosphere, water, soil, waste, the conservation of nature and our heritage, etc.).

The scale of priorities must be verified and applied by all the stakeholders of governance, according to the principles of a truly participatory democracy.

The economy cannot operate separately and disjointedly from the environment, also for reasons of justice: conscientious and reputable businesses, in fact, are harmed by those businesses that violate the principles of prevention and responsibility.

2. The aims of environmental governance

The aim of environmental governance is to "ensure the practical implementation of the principle of sustainable development, through the balanced satis-

[1] Icef international conference on "Global Environmental Governance", 20-21 May 2010 Rome, Ministry of Foreign Affairs.

faction of the needs of the present generations, without jeopardising the opportunities of the future generations".
According to this interpretation, the role of politics is to provide a synthesis and is decisive, especially as regards the medium to long term (the dynamic vision of governance). Of course, too broad an extension of the concept of sustainable development – such as to include economic and social development – can pose problems for the *good governance* of the dramatic global environmental phenomena emerging today, namely climate change, the impoverishment of biodiversity, desertification, the water crisis, the indiscriminate use of non-renewable natural resources: the issue here is not the establishment of a concept of the environment separate and distinct from proper forms of integration with the economy and society, what we need to prevent is the surrender of the environment as a "value" (referred to the primary sustainability of life on Earth). It ensues, therefore, that – when the need arises – environmental governance must set up the environmental values as a priority.

3. The scope of environmental governance

The scope of environmental governance includes *all human activities capable of legally affecting the environment*. The problem remains of comparing environmental interests with other public interests, on a case by case basis, in order to avoid forms of ecological radicalism or fundamentalism that would not be accepted by the overall body of society. We must acknowledge that governance applied to the environment is forcefully conditioned by the very nature of its scope, the characteristic features of the environment at its various levels: essentially speaking, governance affects both human behaviour and what is, to all intents and purposes, a global integrated living ecosystem.
The most delicate aspect of the environment is that it concerns the very life of people and of the other components of nature. Governing natural phenomena can be an extremely complex and difficult task, and climate change, for example, is there to remind us of this fact.
The whole subject of the environment features a forceful technical and interdisciplinary content, as well as still undefined scientific aspects.
The definition itself of the environment takes on a dynamic dimension, depending on cultural and political evolution.
When further investigating this aspect, we will find that a more in-depth reflection on the key role played by the principle of integration of legal systems, in respect of environmental aspects, can come in useful.

4. Inadequacy of the traditional "command and control" approach

The recent phenomenon of the "environment" has been addressed, in its initial phase at least, in an incomplete and partial way, through the multiplication of laws and control by the Institutions.
The results, to date, have been unsatisfactory.
Two fundamental players have been kept out of the picture: **businesses** and **society.**
The first inadequate result concerns the struggle against pollution: the obser-

vance of environmental regulations imposing acceptability thresholds, in respect of the atmosphere, water, soil, etc. have afforded only a limited measure of protection. Businesses are not encouraged to implement better technologies if the law simply requires the observance of minimum pollution thresholds. The philosophy of Governance assures high levels of protection, as a result of which economic tools are also required to achieve this result. The same applies to controls, which are few and far between, and hardly concern the real life of the individual businesses, which are viewed merely as passive subjects of the controls, rather than key players in a different model of protection. The fine system too, if only sporadically applied, is no effective deterrent, with regard to prevention and repair: alas, environmental damage is very widespread and enormous amounts of money are requires, *ex post*, for pollution recovery purposes; on the contrary, Governance operates *ex ante* involving all the public and private stakeholders.
A second inadequate result concerns the use of natural resources and the protection of biodiversity, the landscape and the cultural heritage: in all these cases positive planning and sustainable management actions must be put into place, alongside the thresholds and prohibitions, and this can hardly be achieved without involving businesses, society and the scientific world.

5. Why abide by the principle of "governance"?

The importance of governance is self-explanatory. The ecological crisis, at all levels, has revealed itself to be more complex and serious than originally expected, in economic and social terms as well, which means that all the stakeholders must be involved – at all times (before, during and after) – in the process of "governance", i.e. in the **rational and integrated management of the phenomenon.** As shown above, the traditional mechanisms of *command and control* are simply not enough.
We need to effectively define the roles and responsibilities of all the stakeholders, to ensure the implementation of new solutions, with certain and measurable results.

6. The principles of Governance

The White Paper on "European Governance" [Brussels, 5/08/2001 COM(2001) 428] lists several principles of good governance, which we should keep in mind:

- Openness:
  all institutions should work in a more open manner, to enhance public confidence.
- Participation:
  environmental policies should aim to ensure broader information to and enhanced participation of citizens throughout the policy chain, from conception to implementation.
- Accountability:
  each public institution (whether local, national, EU and international) must explain and take responsibility for what it does.

- Effectiveness:
  environmental policies are meaningful if they can achieve results that are consistent with precise indicators.
- Coherence:
  environmental policies must be integrated within a complex system.
- Proportionality:
  each public action must be in proportion to the objectives it pursues, striking a balance between public interest and economic and social sustainability.
- Subsidiarity:
  each level of governance (local, national, EU and international) is important, but not separate, and should be integrated within the common action, without leaving any empty spaces, according to a gradually stronger and never weaker system.

7. The stakeholders of environmental governance

As mentioned above, the responsibility for good environmental governance lies with a number of stakeholders, because the environment is a common good shared by society as a whole.
By way of example, following is a list of stakeholders responsible for *good environmental governance*:
Public stakeholders:
The international community, international organisations, states, regions and local authorities, legislative authorities, administrative authorities, courts of law, others;
Business stakeholders:
the prevention and repair of environmental damage as illegal damage to the economy and society; the mandatory introduction of state-of-the-art environmental protection technologies; the development of the new opportunities offered by the environment; discussions with the institutions and society as a whole, in view of the introduction of "new ground rules" for integrating the economy and the environment; etc.
Civil society:
implementing the right to environmental information; implementing the right to environmental participation; extending the right of access to justice, with respect to environmental issues, by individuals and NGOs; enhancing the positive role played by NGOs in general, while absolutely reproving any destructive form of violence or ecological fundamentalism; etc..
Scientific world:
ensuring the "independence", "objectiveness", "truthfulness", "spirit of service" of true research for the common good, operating a distinction with technological applications, the environmental implications of which should be assessed on a case by case basis; etc.
Schools, Universities, the Press and Mass Media:
duty bound to provide accurate information and to educate people to respect common environmental values;

Religious authorities:
promoting the environment as an ethical and religious value; including serious violations against the environment among the "sins" against the gift of creation; promoting a demanding secular ethics for protecting the general interests of the community.

8. The Pillars of Governance

1) Acknowledging science as the first pillar of governance
Considering that, due to the complex and delicate nature of the global environmental phenomena, there is the need for a certain and solid core of scientific knowledge and objectively comparable and constantly updated data, collected independently and as an act of service to truth, without any undue interference by the political and economic world; that the environmental Governance decisions – precisely because of their profound impact on the economic models of production and consumption – require Governments to take into account the most recent scientific studies (such as, for example, those on climate change, biodiversity, deforestation, biotechnologies, etc.) and that these studies must be more effectively continues, also with the economic support of all the stakeholders, the best recommendations are*:*

a) to further the role of independent science, in respect of the assessment of risks for the environment and human health (for instance, the acceptable level of risk of GMOs in agriculture; the acceptable level of residual risk involved in the regeneration of pollutes sites; whether or not manufacturing and other industrial plants posing a high health/environmental hazard should be authorised; the environmental impact of biomedicine; the risks related to climate change; the risks ensuing from the loss of biodiversity; the risks of desertification; biosecurity; etc.);
b) to implement the principle of precaution with the appropriate amount of prudence and shying from any ideological prejudice;
c) to avoid any confusion between scientific research and its technological applications, which, at times, can be dangerous.

2) Acknowledging that the second pillar is formed by ethics, religion and culture.
Considering that a mature social and economic ethics forms the basis for a different balance and integration of the economy and the environment; that only if the environment is interiorised as a great common and human value by all people on Earth will it be possible to forcefully demand – as a duty – the implementation of new models of economic and social behaviour, which are a prerequisite for tackling the new global challenges posed by the environment; that positive actions should be implemented by three great monotheistic religions (Christianity, Judaism and Islam), as well as the other Religions, in order to raise awareness about and promote a common strategy in the name of the environment, because – for believers – the environment is the fruit of creation and should, therefore, bring people together in the sign of peace, rather than divide them, the best recommendations are:

a) to foster the development of a mature ethical conscience;
b) to turn the spotlight of the environmental issue not just on the rights but primarily on their duties and responsibilities of all the stakeholders of environmental governance;
c) to focus on the new ethical principles of fairness and justice in economic production and consumption and in international trade, laying down specific rules, with respect to certain key aspects;
d) to accept the proposal authoritatively made by Pope Benedict XVI to set up a wordlwide Authority for economic and environmental governance, with the hope that the Governments make take it into due account.

3) Acknowledging that the third pillar is formed by the economy.
Considering that all the stakeholders must collaborate in changing the economy in all its phases from the inside, deeply and in an organised way; that it is necessary to introduce new global economic and ecological rules in a specific international Convention, to be agreed to by the States, with binding effects; that this role cannot be handed over solely to the international economic organisations (at times with indirect environmental competencies) because – regardless of their merits in other fields – they operate separately, without coordination, and are themselves part of a system that, to date, has viewed the economy and the environment as two distinct fields of action; that it is unrealistic to achieve gradual adjustment without the direct action and strong political will of the Governments; that a worldwide economic governance is required, a fact that is clear to everybody after the recent crisis; that it is necessary to adopt a bottom-up approach, to prepare the best possible conditions for multiplying actions and projects in the economic sector, for the good of the environment, the best recommendations are:
a) to develop all the economic opportunities offered by the environment, fostering dialogue with local enterprises;
b) to implement the broadest possible range of economic and fiscal tools and voluntary agreements with businesses, moving beyond the conventional "command and control" approach applied to date;
c) to effectively implement and properly enforce the existing environmental rules and regulations, at all levels, also extending the legal obligation to introduce technologies that afford the best possible protection of the environment;
d) to promote award and reward systems for virtuous enterprises and products that are compatible with the environment (Ecoaudit; Emas; etc.);
e) to promote energy efficiency and the development of alternative and renewable sources of energy;
f) to support the introduction of biofuels;
g) to reform the system of taxation on energy products and other environmental sectors;
h) to foster the exchange of quotas of greenhouse gas emissions;
i) to lay down rules in respect of economic advertising, to foster transparency and truthful information;
j) to direct the available public resources towards their effective use in vital sectors for the new economy;

k) to end the scandal of tax havens;
l) to enforce the existing international trade rules, introducing further criteria aimed at protecting the environment;

4) Acknowledging that the fourth pillar is formed by the Civil Society.
The best recommendations are also:
a) to preserve and strengthen the link between human rights in general and the Human Right to the Environment;
b) to create the conditions for adopting a specific worldwide Convention on access to environmental justice, before the international courts of law, because if it is decided that the rights to information, participation and access are fundamental rights of human beings, then they should not apply solely at national or regional level;
c) to view the civil society as a key resource for the effective protection of the environment, in the name of common human values, in view of the implementation of a true economic and environmental democracy;
d) to effectively implement the space for information, participation and access to justice, in respect of environmental matters;
e) to effectively implement the new human right to the environment of each person, because this right is meaningless if no legal remedies are available, at all levels, without having to prove the existence of personal and direct damage: any filters should only serve the purpose of preventing an inflation of cases, but the principle should be effectively applied;
f) to join forces against all forms of violence, working to ensure the observance of the decisions passed by the institutions, on environmental issues, when the spaces of information, participation and access are previously safeguarded, because this is essential for the success of the economic projects and for ensuring the principle of democracy;
g) to streamline and enhance the transparency of bureaucracy, so that all common people can learn about the core aspects of an issue and which decisions have been implemented in this respect;
h) to develop relations with the civil society – locally, first of all – overcoming the present obstacles consisting of a lack or shortage of information and participation;
i) to further develop the network of Environmental Protection Agencies, nationally, at EU level, and internationally, ensuring that the relevant data is comparable and easily understandable, also by non-experts;
j) to develop environmental training/communication programs for schools, universities and research centres.

5) Acknowledging that the fifth pillar is represented by the institutions.
The best recommendations are also:
a. to take decisions and develop plans and programmes for implementing an effective economic, social and environmental governance, to ensure a high degree of environmental protection;
b. to ensure the full and efficacious enforcement of the existing environmental

protection rules and regulations – at international, regional and national level – in close agreement with businesses and the communities;

c. to profoundly overhaul the prior authorisation processes, the control/inspection procedures and the penalty system;
d. to recognise the positive role played by the courts of law, in respect of the protection of the environment, in consideration of their independence; in order to achieve a strong and balanced judicial service it is necessary to operate consistently with the efforts by the government and political institutions;
e. to capitalise on the **local governance** experiences made by the municipal, provincial and regional governments in the single States, in order to foster the growth of a bottom-up approach to dialogue between government, businesses and the civil society, assessing the actual implementation of the principles set out in Agenda 21, approved at Rio de Janeiro in 1992. Therefore, States and the international Communities should implement simple review and fact-finding mechanisms, to compare the different experiences made, and periodically disclose and circulate their results. The experience made by the local authorities in respect of the struggle against climate change, biodiversity, desertification, water protection, waste management, soil protection, landscape/heritage protection, regeneration of polluted and deteriorated sites, etc., are particularly important;
f. to improve **national governance,** i.e. governance by the single States, in accordance with clear and measurable common indicators relating to the key priorities, in this case too by creating a streamlined and shared mechanism for comparing data, with a view to assessing the achievement of the established targets. The overall results of national governance should be disclosed and circulated on a periodical basis;
g. to capitalise on and develop experiences at **regional governance** level, starting with the European Union (where environmental governance is already very structured): Mediterranean Basin – Black Sea; Danube delta; Carpathians; Alps; Andes; Himalayas; Arctic; Antarctic; Central and Sub-Saharan Africa; Pacific Islands; other cooperation models, such as Mexico - USA, Canada – USA; large river systems; etc.;
h. to plan common guidelines for the **global governance** of the environment, to ensure the sustainability of development and a global unified response to the emerging environmental phenomena;
i. to extend the process of *compliance* with the commitments undertaken by each Country to all the environmental sectors. The inteconnection between commitments and proposals at each country level should be made clear and understandable, with respect to the economic transition under way internationally;
j. to find a solution for the problem of the States that have not signed up to the multilateral agreements accepted by the majority of other States: these States should not be allowed to become "free riders" and take advantage of the self-limitation measures agreed to by the other States, with serious economic repercussions at a time of globalisation.

Strategy for global environmental governance

The focus should be on speeding up the decision-making processes, with respect

to global environmental governance, through:

b) the overhauling, based on shared proceedings, of the environmental governance model applied by the current system of United Nations, by reforming the UNEP model and transforming it into a new model called UNEO (United Nations Environmental Organisation): the current fragmentation confounds all attempts to plan, manage and control global environmental policy, with respect to certain decisive issues (climate change; loss of biodiversity, desertification; water crisis; etc.). This is a fundamental stage in the process for further streamlining and rationalising the unitary role of the United Nations, with respect to providing a response to the global environmental crisis. Governments must complete the reform process under way with the greatest possible consensus. ICEF fully upholds and supports this choice;

c) the shared reform of the role of the international economic organisations (including the World Bank, World Trade Organisation, International Monetary Fund, etc.) in the environmental sector is not only expedient, but absolutely necessary. A mere process of rationalisation within the framework of the United Nations cannot produce significant and lasting results if the global economic organisations do not find a common ambit, a space within which to plan together and take shared decisions about the environment. The global governance of the economy must proceed alongside the environmental issues, which must be viewed as economic issues as well. The present fragmentation and self-focus of the international economic organisations is unsatisfactory, despite appreciation for the positive efforts deployed, to date, by these organisations, with respect to the environment;

d) the promotion and development of the model of International Government Forums, in respect of environmental issues as well.
   These Forums have grown significantly over the years: G6 in 1975; G7 in 1976; G8 in 1998; G20 in 1999; alongside the vaster actions, undertaken by the Governments at continental level. They have been able to link the economy and the environment in a common vision, also thanks to the participation of the World Bank and the International Monetary Fund.
   High-level meetings of the Heads of State and Government, and operational meetings between Environment Ministers, have also significantly increased: important issues have been tackled, such as climate change, renewable energy sources, the challenges of food and water, especially in Africa, and the need for a growing commitment by the international community as a whole, and the larger economies, such as China, India and Brazil.
   The Environment Ministers meeting at the Siracusa Summit, on 22-24 April 2009, chaired by the Italian Environment Minister, the Hon. Stefania Prestigiacomo, have strived to find gradual and effective solutions;

e) the establishment, by the Governments, of a **working group**, i.e. a Forum on **Global Justice and the Environment**, within the framework of the existing Government Forums.

There is also the need for rationalisation in the delicate field of international environmental Justice:

- it is necessary to identify the existing institutions and mechanisms for enhancing

the prevention of and solving environmental conflicts, according to a more innovatory and integrated approach, at the different levels;
- the number of cases brought before the national and regional courts is increasing, with the significant increase of dedicated environmental courts of law;

Internationally, the situation is different and does not seem favourable, for a number of reasons:
- the ongoing reluctance, by the States, to give up a part of their sovereignty, viewed in terms of exclusive jurisdiction, even in the facr of global environmental problems that concern the international community as a whole and the future of the entire planet;
- the very limited role played by access to justice internationally, not just by individuals and community groups, but even by international organisations;
- the fragmentation of the existing courts and arbitration bodies (the International Court of Justice of the Hague; the International Tribunal for the Law of the Sea; the Permanent Court of Arbitration; ad hoc Arbitration Tribunals; the WTO Dispute Settlement Body; the Interamerican Commission on Human rights; the African Commission on Human rights; the European Court on Human rights; the North American Free Trade Agreement; the Multilateral Environmental agreement and treaty based on compliance mechanisms; etc.);
- the risk of a gap forming, i.e. the breaking of the link of interrelation and integration between the very broad experience of the *Regional and domestic courts* and the limited number of cases pending before the existing international bodies;
- the substantial risk of a case law forming that is inconsistent and fragmented, with respect to complex problems (concept of disputes of international environmental relevance; concept of internationally relevant environmental damage; concept of legal accountability of the States for their failure to prevent/repair cross-border environmental damage; common and differentiated responsibility; applicable principles, such as prevention, precaution, who pollutes pays, equity and future generations, etc.);
- the risk of restricting the implementation of the principles of transparency, public participation and access to justice only to the domestic/regional ambits;
- above all, the risk of leaving out "justice" and the real conflicts relating to the common environmental resources (for example, water, forests, biodiversity, etc.), thus paving the way for the unfair so-economic exploitation of resources in a globalised economy.

Conclusion

In conclusion, the best recommendations are:
- to speed up the process initiated in 2003 for transforming the UNEP into a UNEO;
- to create an ad hoc working group comprising not just experts, but representatives of those Governments that are more sensitive towards the issue of reforming the model of international environmental justice, gradually developing a shared strategy, involving UNEP and the existing international judicial/arbitration institutions, with a view to implementing a shared reform, safeguarding the unitary nature of the international legal system and the principle of access to justice.

APPENDIX A

New rules for a sustainable economy

The adjustment of the economy to the needs of the environment is already under way, thanks to the more sensitive elements of the economic world, capable of foreseeing the demands rising from the public in the medium to long term.
This adjustment, however, is still too slow and partial, because it does not yet affect the whole economy and world of finance, at the various levels.
In the present period of globalisation, "new economic and environmental rules" are becoming increasingly necessary (also as a means for preventing further economic and social crises).
Defining these rules is no easy task, of course, but we can attempt to identify a realistic and shared process, at least with regard to several issues, as follows:

- Economic freedom is and remains a positive value, but every economic decision must take into account the consequences of the common environment;

- The environmental consequences of actions should be taken into account in all the phases of economic activities: procurement of resources, financing, methods of production, the manufacturing world, consumption, and all the other stages of the economic cycle (including waste and its reutilisation/recycling; transport; energy consumption, business relocations, etc.);

- All the economic stakeholders should take into account and assess the environmentally related consequences of their actions, transforming the "limits" – necessarily introduced with respect to their activities – into "opportunities": the public and private sectors, the not-for-profit sector; employees; customers; suppliers; consumers; shareholders; supplier communities; managers; trade associations; trade union organisations; etc.;

- The new principles and rules relating to "the economy and the environment" can be effectively applied only within a common and transparent framework, in which values such as honesty, responsibility, solidarity are enforced and, indeed, shared at the various levels (local, regional, national, international), from the bottom up and vice versa;

- Promoting the integral development of individuals and peoples is unquestionably a real and fundamental ethical requirement for ensuring justice, facilitated by the environmental emergency under way, which demands that single states and the international organisations provide new and courageous answers, and it is undoubtedly realistic to achieve the broadest possible social consensus on this issue;
- "Environmental governance" as such, and as a need, does not differ from "economic governance", if the economy and the environment are considered as a whole, from a structural point of view, within the framework of a medium to long-term outlook;

- "Environmental governance" presupposes a common dynamic vision, the interaction and, indeed, the integration of the various levels on which human knowledge and technological applications thrive and develop, an orderly and targeted interdisciplinarity, clear guidelines for orientation purposes, the identification of instruments, tools, processes and procedures for verifying, assessing, and monitoring as well, the formalities agreed to by all the stakeholders of the "real" economy (including consumers).

- Prohibition of "tax havens" (or, at least, introducing rules and regulations capable of mitigating this phenomenon: mandatory transparency with respect to the payment transactions in the Country of origin of at least a part of the taxes due, in proportion to the amount of money deposited in the tax havens; mandatory transparency with respect to the minimum duration of the deposits with the foreign banks; mandatory exchanging of information between the States and the banks, the legitimacy of the perception of the differential advantages within limits to be agreed to internationally, protected by banking secret; etc.);

- Prohibition of relocating hazardous economic activities which can pose a risk for the environment and, generally speaking, for the human communities as a whole;

- Prohibition of trading in goods and products that are hazardous for the environment;

- Prohibition of introducing protectionist measures, not justified by serious social reasons;

- Developing an ethical certification system to support businesses for which the environment becomes a matter of social accountability;

- Developing a system of ethical accounts and funds by banks and other institutions that are sensitive to environmental values;

- Duties of transparency and sobriety for international organisations dealing with economic and environmental cooperation, in the sense of avoiding useless and costly bureaucratic apparatuses and mandatorily monitoring results;

- Duty to contrast advertising abuse, i.e. making sure that goods and products effectively comply with the environmental requirements as claimed;
- Duty of the international organisations dealing with the economy and the environment to effectively cooperate and network, based on real coordination, without self-focus, transparently and independently from the economic and financial establishments, to support the real economy and not speculation;

- Duty to avoid ideological or utopian visions: the changing rules governing the relationship between the economy and the environment are beneficial to the human development of both individuals and peoples and should be tackled according to a

serious and realistic approach, without a longing for the absolute intangibility of nature and without relying exclusively on technological development, which, however, is nevertheless necessary;

- If there are more suitable technologies on the market for ensuring environmental protection, then it should become mandatory to use and introduce them, accurately setting out the relevant benchmarks and regulations (as to the relevant timelines, quantities, etc.);

- The primary responsibility of emerging from underdevelopment ultimately lies with the people stricken by famine, poverty, endemic diseases, illiteracy, which should avoid forms or illegality or corrupt and anti-democratic regimes: international aid, of course, is necessary and useful if it is based on absolute transparency and results monitoring;

- It is necessary to locally promote the agricultural development of the poorer countries, improving the traditional cultivation and irrigation techniques and training the new generations, avoiding fragmented aid programmes, many of which have purely image-enhancing purposes: the poorer countries themselves should be ultimately responsible for satisfying their primary needs of food, water and medicines for their people, using international aid not just for assistance, but as a springboard for development, requesting the international markets to open up to their products;

- It is necessary to tackle energy related problems with determination and realism, by increasing and diversifying energy sources other than oil, and enhancing energy efficiency in all sectors, cutting down excessive consumption: in particular, it is necessary to exploit nuclear energy for civil and peaceful purposes, based on state-of-the-art and next-generation technology; helping people lacking energy resources by means of effective and ongoing international actions; and resist the oil blackmail used by certain countries dominated by authoritarian and non-democratic oligarchies;

- It is necessary to responsibilize civil society and consumers to encourage them to control from the inside the production, distribution and consumption processes and channels, to promote health and the environment, according to a democratic economic approach: human rights are also human duties and, therefore, they should be exercised not as a political arm, with violence, but according to a spirit of collaboration and proposition, in partnership with businesses and the institutions, also considering "mass consumption" as a delicate and complex economic form;

- Obviously, the political institutions alone cannot ensure economic and environmental governance, but they are nevertheless necessary: now, there is a vacuum, at the international level, as regards management and justice, and it is absolutely necessary to immediately fill in this void. The role that needs to be played by the States is and remains fundamental, based on the principle of subsidiarity, however, we also need a consensus with respect to new rules and

new international governance bodies capable of enforcing them;

- The migratory phenomenon (regardless of whether it is sparked by environmental and other different reasons) is an enormous economic and social problem, destined for many years to come to condition, influence and affect the social and, indeed, political life of the more advantaged areas of this Planet: therefore, we must avoid any form of irresponsible "do goodism", as regards indiscriminate entry into our countries, on the one hand, and, on the other hand, we should not raise rigid barriers against integration. What we need to do is to adopt a balanced view of the problem at the source – as far as possible – by preventing all forms of exploitation by organised crime, and granting rights and duties only to those migrants who are capable of integrating themselves in our societies, by learning the language of the country they live in, finding a job and respecting other cultures and lifestyles. It would be an enormously seriour mistake to consider in "absolute" terms human rights, only in respect of the final segment of the integration of irregular migrants;

- "Reciprocity", with respect to human rights, is not a concession because it refers to the very essence of those rights: if human rights are "universal" then the exercise of those rights must be accompanied by precise duties and obligations, starting from the countries of origin: a universal right-duty is such in any place on Earth and should not be used as an improper and absolute instrument for political bickering;

- We should all acknowledge the fact that the Islamic culture of human rights is not the same as that in the West. A new understanding is possible, however, with respect to all the serious and complex differences, so that we can ensure shared and mutual treatment wherever we are worldwide. These delicate aspects also concern environmental and economic governance at all levels;

- The culture of human rights and environmental protection have already developed a series of common principles, which already require effective application and, above all, management, according to a combined "economic-environmental" governance approach.
  The unitary concept of the environment reflects that of the economy:
  a) the principle of prevention cannot solely concern pollution, but the use of resources as well;
  b) the principle of precaution cannot be invoked generically and in a maximalistic manner, such as to damage the economy;
  c) the principle of environmental damage should be linked to the obligation of introducing and using the best possible risk prevention technologies and measures, typical of a serious assessment of the environmental, social and economic impact;
  d) the principles of information, participation and access no longer comply with purely ecological requirements, but are also linked to economic democracy;
  e) the so-called rights of the future generations, in respect of the environment, are actually a medium-to-long-term need of the healthy and sound economy, within the framework of sustainabile development.

INTERVENTO

Prof. Bernardo De Bernardinis, President of ISPRA

ISPRA- the National Institute for Environmental Protection and Research, - is very proud to support the publication of the Proceedings of this important Conference, organized in a remarkable way by ICEF, together with the participation of outstanding personalities both at national and international level.
This volume contains an overview of many relevant issues and a deep analysis of all the topics related to environmental governance. The wide number of experts involved, their competence and clarity are a prominent feature of this publication and will be appreciate by all readers, These excellent results represent also a sound basis for the adoption of initiatives and measures aiming at reinforcing an effective environmental governance, providing both an overview of current governance framework worldwide and operational suggestions for a roadmap at international and national level.
Currently, the international political debate focuses, inter alia, on reform of the environmental governance, which is considered to be a key element for tracing the roadmap towards sustainable development. Since the Rio de Janeiro Conference in 1992, sustainable development has become a largely shared concept, even though not completely reflected in environmental policies and programs, as well as in development ones. All countries are now urged to better consider the inter-linkages and the inter-dependencies of social, economic and environmental issues and to adopt, consequently, appropriate measures to integrate them.
In 2012, a new challenge will be in front of us: the UNCSD 'Rio +20' Conference – to be held in 2012 - will center its attention on green economy and environmental governance, as essential instruments for the integration of the economic issues with social and environmental components, an integration that cannot be delayed anymore. The Agenda of Rio+20 Conference underline the need to evaluate every tangible environmental improvement and positive changes towards sustainable development, and towards a new, sustainable model of the global economy.
Accordingly, decision making processes should be based on sound and informed bases, so as to achieve a well-structuredand reliable information system. To this end, environmental information should be considered as a fundamental tool on all processes related to sustainable development: environmental data and information are critical to identify effective policy solutions. Institutions and research bodies are called to produce and communicate sound based information and ensure appropriate contribution in order to bridge the science-policy gap.

In this regards, ISPRA plays an important role and has great responsibility in the development of a transparent and effective decision-making process.
As hub of the national environmental agencies system and as a public research body, ISPRA aims at ensuring a sound, scientifically correct, updated and largely available environmental information system, a continuous flow of data and information able to ensure the best available data and information, directly or through appropriate scientific networking activities, to monitor environmental state and changes, to evaluate trends and scenarios, in connection with political addresses and legislative tools. ISPRA considers a key factor in its work the sharing of environmental information within the national environment agencies system, i.e. the environmental protection agencies of the Italian regions and the autonomous provinces. The network is completed by numerous technical-scientific institutions cooperating with ISPRA in data production, validation and information processing.
Furthermore, the dissemination of environmental information is a key mission of ISPRA, following the needs of decision-makers and other operators, as well as – of course – all citizens. The main issues are useful instruments to ensure that all levels of society have access to in-depth knowledge of an ever-increasing number of environmental matrixes and factors, with a view to raising the level of awareness of environmental issues and facilitating the adoption of increasingly eco-friendly life-styles. ISPRA currently handles and diffuses a number of very different information products, all for the purpose of spreading environmental information among a wide-ranging public of users: from public decision-makers to researchers, from holders of economic interests, or stakeholders, to private citizens.

CAPITOLO 1

"THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW"

ENVIRONMENTAL GOVERNANCE AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW

Prof. Nicholas A. Robinson
Pace University School of law, New York

The effectiveness of environmental law is a function of how to align human governance systems with ecological and other natural systems. Since natural systems throughout the biosphere function in scientifically predictable ways, each international, each national or sub-national level and each local level of environmental governance needs to be aligned to take comparable decisions. We shall explore in this panel a series of principles and practices that can align such decision-making.

To date, the implementation of environmental law has produced a significant consensus in a coherent body of jurisprudence. It is timely in this panel to take stock of the law as it is and as it may become through the progressive development of the principles. The fact of this coherence and evolved body of law, congruent across should not surprise us. Humans and nature co-evolve. We are an intertwined socio-ecologic regime.

The "laws of nature," first described by naturalists, and now studied by ecologists, microbiologists, epidemiologists and Earth Systems scientists, provide the context within which humans behave. The environmental "laws" of human societies have emerged from isolated enactments – some quiet ancient – to the conservation laws begun in the 1880s, to the pollution and environmental quality laws begun in 1970s. The objective of what we today envision as "environmental conservation law" is ultimately to harmonize the laws of humans with the laws of nature.

Recounting a history of environmental law requires perspective that is not easily attained. We live today still fighting what U.S. Supreme Court Justice William O. Douglas called a "300 Year War." We are still far from realizing the objective of conforming human laws to the laws of nature, and we are often passionate about the battles of today (whether in the extinction of species or in hydro-fracking to mine natural gas), even as we forget the equally contentious battles of yesteryear. We can better understand how environmental law principles apply in current environmental law controversies by studying how they operated in previous struggles over natural resources. A survey of environmental law, such as this International Conference provides, affords us all a moment of dispassionate reflection about whence we have come.

Law has many faces. It can be considered simply from a positivist perspective: might makes right. The statutes or regulations are enforced by the police and the courts. At a deeper level, law embodies fundamental principles. The crim-

inal law of all nations makes murder a crime. Whether we ground this norm in a religious injunction, or in natural law, or in basic human rights, we acknowledge that the ban on murder reflects more than just a rule adopted by the government. To those who do not understand the basic values underlying environmental law, Environmental law is viewed simply as one of many governmental exercises of administrative law, or "command and control." The democratic legislature or the autocratic ruler issues the rule and the government enforces it. The positivist approach is the same whether the law is envisioned as a utilitarian measure, to advance the greatest good for the greatest number, such as in rules that abate air pollution only incompletely in order to save money, or whether the law is a benefit to specialist interests, such as tax incentives for off-shore oil and gas exploration and extraction. It does not seem to matter when we fight over positivist laws; positivist laws can be manipulated by lobbyists or eviscerated in court decisions, as has often been the fate of regulations adopted by national environmental ministries and agencies., such as the NYS Department of Environmental Conservation or the US Environmental Protection Agency. One side wins and one side losses, and like a sporting event, it is of no matter unless you have taken sides. In the extreme, we had this sort of approach in support of or in opposition to the laws of slavery, before the Civil War in the USA and the abolition of slavery in other nations.

The history of environmental law however calls this model into question. Environmental law has not come into existence as a "fad" or a social preference or simply to correct the health-impairing pollution that economic markets have allowed as externalities. In emergence of environmental law in every nation reflects much the same experiences. That comparable innovations in conservation and environmental stewardship have been adopted in other places is testimony to the depth and recurrence of the environmental norms that we have independently discerned in different legal and political and cultural and geographic settings.

We can know when we violate these fundamental norms; often we choose to ignore them, as when we discount "sound science" and pretend that ecological systems are unaffected by what humans do in any given legal setting. We pretended that our use of Freon had no affect on the stratospheric ozone layer for many years before we banned our uses of chlorofluorocarbons (CFCs), in the Montreal Protocol to the Vienna Convention for the Protection of the Stratospheric Ozone Layer and in national legislation implementing the duties under that agreement.

Environmental law norms are not merely socio-economic preferences, which can be amended at will. Disregarding these norms entails harm to the very fabric of life. The norms have come into high profile because of the harm humans do to the environment which sustains the humans.

If we look at state practice, and examine the various statements of principles, such as the Rio Declaration on Environment & Development or the Earth Charter, six fundamental principles of environmental law may be summarized:

1) ***"Ecosystems and species have intrinsic value***," just as each human has intrinsic value recognized by Human Rights law, and these living systems

are not valued strictly in human economic terms. *For instance*, in the Constitution of the State of New York, in 1894, the electorate adopted the first provision for a strict wilderness areas in law, in Article XIV providing that the forest lands of the State of New York "shall be kept as forever wild forest lands," or the state parks and monuments shall be set aside and preserved, or endangered species shall not be taken or traded or their habitats impaired, or wetlands shall be preserved.

2) ***Natural systems are a "common heritage" to be safeguarded for present and future generations,*** since clean air and access to potable water quality and access to other shared natural resources such as rivers or the Great Lakes, are enjoyed by all, now and into the future, and thus the "public trust doctrine" since the time of the Justinian's ***Institutes***, guarantees all persons access to the coastal foreshores and rivers, or the establishment of wildlife sanctuaries to sustain the reproductive capacity of species, or the clean air act implementation plan mandates measure to ensure the air is kept clean with "an adequate margin of safety," and "sustainable development" objectives operate to way to ensure that developments which meet the needs of the present do not compromise the ability of future generations to meet their needs.
3) ***"Prevention"*** of environmental harm is the primary norm, since it is often impossible to remedy environmental injury and economic compensation is an incomplete and often irrelevant remedy in terms of intrinsic environmental values, and thus use of chemicals that are persistent organic pollutions is banned, introductions of alien species into habitats are controlled, and private and public entities are changed with duties to "do no harm," as in the common law rules governing private and public nuisances.
4) ***"Precaution" shall be used when taking actions that could damage nature***, and where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for taking measures to prevent environmental degradation, *and thus* environmental impacts statements shall be prepared before taking action, and adverse effects mitigated as much as possible, or fishing seasons and catch limits are set when it appears that yields might not be sustained.
5) ***"Public Participation"*** is essential, because environmental decision-making entails such a wide range of interests that full transparency, access to public information, unfettered public participation in governmental procedures, and access to judicial review, redress and remedy, as provided in the Aarhus Agreement. Many nations authorize "citizen suits" and provide for freedom of information laws and open meetings law function pervasively, and environmental reporting by private and public entities alike is required.
6) ***"Polluter Pays"*** entails the internalization of all environmental costs so that the actor who might cause pollution or environmental harm bears the costs of avoiding the harm, cleaning up the mess and compensating for any injuries, and thus permits are required for emissions into the air and water and for solid and hazardous waste disposals, and all such waste are to eliminated or minimized.

As this Conference's Round Table explores how to measure the effectiveness of environmental governance, and in light of the effects of global climate change, we need to ask whether are international environmental law principles are sufficient. I propose that we need at least one more: ***the Principle of Resilience.***

Common to observing each of these principles are some shared questions: how can we know if a natural system is at risk of being irreparably damaged? How can we assess scientific knowledge to know when such risk is posed? How can we take precautionary measures without knowing what constitutes the risk of a tipping point, or of several impacts? How can we protect without knowing how to conserve or preserve the basic characteristics of natural systems that are essential to their functioning, or that allow them to recover from an impact to restore their inherent characteristics?

Arguably, to understand this inquires and apply them, it is necessary to explicitly recognize the principle of resilience, which is within each of the accepted principles. The scale and scope of global environmental degradation requires common action across all States, based on common and shared principles. Resilience is such a principle.

Implicit in the Principle of Precaution is the ecological concept of resilience, which may be restated in legal terms as the Principle of Resilience: "States shall conserve and enhance characteristics of resilience within all activities under their jurisdiction or control." Ecologists and social scientists have recognized and elaborated this principle of resilience. These concepts have been elaborated in the work of the Resilience Alliance, www.resalliance.org, and in B. Walker & D. Salt, Resilience *Thinking:*. B. Walker, S.R. Carpenter & A. Kinzig, "Resilience, Adaptability & Transformability in Socio-Ecological Systems," in *Ecology & Society* (9) (2), available at www.ecologyandsociety.org/vol9/iss2/art5/. The Intergovernmental Panel on Climate Change (IPCC) has defined resilience as the "amount of change a system can undergo without changing state," (IPCC, TAR, 2001) and the UN Development Programme has termed it "a tendency to maintain integrity when subject to disturbance." (UNDP, 2005), both at in: www.safecoast.org/editor/database/File/OECD%20Adapting%20to%20climate%20change.pdf).

The Bali Action Plan contains the soft law decision to advance international cooperation under the UNFCCC to "support implementation of adaptation actions, integration into sectoral and national planning (specified projects and programmes) climate resilience development and reduce vulnerability; risk management and risk reduction strategies…." The Bali Action plan seeks to "build resilience." In some regions, capacity building to advance resilience is underway, e.g. the "Asian Cities Climate Change Resilience Network," which is described at the website: www.rockfound.org/initiatives/climate/acccrn.shtml. ASEAN participates as a member of this network).

As our Route Table begins, let us reflect on how to strengthen in observance of common principles of international environmental law, and elaborate them with new principles such as Resilience.

ESTABLISHING THE UNITED NATIONS ENVIRONMENTAL ORGANIZATION: THE BEST INSTITUTIONAL OPTION FOR REFORMING INTERNATIONAL ENVIRONMENTAL GOVERNANCE*

*Francesco Francioni**, Federico Lenzerini*** and Massimiliano Montini*****

Among the possible options for reforming international environmental governance at the institutional level, three main alternatives emerge. The first option would consist in establishing a specialized agency of the United Nations with specific and exclusive competence in the environmental field, which should inherit the competences that are presently owned and exercised by the United Nations Environmental Programme (UNEP) and develop innovative functions for the coordination of environmental initiatives within the UN System as an umbrella organization. This organization could be named "United Nations Environmental Organization" (UNEO).

As for the second option, it would be represented by the possibility of reinforcing the structure and competences of UNEP, especially through expanding its existing functions and improving its administrative organization and funding. This option, which would be the simplest one in technical and logistic terms, would therefore give rise to an enhanced UN programme that could be called "Enhanced UNEP" (EUNEP).

Finally, the third option would consist in establishing a new international organization – not belonging to the UN framework – based on the model of the World Trade Organization (WTO). This organization would be characterized by a single structure – encompassing an autonomous administrative structure and a dispute settlement regime – and would be based on common principles

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* This article has been drawn from a preliminary study, commissioned by the French Government and prepared by the authors in November 2004 in conjunction with Pierre-Marie Dupuy, Elisa Morgera, Francesca De Vittor, Massimiliano Montini and Riccardo Pavoni, concerning the "Options and Modalities for the Improvement of International Environmental Governance through the Establishment of a U.N. Environmental Organization". The full text of this study is available at <http://www.diplomatie.gouv.fr/fr/IMG/pdf/Etudes_iddri_juridique_EN.pdf> (last visited on 26 October 2010).

** Professor of International Law and Human Rights, European University Institute, Florence (Italy).

*** Professor of International Law and European Union Law, University of Siena (Italy).

**** Professor of European Union Law, University of Siena (Italy).

informing the whole environmental management at the international level. It could be named "World Environment Organization" (WEO).
When drawing a balance between the advantages and disadvantages that would be likely to characterize each of the said options respectively, it emerges that the preferred solution for strengthening international environmental governance would be represented by the establishment of UNEO. In fact, while this option would present the problem of requiring long and expensive negotiations to adopt the international treaty that would be necessary for the institution of a UN specialized agency and of the other international instruments that would be necessary to coordinate its role with that of existing institutions, as well as that of requiring a considerable amount of funds to work in a proper way, it would nevertheless present a number of notable advantages. First, UNEO would be part of the UN system, being therefore characterized by a stronger institutional status than UNEP, hence facilitating its role as the "environmental authority" at the global level and owning a broader potential for wide membership than a UN-unrelated organization. Second, its status of "universal" environmental organization could ensure the coherency of international actions in pursuing environmental goals. Third, UNEO would facilitate the coordination within the UN system of the action in the field of sustainable development, through ensuring stronger and more systematic cooperation with other agencies or programmes dealing with matters strictly linked to environment, such as United Nations Development Programme (UNDP), FAO, IMO, etc. Fourth, UNEO would favour the possibility of increasing participation to existing Multilateral Environmental Agreements (MEAs) by improving their coherence with the global environmental agenda and eliminating possible factors of incompatibility. Fifth, UNEO could prove beneficial to developing countries, since its institutional character and its functions would ensure adequate support for the needs of developing countries. Sixth, UNEO would present a very high potential for coordinating and enhancing the implementation of international environmental law at the regional and/or national level, as well as for the negotiation of new agreements at the international one, as States would have an unique (or, at least, main) interlocutor in the environmental filed, which could offer them concrete help in pursuing their environmental policies. Seventh, UNEO would have huge visibility before the international civil society as unique or principal environmental authority at the international level, therefore favouring partnership with NGOs and the private sector and facilitating their input to the global protection of the environment. Eighth, the efficiency of the global environmental action would be improved in light of the capacity of UNEO to dispose of its own budget.
With respect to the second and the third options described above, the balance between the advantages and disadvantages they would produce in the framework of international environmental governance appears as much less positive than for the first option.
In particular, as regards the option of EUNEP, it would certainly present the advantage of being more "economic", as there would be no need to create a new bureaucratic machinery, thus avoiding the time and costs required by the

institution of a new agency or organization. Also, no particular problems would arise with regard to the transitional phase from UNEP to EUNEP. At the same time, however, the choice of EUNEP would not solve the problem of the lack of coordination of UNEP activities with those performed by other existing programmes, agencies and organizations. EUNEP would retain a weak institutional status, which would hinder its possibility of becoming the "environmental authority" in the global system, thus leading to effective rationalization of the global environmental action; this problem of the scarce visibility of UNEP in the international arena would not be likely to be solved by its simple enhancement. And, last but not least, the establishment of EUNEP would probably not address the issue of the proliferation of Conferences of Parties and Secretariats established by MEAs.

As regards WEO, it would lead to the creation of a "global environmental system" (*i.e.* a package of environmental protection treaties that would include all relevant matters, thus ensuring a rational and coherent global action for environmental protection). Also, it could *prima facie* seem to facilitate adherence by developing countries, through the application of the principle of "common but differentiated responsibilities". Nevertheless, the latter apparent advantage would be nullified by the fact that a system based on the "take all or leave all" approach, such as the one characterizing the WTO, would be too rigid in the environmental context, where, unlike in the WTO, a strong political and economic interest of States to adhere may lack. This would concern not only developing countries, that would be presumably worried by a system that could prove too strong, especially in sanctioning their possible breaches of international environmental law, but also a number of developed States that have a "crucial" role in the environmental field, which today tend to address environmental protection solely by tackling only a limited number of objectives among those pursued by the international community. Furthermore, the fact of transferring the main competences in the field of international environmental law to an organization that is totally extraneous to the UN system would probably instil a feeling of suspicion in many countries, particularly developing ones, which see the UN as the most unbiased and reliable existing international organization.

In practical terms, in order to ensure that the establishment and functioning of UNEO be politically feasible, it would be necessary that UNEO would inherit some of the competences that are presently owned and exercised by UNEP, along with its budget and funds, premises and staff, and develop innovative functions for the coordination of environmental initiatives within the UN system as an umbrella organization.

As its main task, UNEO would provide a global, overall coordination among existing MEAs. It should perform innovative tasks that are not provided by MEAs Secretariats individually (such as annual global cluster coordination meetings, overall integrated assessment of MEA national reports, and support to national integrated MEA implementation), without prejudice to the decision-making and budgetary independence of MEAs Secretariats; in fact, complete incorporation of all MEAs under the authority of UNEO would require

negotiations of such a huge extent that in all probability would be unfeasible. Therefore, the creation of UNEO would not affect the core of the current functions and/or the status of the MEAs Secretariats and would not create obligations or impact on rights of States parties to certain MEAs but non-parties to the UNEO Constitution. The UNEO Constitution would invite MEAs to accept the overall support offered by UNEO itself, particularly in terms of the consideration of crosscutting issues at the global level. Support of the MEAs to the UNEO Constitution could be done by a decision of the Conference of the Parties of each MEA concerned, therefore eliminating the need to renegotiate the text of pre-existing MEAs.

In addition, UNEO would play a central role within the UN System for the development and implementation of environmental law at the international and national levels, through a central, integrated legal service. UNEO would emerge as the main permanent multilateral forum for environmental negotiation, through the identification of gaps in the protection of certain sectors of the environment already provided for by existing MEAs. It would provide legislative and institutional technical assistance and capacity building to member States, particularly developing countries, for the integrated implementation at the national level of MEAs obligations. It would also provide, among other things: capacity building to national judiciary for the effective enforcement of environmental laws; assistance in the development of regional and bilateral agreements for the management of shared natural resources and other transboundary environmental issues; legal advice and support on the resolution of environmental disputes at the regional and international level.

In terms of monitoring, UNEO would periodically undertake field visits for the preparation of national/regional reports on integrated MEA implementation and contextually identify areas for support to the Member States, particularly developing countries. Furthermore, it would broaden UNEP's areas of technical assistance, targeting specifically developing countries, in the areas of, *inter alia*: early warning and emergency; technology transfer; data collection and information; and scientific advice.

UNEO would be characterized by a strengthened institutional status within the UN system. It would build cooperative relationships with the other international organizations having environmental competences/programmes (FAO, IMO, UNDP, WHO, UNCTAD, WMO, Commission on Sustainable Development (CSD), UNESCO, and World Bank) on equal footing, without impinging upon their acquired competences in the field of environment. Rather, the UNEO would conclude cooperation agreements to ensure, on mutually agreed terms, an effective distribution of responsibilities and possibilities of institutional learning and ongoing consultations through common services, common arrangements as to training, interchanges of staff, joint programmes or projects. To this end, it would be particularly opportune to establish an agreement with UNDP for a systematic joint management of GEF projects, in order to ensure to both organizations an equal share of the service fees, at the same time providing for a more cost-efficient task sharing. UNEO would also build stronger relationships with the other UN specialized agencies, through

agreements that respect existing acquired competences in the environmental field, and allow for institutional learning and effective cooperation.

Last but not least, UNEO would play a mutli-faceted role in environmental dispute prevention and resolution. It would prevent disputes through emergency response to environmental disasters and compliance monitoring systems. It would also aid in resolving disputes through mediation and conciliation or through legal advice on judicial dispute settlement.

The UNEO should be established by a multilateral treaty, to be negotiated at an international conference, possibly within the framework of UNEP, with the participation of representatives of UN member States, all UN Programmes and Specialized Agencies having environmental competencies and/or programmes, the Secretariats of the MEAs, the World Bank, GEF, the major international environmental NGOs and the private sector. To ensure the success of the initiative, it would be advisable to present the proposed UNEO Convention as an initiative of a consistent block of States, *e.g.* as a European Union proposal, thus already having the support of its 27 member States as a negotiating block.

THE EXPERIENCES OF INSTITUTIONS AND ORGANS OF CONTROL WITHIN THE INTERNATIONAL CONVENTIONS ON THE ENVIRONMENT (M.E.AS): REFORM OR REVOLUTION

Lucien Chabason;
Associate Director; IDDRI, Sciences-Po, Paris, France

Tous les accords multilateraux sur l'environnement donnent lieu à des débats et initiatives récurrents visant à améliorer leur effectivité et leur.efficacité.
La demande peut avoir pour origine les ONG, certaines Parties, le secretariat ainsi que la publication d'expertises et d'évaluations mettant l'accent sur l'absence ou lalenteur des progres accomplis pour atteindre les objectifs de la convention parfois meme la deterioration des situations environnementales.
Depuis une vingtaine d'années , on constate une tendance à améliorer les conditions institutionnelles et juridiques de l'application effective des conventions; c'est un processus qui demeure lent et mené avec beaucoup de précautions.

1/ La mise en place de systemes de monitoring de l'objet environnemental est une condition importante ,mais plus ou moins necessaire selon l'objet des conventions.
C'est les cas des conventions de protection du milieu marin, des grands fleuves et lacs internationaux, de certaines especes comme les especes migratrices ou d'espaces geographiques.C'est la surveillance continue menée par la Convention ou sous ses auspices qui premet de produire les publications regulieres sur l'etat de l'environnement et en consequence de declencher les mecanismes de surveillance lorsqu'ils existent.
Une autre forme de monitoring est celui qui porte sur les « driving forces » au sens du M.A, c'est-à-dire le suivi des facteurs de pollution ou degradation de l'environnement ou des ressources naturelles

2/ Cependant, le monitoring ne permet que de collecter des données sur le milieu protégé ou sur des causes assez globales de sa contamination
C'est par le système des rapports nationaux que les Conventions ont cherché à progresser dans le contrôle de l'application effective.
La plupart des conventions ont renforcé le systeme des rapports, en demandant des compte rendu precis , détaillés et à periodicité régulière sur l'application des conventions.

3/ la question se pose de l'exploitation des rapports nationaux et de l'Autorité qui, au sein de la Convention, peut examiner les rapports et en tirer des conséquences.
Ce peut etre selon les cas le Bureau, un Comité permanant ou la Confence

des parties.
En general, s'agissant d'une question qui touche à la souveraineté dans la mesure où elle ouvre un droit de regard sur ce que fait un pays dans le cadre de sonterritoire, les Parties accordent peu de pouvoirs aux Secretariats, sauf de compilation et de circulation et aux observateurs.

4/ une autre question est celle du contrôle de la conformité de l'action des Parties vis à vis des obligations prévues par le Traité avec en relation avec cette question, le probleme de la gamme des interventions possibles, de l'assistance technique aux sanctions.Des conventions comme Bale, le Protocole de Montreal ou la convention de Berne sont assez avancées à cet égard avec la creation d'organes particuliers pour traiter de ces questions au sein de la Convention.

Recemment, la Convention de Barcelone a mis en place son Compliance Committee composé de représentants de 7 parties désignées par la COP.Il est interessant d'observer ses conditions de saisine. Certaines conventions prevoient des debuts de mecanismes d'inspectorats.

On note que la situation est relativement differente selon que la Convention est gérée directement par une organisation comme l'OMI ou l'AIEA ou que le Secrétariat est détaché d'une organisation, ce qui est le cas du PNUE qui ne gere pas les Conventions en direct..

L'OMI après l'occurrence de pollutions graves a commencé à s'interesser à l'application effective de conventions comme MARPOL ou bien l'application effective de leurs responsabilités par l'Etat du pavillon.

Malgré les progrès les critiques sont nombreuse quant à l'efficacité générale et particulière du système des AME.

On trouve plusieurs categories de propositions qui auraient en commun de transferer une partie de la question de l'application sur un organisme exterieur : Conseil de Sécurité ecologique(Proposition Gorvatcev), création d'une OME avec un organe de reglement inspiré de celui de l'OMC, tribunal international de l'Environnement).

Ces propositions supposent à des degré divers l'accord des Parties aux traités existants ce qui est une question majeure. Ce probleme d'articulation entre les mecanismes d'application existants au sein des conventions et un nouvel organe exterieur devrait etre traité avec soin.

LE NOUVEAU PRINCIPE DE «NON RÉGRESSION» EN DROIT DE L'ENVIRONNEMENT

Michel Prieur
Professeur de droit émérite à l'Université de Limoges (France)
Président du Centre international de droit comparé de l'environnement
Doyen honoraire de la Faculté de droit et des sciences économiques de Limoges
Directeur de la Revue juridique de l'environnement
(michel.prieur@unilim.fr)

En près de quarante ans le droit de l'environnement a bénéficié d'un développement impressionnant, tant en doit international que national, à travers les conventions internationales, universelles et régionales, les lois sur l'environnement et ses diverses composantes, les codes de l'environnement. Cette augmentation quantitative du droit de l'environnement s'est accompagnée d'une volonté d'amélioration qualitative constante de l'environnement. Tous les textes adoptés visent en principe à renforcer la protection de l'environnement en luttant contre les pollutions et en sauvegardant la faune et la flore.

Ces progrès évidents dans le contenu des normes juridiques risquent cependant d'être victimes de certains groupes de pressions qui continuent de considérer, en dépit des proclamations de marketing sur le développement durable, que les politiques de l'environnement sont un obstacle à la croissance économique. Les aléas conjoncturels comme la crise économique récente ou les aléas politiques liés à des changements de gouvernement constituent une menace permanente contre le droit de l'environnement tel qu'il est aujourd'hui. Sa remise en cause pour des raisons politiques ou économiques ne se heurterait a priori à aucun obstacle juridique. En effet le droit est normalement toujours amendable ou abrogeable. Il n'y a de droits acquis ni au maintien des textes réglementaires, ni au maintien des lois. Ce qu'une loi a décidé une autre peut le modifier. Cette insécurité juridique est inhérente aux théories relatives à l'application des lois dans le temps. Il n'y a pas de droit immuable ou éternel.

Les mutations du droit peuvent revêtir plusieurs formes : abrogation , modification, dérogation. Chacune de ces formes peut conduire, selon le contenu de la réforme, soit à une progression du droit en cause, soit au statu quo quant à l'intensité des protections existantes, soit à un recul ou une régression. Mais la régression ne vient pas seulement des risques de mutation du droit écrit. Elle peut être le résultat de l'interprétation du droit par le juge. Celui-ci appliquant le principe du développement durable va procéder à la conciliation entre les intérêts de l'environnement et les intérêts économiques

et sociaux. Il peut alors arbitrer au bénéfice d'intérêts non environnementaux et remettre ainsi en cause les progrès du droit de l'environnement.

Que la régression du droit de l'environnement vienne des textes ou du juge, la question se pose de savoir si elle est inéluctable ou si elle peut se heurter à des obstacles juridiques garantissant la non régression. Cette dernière peut-elle s'imposer au pouvoir constituant, au législateur et au juge ? Autrement dit le droit de l'environnement comporte –il des règles intangibles bénéficiant d'une clause « d'éternité », selon l'expression des théories normativistes de Kelsen et Merkl ?[1]

Cette hypothèse d'un droit non régressif de l'environnement, et donc d'un droit qui serait nécessairement progressif, va s'appuyer sur ce qui constitue en droit de l'environnement un changement qualitatif majeur: la consécration de l'environnement comme un nouveau droit de l'homme. Devenu un droit fondamental, le droit à l'environnement va bénéficier des théories déjà existantes visant à rendre toujours plus effectifs les droits de l'homme , ce qui implique l'impossibilité de revenir en arrière en garantissant la non régression du droit reconnu comme fondamental et de ce fait irréversible. L'obligation de progressivité ou de progrès continu attaché aux droits de l'homme se traduit juridiquement par une interdiction de régression qui se répercute sur le droit de l'environnement. Pour déterminer dans quelle mesure le droit de l'environnement, parce que devenu un droit de l'homme, est désormais protégé contre les régressions, on présentera d'abord les fondements théoriques et juridiques de la non régression, spécialement au plan international, puis on constatera l'introduction de la non régression dans les droits nationaux avec les limites inévitables qu'elle peut rencontrer.

I. Les fondements de la non régression

La non régression du droit est assez peu étudiée tellement elle semble contraire à l'évolution classique du droit et à sa mutation permanente inéluctable. Est en jeu la dimension du temps en matière d'environnement[2]. L'environnement nous fait entrer à la fois dans un espace sans frontière et dans un temps sans limites selon l'expression de Mireille Delmas Marty[3]. A priori la prétention de légiférer à perpétuité paraît bien prétentieuse. Elle est même en contradiction avec l'art. 28 de la Déclaration des droits de

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[1] On exclura de notre réflexion la question précise de l'intangibilité de certains droits fondamentaux dans les cas de dérogations en cas d'urgence ou de guerre du type de celle prévue par l'art. 15 de la Convention européenne des droits de l'homme ou l'art. 4 du Pacte international relatif aux droits civils et politiques. Cette intangibilité peut être qualifiée de non régression, mais elle répond à des conditions spécifiques qui mériteraient une réflexion distincte en ce qui concerne son impact sur le droit à l'environnement.

[2] Voir François Ost, Le temps du droit, ed. odile Jacob, 1999 ; Thibault Soleilhac, Le temps et le droit de l'environnement, thèse droit Lyon III, 2006 ; Jessica Makowiak, A quel temps se conjugue le droit de l'environnement ? Pour un droit commun de l'environnement, Mélanges en l'honneur de Michel Prieur, Dalloz, 2007, p.263

[3] Mireille Delmas- Marty, Libertés et sûreté dans un monde dangereux, Seuil, 2010, p.187

l'homme et du citoyen du 24 juin 1793 selon lequel : « une génération ne peut assujettir à ses lois les générations futures ». Mais outre que ce texte n'a jamais été en vigueur, l'environnement et le développement durable se trouvent désormais en complète contradiction avec cette formulation puis qu'au contraire il s'agit aujourd'hui de ne pas oublier les droits des générations futures et de ne pas prendre des mesures qui pourraient leur porter préjudice. Mais on peut aussi interpréter le message de l'art. 28 en faveur du principe de non régression. En effet en modifiant aujourd'hui une loi protectrice de l'environnement pour réduire le degré de protection on impose aux générations futures un environnement plus dégradé du fait d'une loi au contenu régressif : notre génération ne peut assujettir les générations futures à une loi qui ferait reculer la protection de l'environnement. La régression du droit de l'environnement décidée aujourd'hui est alors une violation des droits des générations futures puisqu'elle aboutit à imposer à ces générations futures un environnement dégradé. Notre devoir, au moins au plan éthique , consiste donc à lutter contre la régression afin, selon la formule de la Charte constitutionnelle de l'environnement de France du 1° mars 2005, de ne pas «compromettre la capacité des générations futures à satisfaire leurs propres besoins».

La terminologie utilisée n'est pas encore bien arrêtée. Selon les pays on parle de principe de standstill en droit Belge[4], d'effet cliquet ou de règle du cliquet anti-retour dans la doctrine française, d'intangibilité des droits fondamentaux[5], de droits acquis législatifs ou d'irréversibilité des droits de l'homme[6], de clause de « statu quo », de non rétrogression[7]. On utilisera la formulation « principe de non régression » pour bien montrer que ce qui est en jeu c'est la sauvegarde des progrès acquis dans le contenu des législations environnementales. On pourrait préférer la formulation positive : le principe de progrès, mais elle est trop vague et en réalité toute législation est supposée apporter des progrès à la société. Ce que l'on veut souligner c'est la spécificité du droit de l'environnement pour lequel des reculs constituent des régressions dans la protection de l'environnement, même si, comme on le verra, il ne peut y avoir de non régression absolue, mais seulement des degrés dans la régression.

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[4] L'ouvrage fondamental en la matière est celui d'Isabelle Hachez, Le principe de standstill dans le droit des droits fondamentaux : une irréversibilité relative, Bruylant, Bruxelles, 2008

[5] Olivier de Frouville, L'intangibilité des droits de l'homme en droit international, Pedone, Paris, 2004

[6] théorie de Konrad Hesse citée par Christian Courtis, La prohibicion de regresividad en materia de derechos sociales :apuntes introductorios, in Christian Courtis, Ni in paso atras, Buenos Aires, editores del puerto, 2006, p.17

[7] expression utilisée par S.R. Osmani, rapport pour la Commission des droits de l'homme sur les politiques de développement dans le contexte de la mondialisation : contribution potentielle fondée sur les droits de l'homme, 7 juin 2004, E/CN.4/sub.2/2004/18. En anglais on trouve l'expression « ratchet principle », en espagnol « prohibicion de regresividad o de retroceso » ; en portugais : «proibiçao de retrocesso»

Dès 1984 dans les conclusions de notre manuel de droit de l'environnement , nous avions intitulé un paragraphe « régression ou progression du droit de l'environnement ? ». Mais le constat visait seulement à identifier des exemples de recul du droit de l'environnement sans proposer un remède juridique[8]. Souvent ces reculs résultent de ce qu'on a appelé la « déréglementation », qui peut aller jusqu'à la « délégifération »[9]. Au nom de la simplification du droit, l'exécutif ou le Parlement en profitent insidieusement pour réduire des protections et procéder en réalité à un recul du droit existant et donc un recul de la protection de l'environnement[10] . Désormais, s'agissant d'un droit fondamental , le remède aux reculs du droit existe grâce à la théorie des droits de l'homme qui permet d'opposer, dans certains cas et sous certaines conditions, le principe de la non régression au nom de l'effectivité des droits de l'homme.

La non régression en droit de l'environnement se justifie d'abord par des raisons liées au caractère finaliste de ce droit. A ce titre elle est inhérente aux objectifs poursuivis par le droit de l'environnement. Elle trouve aussi son fondement dans le droit international de l'environnement qui exprime en permanence l'idée que l'objectif est la progression de la protection de l'environnement dans l'intérêt de l'humanité. Enfin la non régression du droit de l'environnement va se voir juridiquement légitimée par les droits de l'homme qui reconnaissent à certains droits fondamentaux un caractère irréversible que l'on pourra à l'avenir également reconnaître au profit du droit de l'environnement.

A. Les fondements théoriques de la non régression liés à la finalité du droit de l'environnement

L'objectif du droit de l'environnement est de lutter contre les pollutions et de préserver la biodiversité. Historiquement l'apparition de ce droit dans les années 1970 répondait à l'inquiétude des scientifiques et de l'opinion publique face à une dégradation constante de l'environnement du fait de l'augmentation des pollutions et de ses effets sur la santé, et en raison de l'épuisement des ressources naturelles et de la disparition d'espèces animales et végétales. C'est en réaction contre la dégradation de l'environnement que les Etats

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[8] Michel Prieur, Droit de l'environnement , Dalloz, 1° ed. 1984 ; voir aussi pour des exemples de régression du droit français de l'environnement , Thibault Soleilhac, Le temps et le droit de l'environnement , thèse droit, Lyon III, 2006, ,p. 482 et s. « la stabilité du droit de l'environnement menacé par la régression » qui identifie la multiplicité des formes de régression.

[9] L'annonce faite par le président de la République française qu'à compter de 2011 : « le gouvernement marquera une pause pour que le Parlement puisse, s'il le souhaite, délégiférer » risque de permettre une autre forme de régression (le Monde, 13 février 2010)

[10] Michel Prieur, La déréglementation en matière d'environnement, Revue juridique de l'environnement , 1987-3, p.319

ont adopté des lois spéciales nouvelles. Certes auparavant il existait déjà un certain encadrement juridique des activités polluantes , mais il s'agissait simplement de mesures de police au nom de la santé et de la sécurité publique. Désormais le but poursuivi par le droit de l'environnement est non seulement la santé et la sécurité , mais plus largement la qualité de la vie prenant en considération l'homme dans son milieu naturel et les interrelations entre les diverses composantes de l'environnement (air, eau, sol, climat, biodiversité, paysage) et les diverses activités humaines. L'environnement est devenu en lui même un but d'intérêt général qui conditionne toutes les politiques au nom du principe d'intégration[11]. Ainsi ce nouveau droit de l'environnement n'est pas seulement un droit qui régule des activités de façon neutre, c'est un droit engagé dans la lutte contre les pollutions et la perte de biodiversité. C'est ainsi qu'on a pu considérer que ce droit se définit selon un critère finaliste : « c'est celui qui par son contenu contribue à la santé publique et au maintien des équilibres écologiques, c'est un droit pour l'environnement »[12]. Le droit de l'environnement est donc guidé par un objectif qui implique une obligation de résultat. Il ne s'agit pas simplement de l'ensemble des règles juridiques qui encadrent l'environnement, c'est l'expression d'une éthique environnementale ou d'une morale de l'environnement visant à moins de pollution et à plus de biodiversité[13]. Tout recul du droit de l'environnement serait alors immoral.

On doit remarquer que les principes classiques du droit de l'environnement peuvent facilement être envisagés comme des supports de la non régression : la prévention empêche de revenir en arrière, la durabilité et les générations futures renvoient à la durée et à l'intangibilité pour préserver les droits de nos descendants de jouir d'un environnement sain, la précaution permet d'éviter des irréversibilités qui seraient en elles mêmes des régressions. Finalement la garantie du maintien d'un niveau de protection antérieur des droits en cause ne fait qu'introduire « la mise en œuvre réfléchie d'un projet de société inscrit dans la durée »[14]

Il serait facile d'énumérer des exemples de textes de droit français qui expriment bien cette vision finaliste du droit de l'environnement : la préservation et l'amélioration de l'environnement sont un devoir (art. 2 de la charte constitutionnelle de France) ; l'objectif est le développement durable (art. L.110-1 code de l'environnement) ; le droit de l'eau a pour objet : « une gestion équilibrée et durable de la ressource en eau…la préservation des écosystèmes aquatiques, des sites et des zones humides…la lutte contre toute pollution… » (art. L.211-1 code de l'environnement) ; le droit relatif aux bruits a pour objet

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[11] M. Prieur, Les nouveaux droits, AJDA 2005, n°21, p. 1162

[12] M. Prieur, op.cit., 5°ed., 2004, p. 8 ; A. Van Lang, Droit de l'environnement, PUF, 2°ed. 2007, la reconnaissance d'une finalité spécifique, p.52 ets.

[13] Selon l'expression du président Georges Pompidou dans son discours à Chicago le 28 février 1970

[14] François Ost, le temps du droit, ed. Odile Jacob , 1999, p.195

« de prévenir, supprimer ou limiter l'émission ou la propagation » des bruits (art. L.571-1 code de l 'environnement) ; pour l'air il s'agit de « prévenir ou de réduire la pollution atmosphérique ou d'en atténuer les effets » (art. L. 222-1 code de l'environnement).
Le droit de l'environnement de l'Union européenne a pour but de tenir compte du principe du développement durable dans le cadre du renforcement de la cohésion et de la protection de l'environnement (Préambule du traité sur l'Union européenne de Lisbonne) ; l'Union vise un niveau élevé de protection et d'amélioration de l'environnement (art. 3-3 du traité sur l'Union européenne). La jurisprudence de la Cour de justice de l'Union européenne a même fait de cet objectif finaliste une théorie d'interprétation jurisprudentielle. En effet l'interprétation téléologique vise à appliquer le droit communautaire en interprétant le traité et les directives sur l'environnement en fonction des buts poursuivis. Ces buts sont toujours le progrès dans la protection de l'environnement, ce qui contribue à limiter voir à empêcher l'application de dispositions qui traduiraient une régression . Le juge va toujours s'attacher à rechercher l'objet et la finalité poursuivis par le texte à interpréter au delà des dispositions techniques qu'il doit appliquer. Si la jurisprudence de la Cour de Luxembourg semble globalement plutôt favorable à l'environnement, c'est tout simplement parce que les exigences de protection de l'environnement sont explicites dans le traité et dans chacune des directives, mettant toujours en avant les finalités d'intérêt général attachées à la protection de l'environnement. Une illustration parmi beaucoup d'autres peut être donnée avec l'arrêt du 6 novembre 2008 qui, face à des mesures nationales de simplification des procédures masquant en réalité une régression du droit, interprète la directive 2006/11 CE sur l'eau dans un sens favorable à la non régression.[15]
Au plan international le caractère finaliste des politiques de l'environnement n'est pas moindre. Le principe 2 de la Déclaration de Stockholm de 1972, bien que non contraignant, est formulé de façon impérative : « *Les ressources naturelles du globe, y compris l'air, l'eau, la terre, la flore , la faune, et particulièrement les échantillons représentatifs des écosystèmes naturels, doivent être préservés dans l'intérêt des générations présentes et à venir ».* La déclaration du Millénaire de l'Assemblée générale des Nations Unies du 8 septembre 2000 réclame en termes volontaristes de protéger notre environnement commun. Comment ne pas y voir un appel à la non régression à la fois en matière d'environnement et en matière de droits de l'homme qu'il faut « renforcer » en même temps qu'il faut « renforcer l'état de droit » ?
L'appréciation de la finalité environnementale d'un texte résulte du recours à l'interprétation téléologique du texte qui s'impose particulièrement en droit

[15] CJCE 6 novembre 2008, Association nationale pour la protection des eaux et rivières TOS c/MEDAD France,Aff..C 381/07, commentaire Bernard Drobenko, des exigences du droit communautaire et de la remise en cause du régime déclaratoire : des limites à la déréglementation, Revue européenne de droit de l'environnement, 2-2009, p.203

international et en droit communautaire de l'environnement. Il s'agit de rechercher l'objet et surtout le but du texte afin d'adapter la lecture et l'application de ses dispositions aux objectifs poursuivis[16]. Pour vérifier la non régression d'une modification d'un texte existant, la recherche de l'interprétation téléologique du texte initial sera un outil fondamental. Au- de là de la « mythologie positiviste »[17], le droit de l'environnement, plus que tout autre, est porteur de valeurs et de finalités liées à l'humain dans son interdépendance avec la biodiversité. Aussi le contenu du droit de l'environnement ne peut-il être dissocié de l'intérêt collectif pour la survie de l'humanité et pour la préservation des biens communs. La Cour internationale de justice constate elle même : « toute l'importance que la protection de l'environnement revêt …non seulement pour les États, mais aussi pour l'ensemble du genre humain »[18]. On peut donc considérer que le droit de l'environnement a par nature une essence téléologique.

Mais ce droit finalisé se heurte encore aujourd'hui à des résistances et à des oppositions pour des raisons économiques ou politiques. Aussi le non respect de ces objectifs est fréquent. Il résulte soit d' une violation directe du droit existant, soit d' une passivité des autorités administratives qui n'exercent pas correctement leur devoir de contrôle. L'absence d'effectivité du droit applicable est déjà en elle même une régression. Mais nous voulons ici aborder un autre aspect de la régression : celui qui résulte de réformes visant à modifier ou abroger le droit existant.

De façon générale le contenu de la règle environnementale initiale satisfait aux exigences du but normalement poursuivi en matière d'environnement. On n'imagine pas une loi proclamant la nécessité de polluer plus ou de détériorer la nature. A partir du moment ou le droit à l'environnement est reconnu comme un droit fondamental, il est inhérent à ce droit qu'il ne peut être effectif que si les modifications qui l'affectent aboutissent à un environnement meilleur et non à un environnement pire qu'avant.

Ce qui est en cause ici c'est la volonté de supprimer la règle ou de réduire ses exigences au nom d'intérêts concurrents pour lesquels il n'est pas démontré que juridiquement il sont supérieurs aux intérêts liés à la protection de l'environnement. Le changement de la règle va conduire alors à des régressions plus ou moins caractérisées conduisant éventuellement à terme à des situations irréversibles pour l'environnement. Elles peuvent être analysées comme des atteintes aux finalités poursuivies par les politiques internationales et nationales sur l'environnement. Le retour en

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[16] F. Zarbiev, L'interprétation téléologique des traités comme moyen de prise en compte des valeurs et intérêts environnementaux, in H. Ruiz Fabri et L. Gradoni, La circulation des concepts juridiques : le droit international de l'environnement entre mondialisation et fragmentation, Société de législation comparée , Paris, 2009, p.199

[17] S. Goyard-Fabre, L'illusion positiviste, in mélanges Paul Amselek, Bruxelles, Bruylant , 2005, p.366

[18] CIJ, projet Gabcikovo-Nagymaros, Receuil 1997, p.41, para.53

arrière manifeste en matière d'environnement n'est pas imaginable. Il ne serait pas envisageable d'abroger brutalement les lois anti - pollution ou les lois sur la protection de la nature. En revanche des régressions insidieuses ou progressives sont toujours à l'ordre du jour. Ce sont ces régressions à petits pas qui menacent le plus le droit de l'environnement. Aussi un instrument anti-régression doit-il être envisagé reposant sur des bases juridiques solides. La régression dans le contenu d'une loi portant sur un sujet ordinaire ne doit pas être appréciée de la même façon que la régression d'un loi portant sur un droit fondamental.

B. La non régression supposée en droit international de l'environnement

De façon perspicace le professeur Maurice Kamto a, dès 1998, constaté que : « le droit international de l'environnement affectionne les obligations de standstill »[19] .
Il est certain que le droit international de l'environnement, en anticipant l'avenir, se met à l'abri de la tentation de diminuer le niveau de protection atteint. Sa vision futuriste et progressiste du monde lui donne un contenu très finaliste qui devrait conduire à consacrer sa non régression. Son objectif, clairement affiché, est de promouvoir un meilleur environnement au bénéfice de l'humanité. Dans leur ouvrage de droit international de l'environnement Alexandre Kiss et Jean-Pierre Beurier consacrent un chapitre à la finalité du droit international de l'environnement[20] . Il s'agit de : « *conserver, de protéger et de rétablir la santé et l'intégrité de l'écosystème terrestre* »(Principe 7 de la Déclaration de Rio de 1992). La convention de Bonn de 1979 sur la conservation des espèces migratrices appartenant à la faune sauvage proclame : la faune sauvage doit être conservée pour le bien de l'humanité. La convention cadre sur le changement climatique de 1992 énonce : « Il incombe aux Parties de préserver le système climatique dans l'intérêt des générations présentes et futures » (art. 3 al. 1). La convention de Maputo sur la conservation de la nature et des ressources naturelles en Afrique de 2003 proclame dans son préambule que la conservation de l'environnement mondial est une préoccupation commune à l'humanité tout entière. Toutes le conventions environnementales sans exception affichent des objectifs protecteurs en vue d'un environnement meilleur.
Il existe trois modalités différentes d'exprimer la volonté de non régression. Il peut s'agir soit d'un proclamation expresse visant la nécessité de mieux protéger, ce qui implique l'interdiction de moins protéger ; soit d'une exigence de protection de l'environnement par des mesures nationales à un niveau au moins égal au niveau de protection internationale et en permettant aux États

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[19] Maurice Kamto, Singularité du droit international de l'environnement, in Les hommes et l'environnement, en hommage à A. Kiss, Frison Roche , 1998, p.321
[20] A. Kiss et J.P. Beurier, Le droit international de l'environnement, 2004, Pedone, p. 17 et s.

de protége plus l'environnement que le niveau international ne l'exige ; soit d'une façon plus indirecte mais non moins explicite à travers les clauses de compatibilité avec d'autres conventions. Dans tous les cas ces dispositions visent toujours à adopter des mesures plus protectrices ou plus strictes, ce qui a contrario condamne les mesures régressives.

1. Concernant la proclamation expresse de protéger l'environnement, on peut donner les exemples suivants :
La convention sur le droit de la mer affirme clairement un objectif de protection dans son art. 192 : « *les États ont l'obligation de protéger et de préserver le milieu marin ».* Dans de nombreux articles il s'agit toujours de : « *prévenir , réduire et maîtriser »* les pollutions telluriques, les pollutions par immersion ou les pollutions des navires (art.207, 210, 211). Les différents accords sur les mers régionales édictent le même type d'obligations. Ainsi en est-il de la Convention de Barcelone sur la protection du milieu marin et du littoral de la Méditerranée amendée en 1995 (art.8, 5 et 6). Les États doivent : « *prévenir, réduire , combattre et dans toute la mesure du possible éliminer la pollution dans la zone de la mer méditerranée et protéger et améliorer le milieu marin dans cette zone en vue de contribuer à son développement durable »(art. 4-1).* Selon la convention d'Helsinki de 1992 sur la protection et l'utilisation des cours d'eau transfrontières et des lacs internationaux : « *l'application de la présente convention ne doit pas donner lieu à une détérioration de l'état de l'environnement ni à un accroissement de l'impact transfrontière »(art. 2-7).* Encore plus explicitement la convention de Berne pour la protection du Rhin du 12 avril 1999 fait de la non régression un principe en disposant que : « *les Parties s'inspirent(du) principe de la non augmentation des nuisances »(art.4-e).*[21]
L'accord nord-américain de coopération dans le domaine de l'environnement qui lie depuis 1994 le Canada, les Etats Unis et le Mexique dans le cadre de l'ALENA semble particulièrement favorable à la non régression. D'abord il affirme clairement parmi les objectifs du traité que chaque Partie garantisse un niveau élevé de protection environnementale et s'efforce de continuer à améliorer les lois et règlements qui fixent ces niveaux (art. 3) ; l'idée d'amélioration constante de la législation est reprise à l'art. 10-3 tout en prévoyant l'élaboration de recommandations communes « sans réduire le niveau de protection de l'environnement ». Il est donc clair que tout doit concourir à empêcher des reculs dans la protection de l'environnement.
Il convient toutefois de noter qu'exceptionnellement certaines convention sur l'environnement tolèrent expressément dans leur application une forme de régression via une dérogation. Par exemple la convention de Ramsar sur les zones humides permet « pour des raisons pressantes d'intérêt national » de retirer

[21] voir aussi d'autres exemples dans J. Verschuuren, Principles of environmental law. The ideal of sustainable development and the role of principles of international, european and national environmental law, Baden-Baden, Nomos Verlagsgesellschaft, 2003

un site de la liste internationale ou de réduire son étendue (art. 2-5). De même la convention de Berne sur la conservation de la vie sauvage et du milieu naturel de l'Europe autorise des dérogations à certains de ses articles à condition « que la dérogation ne nuise pas à la survie de la population concernée » (art. 9). La convention CITES de Washington de 1975 sur le commerce international des espèces de faune et de flore menacées d'extinction prévoit aussi des dérogations. Ces dérogations sont soumises à des conditions de fond et de forme et en tout état de cause elles ne peuvent être considérées comme des non régressions au sens ou on l'entend ici. En effet elles ne concernent pas une modification du contenu de la convention existante.

2. Concernant le niveau de protection des mesures nationales au regard des règles internationales on trouve des clauses de sauvegarde permettant une protection renforcée.
En droit international on les trouve par exemple dans le protocole de Cartagena de 2000 sur la prévention des risques biotechnologiques. L'art. 2 permet aux États de prendre des « *mesures plus rigoureuses pour la conservation et l'utilisation durable de la diversité biologique ».* Dans la convention sur le droit de la mer les art. 208, 209 et 210 concernant diverses pollutions marines imposent aux États que leurs lois, règlements et mesures nationales « *ne soient pas moins efficaces que les normes de caractère mondial* ». La convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux de 1989 permet aux États dans l'art. 11 « *d'imposer des conditions supplémentaires pour mieux protéger la santé humaine et l'environnement ».* La convention de Berne de 1979 sur la conservation de la vie sauvage et du milieu naturel de l'Europe permet aux États à l'art. 12 « *d'adopter des mesures plus rigoureuses »* que celles prévues dans la convention. La convention d'Helsinki précitée de 1992 prévoit que les Parties peuvent adopter, individuellement ou conjointement, des mesures « *plus rigoureuses » (art. 2-8).*
Dans le même esprit, en cas de conflit entre les dispositions d'une convention et le droit national, certains traités consacrent a priori la supériorité de la règle la plus favorable à l'environnement ou la plus stricte en matière de protection, par exemple : art. 12 de la convention européenne du paysage de 2000 ; art. XII-3 de la convention de Bonn sur les espèces migratrices appartenant à la faune sauvage ; art. 12 de la convention de Berne relative à la conservation de la vie sauvage et du milieu naturel de l'Europe. Parfois même cette supériorité juridique de la règle la plus protectrice de l'environnement vise aussi bien des règles existantes que des règles futures (art. 12 de la convention européenne du paysage).

3. Concernant les clauses de compatibilité entre conventions internationales, la volonté d'atteindre le niveau le plus élevé de protection se traduit par des clauses selon lesquelles, en cas de concurrence ou de contrariété entre plusieurs conventions, est affirmée la primauté ou la prééminence du traité qui propose la protection la plus grande de l'environnement. La prime est donc bien donnée au traité le mieux disant en matière d'environnement.

Il en est ainsi par exemple dans la convention sur la diversité biologique dont l'art. 22-1 fait prédominer son texte sur tout autre accord international existant dont le respect « *causerait de sérieux dommages à la diversité biologique ou constituerait pour elle une menace ».* Le protocole de Cartagena sur la prévention des risques biotechnologiques ne permet des accords régionaux qu'à la condition « *qu'ils n'aboutissent pas à un degré de protection moindre que celui prévu par le protocole(art. 14-1) ».* La convention d'Espoo de 1991 sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontalier prévoit que des accords bilatéraux puissent « *appliquer des mesures plus strictes » (art.2-9).* La convention de Bâle de 1989 sur les déchets permet des accords régionaux à la condition qu'ils énoncent *« des dispositions qui ne sont pas moins écologiquement rationnelles que celles prévues dans la convention »(art. 11-1).* La convention d'Helsinki de 1992 sur les effets transfrontières des accidents industriels dispose en son art 24-2 que les parties peuvent prendre des mesures « *plus rigoureuses »* en vertu d'accords bilatéraux ou multilatéraux[22].
Par ces clauses les États recherchent l'efficacité maximale de la protection par rapport aux objectifs poursuivis[23]. Si des conventions ou protocoles d'application avaient un contenu moins rigoureux que la convention cadre, elles constitueraient une régression prohibée qui pourrait soit être contestée par une Partie devant la Cour Internationale de Justice soit être soumises à un arbitrage. La règle lex posterior derogat priori se trouve ainsi écartée au profit de la non régression exprimée à travers l'idée d'une recherche de protection la plus stricte. L'appréciation du caractère plus strict ou plus rigoureux d'une règle sera au cœur du débat en cas de conflit entre plusieurs conventions.
Certes comme les lois nationales, et bien que non soumis au principe du parallélisme des formes, tout traité peut être modifié et pourrait donc faire théoriquement l'objet d'une régression. Les amendements aux annexes I et II de la convention CITES ont pu constituer des régressions quant à la protection des espèces menacées d'extinction. La modification des listes d'activités ou des seuils de pollution accompagnant de nombreuses conventions internationales, pourrait être l'occasion d'une régression ponctuelle. Mais il n'existe, à notre connaissance en matière d'environnement, aucun précédent de régression résultant d'un amendement touchant le texte même d'une convention et traduisant un recul substantiel dans la protection de l'environnement. La révision du protocole de Kyoto sera un test suite à l'échec de la conférence de Copenhague sur le changement climatique. Les conventions comportent toutes des procédures d'amendement sans interdire formellement la régression. On peut considérer néanmoins qu'une régression dans le droit international des traités sur l'environnement, bien que juridiquement possible, reste

[22] la même expression est utilisée à l'art. 4-8 du Protocole du 18 juin 1999 sur l'eau et la santé
[23] Ph. Weckel, La concurrence des traités internationaux, thèse droit, Université Robert Schuman, Strasbourg, 1989, p. 356

une hypothèse d'école. Faute d'un contrôle juridictionnel de la conformité des traités internationaux aux principes du droit international, on ne voit pas comment pourrait être sanctionné un traité amendé qui réduirait le niveau de protection de l'environnement. En dépit de cette absence de sanction juridique de la régression en droit international, l'environnement semble de fait plus menacé de régression au niveau national qu'au niveau international. La situation du droit de l'Union européenne est particulière : on y constate une non régression non explicitement affirmée mais juridiquement plus solide qu'en droit international ou en droit national.

C. La non régression affirmée en droit communautaire de l'environnement

Au niveau européen la CJCE a très tôt affirmé que l'environnement était « *un des objectifs essentiels de la Communauté*[24] »,puis la Cour a élevé cet objectif au rang « *d'exigence impérative*[25]. » Le traité, depuis l'Acte unique de 1987 proclame clairement que l'objectif de la politique communautaire de l'environnement est « *la préservation, la protection et l'amélioration de la qualité de l'environnement… l'utilisation prudente et rationnelle des ressources naturelles » (art.191* du traité sur le fonctionnement de l'Union). L'art. 11 de ce même traité mentionne même : « *les exigences de la protection de l'environnement »* et l'art. 191-2 récidive en répétant l'expression « *exigences en matière de protection de l'environnement »* et surtout en précisant que : « *la politique de l'Union dans le domaine de l'environnement vise un niveau de protection élevé ».* Cette exigence d'un niveau élevé de protection est d'ailleurs une seconde fois formulé encore plus nettement à l'art 3-3 du traité sur l'Union européenne selon lequel « *L'Union œuvre…pour le développement durable de l'Europe fondé sur…un niveau élevé de protection et d'amélioration de la qualité de l'environnement ».* De nombreuses directives sur l'environnement affichent clairement que leur objectif est directement de garantir « un niveau élevé de protection de l'environnement » : protection élevée contre les risques d'accidents majeurs (directive 96/82 du 9 décembre 1996), niveau élevé de protection de l'environnement dans le transport maritime (directive 2005/35 du 7 septembre 2005).
De plus le droit communautaire à l'image du droit international, mais ici de façon systématique, admet le droit pour tout État membre de protéger l'environnement plus que ne l'impose la norme communautaire. L'art. 193 du traité sur le fonctionnement de l'Union européenne permet aux États membres de maintenir ou d'établir « *des mesures de protection renforcée »* par rapport aux mesures adoptées par l'Union. Il s'agit d'une clause dite de sauve-

[24] CJCE 7 février 1985, procureur de la République / Association de défense des brûleurs d'huiles usagées, aff. 240/83, Rec.p. 531, point 13
[25] CJCE 20 septembre 1988, Commission / Danemark ; aff. 302/86, Rec. p. 4607, point 9

garde ou de subsidiarité exprimant l'idée que doit s'imposer la règle juridique la plus protectrice de l'environnement. Mais si l'Etat peut protéger plus et polluer moins, il ne peut pas protéger moins et polluer plus que le minimum communautaire. Plusieurs directives précisent qu'elles ne peuvent avoir pour effet la réduction d'un niveau de protection existant antérieurement dans un État membre. Autrement formulée la directive cadre sur l'eau 2000/60 dispose que les États membres prennent les dispositions nécessaires pour ne pas augmenter la pollution des eaux marines ou causer directement ou indirectement un accroissement de la pollution des eaux de surface (art. 11-6). L'interdiction d'une aggravation de la pollution, par exemple par une diminution des seuils, est l'expression de l'obligation de la non régression.

Même si le droit à l'environnement ne figure pas en tant que tel dans le traité comme droit fondamental, il en a toutes les vertus, en particulier du fait que depuis le traité de Lisbonne , en vigueur depuis le 1° décembre 2009, la Charte des droits fondamentaux[26] a la même valeur juridique que les traités (art.6 du traité sur l'union européenne) avec son art.37 sur la protection de l'environnement[27]. La Charte a pour but de « renforcer » la protection des droits fondamentaux (préambule). L'art. 37 met en avant ce qui doit être interprété comme une affirmation de l'irréversibilité des mesures concernant l'environnement : « le niveau élevé de protection de l'environnement et l'amélioration de sa qualité ». La régression paraît bien impossible face à ces deux exigences tournées vers un environnement toujours meilleur. Ces dispositions, comme tous les autres droits fondamentaux sont de plus encadrées par les art. 53 et 54 de la Charte des droits fondamentaux. La Charte ne peut être interprétée comme « limitant » les droits reconnus ni comme impliquant le droit de les détruire ou de les limiter plus que ce qui est prévu. Là encore, ces dispositions renforcent l'obligation de non régression et donc l'interdiction de la régression dans le domaine de l'environnement. Ce sont des clauses classiques dans les convention sur les droits de l'homme (voir les art. 17 et 53 de la Convention européenne des droits de l'homme). Il s'agit de donner la préférence au système le plus protecteur et donc de privilégier toujours le niveau le plus élève de protection de l'environnement. Il en résulte nécessairement un privilège donné à la non régression. L'art.53 de la Charte des droits fondamentaux : « garantit que l'évolution ne peut se faire que dans le sens de la progression, non dans celui de la régression »[28].

Comme le précise Isabelle Hachez le principe de non régression ne figure pas expressément dans l'art. précité 191-2 parmi les principes directeurs de l'action communautaire[29]. Néanmoins nous estimons que l'exigence de protec-

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[26] adaptée le 12 décembre 2007 et publiée au JO C-303 du 14 décembre 2007

[27] Michel Prieur, commentaire de l'art. 97 de la Charte des droits fondamentaux, in L. Bourgorgue-Larsen , A. Levade, F. Picod, dir. Traité établissant une constitution pour l'Europe, partie II la Charte des droits fondamentaux de l'Union, Bruylant, 2005, p. 483

[28] Loic Azoulai, art. 53 , niveau de protection , in L. Burgorgue-Larsen, A. Levade, F. Picod dir., op. cit.p.706

[29] Isabelle Hachez, op. cit. p.41 note 79

tion et d'amélioration de l'environnement (le contraire de la détérioration) et d'un niveau élevé de protection figurant dans le traité, devrait à elle seule, sous le contrôle du juge communautaire, mettre à l'abri contre toute régression substantielle du droit de l'environnement de l'Union. Jusqu'alors les directives environnementales, qui ont souvent fait l'objet de plusieurs modifications, semblent comme les traités, avoir échappé à la régression. Elles sont soumises en tout état de cause au contrôle juridictionnel de la Cour de justice de l'Union européenne qui, au nom du contrôle sur la légalité des actes adoptés (art.263 du traité sur le fonctionnement de l'Union européenne) pourrait annuler une directive dont le contenu, contraire aux objectifs très clairs du traité, serait une régression en matière d'environnement.

La doctrine communautaire, au nom de la consolidation de l'acquis communautaire considère que les avancées de l'intégration européenne deviennent « juridiquement irréversibles »[30] en raison d'un effet d'engrenage (spill over) et constituent une sorte de « *principe du cliquet* »[31] qui reposerait sur la jurisprudence de la Cour[32]. Est ainsi reconnu le principe de non régression à travers la « sédimentation définitive de l'acquis communautaire »[33] . Cette irréversibilité des acquis communautaires n'est pas spécifique à l'environnement, elle est liée au particularisme de la structure constitutionnelle communautaire qui la différencie des règles de droit international.

L'intangibilité de l'acquis communautaire, ou l'irréversibilité du temps communautaire, résultait également du traité de Maastricht. En effet les art. 2 et 3 du traité de 1992 sur l'Union européenne, repris à Nice en 2001, affirmaient clairement que l'objectif de l'Union était : « *de maintenir intégralement l'acquis communautaire et de le développer* ». Cette disposition a curieusement disparue du traité de Lisbonne en 2007[34]. Est-ce une raison de fond ou simplement de forme , faute d'avoir trouvé une expression équivalente du fait de la disparition de la référence « communautaire » ? Faut-il y voir un recul ouvrant la porte à la régression alors que le principe de non régression disposait jusqu'alors d'une base conventionnelle ? En tout état de cause à l'avenir l'acquis communautaire en tant que garant de la non régression ne pourra s'appuyer que sur l'interprétation du juge de l'Union. Il faut noter enfin que l'acquis communautaire englobant les accords internationaux auxquels l'Union européenne a adhéré, la régression pourrait théoriquement être réintroduite dans le droit de l'Union au cas de recul d'un traité international auquel elle est Partie ce qui contredirait directement les objectifs fondamentaux de l'Union. Mais face à un traité international qui deviendrait régressif dans la protection de l'environnement, l'Union européenne aurait toujours la possibilité de le dénoncer.

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[30] Denys Simon, Le système juridique communautaire, PUF, 1997, p. 58

[31] expression de F. Ost et M. Van de Kerchove, De la pyramide au réseau ? Pour une théorie dialectique du droit, Bruxelles, F.U.S.L., 2002, p.72

[32] CJCE 15 juillet 1964, Costa c/ Enel, aff. 6/64, Rec. p. 1141

[33] Denys Simon, op.cit. p. 58

[34] Christine Delcourt, Traité de Lisbonne et acquis communautaire, Revue du marché commun et de l'Union européenne, n°518, mai 2008, p. 296

En définitive les formulations explicites du traité en matière d'environnement et la théorie des acquis communautaires devraient conduire le juge communautaire à censurer facilement toute régression.

D. La non régression renforcée grâce aux droits de l'homme

Selon Rebecca J. Cook : « le principe de non-rétrogression est implicite dans les convention sur les droits de l'homme ».[35]Depuis que l'environnement est consacré en droit international et en droit national comme un droit de l'homme, il bénéficie des théories et des jurisprudences relatives aux droits de l'homme[36]. Or celles-ci permettent de fonder juridiquement le principe de non régression attaché à l'idée de « progrès » inhérente aux droits de l'homme et à la volonté de garantir l'effectivité des droits fondamentaux. La déclaration universelle des droits de l'homme proclame que les peuples sont « résolus à favoriser le *progrès* social et à *instaurer de meilleures conditions de vie* ».C'est notamment par rapport à des obligations positives accompagnant un droit fondamental, en particulier dans le domaine de l'environnement, que la non régression vient renforcer et pérenniser l'obligation positive quant à sa substance. Selon la belle expression d'un auteur : la non régression est : « une obligation négative inhérente à toute obligation positive assortissant un droit fondamental »[37].
Plusieurs textes internationaux relatifs aux droits de l'homme, concernant en particulier les droits économiques et sociaux auxquels le droit à l'environnement est généralement associé, font état du caractère progressif de ces droits dont on a déduit la non régression ou non régressivité.
Le Pacte international relatif aux droits économiques, sociaux et culturels de 1966 impose aux États : « d'assurer progressivement le plein exercice des droits reconnus » (art.2-1). Selon Isabelle Hachez cette clause de progressivité « s 'oppose corrélativement à l'adoption de mesures régressives »[38]. De même selon Nicolas Gonzales del Solar : « l'obligation de progressivité implique la non régression ; on ne peut revenir en arrière ou prendre des mesures qui diminuent ce droit »[39] L'art. 11-1 reconnaît le droit de toute personne à « une amélioration constante de ses conditions d'existence », ce qui peut facilement inclure implicitement l'environnement et le cadre de vie. Enfin l'art. 12 relatif au droit à la santé prévoit : « l'amélioration de tous les aspects de l'hygiène du milieu ». Le concept « d'amélioration » peut être aussi interprété comme empêchant la régression.

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[35] R.J. Cook, Reservation to the convention on the elimination of all forms of discrimination against women, V.J.I.L., vol 30, 1990, p. 683 (cité par Olivier de Frouville, L'intangibilité des droits de l'homme en droit international, Pedone, 2004, p.360)
[36] M. Prieur, Le droit à l'environnement , Jurisclasseur Libertés, Lexis nexis. , 2007
[37] Isabelle Hachez, op. cit.p.195
[38] op.cit. p. 26
[39] Nicolas Gonzales del Solar, El derecho a la salud, planteamineto generales y ordenamiento argentino, in Antonio Embid Irujo, derechos economicos y sociales, Madrid, Iustel , 2009, p. 422

L'idée de droits fondamentaux intouchables résulte également de l'art. 5-2 du Pacte qui interdit « restriction ou dérogation » pour des droits existants par ailleurs mais non reconnus dans le Pacte, ce qui est précisément le cas du droit à l'environnement.
Le Comité des droits économiques , sociaux et culturels dans son observation générale n° 3 du 14 décembre 1990 stigmatise toute « mesure délibérément régressive » (para.9). Allant plus loin dans l'analyse de la portée juridique de l'art. 2-1, l'observation générale n°13 du 8 décembre 1999 déclare : « le Pacte n'autorise aucune mesure régressive s'agissant du droit à l'éducation, ni d'ailleurs des autres droits qui y sont énumérés » (para. 45). Les directives de Maastricht du comité d'experts de la commission internationale de juristes adoptées le 26 janvier 1997 considéraient que « l'adoption de toute mesure délibérément rétrograde qui réduise la protection accordée à l'un quelconque de ces droits » était une violation des droits économiques, sociaux et culturels[40]. Depuis le 19 novembre 1999 l'interprétation officielle du Pacte par le Comité s'est renforcée en confirmant cette interprétation et en faisant figurer les mesures régressives parmi les causes de violation du Pacte[41]. Selon l'observation générale n° 15 du Comité des droits économiques, sociaux et culturels sur le droit à l'eau du 20 janvier 2003 : « il y a une forte présomption que l'adoption de mesures régressives en matière de droit à l'eau est prohibée par le Pacte »(para.19) [42] .
Un cas particulier de régression des droits pouvant être lié à l'environnement concerne les déplacés environnementaux privés de leur droit à un logement suffisant prévu par l'art. 11-1 du Pacte relatif aux droits économiques , sociaux et culturels . Lorsqu'ils sont des déplacés forcés ou expulsés forcés soit suite à des opérations d'urbanisme ou d'aménagement d'infrastructures, soit suite à des accidents ou catastrophes naturelles, la non régression de leur droit consiste à imposer à l'Etat de prendre tous les moyens appropriés pour garantir le droit à un logement suffisant. La Commission des droits de l'homme a affirmé que : « la pratique des expulsions forcées constitue une violation flagrante des droits de l'homme »[43] .Dans ses observations générales n° 7 le Comité des droits économiques, sociaux et culturels énonce une série de mesures qui doivent accompagner les expulsions forcées[44]. Selon Julieta Rossi le principe de non régression

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[40] point 14,e
[41] E/2000/22, Annexe IX, section V relative aux violations
[42] Pour une analyse détaillée des interprétations du Comité sur le concept de "régression", voir Magdalena Sepulveda, La interpretacion del Comite de derechos economicos , sociales y culturales de la expresion « progresivamente » in Christian Curtis, Ni un paso atras, la prohibicion de regresividad en materia de derechos sociales, Buenos Aires, editores del Puerto, 2006, p. 117
[43] Résolution 1993/77 de la Commission des droits de l'homme (para. 1)
[44] Observations n° 7 du 1- mai 1997

renforce ici l'obligation positive des États en matière de logement[45]. On peut se demander toutefois si ce cas de figure rentre bien dans la non régression telle que nous la concevons. En effet ne s'agit-il pas plus d'une situation de violation directe d'un droit fondamental qui implique une mesure de rétablissement du droit violé ? Certes le rétablissement d'un droit violé est une mesure de non régression au sens matériel , alors que nous considérons ici la non régression dans son sens primitif comme un manifestation formelle d'un retour en arrière. Sinon toute violation d'un droit pourrait être assimilée à une régression et dans ce cas la non effectivité du droit serait elle même un cas de régression.

Le principe de non régression fait ainsi son chemin. Le rapport de S.R. Osmani[46] présente le principe de non régression des droits comme un acquis protecteur en faveur des personnes vulnérables : « l'approche du développement fondée sur les droits… ne permet pas que le degré de jouissance d'un droit quel qu'il soit régresse par rapport au passé ». Il attire l'attention à ce titre sur les déréglementations et leurs effets négatifs sur la protection sociale. Le Haut commissaire des Nations Unies aux droits de l'homme dans son rapport sur le concept de réalisation progressive des droits économiques, sociaux et culturels souligne le fait que le Pacte implique « le principe de l'illicéité de mesures délibérément régressives », autrement dit « une présomption quant à la proscription de toutes mesures délibérément régressives qui compromettent l'exercice d'un droit ». Il en résulte l'obligation immédiate d'assurer l'essentiel ou le minimum de chacun des droits ou obligation fondamentale. L'accès à l'alimentation , à l'eau, à l'assainissement, c'est à dire aux services essentiels liés à l'environnement fait partie de ces obligations minimales[47].

L'adoption du Protocole facultatif se rapportant au Pacte international relatif aux droits économiques, sociaux et culturels par l'Assemblée générale des Nations Unies le 10 décembre 2008 [48] introduit le droit de communications

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[45] Julieta Rossi, la obligacion de no regresividad en la jurisprudencia del comité de los derechos economicos, sociales y culturales, in Christian Courtis, op.cit.p. 106; sur les déplaces environnementaux, les expulsés et les droits de l'homme voir le projet de convention sur le statut international des déplacés environnementaux, CRIDEAU-CIDCE in Revue européenne de droit de l'environnement, Limoges, 2008-4, p. 375 et Conseil de l'Europe, projet de charte éthique européenne et méditerranéenne sur la résilience aux catastrophes, Accord sur les risques majeurs (EUR-OPA), Strasbourg, 2010

[46] op.cit. supra note 3

[47] Rapport, Conseil économique et social des Nations Unies, Genève 25 juin 2007, E/2007/82

[48] le Protocole facultatif a été ouvert à la signature le 24 septembre 2009 et a été signé par 32 États. Son entrée en vigueur exige dix ratifications. Voir Javier Quel Lopez, Un paso esencial hasta la eficacia internacional de los derechos economicos, sociales y culturales, luces y sombras del protocolo facultativo del Pacto de derechos economicos, sociales y culturales, in Antonio Embid Irujo, derechos economicos y sociales, Madrid, Iuste, 2009, p.305

individuelles devant le Comité des droits économiques, sociaux et culturels. Ce dernier peut prendre des mesures provisoires pour éviter un éventuel préjudice irréparable. Cette réforme sera certainement à l'origine d'une jurisprudence nouvelle sur le principe de non régression. Dans l'attente de l'entrée en vigueur de ce Protocole, le Comité des droits économiques, sociaux et culturels, dans ses observations finales, a pu relever des régressions en particulier du fait de l'augmentation ou de l'introduction de frais de scolarité dans l'enseignement. Ces constatations restent toutefois pour l'instant assez timides[49].

Au niveau régional, la Charte sociale européenne du Conseil de l'Europe de 1961, révisée en 1996 conduit également à faire évoluer les droits sociaux fondamentaux, y compris l'environnement, vers la reconnaissance de la non régression. Son préambule mentionne l'objectif de « sauvegarder » les idéaux patrimoine commun des peuples européens, et de « favoriser » le progrès économique et social. Une décision du Comité européen des droits sociaux a clairement introduit l'environnement parmi les objectifs de la Charte liés à l'art.11 relatif à la santé [50]. Or l'art. G.1 de la Charte révisée prévoit que les droits effectivement mis en œuvre « ne pourront faire l'objet de restrictions ou limitations non spécifiées dans les parties I et II à l'exception de… ». C'est bien affirmer le principe de non régression tout en l'accompagnant de certaines exceptions.

La convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales interprétée par la Cour européenne des droits de l'homme a intégré l'environnement parmi les droits fondamentaux protégés par ricochet. La formulation de l'arrêt Tatar c/ Roumanie du 27 janvier 2009 conduit à admettre désormais un droit à la jouissance d'un environnement sain et protégé par le biais de l'art. 8 de la Convention[51]. On peut considérer que les articles 17 et 53 de la Convention en prohibant des limitations allant au delà de celles prévues par la Convention, reconnaît de façon certes prudente, une certaine obligation de non régression ou à tout le moins une obligation de ne retenir que la disposition la mieux disante et la plus favorable. En cas de conflits entre une loi et la Convention ou entre une autre convention et la convention des droits de l'homme , c'est le texte le plus protecteur de l'environnement qui devra l'emporter. L'art. 17 inspiré par l'art. 30 de la Déclaration universelle des droits de l'homme de 1948, et que l'on retrouve dans les art. 5 des deux Pactes de 1966, revient à interdire à un État d'utiliser les droits existants pour les détruire ou les limiter. La « destruction »

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[49] voir Isabelle Hachez, op.cit. p.63 et s. ; M. Sepulveda, The nature of the obligations under the international covenant on economic, social and cultural rihgts, Antwerpen, Intersentia, 2003

[50] Affaire Fondation Marangopoulos pour les droits de l'homme c/ Grèce (à propos d'une pollution due à une exploitation de lignite) , 6 décembre 2006, Revue juridique de l'environnement, 2007-3, p. 335

[51] voir J.P. Marguenaud, Revue juridique de l'environnement, 2010-1, p.62

ou la « limitation » d'un droit fondamental constitue bien une régression. Aucune jurisprudence ne permet encore de mesurer précisément la façon dont la Cour pourrait réagir face à des reculs d'un droit protégé au-delà des limites normalement admises.

La convention américaine des droits de l'homme adoptée en 1969 prévoit en son art. 26 d'assurer « progressivement » la pleine jouissance des droits, ce qui implique à la fois, comme pour le Pacte international relatif aux droits économiques, sociaux et culturels, une adaptation dans le temps et une non régression. L'art. 29 sur les normes d'interprétation précise qu'il n'est pas possible de supprimer la jouissance des droits reconnus ou de restreindre leur exercice plus qu'il n'est prévu par la Convention. Le protocole de San Salvador sur les droits économiques, sociaux et culturels de 1988 comporte un article expressément dédié à l'environnement (art. 11). Bien que cet article ne soit pas justiciable directement devant la commission et la Cour interaméricaine des droits de l'homme, il est soumis au principe de l'art. 1 relatif à la progressivité conduisant au plein exercice des droits reconnus ce qui implique nécessairement la non régression. Comme le précise un commentaire officiel de l'organisation des États américains , les mesures régressives sont : « … toutes les dispositions ou politiques dont l'application signifie une diminution de la jouissance ou de l'exercice d'un droit protégé »[52]. Un recul dans la protection de l'environnement constituera donc une régression condamnable juridiquement par les organes de contrôle de la Convention et du protocole.

Dans l'affaire des cinq retraités c/ Pérou, la Commission interaméricaine des droits de l'homme dans sa décision 23/01 du 5 mars 2001 déclara : « le caractère progressif de la majorité des obligations des États en matière de droits économiques, sociaux et culturels, implique pour ces États, avec effet immédiat, une obligation générale de concrétiser la réalisation des droits consacrés sans pouvoir revenir en arrière. Les régressions en la matière peuvent constituer une violation , entre autres, de l'art 26 de la convention américaine. » (para. 86). La Cour interaméricaine des droits de l'homme dans son arrêt n° 198 du 28 février 2003 confirma la décision de la Commission sur le fond sans toutefois préciser que la régression est une violation de la Convention.

Cette non régression des droits de l'homme ainsi généralisée de façon très discrète, probablement pour ne pas heurter les positivistes tout en satisfaisant les moralistes, est destinée à se répercuter inévitablement sur le droit de l'environnement en tant que nouveau droit de l'homme. L'apparition de ce nouveau principe applicable à l'environnement est en totale synergie avec le caractère finaliste et volontariste de ce droit et pourrait même soulever peut être moins d'objections et de résistance que la non régression dans le

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[52] Conseil permanent de l'OEA, « Normes pour l'élaboration des rapports périodiques prévues à l'art. 19 du Protocole de San Salvador », OEA/Ser.G.CP/CAJP-222604)17décembre 2004

domaine social. Cette idée de garantir un développement continu et progressif des modalités d'exercice du droit à l'environnement jusqu'aux niveaux les plus élevés de son effectivité peut sembler utopique. L'effectivité maximale est la pollution zéro. On sait qu'elle n'est pas possible. Mais entre la pollution zéro et l'utilisation des meilleurs technologies disponibles pour réduire la pollution existante, il y a une marge de manœuvre importante. La non régression va donc se situer dans un curseur entre la plus grande dépollution possible (qui va évoluer dans le temps grâce aux progrès scientifiques et technologiques) et le niveau minimal de protection de l'environnement qui lui aussi évolue constamment. Un recul aujourd'hui n'aurait pas été un recul hier. C'est au niveau du droit national que va se jouer l'application concrète du principe de non régression qui sera conduite nécessairement à préciser les limites à la non régression.

II. La non régression dans les droits nationaux et ses limites

Le principe de non régression va se manifester dans les différentes sources du droit national : la constitution , les lois et règlements , la jurisprudence . Comme tout principe il va se heurter à des exceptions ou limites, soit clairement exprimées soit implicites.

A. La non régression dans les Constitutions :

Le principe de non régression du droit de l'environnement devrait pouvoir s'appuyer à la fois sur des normes constitutionnelles non révisables et sur des droits fondamentaux non dérogeables.

Il faut en effet distinguer la non régression résultant d'une interdiction expresse de modifier la disposition environnementale figurant dans la constitution, de la non régression résultant de l'interdiction constitutionnelle imposée au législateur de diminuer la portée d'un droit fondamental.

A part le cas particulier du Brésil et du Portugal, on trouve peu de constitutions qui prétendent figer le droit applicable en interdisant expressément toute modification constitutionnelle de son contenu en matière d'environnement.

La constitution Brésilienne de 1988 comporte un grand nombre de dispositions sur l'environnement, donnant ainsi à cette politique une place éminente dans la hiérarchie juridique. Bien qu'ils ne figurent pas dans le titre II consacré aux droits et garanties fondamentales, la doctrine considère que les droits liés à l'environnement constituent au plan matériel, sinon formel, des droits fondamentaux.[53]. Cette constitution comporte une disposition originale consistant à énoncer que les « droits et garanties indi-

[53] P.A. Machado, La constitution brésilienne et l'environnement , Cahiers du Conseil constitutionnel, n° 2005, p. ; P.A. Machado, direito ambiental brasileiro, Sao paulo, Tiago Fensterseifer, Direitos fundamentales e proteçao do ambiente, Porto Alegre, Libraria do advogado, 2008, p. 159 et s.

viduels » sont exclus d'une révision constitutionnelle en application de l'art. 60 §4-IV (clausula pétrea ou clause d'intangibilité constitutionnelle). Ces droits sont considérés ainsi comme des droits acquis. Il semble bien admis que la protection constitutionnelle de l'environnement fait partie des droits acquis qualifiés d' immuables et qu'elle n'admet aucune révision[54] L'abolition ou la modification constitutionnelle d'une garantie protégée en matière d'environnement, comme en matière de droits de l'homme, serait inconstitutionnelle. Selon Jose Afonso da Silva, le rattachement du droit à l'environnement au droit à la vie et au principe de la dignité humaine lui confère un caractère intouchable de durabilité qui lui permet d'échapper, théoriquement , à la dérégulation et aux régressions temporaires qui proviendraient d'une révision de la constitution.[55]L'inconstitutionnalité peut aussi résulter d'une régression par omission ou compétence négative, lorsque les pouvoirs publics par omission ne prennent pas les « mesures nécessaires pour rendre effective la norme constitutionnelle » (art. 103 par.2 de la constitution)[56].

Mais au delà de cette non régression constitutionnelle, il existerait également en droit brésilien un principe de non régression ou principe d'interdiction de la régression environnementale s'imposant au législateur[57]. L'expression est attribuée à Ingo Wolfgang Sarlet dans ses cours à Porto Alegre sur les droits fondamentaux et la constitution en 2005[58]. Ce principe serait un principe constitutionnel implicite s'imposant au législateur à la fois au nom de la garantie constitutionnelle des droits acquis, au nom du principe constitutionnel de sécurité impliquant la sécurité juridique , au nom du principe de la dignité humaine et au nom du principe de l'effectivité maximale des droits fondamentaux (art. 5§1 de la constitution fédérale)[59].

Au Portugal la constitution reconnaît en son art. 66 l'environnement

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[54] "Un amendement du texte constitutionnel ne saurait modifier ce droit fondamental(à l'environnement) », Solange Teles Da Silva, le droit de l'environnement au Brésil, in Confluences, Mélanges en l'honneur de Jacqueline Morand Deviller, Montchrestien, 2007, p.928

[55] Jose Afonso da Silva, Fundamentos constitucionais da proteçao do meio ambiente, revista de direito ambiental, n°27, 2002, p.55, cité par Tiago Fensterseifer, op. Cit. p.169

[56] mentionné par Gliberto d'Avila Rufino, le droit de l'homme à l'environnement dans la constitution de 1988 du Brésil, Revue juridique de l'environnement, n°4-1994, p.371

[57] « garantia da proibiçao de retrocesso ambiental »; un autre auteur brésilien parle de principe d'interdiction de la: « rétrogradation socio – environnementale » (« proibiçao de retrogradaçao socioambiental »), v. carlos Alberto Molinaro, Minimo existencial ecologico e o principio de proibiçao da retrogadaçao socioambiental, in Benjamin Antonio herman, ed., 10° congres international de droit de l'environnement, Sao Paulo

[58] Tiago Fensterseifer, op.cit.p.258 , note 746

[59] Cette justification théorique du principe de non régression est appliquée en matière de droit social, mais pourrait s'appliquer aussi aux autres droits fondamentaux selon Ingo Wolfgang Sarlet , voir. La prohibicion de retroceso en los derechos sociales en Brasil : algunas notas sobre el desafio de la supervivencia de los derechos sociales en un contexto de crisis, in Christian Courtis, Ni un paso atras, op.cit. p.346

comme un droit fondamental au titre des droits et devoirs sociaux. Il est précisé que l'État doit faire respecter les valeurs environnementales. C'est l'art. 288 qui énumère des domaines constitutionnellement intangibles parmi, lesquels « les droits et libertés garanties dont jouissent les citoyens ». Parmi ceux-ci figure le droit à l'environnement qui ne peut donc pas faire l'objet d'une révision constitutionnelle.

En Italie la doctrine considère qu'il existe une limite implicite aux révisions constitutionnelles concernant les droits « inviolables » de l'homme ; « inviolable » signifierait « inrévisable » du moins en ce qui concerne le noyau dur de ces droits. La Cour constitutionnelle dans un arrêt n°1146 de 1988 a considéré que des « principes suprêmes » ne peuvent être modifiés dans leur contenu minimum essentiel par une loi de révision constitutionnelle[60]. La reconnaissance de cette intangibilité pour des principes qui même non expressément mentionnés dans la constitution (comme le droit à l'environnement, bien que l'environnement figure explicitement dans la Constitution depuis la réforme de 2001[61]) appartiennent à « l'essence des valeurs suprêmes » ou ont un caractère fondamental[62] ne pourrait- elle à l'avenir être reconnue au droit à l'environnement ?

Cette intangibilité des droits fondamentaux existe dans plusieurs constitutions en tant qu' intangibilité constitutionnelle ou clause « d'éternité ». La constitution allemande garantit dans son art. 19-2 « le contenu essentiel des droits fondamentaux » qui font partie des domaines intangibles bénéficiant de la pérennité constitutionnelle de l'art.79-3 de la loi fondamentale de 1949.[63] Le contenu essentiel d'un droit concerne sa substance et sa finalité. La référence ambiguë aux fondements naturels de la vie et aux animaux dans l'art. 20 a n'empêche pas qu'en théorie « une loi qui violerait de façon manifeste et massive l'acquis environnemental sera très probablement inconstitutionnelle »[64]. On peut aussi évoquer la situation de la Turquie qui a introduit « le droit de chacun à un environnement sain et équilibré » dans sa constitution parmi les droits et devoirs sociaux (art. 56). On pourrait considérer que cet article est intangible comme pouvant bénéficier de l'art. 4 de la constitution au titre des dispositions inaltérables. En effet l'art. 4 proclame intangible l'art. 2 lequel vise les droits de

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[60] cité par L. Favoreu et L. Philip, Les grandes décisions du Conseil constitutionnel, Dalloz, décision n°45, para. 70

[61] Domenico Amirante, Le droit de l'environnement en Italie (2001-2002), Revue européenne
de droit de l'environnement , n°2-2003, p. 187

[62] Massimo Lucciani, Le contrôle de constitutionnalité des lois constitutionnelles en Italie, Les cahiers du Conseil constitutionnel, n° 27, 2009, p. 27

[63] Oliver Lepsius, Le contrôle par la Cour constitutionnelle des lois de révision constitutionnelle dans la république fédérale d'Allemagne, Les cahiers du Conseil constitutionnel, n° 27, 2009, p.13

[64] Michael Bothe, le droit à l'environnement dans la constitution allemande, Revue juridique de l'environnement , n° spécial 2005, p.38

l'homme et renvoie aux principes fondamentaux du Préambule . Or ce préambule renvoie lui même aux droits et libertés énoncés dans la constitution parmi lesquels figure clairement le droit à l'environnement.[65]

A côté de cette intangibilité des droits constitutionnellement garantis, il existe de façon plus répandue une non régression imposée au législateur. On trouve dans plusieurs constitutions sud-américaines cette idée de limitation des pouvoirs du législateur quant aux finalités poursuivies par certains droits essentiels. Selon la Constitution argentine : « les principes , garanties et droits reconnus dans les articles précédents, ne pourront être modifiés par les lois qui réglementent leur exercice » (art.28). De même selon la Constitution chilienne : « les préceptes législatifs qui, par mandat de la Constitution, régulent ou complètent les garanties que la Constitution a établies ou qui les limite lorsque cela est prévu par la constitution, ne pourront affecter ces droits dans leur essence » (art.19-26). Pour la constitution de l'Équateur : « les lois ne pourront pas limiter l'exercice des droits et garanties reconnus dans la constitution » (art.18) . Encore plus clairement la Constitution du Guatemala dispose en son art. 44 : « seront nulles de droit , les lois, les dispositions gouvernementales et autres mesures qui diminuent , restreignent ou déforment les droits que la Constitution garanti »[66]. Il est important de noter que dans toutes ces constitutions l'environnement est consacré comme un droit protégé et qu'à ce titre tous ces États doivent admettre de jure la non régression du droit de l'environnement.

En Espagne l'art. 53-1 de la Constitution prévoit que la loi qui pourra réguler l'exercice des droits et libertés « devra respecter » le contenu essentiel des droits (debera respetar su contenido esencial) ; or l'art. 45-2 oblige bien à protéger, améliorer et restaurer l'environnement. Il devrait en résulter l'obligation pour le législateur de ne pas régresser dans la protection de l'environnement[67].

A l'occasion de la réforme constitutionnelle de 2001 en Italie le nouvel article 117 al.2 de la constitution réserve au législateur national la compétence de fixer les niveaux essentiels des prestations concernant les droits civils et sociaux. Cette garantie d'un contenu minimum des droits fondamentaux qui jusqu'alors n'était qu'hésitante et jurisprudentielle devient une obligation constitutionnelle imposée au législateur et permettant à la cour constitutionnelle de contrôler directement les régressions législatives. Il s'agira de vérifier si ladite cour considère désormais l'environnement comme protégé au titre des droits sociaux.

La Constitution française, dans ses dispositions sur la révision de la

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[65] Ibrahim O. Kaboglu, le contrôle juridictionnel des amendements constitutionnels en Turquie, in Les cahiers du Conseil constitutionnel, n° 27, 2009, p.38

[66] exemples cités par Christian Courtis, op. cit. p.21

[67] Fernando Lopez Ramon, L'environnement dans la constitution espagnole, Revue juridique de l'environnement, n° spécial, 2005, p. R3

Constitution (art. 89 dernier alinéa), interdit toute révision constitutionnelle qui toucherait à la forme républicaine du gouvernement . Mais la Charte de l'environnement peut être modifiée en respectant la procédure de révision constitutionnelle. Aucune de ses dispositions n'est formellement intangible même si son caractère finaliste engage l'humanité et les générations futures. Toutefois, contrairement à de très nombreuses autres constitutions, la Charte ne formule pas une obligation de protéger ou améliorer l'environnement expressément à la charge de l'État, ce qui aurait pu constituer un fondement juridique à l'obligation de non régression. On pourrait cependant s'appuyer sur l'art. 2 de la Charte qui impose « de prendre part à la préservation et à l'amélioration de l'environnement » à la charge de « toute personne » , y compris donc de l'État et du législateur[68]. Ainsi ces derniers ne pourraient prendre des mesures ayant des effets inverses à la préservation et à l'amélioration de l'environnement. Un commentateur de la Charte considère que le « devoir » pèse aussi sur les personnes publiques dans un esprit finaliste : « l'objectif consistant non seulement à stopper ou ralentir la dégradation de l'environnement, dans le cadre d'une politique défensive, mais également à améliorer l'état de celui-ci »[69]. Selon le même auteur, le Conseil Constitutionnel pourrait ainsi censurer le législateur réduisant de manière excessive les devoirs environnementaux en introduisant des dispositions plus permissives en matière d'installations classées. Un recul dans les protections de l'environnement, à travers une diminution des devoirs environnementaux, pourrait donc être considéré comme une violation de la constitution trouvant son origine dans le constat d'une régression. Au delà même de l'environnement le professeur Emmanuel Decaux dans son commentaire sur l'art. 60 de la Convention européenne des droits de l'homme mentionne précisément le concept de « régression » applicable à la France, en considérant qu'une loi nouvelle ou une convention internationale nouvelle qui seraient contraire à un des éléments du bloc de constitutionnalité (dont fait partie depuis 2005 la Charte de l'environnement) seraient « bloqués », on suppose par le Conseil constitutionnel[70]. Le blocus de la non régression permettrait ainsi de faire échapper la réforme régressive à la menace de l'acte contraire. Autrement dit la non régression consacre l'interdiction d'un acte contraire quant à son contenu finaliste. Cela équivaut à considérer qu'au nom de la non régression le législateur a une obligation négative de ne pas

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[68] voir Jean-Pierre Marguenaud, Les devoirs de l'homme dans la Charte constitutionnelle de l'environnement, in Confluences, Mélanges en l'honneur de Jacqueline Morand Deviller, Montchrestien, 2007, p.879

[69] Pascal Trouilly, Le devoir de prendre part à la préservation et à l'amélioration de l'environnement : obligation morale ou juridique ? Environnement, Lexis Nexis, n°4, avril 2005, p.21

[70] L.E. Petitti, E. Decaux et P.H. Imbert, La convention européenne des droits de l'homme, commentaire article par article, Economica, 1995, p.899

introduire de restrictions aux droits fondamentaux acquis.

La constitution Belge a introduit en 1994 le droit à la protection d'un environnement sain (art. 23, al. 3). Elle confie aux législateurs le soin de « garantir » les droits fondamentaux énumérés. L'objectif consiste donc à mettre en œuvre les droits énoncés afin de les rendre effectifs même s'il est considéré qu'ils n'ont pas d'effet direct et que seule la loi peut les rendre justiciables. Les travaux préparatoires et la doctrine belge considèrent que l'art. 23 bénéficie de l'obligation de standstill consistant à garantir l'absence de recul dans les droits protégés[71]. Cette obligation s'impose au législateur. Comme l'a écrit le professeur Louis-Paul Suetens : l'art. 23 : « … contient à tout le moins une obligation de standstill, c'est à dire qu'elle s'oppose à ce qu'en Belgique, le(s) législateur(s) prenne(nt) des mesures allant à l'encontre de l' objectifs de la protection d'un environnement sain. L'avantage de la nouvelle disposition constitutionnelle consiste donc essentiellement en ce qu'il ne peut être revenu sur des règles de droit qui existent déjà et sur la protection d'un environnement sain réalisée grâce à ces règles »[72] . En 2007 la Belgique a procédé à une nouvelle insertion de l'environnement dans la Constitution en visant les objectifs du développement durable et la solidarité entre les générations (art. 7 bis de la Constitution). Soumise également à l'obligation de standstill, cette disposition, bien que très vague quant à son contenu normatif, permettra de renforcer l'objectif environnemental constitutionnel, à moins qu'elle n'ouvre la porte à de subtils reculs justifiés par la référence à l'insaisissable développement durable boîte de pandore des conciliations impossibles.

La constitution grecque de 1975 protège constitutionnellement l'environnement selon l'art. 24. Il en résulte que : « aussi bien l'administration que le législateur peuvent édicter des règles uniquement si elles procurent une protection égale ou supérieure à celle offerte par la constitution » [73].

En Pologne la Constitution de 1997 contient plusieurs articles sur l'environnement. L'art. 68 al. 4 introduit le principe de non régression environnementale en déclarant : « les pouvoirs publics sont tenus d'empêcher les effets de la dégradation de l'environnement nocifs pour la santé ». Cette disposition est renforcée par le devoir constitutionnel de protéger l'environnement qui incombe aux pouvoirs publics selon l'art . 74-2[74].

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[71] Isabelle Hachez, op.cit. p.44 et s.

[72] Paul-Louis Suetens, Le droit à la protection d'un environnement sain (art. 23 de la Constitution belge) ; in les hommes et l'environnement, en hommage à A. Kiss, Frison Roche, 1998, p.496

[73] Glykeria Sioutis, le droit de l'homme à l'environnement en Grèce, Revue juridique de l'environnement, n°4-1994, p.330 ; T. Nikolopoulos et M. Haidarlis, La constitution , la jurisprudence et la protection de l'environnement en Grèce, Revue juridique de l'environnement, n° spécial, 2005, p. 63

[74] Krzystzof Wojtyczek, le droit à l'environnement , droit constitutionnel en Pologne ? in cahiers administratifs et politiques du Ponant, Nantes, n°11-2004, p.36

B. La non régression dans les lois et règlements

Compte tenu du caractère volontariste et finaliste du droit de l'environnement , il n'est pas étonnant de trouver dans de nombreuses législations des formules qui énoncent la volonté de ne pas aller en arrière, même en l'absence de fondements juridiques constitutionnels solides. Le législateur lui même s'auto-limite en s'interdisant de régresser dans l'intérêt commun de la protection de l'environnement et indépendamment même d'une reconnaissance directe d'un droit de l'homme à l'environnement. Selon Isabelle hachez, dans la mesure ou les États Unis ont été les premiers à légiférer sur l'environnement dans les années 1970, il n'est pas étonnant de trouver dans ces premières lois américaines sur l'air ou sur l'eau des dispositions empêchant la régressivité.[75] On trouve ainsi dans le clean water Act des dispositions imposant aux états d'adopter une politique de lutte contre la dégradation de l'eau (antidegradation policy) qui impose en réalité la non régression puisqu'il est imposé de maintenir et protéger la qualité de l'eau (Code of federal regulation, Sec. 131.12). Des exemples nombreux peuvent être trouvés aux Pays- Bas et en Belgique et particulièrement dans la législation flamande. Cette dernière mentionne expressément le principe de standstill dans le décret de 1995 sur la politique de l'environnement et dans le décret de 1997 sur la conservation de la nature. En France bien qu'il n'existe pas de clauses affirmant expressément la non régression plusieurs dispositions condamnent le retour en arrière par une interprétation a contrario. On peut citer par exemple l'art. L.211-1 du code de l'environnement : ne pas accroître la dégradation ; l'art.L.221-1 qui prévoit des valeurs limites de qualité de l'air dans le but de réduire les effets nocifs ; l'art. L.331-1 selon lequel les parcs nationaux doivent « préserver » des dégradations ; l'art. L.541-1 qui vise à prévenir ou réduire la production et la nocivité des déchets. Bien souvent la norme imposant un seuil technique de rejet d'un polluant pris en application d'une directive communautaire fixant des valeurs limites et des objectifs de qualité sera assimilée, abusivement à notre sens, à une clause de standstill. Il ne s'agit là que d'une obligation de protection qui peut bien sûr varier dans le temps, compte tenu des progrès techniques et des coûts économiques. La question de la non régression concerne seulement l'impossibilité juridique d'a baisser le seuil de pollution pour le rendre moins protecteur du milieu naturel et de la santé.

C. La non régression dans la jurisprudence

Le juge peut-il empêcher la régression à travers le contrôle du respect des objectifs environnementaux ?
La non régression des droits fondamentaux a été reconnue au Portugal, à propos du droit à la santé, dans une décision du Tribunal constitutionnel (déci-

[75] Isabelle Hachez, op.cit, p.540 , note 950

sion 39 de 1984) selon laquelle : « les objectifs constitutionnels imposés à l'État en matière de droits fondamentaux l'oblige non seulement à créer certaines institutions ou services, mais également à ne pas les supprimer une fois crées ».
En Espagne la non régression en matière sociale a été parfois admise par le Tribunal constitutionnel bien qu'à la différence du Brésil, aucune dispositions constitutionnelle ne l'envisage. S'appuyant sur le principe constitutionnel de la dignité de la personne, le Tribunal constitutionnel a considéré que les étrangers jouissent de droits constitutionnels minimum qu'aucune loi ne peut limiter ou supprimer (arrêt 107 de 1984). De même le travailleur ne peut se voir supprimer sans raisons suffisantes les conquêtes sociales acquises (arrêt 81 de 1982). Mais de façon générale la thèse de la non régression ne semble pas avoir beaucoup prospéré en Espagne bien que l'environnement figure en bonne place dans la constitution comme un droit de la personne (art. 45)[76].
Pour la Cour constitutionnelle de Colombie : « la clause de non régression en matière de droits économiques, sociaux et culturels, en définitive suppose qu'une fois atteint un certain niveau dans la concrétisation des droits économiques, sociaux et culturels au moyen de dispositions législatives ou réglementaires, les conditions préétablies ne puissent être affaiblies par les autorités compétentes sans des justifications sérieuses »[77].
Au Brésil la non régression a déjà été admise dans le domaine des droits sociaux[78]. Plusieurs actions sont en cours dans le domaine de l'environnement sous la pression d'une partie de la doctrine qui cherche à faire consacrer par le juge le principe d'interdiction de régression écologique (principio de proibiçao de retrocesso ecologico) s'appuyant sur le principe de non régression constitutionnelle étendu aux actes législatifs des membres de la fédérations . Ainsi est en cours une action directe d'inconstitutionnalité à l'initiative du Procureur général de justice de l'état de Santa Caterina contre une loi de l'état réduisant les limites d'un parc (parque estadual da serra do tabuleiro), « le principe de l'interdiction de la régression écologique signifie que, en dehors de changements de faits significatifs, on ne peut admettre un recul des niveaux de protection inférieur à ceux antérieurement consacrés. Cela limite les possibilités de révision ou d'abrogation »[79]. Dans le même état une autre action vise le nouveau code de l'environnement considéré par des associations requérantes comme réduisant le niveau de protection de l'environnement. Cette action est pendante au niveau national devant le Suprême Tribunal

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[76] Gerardo Pisarello, Derechos sociales y principio de no regresividad en Espana, in Christian Courtis, Ni unpaso atras, op.cit.p.321
[77] Décision T –1318 de 2005 citée par Rodolfo Arango, La prohibicion de retroceso en Columbia, in , Christian Courtis, Ni un paso atras op. cit. p.157
[78] Tribunal de Justicia du Rio Grande do Sul, 18 décembre 2008, n°7002162254 ; Tribunal de Justicia de Sao Paulo, 25 août 2009, n°5878524400
[79] Ministère public de l'Etat de Santa Caterina, action d'inconstitutionnalité, n°14.661/2009, du 26 mai 2009

fédéral faisant office de cour constitutionnelle[80]. Un décision du tribunal de justice de Rio grand do Sul a déjà annulé une modification de la constitution de l'état pour régression écologique en s'appuyant sur la doctrine relative à la régression sociale (il s'agissait de permettre le brûlage des champs comme technique de nettoyage)[81]. L'interdiction d'amendement à la constitution en matière d'environnement conduit à considérer que le pouvoir exécutif comme le pouvoir législatifs sont liés par les buts énoncés dans la Constitution.
Le Conseil d'Etat grec a reconnu parfois, suite à la consécration constitutionnelle de l'environnement, l'existence d'acquis législatif . La loi n°1577/ 1985 sur le règlement général de construction a été considérée comme contraire à la constitution du fait qu'elle entraînait une aggravation des conditions de vie des habitants portant atteinte à un « acquis de droit urbain » (Ass. 10/1988). Sur les droits acquis la jurisprudence grecque serait plus protectrice en matière d'environnement qu'en matière de droits sociaux[82]
C'est en Belgique que la jurisprudence a le plus clairement consacré la non régression[83]. Dans un arrêt du 27 novembre 2002 (n°169/2002) la Cour d'arbitrage appliquant l'art. 23 de la constitution belge en matière sociale impose au législateur de ne pas porter atteint au droit garanti. Plusieurs avis du Conseil d'Etat ont considéré que des décrets portaient atteinte à l'obligation de standstill en dispensant ou en ne prévoyant pas de garanties existant déjà en faveur de l'environnement. L'arrêt du Conseil d'Etat Jacobs du 29 avril 1999 (n°80018) est le premier à appliquer le principe au contentieux en ordonnant la suspension d'un règlement attaqué qui assouplissait les conditions environnementales imposées aux terrains de moto-cross. La Cour d'arbitrage dans une décision du 14 septembre 2006 (n°137/2006) a de même censuré une loi modifiant le code Wallon de l'aménagement du territoire pour « régression sensible ». Il en résulte qu'un simple recul qui ne serait pas une régression sensible ne serait pas sanctionné. La plupart des régressions sanctionnées concernaient des assouplissements ou des dérogations dans les garanties procédurales existantes (nationales, communautaires ou internationales telles que la convention d'Aarhus) susceptibles de conduire à une protection moindre de l'environnement.[84]

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[80] Action directe d'inconstitutionnalité n° 4252

[81] Action directe d'inconstitutionnalité, ADIN n° 70005054010, décision du 16 décembre 2002

[82] cité par Constantin Yannakopoulos, Le notion de droits acquis en droit administratif français, LGDJ, bibliothèque de droit public, Tome 188, 1997, p.40 , note 128

[83] pour une présentation détaillée en matière d'environnement voir Isabelle Hachez, op.cit. p.109 à 149. ; Isabelle Hachez et Benoît Jadot, Environnement, développement durable et standstill : vrais ou faux amis ? Aménagement-Environnement, Kluwer, 2009/1, p. 5 à 25 ; Francis Haumont, Le droit constitutionnel belge à la protection d'un environnement sain, état de la jurisprudence, Revue juridique de l'environnement, n° spécial, 2005, p. 41 à 52

[84] exemples tirés de J.F. Neuray et M. Pallemaerts, L'environnement et le développement durable dans la Constitution belge, Aménagement, environnement , Kluwer, mai 2008, n° spécial, p.150

En France seule une jurisprudence du Conseil constitutionnel appliquée depuis 1984 à certains droits fondamentaux pourrait conduire à un principe de non régression en matière d'environnement. Il s'agit de la jurisprudence dite « effet -cliquet ». L'expression vient des commentateurs mais n'a jamais été usitée par le Conseil constitutionnel[85]. La formule utilisée est malheureuse et fait plus penser à une technique de mécanicien qu'à un principe juridique. Du fait de l'évolution de la jurisprudence ne censurant parfois que le recul du noyau dur des droits en cause, Louis Favoreu a alors parlé « d'effet -artichaut » ce qui peut sembler plus écologique mais reste un vocabulaire de gourmet et non de juriste. Aussi il serait préférable, qu'en matière d'environnement, l'effet-artichaut et l'effet cliquet soient simplement appelés : principe de non régression.

Raphael Romi considère que : « l'effet cliquet aboutira inéluctablement à ce que le législateur soit contraint par la Charte » chaque fois qu'il modifiera une législation, « c'est sûrement le principal apport de la constitutionnalisation de l'environnement dans le contexte français » [86]. Toute modification d'une législation qui ne serait pas dans le sens de l'un des objectifs définis par la Charte de l'environnement, rencontrerait la censure du Conseil constitutionnel[87]. C'est aussi l'opinion de Agathe Van Lang qui écrit à propos du droit à l'environnement et du rôle futur du Conseil constitutionnel : « il pourra aussi censurer les lois qui marqueraient un **recul** dans sa protection au nom de l'effet cliquet ».[88] La constitutionnalisation de l'environnement dans la Charte adoptée en 2005, a nécessairement pour effet d'interdire au législateur de supprimer des textes protecteurs. De même la « haute juridiction pourrait ainsi veiller à ce qu'un nouveau dispositif **plus restrictif** ne prive pas de garanties légales les exigences découlant de la Charte »[89] Jusqu'alors aucune décision n'a été prise en ce sens en matière d'environnement. Mais cela ne saurait tarder. En effet Le Conseil Constitutionnel français peut vérifier que les lois votées ne sont pas contraires à la Charte de l'environnement et sa saisine vient même d'être élargie à la suite de la révision constitutionnelle du 23 juillet 2008[90] introduisant la question prioritaire de constitutionnalité qui peut être soulevée à l'occasion d'une instance devant toute juridic-

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[85] à l'exception de la reprise de la formulation des auteurs des saisines dans Conseil constitutionnel n°202-461 DC du 29 aout 2002, considérant.64

[86] Raphael Romi, droit à l'environnement , prolègomènes, in la constitutionnalisationde l'environnement en France et dans le monde, cahiers administratifs et politiques du Ponant, Nantes, n°11-2004, p.10

[87] Guillaume Drago, principes directeurs d'une charte constitutionnelle de l'environnement, AJDA, n°3-2004, ,p.133

[88] Agathe Van Lang, droit à l'environnement, in Dictionnaire des droits de l'homme, J. Andriantsimbazovina, H. Gaudin , J.P. Marguenaud, S. Rials, F. Sudre, dir. PUF, 2008, p.374

[89] Laurence Gay, Les « droits- créances » constitutionnels, Bruylant , 2007, p.423

[90] introduisant un art. 61-1 dans la Constitution, complété par la loi organique n°2009-1523 du 10 décembre 2009 et le décret n° 2010-148 du 16 février 2010

tion. Le Conseil d'État français peut quant à lui vérifier que les textes réglementaires respectent la loi et la Constitution.
L'origine de cette jurisprudence vient d'un revirement de jurisprudence s'inscrivant dans l'évolution de sa jurisprudence sur les droits fondamentaux[91]. Le 20 janvier 1984, pour la première fois, il décide d'encadrer le pouvoir de modifier les lois anciennes touchant à un droit ou une liberté fondamentale[92] : le législateur ne peut abroger une législation protectrice d'une liberté fondamentale sans la remplacer par une autre offrant des garanties équivalentes. Par la suite plusieurs décisions iront dans le même sens. Il ne s'agit pas de rendre éternelles les lois sur les libertés fondamentales, mais simplement de veiller à ce que leur abrogation ou leur modification ne porte pas atteinte aux droits protégés par la constitution. Ainsi le Conseil constitutionnel va préciser le champ d'application de cette jurisprudence dite du cliquet en décidant que : la loi ne peut réglementer l'exercice d'une liberté fondamentale « qu 'en vue de la rendre plus effective ou de la concilier avec d'autres règles ou principes de valeur constitutionnelle »[93]. Puis le plus souvent, à partir de 1986, il indiquera que le législateur est libre d'apprécier l'opportunité d'adopter des lois nouvelles qui peuvent modifier ou supprimer des disposition excessives ou inutiles, mais toujours sous la réserve de principe que ces modifications de lois anciennes n'aboutissent pas à [94] « priver de garanties légales des exigences constitutionnelles ». Cette jurisprudence sera appliquée également pour la première fois en 1991 à un droit économique et social : la santé[95]. Le contrôle du juge consiste désormais à apprécier le niveau de progression ou de maintien des garanties légales selon « une échelle de garanties »[96]. Jusqu'à quel niveau la régression sera-t-elle tolérée sans mettre en cause les droits protégés ? c'est l'enjeu à venir du contrôle des droits fondamentaux par le Conseil constitutionnel. L'environnement sera un terrain privilégié d'application de cette subtile jurisprudence.
Il reste certain que le législateur ne peut porter atteinte à des droits fondamentaux qu'à la condition de les remplacer par un régime au moins aussi protecteur. Il s'agit d' « améliorer » l'exercice réel d'un droit en le rendant plus effectif, ce qui oblige le Parlement à donner toujours à la législation un « effet ascendant » selon l'expression de Dominique Rousseau[97]. Toutefois,

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[91] Thierry Di Manno, Les revirements de jurisprudence du Conseil constitutionnel français, in Les cahiers du Conseil constitutionnel, n°20-2006, p.146
[92] Cons. Const. n°83-165 DC, 20 janvier 1984, Libertés universitaires, §42, Rec. p. 30
[93] Cons. Const. n°84-181 DC, 10-11 octobre 1984, Entreprises de presse, §37, Rec. p .73
[94] Cons. Const. n° 86-210 DC, 29 juillet 1986 et n°86-217-DC, 18 septembre 1986 ; de même n°89-259 DC, 26 juillet 1989 ; n° 94-345 DC , 29 juillet 1994
[95] Cons. Const. n° 91-287 DC , 16 janvier 1991, mentionné par L. Favoreu et L. Philip, les grandes décisions du Conseil constitutionnel, Dalloz, n°35
[96] Grégory Mollion, Les garanties légales des exigences constitutionnelles, Revue française de droit constitutionnel, 2005-2, p.265
[97] Dominique Rousseau, chronique de jurisprudence constitutionnelle 2009, Revue du droit public, 2010, n° 1, p.261

selon le même auteur, le Conseil constitutionnel n'a pas encore trouvé la voie juste en tolérant parfois la diminution ou la réduction des droits donnant alors à la législation un effet « descendant ».
En matière d'environnement, comme pour les autres droits de l'homme, le législateur a donc compétence liée : il ne peut que rendre plus effectifs tous les droits proclamés par la Charte sans les distinguer, mais en respectant les finalités et les objectifs du droit de l'environnement telles qu'ils sont exprimées par la Charte y compris son préambule intitulé « considérant ». « Le législateur n'a compétence que pour renforcer un droit ou une liberté en rendant plus effectif l'exercice de ce droit ; il n'a pas compétence pour diminuer les garanties d'effectivité »[98]. Cette jurisprudence est bien une jurisprudence imposant la non régression : « Le Conseil constitutionnel doit faire obstacle à la régression des droits de l'homme dont le respect est exigé par la constitution »[99] .
Même en l'absence d'un principe de non régression, faute de dispositions constitutionnelles ou internationales suffisamment explicites ou faute de jurisprudence innovante en ce domaine , il est certain que de nombreuses juridictions pourraient assez facilement utiliser des concepts déjà largement admis dont les résultats seraient équivalents à l 'application formelle du principe de non régression. Ces concepts qui accompagnent le raisonnement de la plupart des juges constitutionnels sont : le principe de sécurité juridique, le principe de confiance légitime, le principe des droits acquis en matière de droits de l'homme, le contrôle de proportionnalité. On peut penser que la pression sociale collective en faveur d'une meilleure protection de l'environnement est de nature à rendre intolérables pour l'opinion des mesures régressives , ce qui conduirait le juge à les censurer. Enfin il convient de relever que les juges constitutionnels censurent certainement la violation par la loi d'un droit constitutionnellement protégé sans nécessairement relever qu'il s'agit en réalité d'un recul ou d'une disposition restrictive.

D. Les limites aux principes de non régression

Le principe de non régression n'est jamais absolu, il est toujours relatif car , selon les constitutions et les jurisprudences, il existe des exceptions à la non régression. Mais dans tous les cas l'interprétation des seuils de régression tolérée sera faite de façon assez restrictive puisqu'il s'agit toujours de déroger au principe général selon lequel toute législation ou réglementation environ-

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[98] Louis Favoreu, le droit constitutionnel jurisprudentiel, Revue du droit public, n°2-1986, p.482
[99] Marie-Anne Cohendet, droit constitutionnel, Montchrestien, 2008, p.79-80 et Revue juridique de l'environnement , n° spécial 2005, p. 109, note 7; Il subsiste toutefois une partie de la doctrine qui s'oppose toujours à cette évolution et considère : « qu'il n'y a pas en France de « cliquet anti-retour contrairement à ce que l'on a longtemps écrit », Bertrand Mathieu, Revue juridique de l'environnement, n° spécial 2005, p.73

nementale doit permettre de mieux protéger et améliorer l'environnement. Il ne s'agit pas de geler les situations acquises puisque le principe reste de toujours progresser. C'est pourquoi les progrès continus du droit de l'environnement liés aux progrès continus de la science et aux progrès technologiques font que les seuils de non régression sont en perpétuelle mutation du fait des réformes successives du droit de l'environnement qui intègrent les nouvelles exigences technologiques plus protectrices de l'environnement.

La régression peut être justifiée par des circonstances prévues par certains textes ou résulter de certaines jurisprudences. Mais l'exception au principe de non régression rencontre lui même des limites dans le domaine social avec l'obligation de respecter un contenu minimum des droits fondamentaux en cause.

Les droits fondamentaux pourront être provisoirement écartés en cas de crise particulièrement grave ou de situation de guerre. C'est ainsi que plusieurs conventions relatives aux droits de l'homme admettent, sous certaines conditions de fond et de forme, que l'État suspende certains droits fondamentaux . C'est la cas de l'art. 15 de la Convention européenne des droits de l'homme « dérogation en cas d'état d'urgence », de l'art. F de la Charte sociale européenne en cas de guerre ou de danger public, de l'art. 4 du Pacte international relatif aux droits civils et politiques, de l'art. 27 de la Convention américaine des droits de l'homme ou de l'art. 4 de la Charte arabe des droits de l'homme. Ces dérogations s'accompagnent d'une liste de droits indérogeables ou noyaux durs de droits intangibles même en cas de crise. La question se pose alors de savoir dans quelle mesure les droits liés à l'environnement pourraient être suspendus sur la base de ces dispositions et s'ils pourraient être ou non rattachés à des droits indérogeables ? On peut songer aux crises résultant de catastrophes écologiques naturelles ou accidentelles entraînant le déclenchement de l'état d'urgence. La particularité de ces hypothèses de régression est leur caractère temporaire.

Il en va autrement de régressions tolérées par la jurisprudence suite à des modifications législatives réduisant le contenu des droits liés à l'environnement. Les juges utilisent plusieurs concepts pour justifier un recul dans les protections des droits fondamentaux : l'appréciation du caractère proportionnel du recul, la nécessité de la conciliation avec d'autres droits fondamentaux ou la pesée des intérêts, les exigences tirées d'un intérêt supérieur général ou de motifs impérieux, les exigences de l'ordre public, la marge nationale d'appréciation .

La question de la conciliation entre le droit à l'environnement et d'autres droits fondamentaux méritera sûrement d'être revisitée. La traditionnelle non hiérarchie entre les droits de l'homme doit désormais tenir compte de cet arrêt de la Cour européenne des droits de l'homme selon lequel : « des impératifs économiques et même certains droits fondamentaux comme le droit de propriété ne devraient pas se voir accorder la primauté face à des considérations relatives à l'environnement » (para. 79 de l'arrêt Hamer c/ Belgique, n° 21861/03 du 27 novembre 2007)[100].

[100] Jean-Pierre Marguénaud, note Dalloz, n°13, 2008, p. 884

En tout état de cause, il y a des limites aux limites tolérées. Le principe étant la non régression, les hypothèses de régression ne peuvent résulter que d'une interprétation restrictive. De plus la régression ne doit jamais contrecarrer la préoccupation de toujours rendre plus effectifs les droits protégés. Enfin le recul d'un droit ne peut descendre en dessous d'un certain seuil sans dénaturer le droit en cause. Ceci concerne aussi bien les droits substantiels que les droits procéduraux. Il devra être ainsi considéré qu'en matière d'environnement il existe un niveau d' obligations juridiques fondamentales de protection en dessous duquel toute mesure nouvelle devrait être considérée comme violant le droit à l'environnement. Ce niveau ou seuil minimum n'existe pas a priori. Il dépend des pays et des secteurs de l'environnement (eau, air , bruit, paysage, sols, biodiversité) .Il a pu être appelé : minimum écologique essentiel. Mais selon nous ce concept est dangereux : il n'y a pas de minimum essentiel en matière d'environnement, il n'y a qu'un niveau adéquat de protection compte tenu des technologies disponibles. Le Comité des droits économiques, sociaux et culturels a précisé que pour qu'un État s'acquitte de ses obligations fondamentales minimum : « il faut tenir compte des contraintes qui pèsent sur le pays considéré en matière de ressources »[101]. C'est en quelque sorte appliquer le principe de droit de l'environnement de responsabilité commune mais différenciée qui aboutirait à ce que les seuils varient avec les lieux et les ressources économiques. Pour déterminer les seuils ou minima écologiques applicables, des indicateurs de l'environnement, aussi bien scientifiques que juridiques, sont indispensables. Ils répondent au mouvement en cours d'élaboration d'indicateurs des droits de l'homme[102]. Un cadre conceptuel et méthodologique a été élaboré pour définir des indicateurs quantitatifs et autres données statistiques pour servir à promouvoir et suivre l'application des instruments internationaux relatifs aux droits de l'homme tant civils et politiques qu'économiques, sociaux et culturels[103].

Le concept de contenu minimum des droits devrait toutefois faire l'objet d'une réflexion spéciale adaptée à la matière environnementale. Il ne faudrait pas qu'il constitue un prétexte pour abaisser abusivement les seuils de protection de l'environnement. Les analyses faites en matière de contenu minimum dans le domaine social ne devraient pas être étendues systématiquement à l'environnement, l'histoire et les données des deux domaines ne permettent pas des les confondre. De plus les exigences internationales et surtout celles de l'Union européenne imposent toujours en matière d' environnement un niveau élevé de protection qui n'est pas compatible avec une quelconque tolérance d'une régression abaissant la protection jusqu'à un seuil minimum qui risque d'être très bas. Le contenu minimum en matière d'environnement devrait donc

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[101] Observations générales n° 3 (1990), para. 10

[102] Isabelle Hachez, op.cit. p.636 ; voir aussi Observations générales du Comité des droits économiques, sociaux et culturels n° 14 à 18 qui comportent tous des parties consacrées aux indicateurs

[103] Rapport des présidents des organes crées en vertu d'instruments internationaux relatifs aux droits de l'homme, Genève, 23-24 juin 2005,(A/60/78)

être la protection maximum compte tenu des circonstances locales. Assimiler le contenu minimum à une simple limite au principe de non régression est abusif. En effet la violation du contenu minimum va beaucoup plus loin qu'un simple recul des droits, c'est une atteinte radicale aux droits fondamentaux. Aussi le concept de contenu minimum ne devrait pas être retenu en matière d'environnement sauf à dénaturer totalement les ambitions protectrices des politiques de l'environnement. Préconiser un « minimum écologique » dans les politiques publiques est une nécessité liée au développement durable pour tous, en faire un seuil qui fait obstacle aux mesures régressives est une autre perspective. C'est pourquoi nous sommes très réservés vis à vis des théories naissantes vantant les mérites d'un minimum écologique comme obstacle à la régression du droit de l'environnement. L'obstacle à la régression c'est la gravité croissante des dégradations de l'environnement et la nécessaire survie de l'humanité.

Il convient donc, à titre exceptionnel, de ne tolérer des régressions que dans la mesure ou elles ne contrarient pas la recherche d'un niveau élevé de protection de l'environnement et préservent l'essentiel des acquis environnementaux.

Conclusion

La critique du principe de non régression environnementale ne manquera pas d'évoquer une forme nouvelle d'immobilisme ou de conservatisme. En réalité on mesurera rapidement combien le droit à l'environnement n'est pas un droit de l'homme comme les autres. Sauvegarder les acquis du droit de l'environnement, ce n'est pas un repli sur le passé, c'est au contraire une assurance sur l'avenir.

Le droit de l'environnement contient une substance intangible étroitement liée au plus intangible des droits de l'homme : le droit à la vie entendu comme un droit à la survie face aux menaces qui pèsent sur la planète du fait des dégradations multiples du milieu de vie des êtres vivants. Mais cette substance intangible est un ensemble complexe dont tous les éléments sont interdépendants. Aussi une régression locale même limitée risque d'avoir des effets ailleurs et dans d'autres secteurs de l'environnement. Toucher à une pierre de l'édifice peut conduire à son effondrement. C'est pourquoi les juges qui auront à mesurer jusqu'ou on peut régresser sans mettre en cause tout l'édifice, devront ne pas s'enfermer dans les jurisprudences anciennes relatives à l'intangibilité des droits traditionnels, mais imaginer une nouvelle échelle de valeurs pour mieux garantir la survie du fragile équilibre homme-nature en prenant en compte la mondialisation de l'environnement.

ECOLOGICAL REFUGEES—SCIENCE FOR PEACE

Laura Westra

I have coined the term "ecological refugees" to include both environmental refugees[1], the newer concept of "climate refugees", and other categories of displaced persons, including those fleeing various industrial and chemical hazards.[2] In 1985 Essam El Hinawi said:

> Environmental refugees are defined as those people who have been forced to leave their traditional habitat temporarily or permanently, because of a marked environmental disruption (natural or triggered by people) that jeopardizes their existence and/or seriously affected the quality of their life.

In turn, he defines "environmental disruption" as "any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it temporarily or permanently unsuitable to support human life".
The magnitude of the problem cannot be overstated, as correct estimates range from 50 million to as much as 200 million of refugees. Hence we are faced with millions of people in forced migrations, escaping from grave environmental and climate episodes, or various forms of industrial "development" from mining and extracting industries, which affect primarily Indigenous and local communities. In addition, climate change engenders droughts and floods in southern continents, and glacial melts in the Arctic and northern regions.[3]
But the millions escaping harsh and unlivable conditions are, for the most part, non Convention refugees, according to the 1951 Convention on the Status of Refugees[4] with its specific definition and requirements, based on "the well-founded fear of persecution for reason of race, religion, nationality or membership in a particular social group".
For most, the category of Internally Displaced Persons (IDPs) appears to be a better fit.[5] However, although today and tomorrow's ecological refugees do

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[1] (a term defined by Norman Myers, in 1993, "Environmental Refugees in a Globally Warmed World", Bioscience, vol.43
[2] Westra, Laura, 2009, Environmental Justice and the Rights of Ecological Refugees, Earthscan, London, UK
[3] Ford et al., 2006, "Vulnerability to Climate Change in the Arctic: A Case Study form Arctic Bay, Canada", Global Environmental Change, vol.
[4] 189 UNTS 150, into force 22 April 1954
[5] Hathaway, J. 2005, The Rights of Refugees Under International Law, Cambridge, UK

not fit the 1951 definition, IDPs have no legal protection in international law, that is, they are dependent on humanitarian aid, or on charity from international organizations or special donors.
The conditions that force their flight are—for the most part—anthropogenic in origin and—whether they are the result of climate change or of industrial operations, the "environmentally displaced"[6], have not originated the conditions from which they flee, nor have they benefitted from them.
Therefore it would seem that justice would require—at best—the eliminated or at least the modification of the practices that result in the gross human rights violations that affect too many people, from the DRC and Darfur, to Kishmaref, Alaska; from Ecuador and Guatemala to Palestine. In Contrast, Europe is tightening its borders as are the US and Canada, the latter, applying the 1951 Convention literally, with is inappropriate and anachronistic mandates. The Convention was originally designed after WWII, to deal with the individuals and groups displaced and persecuted at that time. It could not have anticipated the displacement of so many people whose plight does not specifically include deliberate persecution on any grounds, the only basis for granting asylum today. Industrial activities that give rise to climate change, or the development activities of "free trade" are not promoted and practiced with the intent to harm or even eliminate persons or communities as "peoples", although that is often the result that follows those activities.
The currently available jurisprudence, such as it is, is primarily related to climate change. For instance, the Petition by the Inuit Peoples (Petition on Human rights-Violations Resulting from Global Warming Caused by the United States, Sheila Watt-Cloutier and others, December 2005), requesting redress primarily from the US Administration under the Bush Administration, was rejected by the Interamerican Court of Human Rights, as there was "no proof that the US had contributed substantially to the glacial melts they were experiencing". However, most Inuit and other people s of the High Arctic are not refugees, in the sense that they cannot (and do not want to) leave their territories.
In contrast, the people of Shishmaref (Kivalina, Alaska) are facing their town sinking into the sea because the protective ice-barrier they had has melted, and the territory and town is disappearing because of global warming. Some San Francisco lawyers brought their case to court, under the law of "public nuisance", but also under "civil conspiracy" on the part of 28 Gasoline and electric companies primarily EXXON, because of the deliberate and well-funded campaign against the existence first, then the harms engendered by, climate change They lost, but the case is under appeal now. The US Corps of Engineers anticipates a cost of over 400US$ mill. to relocate the community elsewhere. In that case, they would indeed be ecological refugees. In addition, by losing their own land, with their cultural/ religious landmarks, they would probably cease to exist as a "people", although the individual inhabitants would be saved.

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[6] Prieu, Michel, 2008, "Draft convention on the International Status of Environmentally Displaced Persons", Revue Européenne de Droit de l'Environment, No.4, p.381

It is necessary to start by pressuring governments to treat those who arrive at their borders in a humane and helpful manner, and to ask judges and courts to interpret existing instruments and cases in a more liberal manner. Finally, and most important, we need to ensure that our representatives at international meeting and the UN are prepared and willing to ask for a much stronger position in this regard. This is perhaps the most important issue in a globalized world: the UN reports, and the documents of its appointed Rapporteurs good as they are, are often unheeded and unenforced, as are its General Comments, following the United Nations Human Rights Committee.

"THE EXPERIENCE OF PREVENTION, INSPECTION AND REPARATION IN THE EVENT OF ACCIDENTS OR DISASTERS INVOLVING ENVIRONMENTAL DAMAGE OF INTERNATIONAL IMPORTANCE"

Branca Martins DA CRUZ

I. La problématique

1. Les désastres écologiques d'ampleur internationale : Quelques exemples
2. Les raisons plus courantes
   - Économiser
   - Obtenir plus de profit
   - Mépris envers les valeurs environnementales
   - Enjeux nationaux et internationaux (mais aussi une certaine impuissance locale, régionale et même nationale qui réclame que l'on agisse sur le plan internationale).
3. L'activité de l'éco-mafia et tous les navires coulés en Méditerranée et en Somalie

II. Les dommages

1. À l'environnement, aux écosystèmes et à la biodiversité
2. À la chaîne alimentaire
3. Aux personnes
4. Aux générations futures

III. La responsabilité

1. Les difficultés d'un régime juridique d'étendue globale
2. Les réponses possibles : L'exemple des 3 paquets de sécurité maritime de l'UE

IV. Conclusions

1. Il s'agit, en grande partie, de vrais crimes contre l'humanité présente et future, auxquels la communauté internationale a besoin de répondre très fermement et avec urgence
2. L'absence des moyens juridiques nécessaires se doit plutôt aux enjeux politico-économiques, voire, à la faible volonté des Etats
3. Il faut stimuler le principe de participation des citoyens, en leur donnant un effectif accès à la justice environnementale aux niveaux local, régional, national et international
4. Il faut donner effectivité au principe pollueur-payeur au plan international-global

5. Indépendamment des Traités internationaux existants, il faut se mettre d'accord sur un Droit international de la responsabilité qui, de façon générale, couvre les dommages causés à l'environnement
6. Il doit s'agir d'une responsabilité civile, autant que pénale, avec des peines fixées selon la gravité des crimes commis
7. La responsabilité des Etats doit aussi être engagée, chaque fois qu'ils n'agissent pas, en ayant l'obligation et les moyens

Résumé : Les désastres écologiques d'ampleur internationale se doivent soit à des accidents, soit à des actes criminels, délibérés, qui cachent un profond mépris envers les valeurs environnementales. La distinction n'est pas toujours facile à faire, puisque, même les incidents que l'on peut considérer d'origine accidentelle sont, pour la plupart, dus à des raisons d'ordre économique, visant à l'obtention de plus de profit, ayant alors à l'origine une action fautive, même si celle-ci est difficile à prouver. Ils font aussi preuve d'une certaine impuissance des pouvoirs publiques, à tous les niveaux : local, régional, national et, surtout, international, qui se manifeste dès lors au stade de la prévention, mais qui est aussi présente au moment de la réaction, quelle soit réparatrice ou répressive. Cette, soi-disant, impuissance a plusieurs causes et les enjeux politico-économiques en sont une des plus importantes, qui rejoint l'absence d'une gouvernance internationale de l'environnement investie de pouvoirs effectifs. La quasi-indifférence devant les agissements criminels de l'éco-mafia, en Méditerrané et en Afrique, dans les années 90, en sont une preuve. L'appareil (national comme international) est lourd et la réaction tardive ou simplement inexistante. Par contre, les dommages sont gros et les conséquences graves, atteignant directement les personnes, l'environnement, les écosystèmes et la biodiversité, ainsi qu'ils portent préjudice aux générations futures, mettant en péril la subsistance même de la Planète et de notre survie.

Alors, une gouvernance internationale de l'environnement s'impose avec urgence, supposant la création d'une entité internationale investie de pouvoirs pour mener des actions préventives, d'inspection et de fiscalisation, ainsi que pour juger et condamner les responsables et les criminels, en cas d'incident ou d'accident écologiques d'ampleur internationale. Cette gouvernance ne peut, non plus, se passée d'un Droit de l'Environnement claire et solide, notamment, en ce qui concerne un Droit de la responsabilité environnementale spécialement conçu pour ces désastres qui mettent notre Planète en danger et qui finissent par toucher gravement toute l'Humanité, générations présentes et futures confondues.

IL CONTROLLO DEL PIANETA DALLO SPAZIO

Roberto Somma, Rosario Vigliotti
Thales Alenia Space

Sommario

La condivisione della medesima risorsa ambientale da parte di nazioni differenti ed il carattere transnazionale dei fenomeni di inquinamento che ne possono compromettere la qualità, hanno sottolineato l'esigenza della dimensione globale nella quale va affrontato il problema. Tale constatazione ha condotto al varo di iniziative e programmi internazionali inquadrati nel contesto dello *United Nations Environmental Program (UNEP)*, avente l'obiettivo di promuovere la presa di coscienza dei vari Paesi sulle diverse tipologie di minacce ambientali e di coordinare l'adozione di adeguate politiche ambientali a livello regionale e nazionale e lo sviluppo delle relative azioni attuative.

Particolarmente rappresentativo per vulnerabilità della risorsa e numero di Paesi su essa insistenti è il caso del bacino Mediterraneo, per il quale è stato varato, già nel 1975, in ambito UNEP uno specifico *Mediterranean Action Plan (MAP).*

L'attuazione della suddetta strategia si è concretizzata in numerosi protocolli, convenzioni e raccomandazioni dedicati ai diversi aspetti della tematica ambientale. Va però sottolineato che il controllo del rispetto di tali accordi internazionali ed, in particolare, l'evidenziazione di eventuali comportamenti illegali, richiede l'accesso ad informazioni e dati elaborati, caratterizzati da oggettività, accuratezza e continuità.

Il progresso tecnologico acquisito, a partire dagli anni '70 dello scorso secolo, nel settore del Telerilevamento ha reso disponibili sensori specializzati nella rilevazione di informazioni su una vasta gamma di fenomeni ambientali di interesse. Tali sensori possono ovviamente essere utilizzati su diverse piattaforme fisse o mobili, ma appare evidente che, nel caso di osservazioni su vaste aree o transazionali, la piattaforma satellitare si ponga come soluzione maggiormente efficace, se non unica.

Nel presente intervento verranno mostrate le potenzialità di alcuni sensori attualmente in attività ed operanti nelle bande spettrali ottiche e delle onde radio in funzione delle finalità dell'osservazione.

CAPITOLO 2

"THE ROLE OF NATIONAL PUBLIC AUTHORITIES FOR ENVIRONMENTAL GOVERNANCE"

LE SYSTÈME DE GOUVERNANCE ENVIRONNENTALE DE L'UNION EUROPÉENNE : DES RESPONSABILITÉS PARTAGÉES POUR LA MISE EN OEUVRE DU DROIT DE L'UNION DE L'ENVIRONNEMENT

THE SYSTEM OF ENVIRONMENTAL GOVERNANCE IN THE EUROPEAN UNION: SHARED RESPONSIBILITIES FOR THE IMPLEMENTATION OF EU ENVIRONMENTAL LAW.

Pia Bucella, Director, Directorate "Legal affairs and cohesion", Directorate General Environment, European Commission

Abstract

It is not by chance that we refer to EU environmental law in the introduction of the third session of the Conference dedicated to the role of national and local authorities in environmental governance. For the European Union, the success of environmental governance lies in close cooperation at all political levels – European, national and local. This cooperation is essential, not only in the context of the development of environmental law, but also in the day to day implementation of that law. In many cases, when local action is necessary, it has to be taken through the use of the tools provided by Union law.

When we talk of environmental law in the European Union we are referring to texts adopted by the European Parliament and the Council since the 70's and the development of a true "European environmental identity". European environmental law addresses for instance the protection of biodiversity with Natura 2000 network but also air quality or public participation in environmental decisions. It is an area in which EU citizens can gauge the benefits brought to them by the European Union. They can see these benefits on a daily basis through the actions of their local authorities – actions such as the establishment of waste collection systems or the construction of waste water treatment plants. In fact today, nearly all aspects of environmental law are addressed and driven by European Union law.

Before asking how this law is applied, it is essential to underline that it is the Member States themselves who elaborate European Union law, acting as co-legislators with the European Parliament.

The Lisbon Treaty reinforces the dialogue between the political spheres at the heart of the Union. An innovative example - and one of the most remarkable

in this field - is the closer association of national Parliaments in the elaboration of Union texts. This is an evolution based on the principle of subsidiarity introduced by the Treaty of Maastricht, whereby decisions are not only taken at a level closer to the citizen but also European level decisions are supported, sustained and reinforced through national level action.

There is then a huge contrast between Union Law and International Law. The former is elaborated by Parties and, essentially, binds Parties together but only Parties. In this area as well, Europe is unique because, for most international texts, the establishment of international conventions means establishing EU law. Such is the case for instance for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. In Union law, this Convention is implemented in Regulation 1013/2006 which implements not only the Basel Convention but also an OECD Decision. The Union and the Member States are Parties to many environmental Conventions in the field of environment and these same Conventions from an integral part of Union Law, as demonstrated by the European Court of Justice in the French "Etang de Berre" case related to water pollution.

The strength of European Union Law lies in the fact that not only is the legislation common to all Member States but also that this same legislation is fully part of Member States' legislation.

In all Courts, all judges in all Member States are judges of European Union Law. Since the recognition of the primacy and direct application of European Union law following the *Costa* ruling, each and every citizen can claim the rights accorded by the adoption of these directives, before any national Court. The role of national Courts is, hence, primordial.

It is true that the Commission has the possibility to take an environmental infringement case before the Court of Justice. We exercise fully this right. Commissioner Poto?nik recently indicated that the application of European Union Law is one of his priorities. involving the infringement of EU law - cannot be dealt with by Brussels. This would counter the subsidiarity principal previously mentioned.

The Commission's Directorate General for Environment has developed links with national judges. We support the Forum of Judges for Environment and many of its members will speak at this Conference. However, following a conference held in Paris under the French Presidency in October 2008 and which brought together 200 judges of the European Union, we were invited to take a step further. In fact, the associations of magistrates and judges expressed a need to reinforce contacts between judges with a view to exploring the practical questions that the application of European Law often poses. It is to this end that we organised, in 2009, and now, in 2010, several workshops, aimed at national judges and prosecutors, on environmental law in the fields of nature and waste.

We realise, today, that national judges are now, more than ever, aware of the need to confront their practices and compare the approaches and procedures in the different Member States. In this respect, the field of environment is fortunate to have these debates between judges on the application of Euro-

pean Union law not only because it is a domain of predominantly covered by European law but also because it is relatively recent and therefore not subject to age old legal traditions. To demonstrate the openness of judges, the Aarhus Convention offers an interesting case-study. Ratified by the European Union, it is an integral part of EU law and it makes access to justice one of the pillars of good environmental governance. If Member States are reluctant to adopt a directive in this area, we note that judges are more open. As such, many judges have come to realise that with a view to equal treatment throughout the European Union, it is necessary to adapt legal procedures to make them accessible to each and every citizen.
The European Union has developed a set of rules that have changed our approach to the environment. Its citizens realise that the protection of the environment has evolved in each Member State in areas such as nature protection, water quality and the treatment of waste. This would not have been possible without the positive driving force of European law.

Il est pleinement justifié que l'introduction de la troisième session de cette conférence portant sur le rôle des autorités nationales et locales dans la gouvernance environnementale puisse être faite par une analyse de la gouvernance dans le cadre de l'Union européenne. En effet, pour l'Union, la gouvernance environnementale repose sur une coopération étroite entre les niveaux européens, nationaux et locaux. Cette coopération est essentielle non seulement pour ce qui concerne le développement du droit de l'environnement mais aussi pour ce qui concerne l'application quotidienne de ce droit. A tel point que dans de très nombreux cas, lorsqu'on doit agir localement, c'est avec les outils du droit de l'Union qu'on le fait. Mais il convient surtout de ne pas avoir une vision pyramidale de la gouvernance environnementale en Europe : il n'y a pas un système européen dans lequel des textes adoptés au niveau de l'Union seraient imposés à des niveaux locaux qui ne feraient que les appliquer. Il y a au contraire des échanges constants entre ces niveaux et ceci aussi bien pour ce qui concerne l'élaboration des règles de droit que pour ce qui concerne leur mise en œuvre.

L'environnement au cœur de l'identité européenne

Rappelons tout d'abord que le droit de l'environnement dans l'Union européenne est essentiellement du droit européen : les textes adoptés par le Parlement européen et le Conseil ont depuis les années 70 façonné une véritable « identité environnementale européenne ». Evoquer cette identité c'est aller au-delà de l'aspect purement juridique des choses et considérer qu'il y a bien un souci de prendre en compte l'environnement qui spécifique aux européens. Il y a une vision commune basée sur la préservation de la nature qui s'est forgée progressivement à partir des décisions prises au niveau communautaire. Toutes les enquêtes menées auprès des citoyens de l'Union font apparaître l'environnement comme un secteur pour lequel ils souhaitent une forte

implication de l'Union[1]. En réalité, en adoptant de la législation en matière environnementale, ce que promeut l'Europe, c'est un modèle de développement pour lequel l'environnement est un des piliers fondateurs[2]. L'émulation en ce domaine joue incontestablement un grand rôle : faisant partie de la même Union Européenne, nous comparons nos performances et si notre pays n'est pas très bien placé, nous prenons conscience de la nécessité de rattraper ce retard. L'intégration des pays scandinaves dans l'Union a renforcé considérablement la prise en compte de l'environnement dans l'opinion publique européenne et dans les politiques de l'Union.

Afin d'illustrer concrètement cette spécificité européenne et cette performance européenne sur le plan mondial, on peut par exemple retenir que le classement établi par l'Université de Yale[3] sur la performance environnementale des pays au niveau mondial place l'Europe en tête : en prenant les pays du G20, les meilleurs indices de performance sont obtenus par les 4 pays du G20 appartenant à l'Union européenne[4]. Il y a donc assurément une volonté européenne d'agir pour l'environnement qui se traduit par des performances spécifiques de l'Union européenne dans ce domaine. Et il convient de remarquer que cette performance c'est construite par des actions menées depuis près de 40 ans.

A compter du début des années 70, le thème « environnement » émerge en même temps que les interrogations sur la croissance économique et ses limites. C'est la conférence de Stockholm en 1972 qui met en place le Programme des Nations-Unies pour l'Environnement. Mais l'Europe n'est pas en reste et elle inscrit à la même époque l'environnement dans ses politiques. Le Conseil adopte le 22 novembre 1973 une déclaration qui constitue un premier programme environnemental pour l'Europe. Et les premières directives (qualité de l'eau, gestion des déchets) sont adoptées dès 1975. On utilise pour cela l'article 235 du Traité de Rome (aujourd'hui article 352 du Traité sur le fonctionnement de l'Union européenne) qui dit en substance que lorsque c'est nécessaire et bien on peut légiférer y compris dans un domaine qui n'est pas prévu par le Traité. C'est ainsi que la fameuse directive protégeant les oiseaux est adoptée en 1979, directive célèbre dans l'Europe entière pour ses effets sur la chasse.

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[1] Voir par exemple les sondages effectués par l'Eurobaromètre
http://ec.europa.eu/public_opinion/archives/eb/eb70/eb70_first_fr.pdf

[2] On rappellera que l'article 11 du Traité sur le fonctionnement de l'Union européenne reprend le texte de l'ancien article 6 adopté par le Traité d'Amsterdam qui précise que : « Les exigences de la protection de l'environnement doivent être intégrées dans la définition et la mise en œuvre des politiques et actions de l'Union, en particulier afin de promouvoir le développement durable. ». L'environnement joue donc un rôle tout à fait particulier dans les politiques de l'Union puisqu'il n'est pas une simple politique à côté d'autres mais qu'il est au contraire une dimension qui doit être prise en compte transversalement.

[3] Voir http://epi.yale.edu/Countries

[4] Dans l'ordre, France, Royaume-Uni, Allemagne, Italie.

On constatera donc que dès que le thème de l'environnement prend place sur le plan international, l'Europe s'en saisit et est depuis cette date, un acteur – peut-être même l'acteur majeur - sur le plan international. En effet, l'Europe porte très souvent au plan international des objectifs ambitieux car elle croit à la règle de droit et au multilatéralisme.
Le droit européen de l'environnement concerne des domaines aussi divers que la protection de la biodiversité avec le réseau Natura 2000 ou que la qualité de l'air. C'est un secteur où les citoyens savent bien ce que l'Union européenne a pu leur apporter. Ils le mesurent en effet quotidiennement, très souvent par les actions menées par les autorités locales comme lorsque celles-ci mettent en place des systèmes de collecte des déchets ou construisent des stations de traitement des eaux usées. De fait, la quasi-totalité du champ du droit de l'environnement est aujourd'hui couverte par le droit de l'Union européenne.
La législation européenne modèle donc notre cadre de vie – eau, nature, déchets, qualité de l'air, recyclage. Mais cette législation dépasse le cadre strict des questions de protection des ressources : elle développe un véritable modèle de gouvernance environnementale en imposant que soient réalisées des études d'impact pour des projets et en posant le triple principe de l'accès à l'information environnemental, de la participation du public aux décisions en matière d'environnement et de l'accès à la justice en matière environnementale. Il n'existe aucun domaine où le droit communautaire soit allé aussi loin dans la définition d'un modèle de société propre à toute l'Union Européenne.
A tel point que la question de l'accès à la justice en matière environnementale reste une question controversée par les États membres qui – bien qu'ils aient pour la plupart ratifié la Convention de Århus de 1998 – ne considèrent pas qu'il soit approprié d'adopter la proposition de directive faite dans ce domaine par la Commission en 2003. De même, l'Union a adopté en 2008 une directive en matière de droit pénal de l'environnement ce qui montre à quel point le droit de l'environnement jouit d'une situation particulière en ce sens qu'il atteint ce qui peut sembler faire partie du domaine le plus réservé des États membres.

Le droit de l'Union est fait par les États membres

Avant de s'interroger sur la façon dont ce droit est appliqué, il convient de rappeler que dans son élaboration même, le droit de l'Union est produit par les États membres agissant comme co-législateurs avec le Parlement européen. C'est qu'en effet, dans le modèle de gouvernance européenne, les lois européennes sont décidées par le Conseil représentant les États membres et par le Parlement représentant directement les citoyens. Les directives de « Bruxelles » sont des textes votés par des représentants des gouvernements élus et par des parlementaires élus au suffrage universel.
Le Traité de Lisbonne renforce ce dialogue entre les niveaux politiques au sein de l'Union. On doit alors citer en exemple une des innovations les plus marquantes dans ce domaine, à savoir l'association plus étroite des Parlements nationaux dans l'élaboration des textes communautaires. Le Protocole n°1 annexé au Traité qui développe les principes posés au paragraphe 3 de

l'article 5[5] du Traité sur l'Union européenne explicite ce rôle des Parlements nationaux qui sont consultés pour tout acte législatif de l'Union et qui peuvent transmettre leurs observations au législateur communautaire. En associant plus étroitement les Parlement nationaux aux étapes en amont du processus législatif, il s'agit à la fois de faire en sorte que l'attention du législateur européen soit attirée sur des aspects liés aux traditions constitutionnelles de chacun des Etats membres ou sur des difficultés potentielles découlant du cadre juridique spécifique d'un pays mais il s'agit aussi que les difficultés éventuelles de mise en œuvre de la législation de l'Union soient identifiées très tôt. Les Parlements nationaux avaient en effet le sentiment d'être seulement mis à contribution au moment de la transposition des directives communautaires, les gouvernements pressant les parlementaires à adopter des textes sur lesquels ils n'étaient que peu intervenus. Il y avait assurément un sentiment de dépossession de la part du parlementaire national qui n'avait d'autre choix que d'adopter des mesures négociées par les gouvernements et le Parlement européen. La nouvelle architecture illustre bien le fait que l'Union n'est pas une structure pyramidale de pouvoir mais doit bien plutôt s'analyser comme un réseau de relations. On rappellera que, sur ce point de l'association des parlements nationaux, la Cour constitutionnelle allemande a par son arrêt du 30 juin 2009 suspendu le processus de ratification du Traité pour permettre la mise en place des textes prévoyant la participation du Bundestag et du Bundesrat.

Nous sommes là face à un développement du principe de subsidiarité tel qu'introduit par le traité de Maastricht : il s'agit non seulement que les décisions soient prises au plus près des citoyens mais également que le niveau européen assiste, aide, soutienne l'action des niveaux nationaux. C'est l'originalité de la gouvernance européenne.

Le contraste est donc grand entre le droit de l'Union et le droit international : celui-ci est élaboré par les Etats et engage essentiellement les Etats entre eux. En revanche, il est clair que l'absence de respect du droit international par un Etat partie à une Convention n'est pas sanctionné avec la même vigueur que s'il s'agit du respect du droit national pour lequel précisément les cours nationales sont chargées de cette tâche.

Mais y compris pour ce qui concerne le droit international, la situation européenne est singulière. En effet, pour la plupart des textes internationaux en matière d'environnement, mettre en œuvre ces conventions internationales,

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[5] Article 5 paragraphe 3 TUE : « (…)3. En vertu du principe de subsidiarité, dans les domaines qui ne relèvent pas de sa compétence exclusive, l'Union intervient seulement si, et dans la mesure où, les objectifs de l'action envisagée ne peuvent pas être atteints de manière suffisante par les États membres, tant au niveau central qu'au niveau régional et local, mais peuvent l'être mieux, en raison des dimensions ou des effets de l'action envisagée, au niveau de l'Union. Les institutions de l'Union appliquent le principe de subsidiarité conformément au protocole sur l'application des priC-239/03, 7 octobre 2004, Commission/France, Rec. p. I-7773

c'est mettre en œuvre du droit de l'Union européenne. C'est par exemple le cas pour la convention de Bâle sur le transfert des déchets : pour l'Union, tout est dit par le Règlement 1013/2006 sur le transfert des déchets qui non seulement met en œuvre la Convention de Bâle mais également une décision de l'OCDE. L'Union est elle-même aux cotés des Etats membres partie à la plupart des conventions dans le domaine de l'environnement : à ce titre les conventions sont parties intégrantes du droit de l'Union comme a pu par exemple le rappeler la Cour de Justice dans le cas de la pollution de l'Etang de Berre en France[6].

Dans le système de gouvernance européen, le rôle des juges est capital

Tout système de gouvernance démocratique fait une place importante au contrôle du juge. Il n'est pas besoin de développer beaucoup cet aspect bien connu : en absence de contrôle par une juridiction des engagements pris, ceux-ci sont livrés au bon vouloir des pouvoirs publics. C'est tout le sens de l'engagement de l'ICEF en faveur d'une Cour internationale pour faire respecter le droit de l'environnement.

Mais je voudrais souligner un aspect particulier à la construction européenne qui peut expliquer pourquoi sur le plan international l'Union européenne est si attachée au respect d'engagement multilatéraux et soutient l'approche de l'ICEF.

Notre modèle européen est en effet fondé sur le respect de la règle de droit. Chaque État membre a sa propre tradition constitutionnelle mais en intégrant l'Union, il accepte de donner au droit de l'Union la primauté sur le droit national. L'intégration européenne est donc fondée sur une intégration juridique. La règle de droit est en effet un moyen de permettre, dans une Europe comprenant aujourd'hui 27 États membres et 23 langues officielles de disposer d'un même référentiel commun et explicite : les lois européennes. La forme même du droit positif – un texte explicite duquel découle des obligations précises – est un moyen de sceller un pacte entre les citoyens et l'Union car ces textes doivent se retrouver intégralement dans le droit positif de tout Etat membre.

Ce qui fait toute la force du droit de l'Union c'est qu'il ne s'agit pas seulement d'énoncer des règles en commun mais c'est bien que ces règles s'inscrivent directement dans le droit des États membres.

Dès lors, tout tribunal, tout juge de chaque État membre est un juge du droit de l'Union. Depuis que la primauté du droit communautaire a été reconnue par l'arrêt Costa et que l'effet direct du droit de l'Union est reconnu, chaque citoyen peut se prévaloir devant une juridiction nationale des droits qui lui sont reconnus par des directives adoptées. Ce rôle des juridictions est donc capital.

Certes la Commission dispose d'un pouvoir propre de saisir la Cour de Justice en cas d'infraction au droit communautaire[7]. La Commission a publié le 5

[6] C-239/03, 7 octobre 2004, Commission/France, Rec. p. I-7773

[7] Article 258 et 260 du Traité sur le fonctionnement de l'Union européenne

septembre 2007 une communication « Pour une Europe des résultats – Application du droit communautaire » (COM(2007)502) rappelant sa volonté de faire en sorte que tous les outils à disposition de la Commission soient mis en œuvre pour améliorer l'application du droit de l'Union. La communication inscrit clairement la politique d'infraction dans le cadre plus large de la mise en œuvre du droit de l'Union qui passe d'abord par des mesures relatives à la correcte transposition des directives : cela suppose que la période entre l'adoption d'un texte et sa transposition – généralement de deux ans – soit mise à profit pour préparer dans chaque État membre les modifications législatives nécessaires. Par ailleurs la Commission indique qu'elle traitera en priorité les questions liées à l'exécution des arrêts de la Cour.
La communication de 2007 a été complétée par une communication spécifique au droit de l'environnement (communication du 18 novembre 2008 COM(2008)773 relative à l'application du droit communautaire de l'environnement). Il convenait en effet, sur la base des principes posés par la communication générale de 2007, de préciser comment la Commission s'assurera de la mise en œuvre correcte du droit de l'environnement compte-tenu des spécificités de ce domaine. La communication de 2008 insiste d'abord sur les difficultés propres au secteur de l'environnement : les directives requièrent de la part des États membres des mesures législatives mais elles demandent aussi d'atteindre des résultats. Ceci suppose fréquemment des investissements considérables. On estime ainsi que la directive 91/271/CEE relative au traitement des eaux urbaines résiduaires demandera un effort financier de plus de 35 milliards d'euros dans les années à venir pour les nouveaux États membres. De la même façon, alors que la directive 1999/31/CE concernant la mise en décharge des déchets impose que toutes les décharges soient conformes à la directive à compter du 16 juillet 2009, la mise en place de systèmes de collecte et de traitement des déchets constitue beaucoup plus qu'une simple modification législative. La conformité avec les exigences des directives environnementales passe donc par des investissements importants et l'arbitrage politique entre ces dépenses et celles relatives à d'autres domaines joue parfois en défaveur de l'environnement : la construction d'une station d'épuration ou d'un site d'élimination des déchets sont incontestablement des charges lourdes et des dossiers politiquement sensibles donnant lieu à des contentieux environnementaux et de voisinage souvent virulents.
Le Commissaire Poto?nik a récemment indiqué que l'application du droit de l'Union est une de ses priorités. Mais il est clair que tous les contentieux environnementaux – qui sont souvent des contentieux impliquant le droit communautaire – ne peuvent être traités à Bruxelles. Ce serait assurément une curieuse pratique au regard du principe de subsidiarité évoqué plus haut !
La Direction Générale de l'Environnement de la Commission a depuis développé des liens avec les juges nationaux. C'est ainsi que nous soutenons le Forum des Juges pour l'environnement dont plusieurs membres interviennent dans cette conférence. Mais nous avons souhaité aller plus loin à la suite une conférence qui s'est tenue sous présidence française en octobre 2008 qui a réuni plus de 200 juges de l'Union européenne à Paris. Les associations de

magistrats et les juges présents ont exprimé le besoin de développer les contacts entre les juges afin d'approfondir les questions pratiques que posent souvent l'application du droit de l'Union. C'est ainsi que nous avons organisé en 2009 et en ce début d'année 2010, plusieurs séminaires sur le droit de la nature et sur le droit des déchets destinés aux juges et aux procureurs de différents États membres.

Nous constatons aujourd'hui que les juges nationaux sont plus que par le passé sensibles à la nécessité de confronter leurs pratiques, de comparer les approches et les procédures entre les différents États membres. Le domaine de l'environnement est un domaine privilégié pour ces débats entre magistrats sur la mise en œuvre du droit de l'Union car - comme cela a été rappelé - c'est un domaine d'intervention privilégié du droit de l'Union mais c'est aussi un droit relativement récent, pour lequel il n'y a pas à confronter à des traditions juridiques séculaires. Plus généralement, les juges sont conscients que l'application différenciée du droit européen par les différentes juridictions n'est pas satisfaisant. Ainsi que le soulignait récemment le Vice-président du Conseil d'État français: *«Dans la tâche d'application du droit de l'Union, les techniques contentieuses propres à chaque tradition nationale et l'intensité variable du contrôle juridictionnel sont de nature à introduire des distorsions qui ne sont pas négligeables. (…) Par conséquent, seul l'examen de cas pratiques peut permettre de révéler la réalité des convergences ou des oppositions de points de vue entre juges des États membres. Ce travail d'inventaire ou d'état des lieux est le préalable nécessaire à la réduction d'éventuels malentendus ou divergences pouvant exister entre nous. Notre crédibilité de juges européens est à ce prix.*[8]*»*. L'adoption de directives ambitieuses sans disposer d'une mise en œuvre de la loi européenne rigoureuse sur tout le territoire de l'Union ne pourrait que conduire à la remise en cause de ces textes. Lorsqu'en février 2008, le Conseil d'État néerlandais annule une autorisation de pêche au motif de l'insuffisance de l'étude d'impact sur un site Natura 2000, les entreprises concernées se demandent si les contraintes qu'on leur impose sont les mêmes que celles reposant sur les pêcheurs danois ou allemands. C'est parfaitement compréhensible. De même, il est tout aussi légitime que les acteurs économiques se posent des questions sur l'application uniforme du droit communautaire quand des directives telles que celle sur la gestion des déchets électriques et électroniques ou celle - entrée en vigueur en septembre 2008 - sur le recyclage des batteries et des piles, imposent des obligations fortes aux producteurs de ces équipements.

Pour illustrer cette attitude d'ouverture des juges, on peut par exemple, considérer la situation de la Convention de Århus. Comme cela a été rappelé plus haut, elle a été ratifiée par l'Union et donc fait partie intégrante du droit communautaire et elle fait de l'accès à la justice un des piliers de la bonne gouvernance environnementale. Or si les États membres sont très réticents à adopter une directive dans ce domaine, nous constatons que les juridictions sont plus ouvertes. Ainsi de très nombreux juges font le constat qu'il est

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[8] Colloque sur « Le juge en Europe et le droit communautaire de l'environnement », 9-10 octobre 2008. Introduction de Jean-Marc Sauvé, Vice-Président du Conseil d'Etat français

nécessaire - dans une Union devant appliquer le même droit - que, d'une certaine manière, les procédures juridictionnelles soient adaptées afin que le droit de l'Union soit effectif pour chaque citoyen.
A cet égard, il faut souligner le rôle de plus en plus actif que jouent les associations de magistrats. Il a été rappelé que le Forum des juges de l'Union européenne pour l'environnement a, depuis 2004, permis de rassembler des juges de tous les États membres pour des échanges sur l'application du droit de l'Union. Mais il faut aussi mentionner dans le domaine du droit de l'environnement - qui est pour l'essentiel du droit administratif - le rôle particulier de l'association des Conseils d'États et des Juridictions administratives suprêmes de l'Union européenne[9] et de l'association européenne des juges administratifs[10]. La Commission travaille très directement avec ces associations.
Il apparaît clairement qu'au-delà d'un même référentiel commun aux Etats membres de l'Union européenne, l'application des textes peut être faite de façon très différente si on prend en compte les spécificités des systèmes juridictionnels. L'accès au juge peut ne pas être facile pour des organisations non gouvernementales qui doivent démontrer un intérêt à agir direct. Les règles de charge de la preuve peuvent conduire à ce que les parties contestant une décision administrative se voient confrontées à une tâche insurmontable. Les procédures d'urgence peuvent être appliquées plus ou moins généreusement par les juges nationaux. Ces quelques exemples qui ont été largement débattus dans les séminaires organisés par la Commission avec les juges nationaux montrent que la mise en œuvre effective du droit de l'Union ne repose pas seulement sur une transposition correcte des directives mais qu'elle est fortement dépendante également des régimes de procédure en place dans les Etats membres. Nous pensons à ce stade qu'il est important que les juges eux-mêmes puissent comparer leurs pratiques et identifier ces différences. Chaque système juridictionnel devra trouver ses propres solutions pour permettre une application uniforme du droit. C'est dans le cadre d'un « dialogue des juges » que ces solutions seront élaborées.

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L'Union européenne a su développer un ensemble de règles qui ont modifié les comportements vis-à-vis de l'environnement. Ses citoyens constatent que la protection de l'environnement a progressé dans chaque Etat membre : le développement du tri des déchets, la protection de la qualité de l'eau ou les efforts fait en matière de protection de la biodiversité en témoignent. Cela n'aurait pas été possible sans une dynamique positive dont le droit européen est un moteur. Il convient de faire en sorte que la mise en œuvre de ce droit soit renforcée, que tous les effets des textes adoptés soient pleinement à la disposition des citoyens de l'Union. Il est donc nécessaire afin de franchir une nouvelle étape dans l'application de ce droit que les juges européens soient associés étroitement aux actions que l'Union entreprend dans ce domaine.

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[9] Voir www.juradmin.eu
[10] Voir www.aeaj.org

ENVIRONNEMENT: LES INSTRUMENTS JURIDIQUES

Giovanni CORDINI
Professeur de Droit Public Comparé
Fac. de Sciences Politiques – Section d'Etudes Politiques et Juridiques
Université de Pavia

§1 Le principe du "développement durable".

Les altérations de la nature prennent une importance juridique lorsque l'on peut établir une relation causale avec l'activité de l'homme en termes de rapport juridique. Savigny a défini ce rapport comme "relation entre plusieurs personnes déterminée par une règle de droit". Si on ne tient pas compte du rapport juridique, les concepts de "dommage" et d'"indemnisation" seraient dépourvus de tout fondement. Le droit reconnaît et protège l'intérêt de l'environnement. Cet intérêt s'exprime par le maintien d'un rapport d'équilibre entre l'homme et l'environnement. En partant de la considération que la présence de l'homme constitue déjà en elle-même un facteur de "perturbation" de la nature, le conflit homme/nature peut par conséquent être posé et résolu entre facteurs environnementaux et développement. Cette approche permet d'opposer des propositions raisonnables aux fondametalismes environnamentales et aux extrémismes dont parlait deja Commoner dans son ouvrage "Making Peace With The Planet". Par contre, il est important de reconnaître que le développement et la croissance de l'économie doivent respecter l'environnement . Cette considération est aussi acceptée par le traité de l'Union Européenne avec l'idée de "développement durable" pour l'environnement.

§2 La notion d'environnement n'appartient pas au domaine juridique et sa détermination est necessaire mais problématique.

Le sens lexical du terme "environnement" n'appartient pas proprement au domaine juridique. Le mot se prête à une lecture amphibologique. Le terme environnement est conventionnel et il est adopté pour exprimer des intérêts hétérogènes entre eux: la protection du paysage, la défense des biens environnementaux, l'urbanisme, la lutte contre les pollutions. D'une part, l'environnement peut être vu en relation avec les activités humaines (transformation par l'homme de l'écosphère en technosphère), d'autre part, l'environnement peut être considéré dans domaines particuliers (environnement géographique, géologique, physique, etc…). Les différents sens métaphoriques prennent une importance spécifique: on peut parler en ce sens d'environnement par rapport aux milieux social, culturel et politique. Par

rapport à l'espace les subdivisions de l'environnement sont encore différentes: terre, eau, air. L'environnement se compose toujours d'une variété et d'une complexité d' éléments. Ce "réticule où chaque partie est reliée à beaucoup d'autres", est décrit avec efficacité par l'Organisation Mondiale de la Santé dans la définition qu'elle propose. Cet organisme par ce terme entend l'ensemble des éléments physiques, chimiques, biologiques et sociaux qui exercent une influence importante sur la santé et le bien-être des individus et des collectivités.
Ces distinctions intéressent aussi le juriste du moment que la législation et le système de gouvernent de l'environnement en tiennent compte. D'autres relations s'établissent en fonction des activités humaines; on entend par là les pollutions, l'utilisation et la gestion du territoire et des ressources naturelles. Il s'agit d'activités réglées par une législation très ample. Il peut enfin y avoir des altérations de l'environnement dues à des phénomènes naturels. Le législateur doit tenir compte de ces dernières, aussi bien en ce qui concerne la prévention des risques naturels que comme gestion du danger qui en découle.

§3 Le droit humain à l'environnement ayant pour but de renforcer chez l'homme la "capacité de transcendance".

Le droit naturel représente une conception personnaliste selon laquelle l'attention doit être portée, avec priorité, sur l' être humain. Le système juridique ne peut ignorer la nature et le but de la personne en tant que quid completum, selon l'enseignement de Saint Thomas d'Aquin. L'environnement, du moment qu'il est fondamental pour la vie de l'homme, doit être conservé comme patrimoine de l'humanité et il représente un "bien immatériel unique" qui ne peut être l'objet de propriété individuelle. La protection juridique, au contraire, est assurée aux biens environnementaux et au "système environnement" dans lequel la relation entre homme et biens environnementaux est décisive. Ce rapport n'est plus fondé sur l'antagonisme entre la liberté de l'homme sur le milieu et ses limites. Le maintien d'un équilibre dont dépend la qualité de la vie sur terre est décisif. On peut,en ce sens, parler d'un habitat où l'homme "vit et agit". La conservation des valeurs de l'environnement permet, d'ailleurs, de renforcer chez l'homme ce qu'un courant sociologique définit comme "capacité de transcendance". Cette conception a son importance pour le droit aussi. Le juriste Forsthoff, par exemple, indique la "prévoyance pour l'existence" comme un des devoirs de l'Etat social. Par conséquent, la relation entre l'homme et le milieu reste fondamentale même si on refuse la "réduction utilitariste de l'environnement à une pure et simple ressource". Cette réduction agit en vertu d'une vision de l'environnement qui attribue "une valeur autonome à la nature". La reconnaissance métaphorique de sphères de tutelle, indiquées par l'expression "droits de la nature", peut être représentée juridiquement comme une protection de l'environnement qui s'exprime au moyen de représentation et de pouvoirs fiduciaires. Cette protection est toutefois possible exclusivement dans le domaine du rapport juridique. Les écocentristes aussi admettent que la "constitutionnalisation" du droit de l'environnement a lieu dans la forme des devoirs fondamentaux de l'homme à

l'égard du milieu ambiant, alors que la protection se sert d'obligations générales concernant les droits fondamentaux. Ces obligations sont justifiées par le principe affirmé dans le droit international et repris par le Traité de Maastricht sur l'Union Européenne.Dans ce Traité, on reconnaît que l'expansion économique et le développement représentent un "progrès" uniquement lorsqu'ils peuvent rester soutenables pour l'environnement.
L'aspiration au développement que l'on peut exprimer comme une tendance vers un "nouvel ordre humanitaire international", s'accompagne de la préoccupation soulevée par la "crise de l'environnement", due au conflit entre écosphère naturelle et technosphère créée par l'homme. Pour rencontrer un exemple de la fragilité tennologique de la société moderne on pourrait faire réfèrence aux conséquences globales provoquées par le nuage du volcan de l'Islande.

§4 La protection de l'environnement au niveau global et la "gouvernance environnamentale".

En soutenant l'exigence de protection de l'environnement, il est bon de souligner la globalité du "problème environnement". Pour comprendre le système "environnement", il faut avant tout tenir compte que les "indices interdisciplinaires ou d'interconnexion sont très nombreux". La critique selon laquelle le péché originel du système de réglementation de l'environnement consisterait à suivre la voie stérile de la limitation plutôt que celle de la prévention de la pollution est fort pertinente. On pourrait enfin tenter un rapprochement entre le droit de l'environnement et les droits de l'homme, en admettant que le droit de l'environnement, en tant que droit fondamental de l'homme, possède une dimension spatiale qui embrasse la planète tout entière et un déroulement temporel qui implique aussi les générations à venir.
Les intérêts de l'environnement sont en large mesure liés aux problèmes du développement et ils dépendent des connaissances qui, dans notre ère technologique, sont en continuelle et impétueuse évolution. Le système juridique d'un Etat souverain n'est pas en mesure d'assurer aux ressources de l'environnement de l'humanité une protection adéquate, basée sur une prévention efficace entendue comme une réorganisation des fonctions.
Du moment que les problèmes de l'environnement peuvent comporter une réorganisation des systèmes de coexistence et des appareils institutionnels, la dimension que ces derniers ont atteint engage les Etats à une intense coopération internationale. En effet, beaucoup de facteurs de détérioration écologique se situent sur un plan transfrontalier où ils prennent une consistance cosmique.
Les limites révélées par la doctrine à l'égard du gouvernement de l'environnement et de la coopération internationale aussi peuvent être dépassées surtout par l'intervention de pouvoirs supranationaux. On peut citer à ce propos le projet pour une convention de sauvegarde du droit de l'homme à l'environnement ainsi que les initiatives pour la réalisation d'une agence et d'une juridiction internationales de l'environnement sous l'égide de personnalités de formation diverses, avec une ample présence de juristes.

§5 La protection de l'environnement en droit comparé.

La sensibilité sociale, qui ne cesse de croître à l'égard de la protection de l'environnement, a poussé les législateurs à tracer quelques orientations politiques fondamentales, en les formalisant en des normes de principe insérées dans les textes constitutionnels et les lois fondamentales.

Une première comparaison des textes normatifs permet de rapprocher des concepts exprimés de façon analogue avec des formules topiques qui assument une caractéristique universelle. En des modèles constitutionnels profondément différents entre eux et reflétant parfois des régimes politiques complètement dissemblables, les dispositions de principe concernant la protection de l'environnement révèlent une tendance commune. La protection de l'environnement est considérée comme une des exigences fondamentales pour assurer le bien-être et le progrès de la communauté civile. La comparaison confirme la centralité du "problème de l'environnement", qui a impliqué, dans les différents pays, des modifications dans les institutions (par exemple la création des Ministères de l'Environnement et des Agencies) et l'adoption d'une vaste législation, parfois provoquée par l'application de normes internationales et communautaires. Par conséquent, l'idée suivie dans le droit international semble se confirmer, selon laquelle les ressources de l'environnement font l'objet de protection dans l'intérêt de l'humanité en tant que "patrimoine commun ".

D'ailleurs la situation de l'environnement est différente d'un pays à l'autre et il ne semble pas possible d'assimiler totalement les conditions des Pays du Tiers Monde avec ces pays qui ont une situation économique plus stable ou qui ont de meilleurs perspectives de croissance à court terme. La sauvegarde de l'environnement dans les pays sous-dèveloppées ne peut être assurée qu'au moyen d'un soutien financier considérable et convaincu de la part de l'Occident, en admettant que ces Pays ne possèdent pas les ressources indispensables pour redresser les effets désastreux des politiques poursuivies par les régimes passés et pour entreprendre en même temps des projets de développement totalement nouveaux, où l'environnement ne représente point une variable indépendante. Cette situation confirme la dimension supranationale du thème environnement, mais elle ne permet pas pour le moment d'entrevoir des solutions convaincantes. L'engagement financier peut être certainement conditionné à la considération adéquate de l'impact environnemental des projet de développement qui béneficient d'une contribution. Le résultat toutefois serait d'une efficacité douteuse s'il n'etait pas possible d'exercer aussi un contrôle sur la réalisation des oeuvres et sur leurs effets. A ce propos, il serait utile d'instituer une autorité supranationale appropriée chargée de coordonner les interventions et d'en vérifier la réalisation en comptant sur sa compétence et sur son prestige mais en mesure aussi d'agir de façon totalement indépendante vis-à-vis des gouvernements de ces pays.

§6 Considérations finales

Certains thèmes de théorie générale sont apparus d'abord. Une définition juridique de l'environnement peut être accueillie de façon conventionnelle soit

par la doctrine soit par la jurisprudence suivant la considération, qui est utile au juriste, de proposer une construction unitaire des problèmes de l'environnement. D'autre part tout le monde est d'accord pour reconnaître que l'environnement constitue un habitat. Ce dernier a une dimension qui lui est propre et un équilibre qui lui appartient et qui font qu'il ne peut être vu en fonction uniquement naturaliste ni qu'il ne peut être limité à un fait esthétique. Dans l'ensemble de ses ressources, l'environnement s'élève à "intérêt public fondamental" pour chaque collectivité. Une telle conception "in nuce" est déjà présente dans l'ancienne notion juridique de "territoire" conçu comme objet à propos duquel on peut exercer une activité des hommes juridiquement réglée suivant un modèle unitaire. Dans le droit de l'environnement il est donc possible de résumer les différents profils de protection à travers une synthèse descriptive efficace sur le plan didactique. On ne doit cependant pas négliger l'enseignement traditionnel, du moment que la protection de l'environnement, sur le plan juridique, se réalise en fonction d'idées qui ont une signification et un développement autonome dans le droit. On parle donc, par exemple, de "bien", de "responsabilité",de "dommage", de "sanction".
Le problème de l'environnement prend une dimension supranationale en raison des effets transfrontaliers produits par les pollutions et par les autres facteurs de dégradation du milieu ambiant. L'action entreprise par les principales organisations internationales trouve, par conséquent, une totale justification. La conscience du risque grave et actuel, de détériorer ou de détruire des biens de l'environnement - qui sont un patrimoine commun de l'humanité - a fait en sorte que la protection de l'environnement soit l'objet de considérations particulières également dans les textes constitutionnels récents. L'institution d'une autorité supranationale au niveau mondial, capable de répondre à un défi qui atteint des dimensions cosmiques et qui implique toute l'humanité, est une exigence qui se fait de plus en plus insistante. L'attribution d'un pouvoir supranational à un tribunal international de l'environnement, institué auprès des Nations Unies n'est pas une proposition utopique dès lors que l'on discute à ce propos sur la base de projets concrets. Déjà cette perspective met en cause des organisations institutionnelles existantes et qui sont le résultat d'un processus historique où le changement est une donnée inéluctable. Il se manifeste ainsi une tendance à tracer, pour ce qui est de l'environnement, un "droit qui soit valable pour tous les hommes", ainsi que cela semble se réaliser, avec beaucoup de difficultés dans le domaine des autres droits humains fondamentaux et inviolables.

NATIONAL REPORT

REPORT GERMANY
THE ROLE OF NATIONAL ADMINISTRATIVE AUTHORITIES

Dr. Jochen Ritter
Federal Ministry for the Environment, Nature Conservation and Nuclear Safety Division ZG III 4, Strategic Aspects of Environmental Legislation, Environmental Assessment Legislation, Resource Conservation Legislation

1. Relationship with business

Relationship Government and Public Administration with business world
As required by democratic and constitutional principles, there is organisational separation between Government and Public Administration on ths23 e one hand, and the business world on the other. Regulations affecting the basic rights of citizens as anchored in the Constitution must be adopted by legislators who have been elected by the people. Ultimately, however, the Government and the administration that reports to it derive their legitimation from the outcome of democratic elections. Having said that, there are overlaps, crossovers and relations between the public and private sector in certain areas. The Government itself participates as a player in economic life in a variety of ways: through public administration, through Governmentowned companies, and through the purchasing of products.
One political objective of every Government must be to promote economic development and hence general prosperity. This is not at odds with the parallel objective of protecting the environment, resources and the general foundations of life. Rather, the German Environment Ministry feels that good environmental policy is also good economic policy. Different instruments are selected in order to pursue these two objectives. The key to the success of both economic and environmental policy lies in the intelligent use of the available governance instruments.

"Command and control", economic instruments, voluntary agreements
Traditionally, German environmental law has tended to be characterised by "command and control" mechanisms. Over the past 20 years, however, a growing number of other mechanisms have likewise been incorporated into environmental legislation, partly as a result of the provisions of European environmental law.
Currently environmental policy is based on a mix of instruments comprising both regulatory and economic mechanisms, as well as innovative political and social elements. Examples of the latter include consulting civil society on polit-

ical decisionmaking, binding voluntary commitments by industry, and new decisionmaking structures in crosssectional Federal Government bodies such as the State Secretary Committee for Sustainable Development. Economic instruments such as emissions trading utilise the market to achieve environmental policy goals. Product labelling creates an incentive for consumers to adopt ecofriendly habits, for example in the field of energysaving.
Additionally, in future, a significant role will be played by regulatory provisions. Binding environmental regulations ensure legal certainty and guidance for all parties involved, and compliance with such provisions can be reliably guaranteed by regulatory law. In legal terms, there is almost no more effective way of protecting man and the environment, and limiting risks in accordance with technical progress.
The ambitious targets and requirements formulated by environmental law generate innovative momentum for environmentally friendly technologies and products. At the same time, they also lend important impetus to investments. The use of socalled voluntary commitments and other cooperative instruments should likewise be measured against this yardstick. Such measures have a valid place in the instrument mix, but they must be expediently designed and applied. Experience has shown that voluntary instruments are not always appropriate or successful. They are not usually appropriate for averting threats; in such cases, direct responsibility must rest with the state. The specification of clear, binding objectives and the existence of effective review mechanisms and penalties are decisive for the success of voluntary commitments.

Penalties for environmental crimes
Penal provisions are likewise indispensable in the mix of instruments for environmental law, although their practical relevance is very limited in Germany. Nevertheless, the deterrent effect associated with the threat of criminal proceedings should not be underestimated.

"Polluter pays" principle
The "polluter pays" principle is fundamental to German environmental law and has been implemented almost consistently throughout all areas: For example, anyone who causes environmental damage as a result of inadmissible air emissions will be liable under the polluter pays principle. Another illustration of this principle is the fact that the costs of licensing procedures must be borne by the applicant.

"Help desks" and simplification of procedures
Companies receive various forms of assistance with licensing procedures. For example, the authorities have an obligation to advise applicants. There are also a number of selfgoverning bodies within industry, such as the Chambers of Industry and Commerce and the Chambers of Skilled Crafts, which are likewise able to offer advisory services. The EU Services Directive[1] also played a

[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 about services in the internal market.

major role in helping to simplify licensing procedures for companies. This Directive states that serviceproviders may carry out licensing or notification procedures via "points of single contact".

New initiatives
One example of a recent initiative by the German Government in which economic development and environmental protection go hand in hand is the "Environmental Technologies Masterplan". The German Government is hoping that this broadbased instrument will enable it to selectively harness the major economic potential of environmental technologies on behalf of the German economy, and intermesh its environmental and innovations policies even more closely than before.
Core elements include research subsidies, the transfer and dissemination of new technologies, improvements in the areas of education and training, and support to innovative SMEs, particularly in the field of international cooperation. For example, the Federal Research Ministry has budgeted more than 250 million Euros to fund four innovation alliances focussing on climate protection. This year and in future years, the German Environment Ministry will be making over 100 million Euros available for research and technology development as part of its divisional responsibility for renewable energies. In the area of resource efficiency, the Federal Research Ministry provides financial support to innovative technologies and techniques in sectors that consume large quantities of raw materials, such as the metals industry. Linked to this, the "Resource Efficiency Network" has been devised to encourage the spread of innovations. This network combines knowhow and experience on resource-conserving production, products and management, and is used for mutual information and organises exchange

2. Relationship with civil society

Information, participation of the public, legal redress
Even under earlier provisions that preceded the influence of European Directives, public involvement played an important role in decisionmaking processes relating to environmental law. In recent years, however, EU and international law have strengthened the role of civil society in general in the field of environmental protection. This applies in particular to the adoption of plans and programs, and to the licensing of infrastructure projects and industrial facilities which affect the environment, as well as other environmentrelated projects.
Particularly important in this regard is the UN ECE Convention, agreed in Aarhus (Denmark) on 25 June 1998 (Aarhus Convention).[2] The Convention aims to strengthen access to environmental information, public participation in environmentrelated procedures and access to the courts and justice in envi-

[2] UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

ronmental matters, and thereby help to protect the environment and improve environmental quality. The European Union ratified the Convention on 17 February 2005. It was subsequently ratified by Germany on 9 December 2006. At the same time, its obligations were transposed into national law, where not already covered by earlier laws.

The Convention is comprised of three regulatory areas, also known as pillars:

1. Access to information,
2. Public participation in decisionmaking, and
3. Access to justice.

The Aarhus Convention[3] states that civil society in Germany has a right to access the environmental information held by the public authorities. Furthermore, Article 5 of the Aarhus Convention states that the environmental s23 authorities have an obligation to store, update and make available to the public the information needed in order to enable them to carry out their duties. Such information increasingly takes the form of electronic data. Furthermore, the authorities have an obligation to actively disseminate the information in their possession.

The second pillar of the Aarhus Convention essentially regulates public participation in certain environmentrelated decisionmaking processes[4]. It stipulates that the public concerned must be consulted prior to licensing any activities that may have significant effect on the environment. Furthermore, in accordance with other provisions of the Convention, the public concerned must also be invited to participate in environmentrelated plans, programmes and, to a lesser extent, policies.[5]

According to the provisions adopted by Germany in implementing the Aarhus Convention, recognised environmental associations have an important role to play in environmental protection. These provisions state that such associations have the right to participate in environmentrelated decisionmaking procedures, especially if the association's activities as set out in its statute are affected by the procedure.

Recognised environmental associations also have the right to challenge the licensing of infrastructure projects, industrial facilities and other environmentally relevant projects before a court of law.

List of recognised environmental associations

Up until March of this year, there were various different procedures in place in Germany for the recognition of environmental associations, an older procedure under the Federal Nature Conservation Act and a more recent procedure under the Environmental Appeals Act created during the course of implementing the Aarhus Directive. As a result, in the past there were also various different lists of recognized environmental associations. The various different recognition procedures will now be merged under an Act that entered into

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[3] Article 4 of the Aarhus Convention.
[4] Article 6 of the Aarhus Convention.
[5] Article 7 of the Aarhus Convention.

force in March of this year. Consequently, in future there will be one official list of recognised environmental associations.

System for recognising environmental associations
Recognition generally occurs independently of any specific administrative or court proceeding in which the environmental association might wish to participate. However, there is also a casebycase system for the recognition of foreign environmental associations, and in such cases, recognition is not a prerequisite for challenging the licensing e.g. of an industrial facility. Instead, in such cases, in deviation of other competency regulations, the court responsible for hearing the case may also rule on the matter of recognition.

Right to healthy environment
The human right to a healthy environment is not currently anchored in the European Convention on Human Rights (ECHR). There has been a proposal to add an additional protocol to this effect to the ECHR, but it remains to be seen whether this proposal will succeed. Similarly, the constitution of the Federal Republic of Germany (Basic Law) does not contain any such fundamental right. However, Article 2, paragraph (2) of Germany's Basic Law regulates the right to life and physical integrity. Accordingly, every individual living in Germany has the right to protection from health impairments caused by environmental pollution. Additionally, Article 14 of the Basic Law guarantees the protection of property, which also includes protection associated with impairments caused by environmental pollution.
Environmental protection as a constitutional objective is also anchored in Article 20a of the Basic Law.

> "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order"

Such a definition of a constitutional objective has a triplefold action: It is aimed primarily at the legislator, who has an obligation to uphold environmental protection and to incorporate this and other considerations into national legislation. Secondly, the provision may be consulted when interpreting civillaw standards; as such, the provision may affect the work of the authorities and courts. Thirdly, definitions of constitutional objectives also guide the exercising of discretion; insofar as the law grants the authorities discretionary scope, they are obliged to consider the protection of the environment and the natural foundations of life.

3 Administrative acts and procedures

Integrated environmental permits
As previously mentioned, environmental law in Germany is regulated by individual Acts regulating specific issues. Many of these Acts focus on the protection of

individual environmental assets, such as air, water, soil and nature. At the same time, the individual licensins23 g procedures make provision for assessments that are designed to account for the interactions between individual environmental assets. Licensing under immission protection law is one such example. Although originally conceived to protect against environmental impairments associated with air pollution, when assessing the licensing conditions, allowance must also be made for interactions with other protected assets. This material integration is also complemented by procedural integration: where other licences are required in addition to a licence under immission control law for the construction and operation of an industrial facility, such licences are combined into a single act. Licensing under water legislation, where applicable, is the only exception to this rule. In this way, parallel licensing procedures are coordinated with one another in order to avoid undesirable interactions and contradictions.

Modifications of authorisation procedures
Since the midNineties, a series of legislative and administrative measures have been introduced with the aim of accelerating licensing procedures. Essentially, four strategies have emerged:

- Targeted measures have been introduced to improve communication and coordination between the process participants (e.g. introduction of a compulsory application conference).
- Processing and participation deadlines have been introduced (in immission protection law procedures, for example, the decisionmaking deadline is generally 7 months).
- Participatory powers by certain authorities have been reduced (this strategy is particularly questionable from an environmental viewpoint).
- Complex licensing procedures have been replaced with simplified forms (e.g. procedures that exclude public participation).

Recent studies indicate that overall, these various different measures have produced the desired success. In recent years, licensing procedures have become significantly shorter in duration.

Effectiveness of EIA and SEA
It is difficult to gauge the effectiveness of the environmental impact assessment (EIA) and strategic environmental assessment (SEA). In both cases, a meticulous assessment of environmental impacts is intended to avoid or minimise impairments to the environment wherever possible. Accordingly, the EIA and SEA have a certain intensifying effect, but are nevertheless no substitute for exacting material requirements visàvis environmental protection for the preparation of plans and programmes and the licensing of projects.

"Service Meetings"
If the competencies of several authorities are affected by a project for which an application has been submitted, they will collaborate when carrying out the

licensing procedure. This is prescribed by the EIA Directive[6] and the IPPC Directive[7] for large projects with a high degree of environmental relevance. The EIA Directive's provision is particularly important regarding the scoping: If the developer so requests or if the authority deems it necessary, the competent authority gives an opinion of the content and extent of the documents to be submitted. Prior to such notification, the competent authority gives the developer and the authorities whose environmentrelated competencies are affected by the project the opportunity to discuss the matter. Such discussions could also be described as "service meetings". There are also many other occasions for meetings involving various different authorities, both with and without a specific basis in law.

4. Controls

Execution of controls, criteria for planning and coordinating controls
In accordance with Germany's federal structure, the enforcement of environmental law is essentially the responsibility of the Länder. The performance of monitoring measures depends on the particular circumstances and requirements of the individual Länder. In the 23 case of large industrial facilities with a high level of environmental relevance, regular controls will be carried out by local enforcement officials, whereas in the case of smaller or less hazardous facilities, this is seldom the case. In the case of very small facilities which are exempt from licensing under environmental law, the standard practice is to only carry out controls as and when prompted by a specific occasion.
The selfmonitoring and reporting duties delegated to the operators of facilities exert an important control function. For example, the operators of facilities subject to licensing under immission control law are required to measure their own emissions. Depending on the nature of the facility, these measurements must either be carried out continuously or at specified intervals. There are also requirements governing the calibration of measurement instruments. The measurements and calibrations must be carried out by reliable experts who are proven to possess the requisite expertise. The facility operators must report to the supervisory authorities on these measurements and calibrations. Germany has also implemented the requirements of the Aarhus Convention and the PRTR Protocol[8] regarding the creation of a Pollutant Release and Transfer Register [PRTR] together with the relevant regulations at EU level[9-10]. The requisite

[6] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC), amended by Council Directive 97/11/EC of 3 March 1997 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.
[7] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.
[8] Kiev Protocol on Pollutant Release and Transfer Registers.
[9] Regulation (EC) 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.
[10] Act Implementing the Protocol on PRTRs to the Aarhus Convention.

Act in this connection entered into force on 13 June 2007.
The PRTR is a register of pollutant emissions into the air, soil, waterbodies and (via the sewer system) external sewage treatment plants, as well as via hazardous and nonhazardous waste disposal. It comprises 91 pollutants that are major contributors to air pollution, climate change and waterbody contamination. The Register only lists pollutants that exceed a specified emissions threshold. This is not a limit; the threshold value merely serves to obviate the need for reporting obligations for smaller facilities or minimal pollutant volumes. Th3 e Register covers large industrial facilities such as incineration plants, the metals industry, chemicals industry, waste incineration, landfills, paper manufacturing, food production, intensive animal farming etc. Industrial facilities in Germany generally hold valid official licences with respect to their emissions, and are regularly monitored to ensure compliance with the regulations.

Do environmental information systems fail to reach the ordinary citizen?
It is fair to say that most ordinary citizens do not have the time or inclination to read the information published within the framework of the PRTR on a regular basis. However, this does not necessarily mean that the environmental information system falls short of its objectives. Even the obligation to submit information has a disciplinary effect on companies. The majority will be keen to want to avoid any infringements of the law, because they would then be required to report them. The information collated within the framework of the PRTR is particularly important if an incident does occur. In such cases, ordinary citizens will also be interested in such information if it affects them.

5. Final Assessment

Are the results obtained so far satisfactory?
Germany boasts a number of successes in environmental policy and environmental administration. However, in Germany as in other countries, we cannot afford to be complacent; environmental protection is always under threat from competing interests. Traditionally, policies aimed at protecting the environment are open to the accusation that they hinder economic development. In fact, the opposite is often true. Nevertheless, this prejudice stubbornly persists. If we were asked to name one sector in which the results remain unsatisfactory, agriculture would be the first area that springs to mind, for a number of reasons. Firstly, agriculture as a sector is particularly reliant on the use of nature, and is therefore readily prone to conflict with environmental assets, and in particular, with the objective of biodiversity. Secondly, the potential for innovation in agriculture is rather limited. While innovation has helped the German economy to successfully gain a competitive advantage in many other areas, it is not generally an option in this segment. Farmers are exposed to exceptionally fierce international competitive pressure, which makes them particularly intolerant of ecologically motivated restrictions. Thirdly, farmers in Germany are very well organised and therefore very successful at asserting their interests.

Deficit in the actual enforcement?
The public administration in Germany is under constant pressure to cut spending. Our colleagues in the Länder environmental administrations complain that they are continuously being pressurised to make staff cutbacks. Although the environmental administration in Germany is undoubtedly comparatively wellstaffed by international comparison, there is growing criticism that the proper functioning of the enforcement system is under threat. To date, however, we have been spared any spectacular failures in the system.

Adoption of best technologies
Germany feels that legal obligations to comply with BAT[11] standards are a particularly suitable instrument of environmental governance. In this area, the existing requirements under national law exceed the requirements of EU and international law. Germany would therefore welcome a broadening of the requirements in this regard.

Strategy for improving urban air quality
Based on the provisions of EU Community law[12], German environmental authorities are obliged to prepare air quality plans, an obligation which is met. A few years ago, many cities were finding it difficult to comply with the fine dust limits. However, this problem has since been addressed. Many cities have set up socalled environment zones, which motorised vehicles with particularly high levels of fine dust emissions (usually older vehicles without particle filters) are banned from entering. These concepts are starting to take effect.

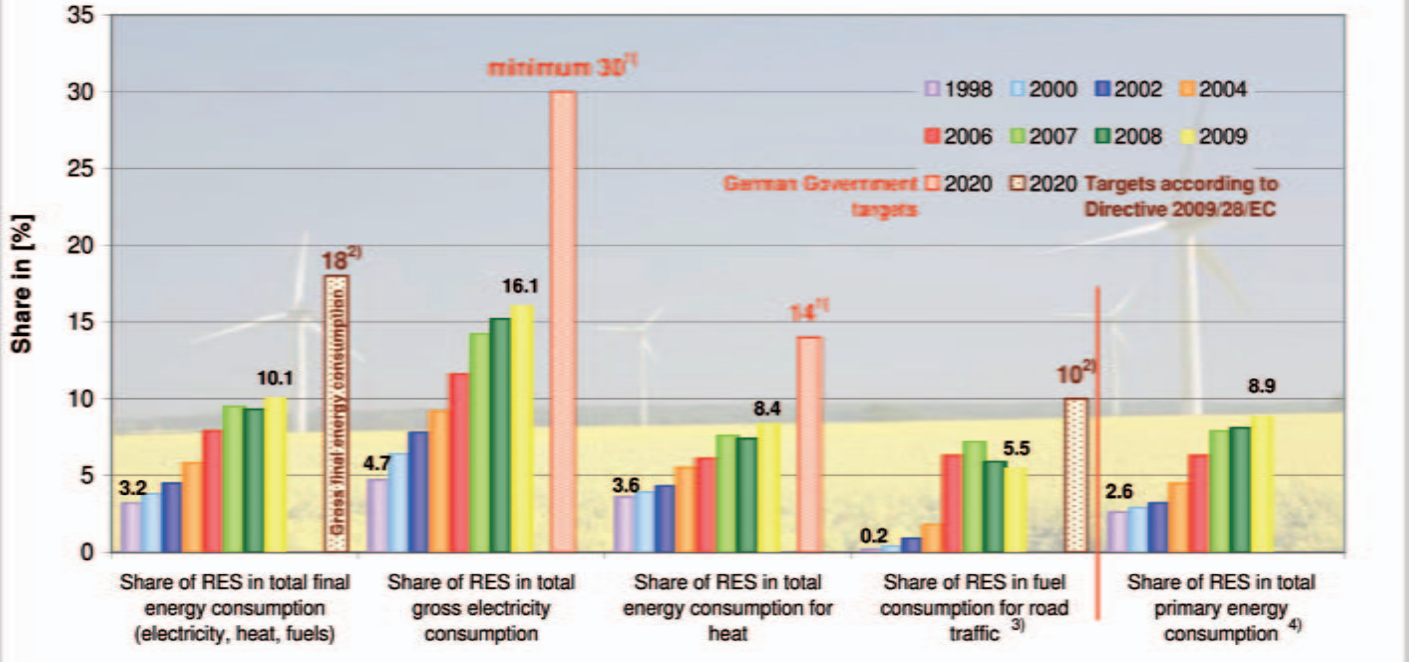
Waste recycling
Germany can claim considerable success when it comes to the involvement of its citizens in waste recycling, because the German people are very meticulous about separating their waste They make a careful distinction between (predominantly plastic) packaging waste, paper/board, and other waste. We can therefore justifiably claim to be "waste separation champions". Measures to encourage people to modify their consumption behaviour are likewise showing signs of progress. For example, there are a growing number of shops selling only organic produce. Nevertheless, there is still plenty of scope for improvement.

Energy efficiency and alternative energy sources
Germany is an international leader in the field of energy efficiency. According to figures supplied by the International Energy Agency, Germany, together with Japan, is among the elite group of industrialised nations that achieve a high

[11] Best Available Technique.
[12] See Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 an ambient air quality and cleaner air for Europe, which is a compendium of Council Directive 96/62/EC, Council Directive 1999/30/EX of 22 April 1999 and Directive 2002/3EC of the European Parliament and of the Council of 12 February 2002.

economic output with a comparatively low energy input. Germany owes this success to its extensive expertise in the field of energy efficiency. Since 1990, primary energy consumption 3 has actually fallen in absolute terms, despite a rising GNP. Spurred on by these achievements, the German Government has set itself particularly ambitious targets here. While Directive 2006/32/EC requires Member States to reduce energy consumption by a total of 9 percent over a period of 9 years (compared with a reference period, which in Germany's case is the average of the years 20012005), the German Government has set itself the target of doubling overall energy productivity compared with 1990. This means that by 2020, only half as much energy per unit of GNP should be consumed as in 1990.
Germany is equally ambitious in its plans to increase the use of renewable energies. Under Directive 2009/28/EC, Germany is obliged to increase the share of renewable energies to at least 18 percent of total energy consumption by 2020. In 2009, this share was 10.1 percent. Germany is therefore well on the way to meeting its targets, as illustrated by the following chart.

Renewable energy sources as a share of energy supply in Germany



RES - Renewable Energy Sources; [1] Sources: Share of total final energy consumption for electricity: Renewable Energy Sources Act (EEG 2009), 25.10.2008; share of final energy consumption for heat: Renewable Energies Heat Act (EEWärmeG), 7.08.2008; [2] Source: EU-Directive 2009/28/EC on the promotion of the use of energy from renewable sources, target for the share of energy from renewable energy sources in gross final consumption of energy and of the final consumption of energy in transport; [3] Total consumption of engine fuels, excluding fuel in air traffic; [4] Source: Working Group on Energy Balances (AGEB); Source: BMU-KI III 1 according to Working Group on Renewable Energies-Statistics (AGEE-Stat); Image: BMU / Brigitte Hiss; all figures provisional

The Federal Government is working out an energy concept, which has the objective to show the way to an age of renewability. Thereby energy efficiency is a key issue, not least to reduce the energy requirement. In the preparatory state the Federal Government examines, in which way climate protection objectives (40 % decrease of greenhouse gases until 2020 and at least 85% decrease until 2050) can be accomplished. It is planned to finish the energy concept in autumn 2010.

Occupation of new places in the countryside
One highly topical aspect of German environmental policy, and an issue which has been rather neglected in the past, is "land consumption". Although population figures in Germany are declining, approximately 100 hectares of land per day are used for human settlements and transport, with a slightly downward trend. In other words, previously undeveloped agricultural land, such as arable land or grassland, is being transformed into residential, transport and industrial land. Land use necessitates complete or partial sealing, i.e. the covering of the soil with structures such as roads, paths, houses, commercial and industrial facilities. Sealing entails a complete loss of soil function and destruction of the soil, because all soil formation and metabolic processes are halted. The increase in land use for human settlement and transport also leads to growing dissection and fragmentation of the landscape. This has multiple harmful effects, including an adverse impact on biological diversity. Mindful of this fact, the German Government has set itself the target of reducing the use of unsealed land to 30 hectares per day by 2020.

Organic farming
In 2007, 5.1% of all agricultural land was farmed in accordance with organic principles. The German Government hopes to further increase this share. However, although the share of organically farmed land increased continuously between 1994 and 2007, stagnation now appears to have set in, prompted to a certain degree by the current competition for agricultural land, which is exacerbated by the support given to the generation of renewable energy sources from biomass (see above).

Technological advances
Germany is a world leader in the development, production and distribution of environmental technology In 2007 alone, Germany produced potential environmental and climate production goods valued at EUR 69.5 billion. This represents an increase of EUR 22.1 billion, or more than 30 percent, compared with 2002. Environmental and climate protection goods include air pollution control filters, sewage and waste treatment facilities, and machinery and plant for the use of regenerative energy sources, such as solar cells and wind turbines. These products account for 5.3 percent (2007) of all industrial goods manufactured, and the trend is rising.
German companies have a share of around 16 percent of global trade in environmental technology. USA follows with a share of 14.9 % and Japan with 9.2 %. Germany is also a world leader in patent registration, responsible for around 23 percent of all environmental technology patents registered at the European Patent Office each year. The German Government will make every effort to ensure that these successes are perpetuated in future.

REPORT INDIA QUESTIONNAIRE

M P Ram Mohan,
Fellow (on study leave), Regulatory Studies and Governance Division, The Energy and Resources Institute (TERI), New Delhi, India India Focal Point: IUCN Commission on Environmental Law Research Scholar, School of Law, Indian Institute of Technology, Kharagpur

A. Mechanisms for upgrading to international environmental law

1. Which national bodies monitor the implementation of the important international environmental Conventions? Is the monitoring process open to experts? Do NGOs also participate?
   Ministry of Environment and Forest (MoEF), Government of India. Yes, Yes

2. Have internal coordination criteria been set up for promptly translating international environmental law? Who provides for this? With what results?
   Yes, Ministry of Environment and Forest (MoEF)

3. Does your country actively participate in the Meetings of the Parties to the international environmental Conventions subscribed to?
   Yes
4. Does your country send Reports, on a regular basis, to the Secretariats of the Conventions with respect to the concrete implementation thereof? Who prepares these Reports and according to which guidelines? Is there coordination between the different offices/departments?
   Yes, Ministry of Environment and Forest (MoEF) submits reports as per the respective guidelines of the Conventions. Yes

5. Do government and the judiciary have real knowledge about the international commitments undertaken by your country?
   Yes

6. Is public opinion aware of the international commitments undertaken by your country and, if not, why?

7. Finally, please express your opinion on the overall impact of international environmental law on your country's system.

   To a limited extent, yes. International commitments are undertaken at the national level and translating to local level is always a difficult exercise.

Many of the national legislations like Air Act 1956, Environmental Protection Act 1986, Biological Diversity Act 2002 have been enacted on the basis of international commitments

8. If your country is part of the European Union, please express your opinion on the overall impact of Community environmental law on your country's system.
   Not applicable

B. The role of national administrative authorities

1. Relationship with business:
   - What relations do Government and Public Administration have with the business world?
     As a licensor, regulator and enforcer governments controls the business activities

   - Does Government use "command and control" instruments?
     Yes, eg., Environmental Protection Act 1986 (EPA 1986)

   - Are economic instruments also used? If so, which?
     In a limited way.
     a. Rebate on Water Cess under Water Cess Act,
     b. Bank Guarantees. Some states employ a bank guarantee scheme as a means of ensuring compliance with SPCB directives Subsidies for Pollution Control Installations.
     c. The central and state governments have introduced a number of subsidies for pollution control equipment and treatment installations

   - How is the "polluter pays" principle applied?
     Through judicial interpretations and various national and state polices

   - Are penalties for environmental crimes economically "effective"?
     No. Fines are very meager. EPA 1986 does deal with it but there exist self defeating provisions like provision of penalties to be paid on the basis of already existing laws.

   - Are there dedicated "help desks" for businesses in order to simplify procedures?
     At the local level, there are single window clearances mechanisms.

   - Are there procedures in place for fostering voluntary agreements between government/administrative authorities and individual businesses?
     No

   - Which new initiatives are underway for fostering integration between the economy and the environment?

National Environmental Protection Agency replacing Central and State Pollution Control Boards, Green Tribunal Act

2. Relationship with civil society:
   - What role do the administrative authorities play vis-à-vis the civil society?
     Public participation is envisaged in environmental clearances of projects

   - Is the right to information enforced?
     Yes through Right to Information Act 2005

   - Is the right to participation enforced?
     Yes

   - Is the right to legal redress enforced?
     Yes. Public Interest Litigations are examples

   - What role do environmental associations play vis-à-vis environmental information?
     Advocacy and litigation
   - What role do environmental associations play vis-à-vis participation in administrative procedures regarding the environment?
     Representation for people and providing technical information

   - What is their role in relation to access to justice?
     Legal representation, PIL

   - Is there an official list of recognised environmental associations?
     No

   - Is there a case-by-case system for recognising local environmental associations?
     No

   - Is the human right to the environment of every individual recognised?
     Yes. Part of Article 21of the Constitution Right to Life and Personal Liberty.

3. Administrative acts and procedures:
   - Have authorisation procedures undergone any modifications?
     Over the years several changes have been made. For eg., to Environmental Impact Assessment notification and industrial consent procedures

   - Are integrated environmental permits required? For which activities?
     Technically no. But Consent requirements administered by Central Pollution Control Board and State Pollution Control Boards, and Environmental Clearance (EC) under EIA notification required for projects mentioned therein

- How is the simplification of administrative procedures for businesses proceeding? *EC is now a de-centralized activity. Proposals are a time bound activity under EC* -How effective are the environmental impact assessments (EIA) and the strategic environmental assessment (SEA) of plans and projects?
  Yes. EIA is effective

- Are "service meetings" held among different public administrations?
  Not effectively administered

4. Controls:
   - How are controls carried out and based on which criteria are they coordinated and planned?
     Through technical inspections. As per adherence to compliance requirements

   - According to what sort of timeline? With what sort of reference to individual businesses? Are they purely focused on stopping offences or do they also provide technical assistance? Are they successful?
     Time lines are generally specified under Consent requirements. It covers all identified industrial activities. Mostly stopping offences and occasionally providing technical assistance. Due to limited human and financial capacity these technical inspections are few.

   - Why do environmental information systems fail to reach the ordinary citizen?
     Literacy, administrative procedures, effective information flow, language constraints and lack of coordinated effort by the authorities and local NGOs.

5. Final assessment:
Please express your overall opinion on the capacity of the administrative authorities in your country to operate within the logic of integrating efforts towards effective environmental governance. To do so more specifically, kindly answer the following questions:
   - Are the results obtained so far by your country satisfactory with respect to the objective of good environmental governance?
     Difficult to answer

   - Which sectors are the most inadequately covered?

   - Is there still a deficit in the actual enforcement of environmental law?
     Yes

   - Has progress been made in the drafting of environmental regulations?
     Yes
   - Is it necessary to broaden the legal obligation regarding the adoption of best technologies?

To limited extent. For eg., emission norms for motor vehicles and energy efficiency for electrical appliance

- Is it necessary to establish standards that cannot be circumvented in some sectors? If so, which?
  It is always difficult to have a perfect law

- Is more effective environmental monitoring necessary, even through a system of public consultation on internet?
  Yes

- Is a strategy for improving urban air quality necessary?
  Yes. Local Governments are putting necessary efforts towards this.

- Is it possible to involve all citizens in the compatible consumption of products and in waste recycling?
  Difficult

- Is it possible to contain the occupation of new places in the countryside in order to protect biodiversity in favour of organic farming?
  Possible. Depends on locations in the country

- Is it necessary to improve energy efficiency based on alternative energy sources?
  Yes

- Are stronger financial instruments supporting technological advances in small and medium-sized businesses necessary?
  Yes

- Should local research programmes and pilot initiatives for sustainable development be fostered?
  Yes

C. The role of the judiciary in environmental governance

1. Can the judiciary in your country directly apply international environmental law in its decisions?
   Yes, as long as it is not in conflict with domestic law. Most of the international environmental principles have been made applicable through judicial decisions

2. Can the judiciary in your country directly apply EU law on the environment?
   Not applicable

3. Which are the most significant cases of the application of international environmental law?

The Vellore Citizens Welfare Forum v. Union of India and Others Karnataka Industrial Areas Development Board v. Sri C. Kenchappa and Others Andhra Pradesh Pollution Control Board v. M.V.Nayudu Narmada BachaoAndolan v. Union of India.
M. C. Mehta v. Kamal Nath
T.N. Godavarman Thirumulpad v. Union of India
Essar Oil Ltd v.HalarUtkarsh Samiti and Others.

And many more

4. Which are the most significant cases of the application of EU environmental law?
Not applicable

5. Does the local judiciary receive training with respect to international environmental law?
Yes

6. Are there legal experience exchange programmes for the judiciary in your country, with other countries?
Yes, in a very limited way.

7. Do you think that the role of the judiciary in your country is significant, in respect of the implementation of environmental law in general?
Very much

8. Which obstacles does the judiciary in your country encounter, in respect of the implementation of environmental law?
There are administrative issues.

9. Are judges really independent when prosecuting environmental crimes?
Yes.

10. Do the judges in your country collaborate with the administrative authorities?
To the extent system allows, Yes.

11. Do the judges in your country (ordinary judges, administrative judges, audit judges, constitutional court judges) collaborate with each other, according to the spirit of unity of the jurisdiction?
Yes, as per the Constitution of India

12. Does your country have any specialised Environmental Courts?
Yes, Green Benches in the higher Constitutional courts. National Environmental Appellate Tribunal and the proposed Green Tribunals

13. Which are the most interesting fields of jurisdiction in your country? -

waste in general -polluted sites -hazardous substances -air pollution -water pollution -protection of nature and biodiversity -soil protection -cultural heritage -landscape -environmental impact assessment of single projects or plans and programmes -ordinary and integrated environmental permits and authorisations -participation in proceedings by civil society -information, participation and access -environmental damage -environmental crimes -renewable energy -food security
Most of what is listed

14. Do you think it useful for judges to support governance by promoting joint cultural projects with the government authorities, supervisory authorities, the scientific world and civil society?
Yes. But may be difficult due to separation of powers and the structure of judiciary in India.

15. Which changes/amendments to legal proceedings might cut back costs and waiting times and achieve cost-effective legal decisions?
The enactment of Green Tribunal and constitution of National Environmental Protection Agency (NEPA) like body is a step towards cost-effective and efficient decision making.

REPORT ITALIA
UN SISTEMA A RETE PER LA PROTEZIONE DELL'AMBIENTE: LE AGENZIE AMBIENTALI IN ITALIA

dott. Roberto Caracciolo
dott.ssa Anna Luise
ISPRA

1. Il contesto di riferimento

Le politiche ambientali, come è noto, possono essere molto schematicamente suddivise in tre tipologie:

- politiche basate su "comando e controllo", con la definizione dei limiti all'inquinamento, l'apposizione di vincoli e la disposizione di procedure autorizzative, con la conseguente istituzione di una rete di soggetti finalizzata al controllo della norma;
- politiche incentrate su piani di azione e specifici strumenti e incentivi economici e normativi di settore, rivolti alle imprese e soprattutto all'impresa privata;
- politiche mirate all'integrazione delle decisioni e delle politiche ambientali nelle scelte delle politiche di sviluppo, con lo scopo di modificarne le direzioni e gli obiettivi, in altre parole dando applicazione ai principi della sostenibilità " (da "Ambiente condiviso", Giovannelli et al, 2005)

Naturalmente, queste tre tipologie non si escludono anzi spesso il successo di una politica ambientale è data proprio dalla costruzione di un sistema di *governance* e di controlli basato su di una loro opportuna integrazione con piani, programmi, azioni, strumenti giuridici, istituzioni nazionali e locali con specifico riferimento non solo al sistema ambientale in senso stretto ma a tutti i settori dei sistemi economico e sociale. Ed il concetto stesso di controllo deve essere inteso in maniera estensiva, come l'insieme di quei processi ed attività fra loro fortemente coordinate ed interrelate, rivolte a tutte le matrici ambientali e sorgenti inquinanti, in grado di offrire la loro continua verifica e la costruzione di un sistema complessivo delle conoscenze ambientali per la restituzione alla collettività ed ai decisori politici nonché a tutti gli *stakeholder* informazioni valide e utili. In altri termini, l'efficacia e l'efficienza dei controlli ambientali si deve intendere come un insieme complesso di attività finalizzate alla protezione ambientale in tutti i suoi aspetti.

L'evoluzione delle politiche ambientali in Italia si muove nel quadro tracciato a livello comunitario dal "Programma Quadro Ambientale" nelle sue successive formulazioni che da un concetto più ristretto di protezione dell'ambiente si sono via via considerevolmente ampliati verso un concetto di sostenibilità, ovvero di stretta connessione tra protezione ambientale, sviluppo sociale e

benessere economico. La tendenza sempre più marcata dell'integrazione delle politiche ambientali in quelle settoriali è poi testimoniata dal fatto che la Strategia Europea di Sviluppo Sostenibile, avviata sostanzialmente a seguito delle indicazioni contenute nell'Agenda 21 di Rio de Janeiro, sta diventando sempre più parte integrante della cosiddetta Strategia di Lisbona, ovvero della strategia che l'Unione Europea si è data in merito allo sviluppo ed all'innovazione nei Paesi membri.
In generale, negli ultimi quindici anni si è assistito, a livello comunitario, all'evoluzione della notevole produzione legislativa in materia ambientale anche a seguito di svariate raccomandazioni provenienti dal Parlamento e dal Consiglio Europeo. E' cambiato l'approccio alla definizione delle strategie e dei mezzi per l'attuazione delle normative che, da atti riguardanti specifici settori o matrici ambientali, si sono indirizzate verso metodologie di valutazione e controllo integrato dell'inquinamento, con una crescente attenzione verso i cittadini, per esempio attraverso le norme sul diritto all'informazione ambientale.
Per quanto riguarda i soggetti istituzionali, nel nostro Paese, le competenze in materia ambientale rientrano nelle funzioni "decentrate" attribuite alle Regioni ed al livello nazionale spettano le funzioni di indirizzo nei confronti di regioni ed enti locali. Dunque, è al livello nazionale che vengono definite i criteri generali per i monitoraggi ed i controlli, per l'analisi dei dati, per l'elaborazione di piani e programmi. Allo Stato spetta poi la definizione dei valori limite, dei valori guida, dei livelli di attenzione e dei livelli di allarme nonché la redazione dei piani di azione per raggiungere gli obiettivi fissati a livello europeo.
L'art.117 della Costituzione attribuisce infatti allo Stato la competenza esclusiva sulla tutela dell'ambiente. Tuttavia la Corte Costituzionale ha ripetutamente affermato che l'ambiente non deve essere considerato una sfera di competenza rigorosamente circoscritta e delimitata, bensì una "materia trasversale", un valore costituzionalmente protetto che interseca altre competenze che ben possono essere regionali, spettando allo Stato il compito di fissare ***standard*** di tutela uniforme sull'intero territorio nazionale, non derogabili (quantomeno non ***in peius) d***alla normativa regionale.
In questo quadro, secondo la normativa vigente, le regioni hanno una competenza specifica in materia di programmazione degli interventi specifici, dell'eventuale introduzione di limiti e misure ancora più restrittive, di rilascio di autorizzazioni, di rispetto della normativa e di coordinamento del sistema di monitoraggi e controlli sul territorio. Le provincie hanno funzioni di programmazione molto più limitate mentre hanno competenze specifiche nel campo della gestione di alcune reti di monitoraggio e sulla vigilanza delle sorgenti di emissione civili. Infine, ai comuni spettano rilevanti competenze di emissione di provvedimenti limitativi ed alla definizione di accordi con soggetti pubblici e privati a scala locale, per esempio per in tema di mobilità.
La nascita nel 1994 del sistema della Agenzie Ambientali ha mirato ad assicurare alle pubbliche amministrazioni locali e nazionali organismi operativi scientificamente affidabile e tecnicamente competenti. Ben sedici anni fa, la legge 21 gennaio 1994, n. 61, convertendo con modifiche il decreto-legge n. 496/1993, aveva infatti ridefinito un nuovo assetto dei controlli ambien-

tali, spinta da un referendum popolare che, nell'aprile del 1993, aveva abolito le norme della legge n. 833/1978 che attribuivano agli organi locali del Servizio Sanitario Nazionale i controlli in materia ambientale. Una prima risposta al vuoto legislativo aperto dal referendum è stata data con l'istituzione dell'Agenzia Nazionale per la Protezione Ambientale - ANPA e, da parte rispettivamente delle regioni e delle province autonome, delle Agenzie Regionali (ARPA) e Provinciali (APPA).
Il sistema, istituito nel 1994 a seguito del Referendum sui controlli ambientali, oltre all´Agenzia nazionale conta oggi la presenza sul territorio nazionale di 21 tra Agenzie Regionali (ARPA) ed Agenzie delle Province Autonome (APPA). Esso appare un sistema federativo consolidato, che, con gli oltre 10.000 operatori addetti a livello regionale e provinciale, dovrebbe coniugare conoscenza diretta del territorio e dei problemi ambientali locali garantita da azioni di controllo sulle attività e monitoraggio dello stato delle risorse ambientali, con il supporto tecnico alle politiche nazionali e locali di prevenzione e protezione dell´ambiente.
Il sistema tecnico – scientifico su cui si basa, o si dovrebbe basare, la complessa *governance* dell'ambiente ed il sistema della conoscenza e dei controlli che ne è una delle basi primarie, secondo le intenzioni del legislatore è quindi rappresentato dal cosiddetto Sistema delle Agenzie Ambientali, intendendo con questo termine la rete costituita dall'Agenzia nazionale e da quelle regionali e provinciali.
L'insieme dei compiti affidati al sistema di agenzie ambientali è quindi molto ampio, anche se in qualche caso le attribuzioni risultano piuttosto generiche e non univoche nell'assegnazione, tanto che l'elencazione fatta dal legislatore termina con una formula di chiusura "*qualsiasi altra attività collegata alle competenze in materia ambientale*" .
Da quelle genericità e mancanze di univocità sono derivate poi numerose difficoltà interpretative, soprattutto per quanto attiene alla ripartizione dei compiti tra i diversi soggetti pubblici operanti a vario titolo nel campo della protezione ambientale, tant'è che in fase di operatività non sempre è stata utilizzata la stessa chiave di lettura delle norme.
Il sistema si configura con legami "deboli", basati più su forme di collaborazione e di attività ed azioni a carattere tecnico-scientifico che su legami istituzionalmente riconosciuti. Già la diversa fonte istitutiva (una legge nazionale per l'ANPA, leggi regionali adattate alle specificità locali per le ARPA, la configurazioni come veri e propri servizi della provincia per le APPA) differenzia il sistema istituzionale di riferimento.
Comunque, i compiti fondamentali attribuiti dalla legge n. 61/1994 al sistema delle agenzie e sui quali sembrano essersi sufficientemente consolidate nel tempo valutazioni e letture concordi sono riconducibili essenzialmente a:

- controlli ambientali e la loro rispettiva ripartizione, con l'assegnazione alle ARPA-APPA delle funzioni operative sul territorio e all'Agenzia nazionale delle funzioni, peraltro non meglio codificate, di coordinamento tecnico-scientifico;
- gestione dell'informazione ambientale, ed in particolare del sistema informa-

tivo ambientale, affidata all'Agenzia Nazionale a livello nazionale, con situazioni molto variegate che caratterizzano tale settore a livello territoriale;
- supporto tecnico-scientifico alla pubblica amministrazione, con la possibilità, per quanto in particolare ha riguardato l'ANPA, di sviluppare in modo autonomo collaborazioni, nel senso di fornire supporto tecnico nel proprio ambito di competenza, con tutti i soggetti della pubblica amministrazione, oltre alla istituzionale funzione di supporto a MINAMB;
- controlli ambientali sull'uso pacifico dell'energia nucleare.

2. LA NASCITA E L'EVOLUZIONE DELL'AGENZIA NAZIONALE: DA ANPA AD APAT FINO AD ISPRA.

Dal 1994 ad oggi, l'Agenzia Nazionale ha già cambiato assetto e denominazione più volte passando da un avvio reso più faticoso dal sostanziale disinteresse delle istituzioni politiche, ad una fase di crescita e di affermazione, anche se non del tutto lineare, sino alla sua trasformazione in un struttura strettamente legata al suo Ministero vigilante, il Ministero dell'Ambiente, della Tutela del Territorio e del Mare – MATTM, e da lui fortemente dipendente. Il nome stesso è variato dall'iniziale ANPA ad APAT fino all'attuale ISPRA.

2.1. L'Agenzia Nazionale per la Protezione dell'Ambiente - ANPA

Le prime attività dell'ANPA vengono effettivamente avviate all'inizio del 1995 ed il primo nucleo di risorse è costituito da quelle della DISP, la struttura dell'Ente Nazionale per l'Energia, le Nuove Tecnologie e l'Ambiente - ENEA incaricata dei controlli di sicurezza nucleare e di radioprotezione su tutto il territorio nazionale, così come previsto dalla legge n. 61. La sua struttura organizzativa sarà definita, in via provvisoria, nel febbraio del 1997 e solo a luglio 1997 viene emanato il suo regolamento di organizzazione (DPR 335/1997) che consente, a febbraio dell'anno successivo, la nomina degli organi di governo, ovvero il Presidente, il Consiglio di Amministrazione ed i Direttore Generale. Nel corso dell'anno, il CdA vara la struttura organizzativa. Finalmente, a luglio del 1999 inizia l'operatività effettiva della nuova struttura.
E sempre nel mese di luglio viene emanato il D.Lgs. n. 300/1999, che prevede un ordinamento generale per tutte le agenzie pubbliche che si dovranno configurare come strutture prive del consiglio di amministrazione e dotate di un organo monocratico, il Direttore Generale. Il decreto istituisce peraltro una nuova agenzia per la protezione dell'ambiente, l'Agenzia per la protezione dell'ambiente e per i servizi tecnici - APAT, dove dovranno confluire l'ANPA e parte dei Servizi tecnici nazionali, che diverrà operativa, come vedremo, nell' ottobre del 2002.
Come abbiamo detto, l'ANPA nasce a seguito del referendum popolare che nell'aprile del 1993 ha abrogato le norme che attribuivano agli organi locali del Servizio Sanitario Nazionale i controlli in campo ambientale. La legge n.61/1994, colmando il vuoto legislativo creato dal referendum, ha completato il processo di separazione tra le funzioni amministrative in materia sanitaria e quelle in materia ambientale, iniziato peraltro con la legge 349/1986, istitutiva del Ministero dell'Ambiente. Per lo svolgimento dei compiti tecnico-operativi in materia di protezione ambientale, e in particolare dei controlli, viene previsto un sistema a rete

- che rappresenta un'anticipazione di un vero e proprio sistema federale – formato dall'Agenzia nazionale, l'ANPA, istituito dalla legge stessa, e dalle Agenzie regionali e delle province autonome, le ARPA-APPA, la cui istituzione è richiesta dalla stessa legge 61/1994 rispettivamente alle regioni ed alle province di Trento e di Bolzano, attraverso proprie leggi.

Per quanto riguarda i controlli ambientali sull'uso pacifico dell'energia nucleare, la legge ha trasferito alla nuova Agenzia sia il personale e le risorse strutturali e finanziarie sia le funzioni di controllo sulla sicurezza e sulla radioprotezione che dall'ENEA-DISP: in tal modo, le attribuzioni dell'Agenzia sono estese al di là della stretta protezione ambientale ed svolgendo inoltre in tale ambito funzioni di vigilanza, che non rientrano invece tra i compiti delle Agenzie regionali.

All'ANPA è attribuito anche il ruolo di intessere e rinforzare un sistema di rapporti con svariate istituzioni ed enti, alcuni dei quali specificatamente individuati dalla legge stessa.

Un rapporto privilegiato è senz'altro quello che la lega al Ministero dell'Ambiente, alla cui vigilanza l'Agenzia è sottoposta. Il programma triennale dell'ANPA è predisposto "anche sulla base di apposite direttive del Ministro", espressione che lascia comunque intendere l'esistenza di margini di autonomia anche nella programmazione più generale, fermo inoltre restando il compito del consiglio di amministrazione di predisporre il piano di attività annuale nell'ambito del programma triennale.

Il secondo rapporto privilegiato è quello con le agenzie regionali e delle province autonome, rispetto alle quali la legge prevede che l'ANPA svolga una funzione di indirizzo e coordinamento tecnico, allo scopo di rendere omogenee le metodologie operative sul piano nazionale, funzione che, come si vedrà, verrà impostata come coordinamento tra autonomie.

Vi è poi il rapporto con tutte le amministrazioni e gli enti pubblici, rispetto ai quali l'ANPA, così come nei confronti del Ministero dell'Ambiente, è chiamata a svolgere un'attività di consulenza e di supporto tecnico-scientifico, facendo di ANPA un **organismo multireferenziale**, e non un mero organo tecnico del Ministero dell'Ambiente. Se è vero che, per la consulenza ed il supporto alle amministrazioni diverse dal Ministero dell'Ambiente è prevista la stipula di apposite convenzioni, è anche vero che leggi di settore, come quelle in materia di sicurezza e radioprotezione, stabiliscono forti relazioni funzionali dirette tra l'ANPA ed altri ministeri, mentre di fatto anche per attività di supporto al Ministero dell'Ambiente verranno talvolta previste convenzioni specifiche. Questa impostazione è d'altra parte fondata su una base razionale molto solida: sono diverse le amministrazioni che, non essendo istituzionalmente preposte alle politiche dell'ambiente, possono nondimeno incidere profondamente su questo attraverso l'esercizio delle loro competenze settoriali, o essere condizionate da limitazioni imposte dal rispetto di norme ambientali, ed è pertanto essenziale che anch'esse trovino per questo aspetto adeguato supporto alla loro azione.

Nell'ambito degli interlocutori previsti dalla legge è di particolare rilievo anche la cooperazione con l'Agenzia europea dell'ambiente e con l'Istituto statistico delle Comunità europee (EUROSTAT), nonché con le organizzazioni internazionali operanti nel settore della salvaguardia ambientale.

In questa rete, il ruolo dell'l'ANPA, è stato caratterizzato da una connotazione di ***terzietà*** rispetto allo stesso Ministero dell'Ambiente, istituzione che determina le politiche ambientali, così come quella delle ARPA e delle APPA rispetto al loro specifico riferimento istituzionale. Il sistema delle agenzie è infatti addetto all'esercizio dei controlli, e quindi alla verifica dell'esito di quelle politiche, nonché alla produzione dei dati che debbono fornire alle politiche le basi di conoscenza oggettiva.
Il rapporto con il Ministero dell'Ambiente ha però rappresentato in varie occasioni un punto critico del sistema di referenzialità dell'Agenzia nazionale.
Le strutture ministeriali - anche al di là di una volontà politica favorevole al passaggio delle funzioni tecnico-scientifiche all'ANPA che parzialmente si esprimeva – hanno talvolta opposto una resistenza quanto meno passiva alla cessione di competenze che avevano sino ad allora esercitato, con un effetto tanto più evidente quanto poco incisive erano le indicazioni normative. Un esempio significativo invece di tale passaggio di funzioni è stato il passaggio all'Agenzia, esplicitamente previsto dalla legge, delle iniziative adottate in relazione al sistema informativo ambientale.
Anche per le funzioni di supporto, il Ministero dell'Ambiente ha dato in più occasioni segnali di non considerare sempre l'ANPA quale interlocutore privilegiato.
Per quanto riguarda l'organizzazione e l'attribuzione di risorse, la legge 61/1994 ha attribuito all'ANPA personalità giuridica. Sono stati previsti, oltre al collegio dei revisori dei conti, due organi, entrambi nominati con decreto del Presidente del Consiglio dei Ministri, rispettivamente su proposta o designazione del Ministro dell'Ambiente: il Direttore ed il Consiglio di Amministrazione, quest'ultimo un organo di indirizzo che, anche se soggetto alla vigilanza dello stesso Ministro, rappresenta, almeno sul piano formale, la garanzia di quella *terzietà* che nel disegno complessivo della riforma dei controlli ambientali è caratteristica essenziale dell'Agenzia.
La nomina di tali gli organi, nomine entrambe di livello politico, anche se reciprocamente indipendenti, ha favorito un parziale dualismo tra loro.
L'ANPA è stata organizzata con una struttura basata su cinque dipartimenti tecnici, oltre a un'area a carattere amministrativo-gestionale. I cinque dipartimenti (Stato dell'ambiente, controlli e sistemi informativi; Prevenzione e risanamento ambientali; Rischio tecnologico e naturale; Rischio nucleare e radiologico; Strategie integrate, promozione, comunicazione) erano stati individuati basandosi su una logica che dava priorità alla funzione da svolgere da parte dei singoli dipartimenti, piuttosto che ai temi ambientali, con una visione integrata del sistema delle Agenzie dove la funzione di coordinamento è affidata all'ANPA.
Un aspetto che ha a lungo condizionato l'attività dell'ANPA è rappresentato dalla disponibilità di risorse umane adeguate e dai problemi connessi al trattamento giuridico ed economico del personale. La legge istitutiva ha trasferito all'Agenzia, sin dal momento della sua entrata in vigore, il personale in organico all'ENEA/DISP, la struttura dell'ENEA preposta alla sicurezza nucleare, poco più di 280 unità tra personale tecnico e amministrativo-funzionale, rendendola immediatamente operativa anche se in modo parziale nonchè altri gruppi di personale da enti ed amministrazioni (in particolare, dall'ENEA

dall'Istituto superiore di sanità, dall'ISPESL, dalle unità sanitarie locali e da altre amministrazioni pubbliche).

2.1.1. Il Sistema Informativo Ambientale

Particolare priorità è stata data, come accennato, alla realizzazione da parte di ANPA del Sistema informativo ambientale - SINANET, visto da tutte le agenzie come uno strumento di base per assolvere al loro mandato istituzionale.

I criteri di riferimento adottati nella progettazione di tale sistema sono stati:

- integrazione spaziale della base conoscitiva almeno a tre livelli, europeo, nazionale, regionale;
- integrazione piena tra sistema informativo e sistema dei controlli, come fonte primaria di alimentazione della conoscenza e per l'utilizzo pieno dell'informazione per l'efficace programmazione e attuazione dei controlli;
- interscambio di dati basato su una rete distribuita (autonomia e responsabilità dei poli territoriali), piuttosto che su una rete a stella con una concentrazione di dati e responsabilità al centro (secondo il modello ministeriale di SINA, mai realizzato).

La sua realizzazione è stata condotta in collaborazione con tutte le agenzie territoriali, man mano che queste diventavano operative, e in stretta connessione con il Sistema Informativo Ambientale Europeo, curato dall'Agenzia europea per l'ambiente (AEA).

Grazie a questa impostazione, che è stata oggetto di una specifica *Intesa* Stato-Regioni, si è riusciti a colmare in tempi relativamente contenuti il significativo ritardo esistente rispetto ad altri partner europei, in un settore strategico della tutela dell'ambiente. La disponibilità del SINANET ha permesso al nostro Paese di cominciare a rispondere più adeguatamente alla richiesta di dati derivante da numerose direttive comunitarie: nei documenti di livello europeo, le informazioni e i dati relativi all'Italia erano spesso contrassegnati con la sigla NA, *not available*.

È stato così possibile anche avviare una regolare pubblicazione da parte di un soggetto istituzionale di informazioni sullo stato dell'ambiente in Italia di verificata attendibilità.

2.1.2. La sicurezza nucleare e la radioprotezione

Per quanto attiene alla **sicurezza nucleare e alla radioprotezione,** il passaggio all'ANPA delle funzioni di autorità nazionale di controllo - che aveva finalmente garantito l'indipendenza di quelle funzioni, in precedenza affidate ad una Direzione dell'ENEA, ente gestore di impianti nucleari e quindi soggetto al controllo stesso - ha consentito l'instaurarsi di un diverso rapporto con gli esercenti, con l'individuazione di obiettivi chiari e ravvicinati e la verifica del loro effettivo raggiungimento.

Un secondo effetto dell'attribuzione è stato il reinquadramento dei compiti dell'autorità di controllo nella più ampia prospettiva delle funzioni di un'agenzia di protezione ambientale. Questa rilettura ha portato ad un approccio più attivo non solo nei confronti degli esercenti, ma anche nella diffusione dell'in-

formazione e nel rapporto con le amministrazioni e le istituzioni chiamate, nell'ambito dei rispettivi ruoli, ad operare per la messa in sicurezza degli impianti e dei rifiuti radioattivi presenti in Italia e per la definitiva chiusura dell'eredità delle attività nucleari svolte nel nostro Paese, sino alla loro cessazione avvenuta a seguito del referendum popolare del novembre 1987.

2.1.3. Le azioni di ANPA per l'avvio e lo sviluppo del sistema delle agenzie ambientali

Sin dai primi mesi della sua operatività l'ANPA si è fortemente impegnata sulla concreta **costruzione e sullo sviluppo del sistema delle agenzie ambientali**. Ciò è avvenuto sia attraverso la promozione presso le regioni e le province autonome della istituzione delle rispettive agenzie, sia attraverso l'assistenza alle agenzie stesse nella loro fase di avviamento.

Da un iniziale confronto con le prime agenzie istituite si è definito il quadro entro cui poteva operare il sistema, nel rispetto nel dettato della legge e delle competenze di ciascuna delle parti. La funzione di coordinamento dell'ANPA prevista dalla legge è stata sin da quella fase impostata come un coordinamento tra autonomie, e come strumento fondamentale, funzionale a quella impostazione, è stato costituito, per unanime volontà dell'ANPA e delle ARPA e APPA allora esistenti, il **Consiglio delle Agenzie**, formato dal Presidente e dal Direttore dell'ANPA e dai direttori delle ARPA-APPA, che, dopo i primi, si sono andati aggiungendo man mano che le agenzie venivano istituite dalle singole regioni. Presso questo organismo, che ha avuto poi un'ufficializzazione a livello di regolamento quando l'ANPA, assieme a parte dei Servizi tecnici nazionali, è stata trasformata in APAT, sono state individuate le problematiche prioritarie - alcune del tutto nuove rispetto all'esperienza tradizionale del personale, in gran parte proveniente dagli ex PMP - e per la loro soluzione sono state messe in comune le esperienze esistenti e sono stati creati i primi **gruppi di lavoro interagenziali**. In tal modo si contribuiva ad accrescere la competenza complessiva del sistema delle agenzie in tutto il Paese e ad uniformare le tecniche, di fatto avviando un confronto a livello nazionale quale primo passo per una standardizzazione dei metodi.

In un secondo tempo per la collaborazione all'interno del sistema agenziale è stato varato, con un notevole contributo finanziario da parte dell'ANPA, un **progetto di "gemellaggi"**, mediante i quali le agenzie regionali più solide ed "anziane" hanno dato assistenza alle agenzie di più recente istituzione, con la messa a disposizione delle proprie esperienze sia in campo amministrativo-organizzativo, sia in campo tecnico-scientifico.

Dal 1997, si è svolta annualmente, di volta in volta in una regione diversa ed organizzata da un'Agenzia diversa, una **Conferenza delle agenzie ambientali**, per una rassegna ed un confronto ampi ed esaustivi delle esperienze e delle problematiche affrontate nonché delle competenze sviluppate e dei risultati raggiunti. Tali conferenze hanno evidenti funzioni di dialogo e di cooperazione.

Questa impostazione ha rappresentato, come si è già accennato, una anticipazione di un possibile modello di funzionamento di un sistema federale a rete, ove il centro, oltre a portare il contributo diretto delle proprie competenze ed

esperienze, serve a catalizzare le funzioni ed i risultati conseguti a livello regionale, promovendone l'interscambio e la messa in comune.
Negli oltre otto anni di vigenza della legge n. 61/1994 (gennaio 1994 – ottobre 2002), che ha avuto senz'altro il merito aver riconosciuto la specificità della protezione dell'ambiente e di averle quindi conferito un assetto autonomo rispetto a quelli preesistenti, sono state avviate una serie di azioni per realizzare effettivamente l'architettura generale di un sistema dei controlli che, come detto, rappresenta un'anticipazione di una struttura a rete di impostazione federalista, il cui funzionamento ottimale dovrebbe essere garantito da una bilanciata ripartizione delle funzioni di coordinamento e di quelle operative sul territorio, con un prevalente affidamento delle prime all'ANPA e delle seconde alle ARPA-APPA.
In relazione agli aspetti concernenti il mandato, tra gli elementi che maggiormente hanno contrastato queste positività della riforma dei controlli, impedendole di conseguire a pieno gli obiettivi fissati, si deve porre, come già accennato, proprio l'ampiezza delle funzioni attribuite al sistema agenziale in generale ed all'ANPA in particolare, un insieme addirittura indefinito, in forza della citata norma di chiusura "*in qualsiasi altra attività collegata alle competenze in materia ambientale*". A questa ampiezza di attribuzioni fa infatti riscontro, oltre che una scarsa efficacia delle norme che prevedono il conferimento di strumenti e risorse per l'espletamento dei compiti, una corrispondente mancanza di delimitazione delle competenze di altri soggetti già presenti, a diverso titolo, nel campo ambientale.
Queste due carenze appaiono peraltro correlate. Infatti, proprio la vastità di funzioni attribuite, almeno in via teorica, all'Agenzia ha finito col non consentire al legislatore di indicare con chiarezza poteri che rendano efficace l'attribuzione e l'esclusività che almeno per alcune di esse, nella logica dell'istituzione di un'agenzia ambientale, avrebbe dovuto essere riconosciuta all'ANPA.
Questa prudenza della legge nei confronti di amministrazioni ed enti già in precedenza preposti a compiti afferenti alla protezione ambientale, primo fra tutti il Ministero dell'Ambiente, non è tuttavia servita ad eliminare tutte le difficoltà, ma le ha spesso spostate dalla fase dell'elaborazione legislativa alla fase operativa.

2.2. L'APAT

A distanza di cinque anni dalla sua istituzione e di quattro anni dall'inizio della sua concreta operatività, ed a pochi mesi dall'entrata in vigore di una struttura organizzativa complessa ed articolata, il D. Lgs. n. 300/1999 sopprime l'ANPA ed al suo posto istituisce l'APAT, Agenzia per la protezione dell'ambiente e per i servizi tecnici, alla quale vengono trasferite le attribuzioni della stessa ANPA e quelle dei Servizi tecnici nazionali, già istituiti presso la Presidenza del Consiglio, che vengono anch'essi soppressi. L'istituzione diventerà poi effettiva nell'ottobre 2002, con l'entrata in vigore del DPR n. 207/2002 che stabilisce, secondo quanto previsto dal D. Lgs. 300, lo statuto della nuova Agenzia.
L'unione, all'interno di uno stesso organismo, dell'ANPA e di parte dei Servizi

tecnici[1] risponde, almeno sotto il profilo teorico, ad un criterio di razionalizzazione rispetto all'assetto complessivo costituito a seguito della legge n. 61/1994. Detta legge, nell'istituire l'ANPA, non aveva infatti provveduto a ridisegnare i ruoli di organismi preesistenti operanti, almeno in parte, in campi che rientravano ora tra le competenze dell'Agenzia, facendo fatto nascere parziali ridondanze e sovrapposizioni e rendendo talvolta meramente alternativa a quella di altri enti la funzione di supporto istituzionalmente attribuita all'Agenzia. L'APAT rispondeva dunque anche alla necessità di trovare una soluzione al problema reale della razionalizzazione complessiva del sistema dei soggetti pubblici che, a diverso titolo e con differenti ruoli, operano nel campo della protezione dell'ambiente e della tutela del territorio.
Tale Sistema può definirsi completo da quando, il 6 ottobre 2002, è avvenuto il trasferimento dell'ANPA e dei Servizi Tecnici della Presidenza del Consiglio (Geologico, Idrografico e Mareografico) alla nuova Agenzia per la protezione dell'ambiente e per i servizi tecnici (APAT).Quasi contemporaneamente, è stata istituita in Sardegna l'Agenzia Regionale per la Protezione Ambientale, segnando la fine di un processo di riassetto istituzionale e contemporaneamente segnato il punto di partenza per il consolidamento operativo/organizzativo del sistema APAT/ARPA/APPA. L'APAT è l'organo di unione e di sviluppo dell'intero sistema, di coordinamento e di coesione tra le varie realtà territoriali di competenza delle singole Agenzie Regionali e delle Province autonome.
Già però dalla lettura delle norme del D. Lgs n. 300 che riguardano l'APAT emerge quanto meno una forte tendenza al ridimensionamento delle caratteristiche di *terzietà* e di *multireferenzialità*. E la nuova Agenzia finisce di fatto con l'essere una sorta di struttura interna al Ministero dell'Ambiente.
Nella sua nuove vesta istituzionale, l'Agenzia Nazionale non ha personalità giuridica ed è dotata di un unico organo, il Direttore Generale, che il decreto legislativo equipara a un direttore di dipartimento ministeriale. Per l'APAT valgono tutte le stesse regole generali che disciplinano l'attività delle numerose agenzie previste dal D. Lgs. n. 300 e la loro soggezione al Ministero vigilante.
Lo strettissimo rapporto di subordinazione dell'APAT nei confronti del Ministero non sembra comunque aver posto l'Agenzia in una posizione di privilegio neppure rispetto alle scelte del Ministero stesso.
Riguardo alla mutireferenzialità dell'Agenzia, interviene lo statuto che, all'articolo 10, stabilisce che le convenzioni quadro per attività di collaborazione, consulenza, assistenza, servizio e supporto alle altre pubbliche amministrazioni siano approvate dal Ministro dell'Ambiente, previo parere del Consiglio di Stato, su proposta del Direttore Generale, previa individuazione da parte di quest'ultimo dei servizi soggetti a tali forme di intervento e predisposizione dei corrispettivi ove non sussistano specifiche disposizioni.

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[1] Il D.Lgs. 300 esclude dal trasferimento all'Apat il Servizio sismico, lo statuto delimiterà maggiormente il passaggio.

Per quanto attiene ai rapporti con le agenzie regionali e delle province autonome, si è già detto che, nell'ambito della legge n. 61/1994, si trattava di un rapporto privilegiato, che aveva trovato evidente espressione nel Consiglio delle agenzie, costituito su base consensuale tra ANPA e tutte le ARPA e APPA. Lo statuto dell'APAT, secondo le indicazioni contenute nel D.Lgs n. 300/1999, ha formalizzato l'istituzione di un simile organo, che viene denominato Consiglio federale, al quale attribuisce funzioni consultive nei confronti del Direttore generale dell'APAT stessa e del suo comitato direttivo.
In questa fase, i rapporti tra APAT e agenzie regionali non sembrano segnare sul piano operativo alcun progresso e nessuna nuova, significativa iniziativa comune viene avviata da quando lo statuto dell'APAT è entrato in vigore.
Dal punto di vista organizzativo, il DPR n. 207/2002 aveva stabilito che la struttura organizzativa dell'APAT fosse basata su sette dipartimenti e sei servizi interdipartimentali, posti alle dirette dipendenze del Direttore Generale. I dipartimenti (difesa del suolo; tutela delle acque interne e marine; stato dell'ambiente e metrologia ambientale; nucleare, rischio tecnologico e industriale; difesa della natura; attività bibliotecarie, documentali e per l'informazione, oltre al Dipartimento servizi generali e gestione del personale) sono prevalentemente basati su una logica di tipo tematico. In questo senso si rimarca una differente impostazione rispetto alle scelte effettuate dal regolamento di organizzazione dell'ANPA, che prediligeva la funzione rispetto al tema, muovendo, come si è detto, da una concezione integrata delle competenze specialistiche sulle singole tematiche esistenti all'interno dell'intero sistema agenziale e dall'opportunità di una loro utilizzazione ottimizzata.
A parziale modifica, è intervenuta la Legge 24 novembre 2006, n. 286 di conversione con modifiche del Decreto legge 3 ottobre 2006, che ha rivisto la natura giuridica e l'organizzazione dell'Agenzia, attribuendole la personalità giuridica a prevedendo quali organi il Presidente, il Consiglio di Amministrazione ed il Collegio dei Revisori dei Conti. Con la nomina quasi contemporanea di un Commissario Straordinario da parte della Presidenza del Consiglio, viene avviata la preparazione del nuovo Statuto e con un decreto commissariale adottata una parziale revisione della struttura interna dei dipartimenti. Di poco successiva, ad inizio 2007, è la nomina definitiva degli Organi istituzionali ma non viene ancora stabilizzata la travagliata situazione dell'Agenzia in quanto interviene poi a giugno 2008 la scelta del nuovo Governo di istituire l'ISPRA.

2.3. L'ISPRA

Recentemente, una nuova trasformazione dell'assetto dell'agenzia nazionale ha portato all'istituzione, con la legge 133/2008 di conversione, con modificazioni, del Decreto Legge 25 giugno 2008, n. 112, dell'Istituto Superiore per la Protezione e la Ricerca Ambientale – ISPRA.
L'ISPRA svolge le funzioni, con le inerenti risorse finanziarie, strumentali e di personale, dell'APAT, dell'Istituto Nazionale per la Fauna Selvatica (a suo tempo istituito con la legge 11 febbraio 1992, n. 157 e successive modificazioni) e dell'Istituto Centrale per la Ricerca scientifica e tecnologica Applicata al Mare (articolo 1-bis del decreto-legge 4 dicembre 1993, n. 496,

convertito in legge, con modificazioni, dall'articolo 1, comma 1, della legge 21 gennaio 1994, n. 61).
L'ISPRA, come già ANPA e APAT, è vigilato dal Ministero dell'Ambiente e della Tutela del Territorio e del Mare e sono in via di definizione il suo regolamento ed il suo statuto.
La creazione dell'ISPRA con il "Decreto Interministeriale recante norme concernenti la fusione dell'APAT, dell'INFS e dell'ICRAM in un unico istituto, denominato Istituto Superiore per la Protezione e la Ricerca Ambientale (ISPRA), a norma dell'art.28, comma 3, del Decreto Legge 25 giugno 2008, n. 112 convertito in legge con modificazioni, dalla legge 6 agosto 2008, n. 133", rappresenta il terzo ed ultimo, per ora, stadio di evoluzione dell'Agenzia Nazionale. Allo stato attuale, l'ISPRA raggruppa le competenze dei tre enti confluiti in ISPRA senza ancora disporre di propri regolamento e statuto, in via di elaborazione.
La sua istituzione rappresenta un intento di rinforzare le potenziali sinergie tra le attività dei tre enti, peraltro operanti in campi analoghi, integrandone le competenze specifiche e proponendo un modello di stretta interconnessione tra le funzioni di protezione e quelle di ricerca nel campo ambientale, in tutte le sue sfaccettature. Ad ISPRA dunque dovranno venire ricondotte funzioni diverse, a partire da quelle di ricerca, intesa come ricerca vera e proprio e come analisi, studi ed elaborazioni delle conoscenze scientifiche più avanzate, senza naturalmente entrare in competizione con le istituzioni già esistenti. Tali funzioni dovranno essere finalizzate e messe in relazione con le attività nel campo dei monitoraggi e dei controlli anche delle Agenzie regionali e provinciali e con quelle relative alla gestione ed alla diffusione dell'informazione nonchè alla formazione ed alla educazione ambientali. Tali funzioni consentiranno all'ISPRA di fornire consulenza e supporto tecnico-scientifici alle amministrazioni pubbliche, di contribuire positivamente all'ottimale coordinamento tecnico di ARPA e APPA, nel rispetto delle specificità istituzionali e di costruire un sistema della conoscenza in campo ambientale articolato e completo.
L'ISPRA potrebbe avviare un percorso virtuoso verso la realizzazione di un'efficace integrazione non solo delle competenze e delle conoscenze di soggetti diversi ma anche delle funzioni di supporto alle politiche di prevenzione e risanamento (pianificazione, programmazione, predisposizione degli strumenti, attuazione, verifica dei risultati) per il governo dell'ambiente, evitando duplicazioni, sprechi, azioni contraddittorie. E, come abbiamo detto, l'integrazione è uno dei principi su cui si basano oggi le politiche di tutela ambientale all'interno di un quadro di sviluppo sostenibile, che impone di coniugare la salvaguardia delle risorse ambientali con le esigenze di sviluppo sociale e benessere economico.

3. Le Agenzie Regionali e Provinciali

Il Sistema delle Agenzie ambientali si è via via sviluppato in parallelo con il complesso processo di decentramento delle funzioni amministrative, avviato con la legge delega n.59/1997, che già prevedeva la riorganizzazione delle competenze a livello centrale solo a conclusione del conferimento delle attribuzioni a livello regionale e locale.

Con il D. Lgs. 112/1998 che ha trasferito alle Regioni le competenze non espressamente riservate allo Stato anche nel settore della tutela ambientale, alle Regioni è stato attribuito il compito di assegnare le funzioni amministrative alle province, ai comuni e agli altri enti locali, quando non necessario a norma di legge il loro esercizio unitario a livello regionale.
L'attuazione della L. 61/94 ha portato alla progressiva regionalizzazione del Sistema di Protezione ambientale con una fase rilevante per il completamento dell'istituzione delle Agenzie tra gli anni 1998 e 1999, nell'arco dei quali sono istituite ben 9 nuove Agenzie regionali, al quale è seguita l'istituzione dell'Agenzia siciliana nel 2001 e di quella sarda, nel settembre 2002. La situazione attuale vede le 19 Regioni italiane e le 2 Province Autonome di Trento e Bolzano dotate di una propria Agenzia.
Il trasferimento delle funzioni e dei compiti, previsto al Capo III del D. Lgs. 112/1998 dedicato alla "Protezione della natura e dell'ambiente, tutela dell'ambiente dagli inquinamenti e gestione dei rifiuti", è quindi avvenuto in un contesto di forte dinamismo anche se in maniera molto differenziata, registrando quasi un primato nell'ambito della Pubblica Amministrazione con processo di continuo adattamento e ridefinizione di strutture e modelli.
L' incertezza del contesto nazionale sul tema, sia per quanto riguarda i tempi di costituzione delle strutture sia per quanto riguarda il trasferimento delle risorse umane, tecnologiche e finanziarie, ha di fatto attribuito al livello la definizione di compiti, funzioni, strutture, con un certo rischio di far prevalere localismi e particolarismi. In particolare, sono state registrate forti difficoltà nella separazione tra le funzioni e le attività a carattere prevenzione sanitario e le funzioni e le attività per la prevenzione ambientale.
Le Agenzie per la protezione ambientale si configurano comunque come enti di diritto pubblico, strumentali delle rispettive regioni, per la protezione ambientale, dotate di autonomia amministrativa, contabile, organizzativa e tecnico-scientifica, tranne che le due APPA, uffici propri delle Province di Trento e di Bolzano.
La loro struttura organizzativa prosegue il modello "monocratico" mutuato dalle aziende sanitarie e essenzialmente prevede una Direzione Generale (Organo statutario per eccellenza insieme al Collegio dei Revisori, presente sempre, e al Comitato d'indirizzo, presente in pochi casi, una Direzione Amministrativa ed una Direzione Tecnica, con poche variazioni da questo modello.
Con una sintetica descrizione, le funzioni alle dirette dipendenze della Direzione Generale si possono articolare in quattro tipologie:

1. la Direzione Generale "leggera": alle dirette dipendenze del Direttore Generale, con ridotte funzioni di staff, di limitate dimensioni;
2. la Direzione Generale "a costellazione", in cui l'articolazione delle funzioni alle dirette dipendenze del Direttore Generale è più complessa;
3. La Direzione Generale "a struttura", considerata come un'evoluzione della precedente, in quanto da un modello di costellazione di unità di staff si passa ad un modello di articolazione in strutture di *line*, articolate su più livelli gerarchici;
4. un modello di Direzione Generale "atipico", in quanto coincide con il governo

complessivo di tutte le strutture di primo livello dell'agenzia, sia di area tecnica che di area amministrativa, data l'assenza rispettivamente delle figure di Direttore Tecnico e di Direttore Amministrativo.

Ogni agenzia è poi articolata di Sedi Territoriali, i Dipartimenti Provinciali.

Le agenzie sono dotate di un sito internet, utile non solo alla diffusione delle informazioni e dei dati e a favorire la trasparenza dei controlli ma anche a essere conosciute e riconosciute in una fase di consolidamento dei loro ruoli e funzioni.

Anche se, come abbiamo detto, le Agenzie Regionali per la Protezione Ambientale hanno uno specifico riferimento istituzionale (regioni e provincie) sono realtà inserite in un contesto più articolato, istituzionale all'interno del quale vari enti richiedono i loro servizi e prestazioni, raggruppabili in cinque principali settori:

– Attività informativa (sullo stato ambientale a livello provinciale e regionale)
– Attività di consulenza (rivolta agli organi istituzionali ma anche a privati)
– Rilevazione dati (sullo stato ambientale)
– Elaborazione dei dati rilevati
– Studio e ricerca (all'interno dei vari ambiti di intervento precedentemente individuati).

Molto rilevanti sono le interazioni con la cittadinanza finalizzate a rinforzare il legame con le comunità di riferimento ed a sensibilizzare l'opinione pubblica. Le attività di comunicazione hanno una forte rilevanza e vengono realizzate essenzialmente attraverso campagne di Sensibilizzazione, convegni, corsi di Formazione e di educazione ambientale, con una certa attenzione per il sistema scolastico

Con modalità diverse, le agenzie hanno sistemi di relazione con il settore imprenditoriale, attraverso la fornitura di pareri e consulenze anche alle associazioni di settore, l'avvio di tavoli di concertazione per il recupero dei siti contaminati, l'organizzazione di incontri specifici per approfondimenti sulle diverse tematiche ambientali.

Nel sistema di relazioni, quelle di gran lunga più rilevanti sono con la regione o la provincia di riferimento, l'agenzia nazionale e con l'Agenzia Europea dell'Ambiente.

Le regioni e le province, di norma, per l'esercizio delle funzioni di competenza in campo ambientale, si avvalgono del supporto tecnico delle Agenzie, che, in quanto dedicati a garantire l'attuazione delle normative e dei programmi nel campo della prevenzione,del monitoraggio e della tutela ambientale, operano sulla base di indirizzi programmatici definiti generalmente dagli assessorati regionali e provinciali

Si tratta di attività istituzionali obbligatorie (prescritte cioè da specifiche disposizioni di legge), le attività istituzionali non obbligatorie (rientranti tra le attività istituzionali dell'Agenzia non esercitabili in base ad una scelta discrezionale delle Amministrazioni interessate) e le attività aggiuntive (attività non avente carattere autorizzativo o certificativo, di tipo oneroso il cui regime è sottoposto a specifiche convenzioni non rientranti tra quelle elencate nelle leggi istitutive e che possono essere erogate ad altri soggetti sia pubblici che privati). Naturalmente, l'efficacia e la funzionalità delle relazioni ha notevoli variazioni specifiche.

I rapporti con l'agenzia nazionale, come abbiamo già detto, avvengono essenzialmente attraverso il funzionamento del Consiglio federale, composto dai legali rappresentanti delle ARPA/APPA e dell'agenzia nazionale, con la partecipazione di un delegato dalla Conferenza dei Presidenti delle Regioni. Il consiglio federale regola la partecipazione a progetti di interesse comune.
Infine, l'Agenzia Europea per l'Ambiente (EEA), che ha il compito di fornire dati, informazioni e valutazioni circa lo stato dell'ambiente a livello europeo: i rapporti avvengono in genere attraverso l'agenzia nazionale, anche se in stretta collaborazione con le altre agenzie.

4. La costruzione e l'evoluzione della "rete": alcuni elementi di riflessione.

L'architettura a rete già conferita dalla legge di riforma dei controlli ambientali del 1994 al sistema di agenzie ambientali ANPA-ARPA-APPA, soprattutto per la caratteristica di rete *distribuita* con la quale è stata interpretata e resa operativa fin dall'inizio, rappresenta uno degli aspetti più qualificanti della riforma stessa e costituisce un presupposto basilare per le politiche ambientali attuali, costruite in una prospettiva di sviluppo sostenibile che non può fare a meno di una logica di sistema.
Il termine *distribuita* è da intendere in senso contrapposto a *gerarchica*. Nella rete, sono distribuite soprattutto le responsabilità e le funzioni, fermo restando forme di sussidiarietà, più o meno sostenute in relazione soprattutto alle fasi diverse di sviluppo dei componenti del sistema. Una rete distribuita si presenta come un'architettura di relazioni che garantiscono non solo efficacia ed efficienza ma anche capacità di adattamento alle specificità territoriali.
Già nelle fasi di avvio della riforma dei controlli ambientali si era parlato spesso di *sistema a legami deboli*, proprio a sottolineare che il sistema di agenzie, piuttosto che poggiare su rapporti di tipo gerarchico, traeva la sua coesione dal comune interesse a sviluppare iniziative di cooperazione tese a favorire quelle sinergie insite nell'aggregazione di strutture che presentano specializzazioni, vocazioni e mandati diversi e dalla comune volontà di trovare un sede di coordinamento per ottimizzare l'impiego delle risorse e massimizzare i risultati positivi delle iniziative.
L'affidamento delle attività dei controlli ambientali a una struttura a rete anche nella visione più complessa dell'integrazione tra tutti soggetti coinvolti è quindi da considerare come una soluzione che potrebbe rappresentare annche un modello per la trasformazione in senso federale delle istituzioni di natura tecnico-scientifica ed operativa, tenendo naturalmente conto di un ottimale bilanciamento delle funzioni di indirizzo e coordinamento e delle responsabilità operative
La complessa natura delle questioni ambientali, così come evidenziato in tutti i più recenti documenti di programma richiede necessariamente un approccio intersettoriale per il quale è necessaria una rete così articolata ed opportunamente coordinata.
Vastità, genericità e in molti casi mancanza di univocità dell'insieme dei compiti e dei ruoli e le conseguenti difficoltà interpretative hanno rappresentato

talvolta uno dei punti più critici della riforma dei controlli ambientali e vanno quindi affrontati prioritariamente.
La loro definizione deve essere poi accompagnata con un riassetto dei soggetti che operano in campo ambientale o quantomeno del loro coordinamento, nel rispetto delle singole situazioni, funzioni e compiti. L'accorpamento tra ANPA e una parte dei Servizi tecnici prima e tra APAT, ICRAM ed INFS poi (anche se quest'ultima fase è sostanzialmente all'inizio), sebbene abbia avviato la conclusione del problema, non è stato ancora sufficiente a risolverlo del tutto.
Saranno certo necessari adeguamenti di assetto e di mandato di molti altri soggetti, sia per le strutture tecniche (come, per esempio, ENEA, CNR con i suoi vari Istituti, ecc., ISS) sia per le Amministrazioni centrali e locali, in particolare dello stesso Ministero dell'Ambiente.

REPORT BOSNIA E HERZEGOVINA
BOSNIA AND HERZEGOVINA: ENVIRONMENTAL GOVERNANCE & PROTECTION: CURRENT STATE AND CONVERGENCE TO EUROPEAN STANDARDS IN THE CONTEXT OF EXISTING CONSTITUTIONAL STRUCTURE AND DISTRIBUTION OF COMPETENCES

Dr. Milorad Živković,
The Speaker of the House of Representatives
of the Parliamentary Assembly of Bosnia and Herzegovina

Your Excellencies,
Dear colleagues,
Representatives of government and non-government sector,
Representatives of media,
Ladies and Gentlemen,

I have a great pleasure to greet you on behalf of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina. It is the honor to participate at this impressive conference on one of the currently most relevant global issue – environmental governance. I would like to thank the organizer for this excellent Conference which offers us opportunity to exchange experiences and opinions and gain our knowledge that will contribute to further processes in environmental governance with respect to national legislation and executive bodies.

Let me introduce the situation in BiH and its entities (in accordance with constitutional structure); present what has been done so far and what further steps will relevant BiH authorities take in the process of joining the EU and harmonization of national legislation with Acquis Communautaire.

The starting point is that a lot of time, knowledge, energy and money in the world have been invested in strategies, laws and regulations necessary for the improvement of the environment and sustainable development. It is enough to recall the estimation often expressed by experts that at least 30 % of Acquis Communautaire relates to environment.

Eminent legal experts make continuous efforts trying to explain complex relation between the Constitution and environment protection. Undoubtedly, the fact that „environmental rights and standards" are guaranteed as human rights in many sub-national acts (some of them are directly implemented as legal sources in domestic jurisdiction) is the reason why modern Constitutions

more often contain right on healthy life and environment protection. Today, amendments to the Constitution are very often consequences of dealing with requirements and standards of European and international conventions and protocols. This „dealing with requirements" implies addressing constitutional and other legal issues arising from the need to integrate domestic law into universal regime of human rights.

Constitution of Bosnia and Herzegovina is Annex IV of Dayton Pease Agreement. It is a frame document, while the constitutions of entities are modern constitutions with the highest standards in the area of the right to life in a healthy environment and creating conditions for sustainable development. According to the Constitution, all functions and powers of the Government which are not explicitly given to BiH state are under the competence of the entities; thus environment protection is not at the state level of Bosnia and Herzegovina's competences. However, there is a possibility of coordination between the entities in matters that are not within the competences of BiH. In accordance with this, an **Inter-entity body for environmental protection** was established to deal with the issues of environmental protection which require harmonized approach of both entities, as well as with other related issues that are transferred to this Inter-entity body by both entities. This body is also important in the context of harmonization of regulations, because in addition to adopting standards and action programs, it deals with the preparation for ratification of international treaties concerning the environment and their implementation, coordination of BiH participation in international processes and cooperation with international organizations. It is also responsible for monitoring the environmental situation, exchange of information and specific cross borders and inter-entity issues related to environment.

BiH laws that are directly related to environment protection and sustainable development have been adopted at the state level. In cooperation with the Ministry of Foreign Trade and Economic Relations, the Ministry of Tourism and Environment in 2007 and 2008 implemented the project „Monitoring the development in implementation of EU directives in environmental protection legislation in Bosnia and Herzegovina".

It is important to note that regulatory rules on natural resources existed in ex SR BiH; the first such legislation was the Law on the Protection of Cultural and natural heritage in Bosnia and Herzegovina adopted 60 years ago by National Assembly of People's Republic of BiH, and declared by Presidio on April 17, 1947 („Official Gazette of PRBiH 19/47"). Environmental Protection Act from 1960 presented a good basis for quality and overall protection in the area.

As we can see, BiH has got tradition taken from ex-Yugoslavia legislation on environmental protection and in the same time legal acts are on the state level, while strict regulations and directives as well as implementation of laws are the jurisdiction of the entities.

Crucial document in this field is the Law on environmental protection of Republika Srpska adopted in 2002; revised text adopted in 2007. (Official Gazette 28/07).

It is a basic law which stipulates terms and conditions for managing, protection and rational use of natural resources and specific components of environment, so this Law prevails all other provisions in the field of environmental protection:
Law on environmental protection of Republika Srpska (50/02 and 34/08) , Law on Nature Protection of Federation, the Law on Environmental Protection of Federation of BiH. /www.vladars.net/ /www.fbihvlada.gov.ba/
Generally speaking, major specificity of BiH environment is that national parks occupy maximum total area. Number of protected zones in relation to the degree of bio-diversity and number of other sights of nature in Bosnia and Herzegovina is rather low, so it is necessary to prepare and implement a completely new approach in the management of special purpose areas. Therefore, it should be emphasized that protected zones that are already in database, are not managed in accordance with scientific ecological principles. The post-war laws pertaining to this field do not precisely stipulate undertaking of previously protected zones, and the parallels according to IUCN categorization, have not been defined. That is why certain zones are ignored, while the others are re-protected.
On the other side, talking about solid waste, Solid Waste Management Strategy in BiH provides management at the regional level, i.e. construction of regional sanitary waste areas. Some progress has been achieved in the construction of sanitary waste areas throughout Bosnia and Herzegovina; we also adopted the regulations on medical waste. However, there was no progress regarding rules and provisions which stipulate recycling system and processing of priority waste streams such as motor oils or tires. Additional efforts are needed to start the process of managing the waste of animal origin.
BiH is in its early phase regarding investments in solid waste management. Additional efforts are needed to perform prioritization and coordination of investment programs, since the funding is limited. In accordance with this, we signed an agreement with World Bank on IDA loan for realization of «Solid Waste Management Project ». This Project provides rehabilitation of existing waste areas and construction of new ones for municipal waste. The Project has been successfully implemented so the problem will be adequately solved.
We also made limited progress in relation to water quality. Bosnia and Herzegovina still implements the requirements of the Water Framework Directive through the entity laws on waters. The Agency for Water Area of Sava River has been established. Further efforts are needed to ensure uniform river basin planning, public consultation and supervision between the entities. Implementing legislation for the Water Acts, water prices, as well as harmful and dangerous substances and their allowed maximum on the water surface have been adopted. However, we must adopt additional laws to harmonize with Acquis Communautaire. Unprocessed waste water is still a crucial issue when it comes to the environment, and access to safe drinking water and infrastructure for wastewater treatment requires more investment.
Report on progress in BiH for 2009, submitted by European Commission

Delegation, states that the progress made in environment protection is still limited. It is also stated that some progress has been made when it comes to horizontal legislation since BiH has ratified the following important agreements: Cartagena Protocol on bio-security, UN Convention on biological diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora- CITES), the Bern Convention for the protection of European Wildlife and Natural Habitats, Aarhus Convention to access to information, public participation in decision-making and access to justice in environmental matters. Now we need to make every effort to ensure their proper implementation. BiH has not ratified yet Espoo Convention on Environmental impact assessment in a trans-boundary context and Stockholm Convention. Although there was no significant progress since the last Report, the Directive on the assessment of environmental impact (EIA) is almost completely implemented into the entities' laws, but we need to pay special attention to the trans-border dimension of the issue.

In a word, in the opinion of the European Commission to BiH, the administrative capacity of Bosnia and Herzegovina in the environmental sector is still weak.

Recommendations provided to BiH in order to improve institutional structures and management systems for nature and natural values are based on an analysis of current situation and recommendations given in the documents of the European Commission.

They range from the need of ratification of international conventions, through the enactment of comprehensive legal solutions to the formation and strengthening of the Agency and specialized inspection services.

I am convinced that BiH authorities will work in this direction in the upcoming period, respecting our complex constitutional structure and distribution of competencies. The knowledge gained at this conference and different experiences shared by the speakers will be of great assistance for us in BiH to establish better system for environmental management. BiH environment is a rather small one, but substantial part of the global environmental system.

Ladies and Gentlemen, I thank for your attention.

REPORT PRINCIPAUTÉ DE MONACO LA POLITIQUE ENVIRONNEMENTALE DU GOUVERNEMENT PRINCIER

Astrid CLAUDEL-RUSIN
Direction de l'Environnement

1. Introduction

La Principauté de Monaco est un Etat riverain de la Méditerranée situé sur la côte Sud de l'Europe au centre du bassin liguro-provençal.
Sa superficie est de 1,95 km^2 pour 4,1 km de littoral. Ses eaux territoriales s'étendent sur environ 71 km^2. Son domaine terrestre se caractérise par une bande côtière très étroite orientée NE-SO située au pied d'un bassin versant de 7 km^2 et entourée par un cirque de hauts reliefs compris entre 550 et 1 100 mètres d'altitude.

3 chiffres clefs :
- Monaco : ville Etat d'environ 2 km?
- 35 000 habitants
- 52 000 salariés

Ces trois chiffres permettent de percevoir la dimension humaine de la Principauté qui connaît une population résidente inférieure à la population salariée, venant des régions voisines française et italienne.
La conséquence directe est un flux de déplacements important notamment aux heures de pointe avec plus de 100 000 entrées/sorties de véhicules et 14 000 voyageurs en train.
Centre d'activité économique majeur et source d'emploi pour le bassin régional, la Principauté est un pays actif mais également une cité où chacune et chacun est attaché à la qualité du cadre de vie, partie intégrante de l'image de la Principauté reconnue mondialement.
Sont développés dans cette présentation quelques éléments d'information sur les principaux axes de la politique publique monégasque en matière de protection de l'environnement et de développement durable.

2. Une volonté politique et des moyens

Une volonté politique

Sous l'impulsion de Son Altesse Sérénissime le Prince Albert II, le Gouvernement Princier agit en faveur d'un développement durable de la Principauté en portant ses actions sur le respect de la biodiversité, la préservation des ressources, la réduction des émissions de gaz à effet de serre et une poli-

tique en faveur d'une ville durable.

Les moyens
Une Administration impliquée : les services de la Commune et de l'Etat (dont les Directions de l'Environnement, de l'Aménagement Urbain ou de la Coopération internationale) contribuent chaque jour dans leurs missions de service public à mettre en œuvre tout ou partie de cette politique.
Une dimension internationale : Monaco participe à de nombreux programmes de coopération avec d'autres pays et est signataire de nombreuses conventions et accords internationaux en matière d'environnement et de développement durable comme la Convention-cadre des Nations Unies de 1992 sur les changements climatiques, le Protocole de Kyoto de 1997, la Convention de Rio de 1982 sur la diversité biologique, la Convention de Washington de 1973 sur le commerce international des espèces de faune et de flore sauvages menacées d'extinction (CITES), la Convention de Bonn de 1979 sur la conservation des espèces migratrices appartenant à la faune sauvage (CMS), la Convention de 1991 sur la protection des Alpes, la Convention de Berne de 1979 sur la conservation de la vie sauvage et du milieu naturel en Europe, la Convention des Nations Unies de Montego Bay de 1982 sur le droit de la mer, la Convention de Barcelone de 1982 sur la protection de la mer Méditerranée et ses protocoles.

Un outil juridique : un Code de l'environnement
L'expression de cette volonté politique et de la vision du Gouvernement en matière de développement durable se retrouve dans le projet de code de l'environnement, en cours de finalisation.
L'ambition de ce texte comportant 178 articles est de formuler les grands principes généraux du droit de l'environnement et du développement durable, dont ceux formulés par les engagements internationaux pris par Monaco tout en restant fidèle à la tradition monégasque. La principale innovation de ce texte pourrait se résumer en une phrase : « Le droit à un environnement sain ».
Le contenu du projet de code se répartit en quatre volets thématiques et deux volets généraux qui correspondent aux préoccupations des différentes conventions internationales auxquelles la Principauté a adhéré :

4 volets thématiques :
- ➢ la protection de la biodiversité et des ressources : évaluation des impacts, inventaires, stratégie de gestion durable des milieux, obligations de reconstitution et de régénération des espèces et politiques de prévention.
- ➢ la lutte contre les pollutions et les nuisances : pollution atmosphérique, pollution des eaux, contrôle des déchets, accidents industriels : politiques d'information du public et de prévention, élaboration de réglementations et de plans d'urgence.
- ➢ la lutte contre les changements climatiques : politiques et mécanismes d'amélioration de l'efficacité énergétique, réduction des émissions de gaz à effet de serre.

➢ l'organisation de l'espace : principes de précaution, pollueur-payeur, application aux politiques publiques, en particulier en matière d'aménagement du territoire, de tourisme ou de transport.

2 volets généraux : les principes fondamentaux et les règles de responsabilité.

Le projet de Code de l'Environnement couvre l'ensemble des thèmes liés au développement durable, à la protection de l'environnement et à l'amélioration de la qualité de vie et de l'environnement humain, répartis en cinq livres :
➢ dispositions communes ;
➢ énergie ;
➢ protection de la nature et des milieux ;
➢ pollutions, risques et nuisances ;
➢ responsabilités et sanctions.

Les principes directeurs énoncés et les dispositions prévues serviront de référence pour les autres politiques et réglementations : l'aménagement du territoire et le droit de l'urbanisme et de la construction, la santé, les transports, …
Le projet de Code de l'Environnement prend en compte les domaines déjà traités par le Code de la mer, dotant ainsi Monaco de deux outils juridiques complémentaires pour une protection efficace de l'environnement dans ses dimensions marines et terrestres.

3. Quatre piliers structurant cette politique

Cette politique en faveur du développement durable s'appuie sur quatre piliers : la gestion du patrimoine naturel ; la mise en oeuvre d'un plan énergie climat ; les actions en faveur d'une ville durable et la mobilisation de la Communauté monégasque.

3.1 - 1er pilier : la gestion du patrimoine naturel

Premier pilier : la gestion du patrimoine naturel de la Principauté s'exprime dans la mise en œuvre de programmes d'inventaires et de suivi de la faune et de la flore marine et terrestre, ainsi que dans les actions relatives à la préservation des milieux.

Gestion de la biodiversité

Biodiversité marine

Parmi les inventaires marins réalisés ou en cours, deux sont particulièrement significatifs :
- le mérou brun (*Epinephelus marginatus*) : une douzaine de spécimens ont été comptés en 1997 et 83 en 2006 ;
- les grandes nacres (*Pina nobilis*) : plus de 450 grandes nacres recensées en 2009.

Sensibles à leur milieu ces deux espèces protégées constituent également de bons indicateurs de la qualité de l'eau de mer.

Deux aires protégées marines, milieux d'observation privilégiés de cette biodiversité, ont été créées dans les eaux monégasques :
- l'aire protégée du Larvotto d'une superficie de 30 hectares constituée pour moitié d'un herbier de Posidonies et d'une faune abondante ;
- l'aire protégée du Tombant des Spélugues se caractérisant par la présence d'un tombant coralligène constituant un site unique en zone urbaine et qui abrite outre plusieurs colonies de Corail Rouge, toutes les composantes caractéristiques d'un tombant coralligène : gorgonaires, spongiaires et grands bryozoaires.

Biodiversité terrestre
Engagé en 2006, l'inventaire complet de la flore indigène terrestre a permis l'identification de 350 espèces végétales dont 18 à forte valeur patrimoniale dont une espèce endémique très rare : la nivéole de Nice (*Acis nicaeensis*).
En 2008-2009, une campagne de recensement des insectes vivants (entomofaune) en association avec les plantes du territoire de Monaco est en cours. 250 espèces d'insectes (Coléoptères et Hétéroptères) dont six coléoptères à forte valeur patrimoniale, ont été inventoriés dans la Principauté de Monaco. A notamment été remarquée la présence d'un petit charançon de quelques millimètres (3mm) le *Tomeuna grouvellei* dont les observations sont très rares.
En 2010, une campagne de recensement de l'avifaune va être lancée.

La préservation des milieux

Dans les missions de surveillance et de préservation des milieux l'Etat a mis en place plusieurs réseaux de surveillance dont notamment la surveillance de la qualité de l'eau de mer et de la qualité de l'air (qui sont contrôlés et respectent les normes qualitatives imposées par les directives européennes).

3.2 - 2éme pilier : le plan énergie climat - Objectifs 2020
Deuxième pilier : la mise en œuvre d'un plan énergie climat qui répond à trois objectifs :
- réduire les émissions de gaz à effet de serre de 30% par rapport à 1990 ;
- améliorer l'efficacité énergétique de 20% ;
- consommer 20% d'énergie finale issue de sources renouvelables. Ces deux derniers chiffres sont à comparer aux valeurs de 2006.

Pour atteindre ces trois objectifs, tous les moyens, réglementaires, incitatifs et contractuels sont mobilisés par l'Etat.

3.3 - 3éme pilier : Monaco une ville durable
Troisième pilier : la mise en œuvre d'une politique en faveur d'une ville durable comporte 4 volets : la mobilité, la gestion des déchets, la gestion de l'eau et l'amélioration du cadre de vie.

1er volet : la mobilité

Développement des transports en commun

Depuis trois ans l'Etat a renforcé son action en faveur des transports en commun, tant intra-muros que pour les déplacements vers les communes et régions voisines :

- achat de cinq rames TER intégrées au réseau ferroviaire régional français contribuant au transport des salariés qui se déplacent chaque jour vers Monaco.
- modernisation des moyens et des services de la Compagnie des Autobus de Monaco avec l'amélioration de la qualité de service et une politique tarifaire incitative. Près de 7 millions de voyages ont été enregistrés en 2009 soit une augmentation de plus de 4 % par rapport à 2008.
- promotion du covoiturage mis en œuvre par une association monégasque à destination des actifs de la Principauté.
- création d'une plate forme de fret pour le transport de marchandise qui permet de réduire de 50 % l'encombrement de la voirie par les véhicules utilitaires.

Ces mesures sont complétées par une gestion de la circulation optimisée, une hiérarchisation des voies de circulation ainsi qu'une politique de stationnement incitative au faible usage de la voiture.

Mobilité douce

En matière de déplacement doux, la topographie en amphithéâtre du territoire a privilégié la mise en place d'un réseau qui facilite le cheminement à pied dans la cité : 35 liaisons piétonnes mécanisées et près d'une centaine d'ascenseurs et escaliers mécaniques gratuits, ouverts 24h/24.

La Principauté compte une quarantaine de parkings publics, dans une quinzaine d'entre eux une cinquantaine de vélos à assistance électrique est disponible gratuitement pour les abonnés et les résidents.

Subvention véhicules électriques

Le Gouvernement favorise également la promotion des véhicules propres ou peu polluants en subventionnant l'achat d'un véhicule électrique (30%) ou hybride (forfait de 3000 Euros).

Les véhicules électriques bénéficient gratuitement de l'accès aux prises de rechargement dans les parkings publics et les véhicules peu émetteurs de CO2 bénéficient de réductions pour les abonnements dans les parkings publics.

Enfin, l'Etat et la Commune se veulent exemplaires en équipant leurs administrations principalement en véhicules soit électriques, soit hybrides.

2éme volet : la gestion des déchets

Tri sélectif

Le deuxième volet de cette politique en faveur d'une ville durable concerne la gestion des déchets. Depuis trois ans, la collecte sélective a été renforcée

avec la mise en œuvre d'une cinquantaine de points d'apport volontaire pour le verre, le papier et les emballages ménagers.
En 2009, ont été collectées chaque mois :
- environ 88 tonnes de papier, journaux, magazines (en 2007, la moyenne mensuelle était de 16 tonnes) ;
- en moyenne, 91 tonnes de verre (contre 42 tonnes en 2007) ;
- en moyenne 12 tonnes pour les emballages ménagers recyclables.

Les entreprises et l'Administration mettent également en place des points de collectes sélectives dans leurs locaux pour le papier, le verre, les piles et les cartouches d'imprimantes.

Valorisation énergétique de l'incinération
La Principauté dispose d'une usine d'incinération des déchets.
Dotée d'un dispositif d'épuration des fumées de dernière génération, cette usine traite les déchets ménagers ainsi que les déchets industriels et commerciaux banals. Elle reçoit également, par injection dans ses fours, les boues produites par l'épuration des eaux usées traitées dans l'Usine voisine de Traitement des Eaux Résiduaires.
L'énergie de cette incinération est valorisée par la production d'électricité équivalente à un peu plus de la moitié de la consommation de l'éclairage public de la Principauté. Une production de chaleur et de froid urbain dessert également l'un des principaux quartiers d'activité de la Principauté.

3éme volet : la gestion de l'eau

Préservation des ressources
L'eau consommée dans la Principauté provient pour 75 % de deux vallées de la région voisine : la Vésubie et la Roya. Les 25 % restant viennent des sources situées sur le territoire monégasque.
Parmi les actions menées par l'État, les industries, et les différents acteurs dans le but de préserver cette ressource, citons l'optimisation de l'arrosage des jardins et la récupération des eaux d'un vallon utilisées pour le nettoyage de la voirie.
Les mesures incitatives de réduction de la consommation également mises en œuvre ont permis une baisse de consommation de 10 % depuis 2000, dont 3% pour l'année 2008.

Traitement des eaux résiduaires
La Principauté possède une usine de traitement des eaux résiduaires qui a subi d'importants travaux afin d'améliorer et d'optimiser le traitement de ces eaux. Cette usine prend en charge la totalité des eaux usées générées sur Monaco ainsi que celles des communes avoisinantes du bassin versant.

4éme volet : la préservation du cadre de vie

La Principauté est très fortement urbanisée mais elle a mis en oeuvre une politique active d'espaces verts en imposant notamment que chaque opéra-

tion de construction comporte une superficie non bâtie et plantée.
La superficie des espaces verts privés et publics couvrent actuellement environ 420 000 m^2 (50 000 m^2 en 1961), soit plus de 20 % du territoire. Parmi ceux-ci 270 000 m? d'espaces verts sont publics.
La Direction en charge de l'entretien des espaces verts fait appel à des techniques respectueuses de l'environnement, en recourant par exemple à des auxiliaires du jardinier comme les coccinelles plutôt qu'à des produits chimiques.

3.4 - 4éme pilier : la mobilisation de la Communauté monégasque
Une gouvernance efficace en matière de protection de l'environnement et de développement durable ne peut être mise en place sans que chaque acteur, administré, entreprise, responsable, contribue dans sa sphère d'intervention et de compétence, à la mise en oeuvre de cette politique.
L'Etat monégasque est particulièrement actif sur l'ensemble des thématiques liées au développement durable et son action doit nécessairement trouver son prolongement dans l'adhésion des différents acteurs de la Communauté monégasque dont la mobilisation mérite d'être soulignée.
Le secteur privé avec, par exemple, la création d'une charte sur la responsabilité sociétale monégasque par la Jeune Chambre Economique de Monaco (adhésion d'une cinquantaine de sociétés) et l'engagement de nombreuses entreprises privées qui s'inscrivent volontairement dans une démarche de certification et qui oeuvrent quotidiennement pour la préservation de l'environnement et le développement durable.
Le milieu associatif est tout aussi actif avec une dizaine de structures qui développent des programmes d'actions et de sensibilisation tant au niveau local que mondial et dans les thèmes les plus divers (véhicules électriques, coopération, espèces protégées, préservation de la biodiversité, tri des déchets, …).
Enfin, la Fondation Prince Albert II de Monaco qui mène de nombreuses actions principalement dans trois domaines : le changement climatique, la biodiversité et l'eau, et l'Institut Océanographique, Fondation Albert 1er Prince de Monaco qui célèbre en 2010 le centenaire du Musée Océanographique. Une occasion qui permet de rappeler toutes les qualités de cette Institution et l'engagement des Princes de Monaco dans la préservation de l'environnement.

En conclusion, ont été ainsi présentés les principaux axes de la politique de la Principauté de Monaco en matière de protection de l'environnement et de développement durable. La gouvernance globale mise en œuvre couplée à des actions de proximité confère à la Principauté de Monaco une effectivité avec cette conscience d'avoir à toujours la renouveler.
Cette présentation a pour ambition d'avoir pu contribuer à porter un éclairage nouveau sur les réalités de ce pays et sur sa volonté de s'inscrire dans une démarche qui respecte la nature et les hommes.

REPORT COLOMBIA
CURRENT STATE OF PUBLIC ENVIRONMENTAL MANAGEMENT, THE ADMINISTRATIVE ENTITIES AND THE PROCEDURES OF ENVIRONMENTAL JUSTICE

Miguel Patiño Posse
Magistrate of the International Court
of Environmental Arbitration and Conciliation

The present paper is being presented to contribute to a global vision of Environmental Government Procedure, in response to the call put forward by the ICEF Conference regarding performance at the political, administrative and judicial levels.

1. Consequences of an Administrative Reform of the Public Sector

The fusion that the Colombian Government carried out some years ago in the public sectors of Environment, Housing and Territorial Development so that they conformed a single ministry has not produced the desired effect. On the contrary, it has created numerous limitations for the effective and efficient management of the Environmental sector and has undermined the importance it had within the Colombian public administration and assigning it the status of Vice ministry.

Several Colombian public and private entities have comented on this. According to a recent document by Orlando Piragauta Rodriguez, Director of the Corporation for the Sustainable Development of Antioquia – CORPORINOQUIA[1], it is necesary to rethink the status and role of the Vice ministry of the Environment and of the National Environmental System – SINA and their territorial influence as a requisite to improve environmental performance in the face of the stress to which national development is subjecting the natural heritage and biodiversity of the country.

As a matter of fact, the environmental dimension is inherent to all of human activity, it is of a transversal nature. There is no action in society without a negative or positive impact on its environment or the use of nature's resources.

Thus, the time has come for this transversal nature of the sector to be recognized through the strengthening of the institutional capacity of SINA and the

[1] V. "Urge Restituir la Jerarquía del Sina y del Ministerio de Ambiente". Planeta Vivo Magazine, June. 2008i

Ministry – both as organizations and as a set of guidelines – nationally as well as regionally.

The public leadership of the SINA and the Ministry (a key factor in regulating and orienting the search for the sustainable management of natural resources, the environment, and the country's biodiversity and territory), is in fact being commandeered by agents of urban development, mining, agroindustry and colonization.

Given the current state of affairs, the main problems to solve are as follows: Preventing the fragmentation of the environmental management sector and influencing the development of truly environmentally conscious territorial planning. Making the concept of the systemic nature of the environment more visible and evident, as well as manage, the ecological passives that generate national economic and demographic growth. particularly in areas of national expansion

The contradiction between the urgency of economic growth and the environmental regulation and planning has only come to the forefront due to the recent –and healthy- face offs of the environmental sector with energy, agricultural and tourist planning. The conflicts between the conservation of the biodiversity and environmental heritage, and the relatively indiscriminate use of natural resources by the productive sectors evidently still persist.

The Autonomous Corporations for Sustainable Development, the research institutes and the Ministry itself have made advances in environmental planning rationalized the required procedures for the acquisition of licenses and permits, as well as the monitoring, control and research of impacts on the environment. However , there is still significant improvement needed in the fulfillment of the management plans of the projects and the consideration of socio-cultural variables in the implementation of environmental planning.

This is especially essential in non-industrialized regions, where the workforce depends on the strengthening of the agricultural sector, particularly agroindustrial development, which uses water and soil as main resources. This latter one is on the forefront of the economic development of the nation.

It must be remembered that Colombia is the second producer of palm in Latin America and that the internal and external demand for bio-diesel and ethanol is on the rise.

Furthermore, clean production is now a main requirement in the market of these goods, as issues such as climate change and the impact of these kinds of productive activities are a big part of the negotiations of international commerce.

As it is widely known, The European Union has recently established restrictions to the import of palm oil to avoid the negative consequences that non-sustainable production generates.

The consolidation of a national policy for the environmental management of resources such as soil and water is, therefore, urgent. It is needed to foresee the added impact of economic expansion on the basic ecologic structure of the regions, and to strengthen precautions and environmental planning from the inception of projects. Such preventive measures are more relevant when promoted and monitored from a national level.

2. Impact of the Global Environmental Agenda on the National Environmental Agenda

Internationally, there have been demands to improve the institutional development of the SINA and the leadership of the Ministry to guarantee consistency in the conduct of environmental institutions.

The global agenda, given its magnitude and the strategic perspective, does impact the national agenda. In Colombia there are at least twenty protocols and agreements in force, which were approved through laws that require more efficacy in their application on all the territory. Such is the case of the biodiversity, woods, wetlands, wild fauna, and national and regional reservation conservation agendas. Furthermore the national environmental system, particularly the Ministry of the Environment, Housing and Territorial Development, require more regional visibility and needs to prove the leadership and the forefront role that corresponds to it as head of the system.

In truth, there is a certain perceived isolation in the integrated management of the SINA and a certain dispersion in the coordination carried out by the Vice ministry, its Management and programs with the planning, education, participation, communication, legal and information staff offices of the Ministry itself.

Probably, one of the factors that limits the Ministry's agenda and the relevance of environmental issues, is the legitimate dispute for attention that other aspects of ministerial management require, such as housing, territorial development and now water and sanitation.

Some proposed solutions. Regional environmental authorities are spread thin enough dealing with the difficulties of improving monitoring and control in their jurisdictions and trying to convene *in situ* rationalization of natural resources with producers that are not necessarily regulated. A greater zeal and executive maneuvering of the tutelary dependencies of the Ministry of the Environment is urgent, so as to harmonize the national directives on a territorial level and improve environmental culture and work.

The idea of the restitution of the importance of the SIMA and the Ministry of the Environment, as conceived fifteen years ago in Law 99 of 1993, must be considered. This law is still a landmark of inter-institutional integration of public and private agencies dedicated to environmental research, conservation and procedure.

Extending the periods of the Corporation Directors so they coincide with those of the territorial authorities in an attempt to harmonize the shared environmental planning of Departments and Municipalities means very little within the present framework. The revitalization of the SIMA, on the other hand, is essential, as it will facilitate the more efficient flow of environmental governability that must be produced in the central level of the State.

The issue of administrative adjustment should be on this year legislative agenda so that environmental institutionalism becomes a true medium for sustainable development.

Taking these political orientations as a starting point, the emphasis must move to their realization and the strengthening of monitoring and cooperation for conservation, research and sustainable use in the individual regions. There

must also be increased functional capacity of the authorities and greater environmental investment. This is touched upon quite clearly in the hopeful environmental procedure goals that are being set for 2019.
The challenges clearly indicate that State intervention must be increased, and that self-regulation and environmental conscience should not be considered enough. Luckily, in the "environment" of public opinion and Congress attention is being paid to the strategic need of the restitution of the importance of SINA and the Ministry of the environment, to which every environmentalist in the country is committed.

3. The Point of View of the Geographic Regions

At a regional level, the analysis of environmental procedure can be carried out from the perspective of environmental investment of the Autonomous Regional Corporations (CAR) during the 2007-2009 period.
The investment reached 1,700 billion pesos, far exceeding that planned by Government in their Development Plan for the 2007-2010 presidential period. While the first figure averages at 560 billion pesos a year, the second only reaches a meager 136 billion.
The investment on the CAR during this period adequately reflects regional priorities, with the exception of big cities, as the Triennal Action Plans that account for it were the result of an ample process of mediation with the communities.
Said plans were formulated based on Decree 1200 of 2004, which establishes the requirements and components they must have. These norm defines them as "the planning instrument of Autonomous Regional Corporations, in which their institutional commitment is realized to achieve the goals and objectives put forward in the Regional Geographic Environmental Plans.
Actions and investments that will be carried out in their jurisdiction are also determined, with a projection to three years. Given that the CAR are the most important entities at a regional level, their investments reflect very closely the tendencies of environmental management on a territorial scope, and in some ways the way in which national policies are implemented at those levels.
Territorially, the foremost priority is the investment directly relate with the conservation and management of the water resource. If the three first lines are added up, its revealed that 79.66% of the total investment is geared toward projects related with hydraulic resources. Thus, there is a strong local and regional preference for this resource.
Even though this priority is very understandable, its still a cause of concern that a part of the investment is meant for the supply of drinking water and even the construction of basic sanitation works (sewage).

4. The Environmental Jurisdictional Aspect in Colombia

The Political Constitution only makes sense through the application and implementation of the principles and rights contained in its dogmatic sections, so it is imperative to translate these into common norms of judicial protection.
Constitutional principles consecrate general judicial prescriptions, making

them norms of immediate application by a constitutional judge. Among the constitutional principles we have, other than the rule of law, pluralist participative democracy, the respect of human dignity, solidarity and the preservation of the common interests (Article 1), and also the right to a healthy environment (Article 58).

Actions in Defense of the Common Rights and Interests: Class Actions. Group Actions, Observance and Tutelage

These actions, denominated "Class Actions" in Anglo-Saxon law, constitute an essential participation mechanism for citizens within contemporary participative democracy.

One of the biggest achievements of modern democracies is to give to their citizens expedite mechanisms for the administration of justice, all the more so given the current slowness of the traditional justice system and the import of the Fundamental rights it protects. Even though the norms that regulate this sort of actions (that allow for the democratic participation of all citizens) present technical legislative problems, they have been a fortunate attempt to give citizens an immediate solution to the judicial conflicts that most closely affect them.

In regards of the procedures and requirements for these kinds of Judicial Actions (both Class and Group Actions), both are developed in accordance with the constitutional principles of Prevalence of Substancial Law Over Procedural Law, Publicity, Economy, Celerity and Efficacy (Article 5 Law 478 / 92) with the active participation of the judge, the participation in the process of the public Ministry (General Attorney and Public Defender) and, in some cases, public servants (Ombudsmen and Mayors), all of which results in a better administration of the law[2].

In addition to the preceding, Class Actions include an observance pact to assure judicial efficacy.

In the case of Class Actions, the characteristics of their procedure, other than the principle of Universal Legitimacy, which allows any natural person or body corporate to exercise them, the possibility of a third party to partake in the process, the incentive to the claimant (which is can increase if a public institution is sued), the possibility to request precautionary measures and the special treatment of proof (which can be charged to the Fund for the Defense of Collective Rights), all of which places them in a privileged position in terms of process.

Other characteristics of the procedures of Class Actions insofar as the legitimacy of their exercise are: they can be put forward by a "plural number or group of people (no less than twenty) that meet with the uniform conditions regarding a cause that generated individual damages to said people" (article 46 Ibidem)

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[2] J. A. Rincón G y Héctor A. Suárez M, according to a quote included in "Las Acciones Populares en el Estado Social de Derecho", Ed. Diké, Santafé de Bogotá, 2004, pg.82

It must be emphasized that the jurisprudence has determined that these uniform conditions must be in keeping with the elements that configure responsibility. Likewise, these actions must be interposed through a legal proxy (a lawyer), or through the public Ministry, and that there is no incentive for the plaintiff therein, insofar as the objective of the action is securing a collective compensation. This relates to the observance and tutelage actions, as their procedures present similar characteristics of celerity, economy and efficiency, abut the Tutelage Action is further characterized by the fact that an immediate and irremediable harm must exist in order for it to be initiated, and that no other legal recourse exists to resolve the citizen's claim.

Insofar as Tutelage or Protected Law. Firstly, we find the sentences of the Constitutional Court (for example the one issued for the finishing of the Vistahermosa sewage system in Cartagena). These are of especial importance and that have protected the citizenship in very concrete instances and that must be cited because of the estimation of the right to the environment as a "fundamental right by connectivity", which has facilitated the request for guarantees for the environment through the privileged channel of the Civil Right Tutelage Action. In this instance, the Court maintained that the Political Constitution only makes sense through the application and implementation of the principles and rights contained in its dogmatic sections, so it is imperative to translate these into common norms of judicial protection.
In fact, it is impossible to interpret a constitution or a procedure provided for by the constitution outside of the material contents of the fundamental principles and rights. Thus, according to the Court, its important to take into account the extant relationship between the constitutional principles and the norms and values of the Constitution.
Constitutional principles consecrate general judicial prescriptions, making them norms of immediate application by a constitutional judge. Among the constitutional principles we have, other than the rule of law, pluralist participative democracy, the respect of human fundamental rights.
The Constitutional Court in its sentences has considered that a specific definition of the fundamental rights in the constitutional corpus isn't very important, as this is a subject that must be carried out by a judge. In this way, the relationship between the constitutional text and the social fact allows a new interpretation of human rights, adapted to the reality of developing countries. This is given that the basic Statute presents an axiomatic catalog from which the sense and finality of judicial intention is derived.
The Constitutional Tribunal has estimated as requisites for the acceptance of a right as fundamental the following: a. A direct connection with the constitutional principles, b. Direct efficacy, and c. The essential content.
As for as criteria for distinction, the Constitutional Court itself has used he following: a. Analytical. When the nature of each case is studied. b. Express consecration. When the fundamental rights are expressly mentioned in the Constitution. Such is the case of those enunciated on Chapter I, Title II, Article 49 regarding the rights of children. c. Direct remission. This eventuality refers

to international treaties (particularly the ones on Human Rights and the express prohibition of limiting them).
Direct connection. This possibility arises when some rights are not expressly designated as fundamental, but their connection with other rights in this category is such that, without due protection, they would disappear or their protection would be rendered impossible. It must be noted that some authors maintain that to study these sort of Actions, besides showing the relationship between collective, individual and group harm, and evidence the relationships and differences between Group, Class and Tutelage Actions, the object of the pretensions of the Class and Group Actions must be examined carefully and the evaluate the judicial procedure established for it.
Regarding the object of the Actions, Class Actions are conformed as a mechanism to suppress or prevent the threat of contingent damage to the Collective Rights and Interests, while Group Actions are geared towards obtaining compensation for individual damages suffered by a plural group of people. This indicates that the latter is idoneous to regulate individual damage and the first to regulate collective damage[3].
Its possible, however, that collective and group damages occur separately or in conjunction. A fact can produce either or both. It has been mentioned as one of these cases the pollution of a river, which caused the extinction of the fishing activity in it. If such eventuality came to pass, then two kinds of damages would occur: firstly, the collective damage, which would affect the owners of riverside property who aspire to return the river to its previous conditions; secondly, to the fishermen whose livelihood was fishing, and thus want to be compensated for the loss of their sole source of income.
There must be a distinction between the "object" of Observance Actions, which consists of ensuring the observance of a legal disposition or rule, or a court sentence, and the "object" of a Tutelage Action, which is to prevent an imminent harm to come to
the claimant.

Judicial Nature, Legitimization, Jurisdiction, Competence and Recourses (Contests) in These Types of Actions. Firstly, it can be observed that all of them are of a constitutional nature, as they are consecrated in the Constitution, the maximum norm of the Colombian legal establishment. As for legitimization of Class Actions, it extends to any natural person or body corporate. Among them are Non Governmental Organizations (NGOs), public institutions that catty out control, vigilance or intervention duties, as long as the threat to the collective rights and interests has not originated through their action or omission, The General Attorney, the Public Defender, and the District and Municipal Ombudsmen, as related to their competence, and the Mayors and other public servants that must promote the protection and defense of these rights and interests as a function of their public duties.

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[3] Dwarkin, Questione di principio; Il Saggiatore, Milano,1985,p 6yss

In Class Actions, the legitimacy befalls in the natural persons or body corporate that have suffered individual damages and that meet uniform conditions regarding the cause of said harm. In the case of Observance and Tutelage Actions, the interested parties have the legitimacy to interpose them.

As for jurisdiction, it befalls the Contentious Administrative to know about Class Actions and Group Actions, when they are originated in facts, actions or omissions of public entities or the private persons that carry out administrative functions. In other cases it will know the ordinary civil jurisdiction. Regarding competence, Class Actions and Group Actions will be met in the first instance by administrative judges and circuit civil judges.

Finally, in the second instance the competence will befall the first section of the Contentious Administrative Tribunal or the civil Chamber of the Judicial District Tribunal to which the first instance judge belonged. Either the judge of the place where the events took place or the judge of the place of residence of the defendant will be competent, to be chosen by the claimant. When due to the facts more than one judge is competent, the one before which the suit was presented will have precedence (Articles 15 and 16 Law 472 of 1998). As for the legal recourse to challenge, the following: There is a Reposition Recourse against the orders issued in the process of a Class Action, which will be interposed in the terms of the Civil Procedural Code. Then there is Appeal Recourse against the sentence issued in the first instance. In the sentences issued in Observance and Group Actions (Article 67 Law 472 / 98) the Appeal Recourse is valid, as well as with Tutelage Actions. There is also a Revision Recourse, to be exercised officiously and selectively by the Constitutional Court in Tutelage Actions and the Annulment Recourse in ordinary jurisdiction in these kinds of Actions.

CAPITOLO 3

"EXPERIENCES OF REGIONAL ENVIRONMENTAL GOVERNANCE"

SESSION IV: EXPERIENCES OF REGIONAL ENVIRONMENTAL GOVERNANCE

Dr. Wolfgang E. Burhenne
Opening Remarks

I have been asked to lead the discussion on "Experiences of Regional Environmental Governance" although I must say that I am not that familiar with this area. Nonetheless, I am thankful to the organizers of this conference who have given me the opportunity to learn something! Please don't expect too much from my side until I have heard from our table, which contrary to its title is not "round"!

Perhaps for my own education it is good that some of the panelists before you are old friends and some of the topics such as climate change, Antarctica, and the Arctic are familiar to me. I was involved in discussions and negotiations of the Protocol on Environmental Protection to the Antarctic Treaty from the very first to the last day. I will never forget the meeting in Madrid for two reasons:

1) The negotiations were well-lead and the result was commendable;
2) During my stay, I was robbed in broad daylight while sitting in the lobby of my hotel!

I have now moved on to the Arctic and have learned that the issues facing the High North are much different than in the Antarctic. The interplay of national sovereignty and environmental governance is something that I have had to study intensely in my role as Chair of the IUCN Commission on Environmental Law Arctic Task Force.

This leads me to the topic of implementation and picks up on the preceding panel on the role of local and national public authorities.

In my experience, governance is intricately related to the success of regional, national and local institutions to interpret international law and policy at their respective levels. However, measuring these achievements becomes more and more difficult as you move down the levels of administration and witness the varying ways that implementation is undertaken. Furthermore, it will be a tremendous task to consolidate and unify the complex and fragmented international environmental governance architecture to effect positive results at all levels. I look forward to this panel shedding some light on how regional environmental governance can bridge this divide.

THE REGIONAL DIMENSION OF ENVIRONMENTAL GOVERNANCE: THE CASE OF THE MEDITERRANEAN SEA

Tullio Scovazzi
Professor of International Law, University of Milano-Bicocca, Milan, Italy.

1. The Implementation of a General Obligation at the Regional Level

The Mediterranean is a regional sea surrounded by the territories of twenty-two States[1]. The bordering countries, all of which have ancient historical and cultural traditions, differ as far as their internal political systems and levels of economic development are concerned. Highly populated cities, ports of worldwide significance, extended industrial areas and renowned holiday resorts are located along the Mediterranean shores. Important routes of international navigation pass through the Mediterranean waters, which connect the Atlantic and the Indian Oceans through the strait of Gibraltar and the Suez canal. The Mediterranean region is an area of major strategic importance and, in certain cases, of high political tension. The protection of the Mediterranean environmental balance, which is particularly fragile because of the very slow exchange of waters, is a particularly serious concern. As regards the legal framework applying to the Mediterranean environment, under the United Nations Convention on the Law of the Sea (Montego Bay, 1982)[2], "States have the obligation to protect and preserve the marine environment" (Art. 192)[3]. To this aim they are bound to co-operate on a global and, as appropriate, regional basis in formulating and elaborating international rules, standards and recommended practices and procedures, taking into account characteristic regional features (Art. 197)[4]. These general obligations must be fulfilled through

[1] Spain, the United Kingdom (as far as Gibraltar and the sovereign base areas of Akrotiri and Dhekelia are concerned), France, Monaco, Italy, Malta, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Albania, Greece, Cyprus, Turkey, Syria, Lebanon, Israel, Egypt, Libya, Tunisia, Algeria, Morocco. This paper does not consider the Black Sea, a semi-enclosed sea connected to the Mediterranean by the straits of Dardanelles and Bosphorous.

[2] Hereinafter: UNCLOS.

[3] The UNCLOS also provides that States are bound to take measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" (Art. 194, para. 5).

[4] Part IX of the UNCLOS, relating to enclosed or semi-enclosed seas, confirms that international co-operation in several fields, including the protection of the environment, is particularly suited in the case of countries surrounding the same regional sea. The Mediterranean fully fits the definition of enclosed or semi-enclosed sea, namely "a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States". (Art. 122).

the adoption, individually or jointly, of measures addressing pollution from all sources, such as the operation of ships, land-based activities, exploitation of the sea-bed, dumping of wastes.

In general terms, an obligation to co-operate implies a duty to act in good faith in pursuing a common objective and in taking into account the requirements of the other interested States. In practice, such an obligation can have several facets (information, consultation, negotiation, joint participation in preparing environmental impact assessments or emergency plans), depending on the different instances.

As remarked by the International Court of Justice, "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation (…); they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"[5].

The obligation to co-operate applies to both the global and the regional basis. While general concerns need to be faced on a world scale, regional or sub-regional treaties are the best tool to take into account the peculiarities of a specific marine area. The number of treaties which have so far been concluded to protect the marine environment is ever increasing. In many regional seas, both treaties having a worldwide scope and treaties having a regional (or even sub-regional) scope are applicable at the same time. It often happens that the same subject matter (for example, pollution from dumping) is regulated by two or more treaties and that complex legal questions of coordination arise[6].

Luckily enough, the UNCLOS, the only global treaty on the law of the sea, specifies that its provisions on the protection of the environment are without prej-

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[5] Para. 85 of the judgment of 20 February 1969 on the *North Sea Continental Shelf* case. In another case, the International Tribunal for the Law of the Sea found that the parties were bound, as a provisional measure, to enter into consultations with regard to possible consequences arising out of the commissioning of a nuclear plant (para. 89 of the order of 3 December 2001 on the *MOX Plant* case). The Tribunal confirmed that the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under the UNCLOS and general international law (*ibid.*, para. 82).

[6] As provided for in the 1969 Vienna Convention on the law of treaties, the legal tools for tackling the problem of potentially overlapping treaties derive from the combination of different criteria (*ratione temporis*, *ratione personae* and *ratione materiae*, to speak in Latin). A conflict between treaties arises only if two successive treaties have been concluded by the same parties and regulate in a different way the same subject-matter. From a logical point of view and assuming, for the sake of simplicity, that all the parties to the earlier treaty are also parties to the later one, the following questions need to be addressed: *a*) whether the provisions of two different treaties relate to the same subject-matter; *b*) if so, whether one of the two treaties specifies that it is subject to the other; *c*) if not, whether the two provisions in question are really incompatible, considering that the special rules (with respect to their subject matter or their territorial application) prevail over the general ones; *d*) finally, if the provisions in question remain incompatible, those of the later treaty prevail.

udice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in the UNCLOS itself (Art. 237, para. 1). It adds that specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of the UNCLOS (Art. 237, para. 2).
While presenting several innovative aspects, the legal instruments applying to the protection of the Mediterranean environment, belonging to the so-called Barcelona system, are consistent with the general principles and objectives of the UNCLOS to which they bring an added value.

2. The Barcelona System

The Barcelona system[7] is a notable instance of fulfilment of the obligation to co-operate for the protection of a semi-enclosed sea[8].
On 4 February 1975 a policy instrument, the Mediterranean Action Plan (MAP), was adopted by an intergovernmental meeting convened in Barcelona by the United Nations Environment Programme (UNEP). One of the main objectives of the MAP was to promote the conclusion of a framework convention, together with related protocols and technical annexes, for the protection of the Mediterranean environment. This was done on 16 February 1976 when the Convention on the Protection of the Mediterranean Sea against Pollution and two protocols were opened to signature in Barcelona. The Convention, which entered into force on 12 February 1978, is chronologically the first of the so-called regional seas agreements concluded under the auspices of UNEP.
In the years following the Rio Conference on Environment and Development (1992), several components of the Barcelona system underwent important changes. In 1995, the MAP was replaced by the "Action Plan for the Protection of the Marine Environment and the Sustainable Development of the Coastal Areas of the Mediterranean (MAP Phase II)". Some of the legal instruments were amended. New protocols were adopted either to replace the

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[7] On the Barcelona system see RAFTOPOULOS, *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime*, Athens, 1997; JUSTE RUIZ, *Regional Approaches to the Protection of the Marine Environment*, in *Thesaurus Acroasium*, 2002, p. 402; RAFTOPOULOS & McCONNELL (eds.), *Contributions to International Environmental Negotiation in the Mediterranean Context*, Athens, 2004; SCOVAZZI, *The Developments within the "Barcelona System" for the Protection of the Mediterranean Sea against Pollution*, in *Annuaire de Droit Maritime et Océanique*, 2008, p. 201.

[8] Other treaties, that do not belong to the Barcelona system, are relevant for the Mediterranean marine environment, such as, the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; so-called ACCOBAMS) and, on the sub-regional level, the Agreement between France, Italy and Monaco on the protection of the waters of the Mediterranean shore (Monaco, 1976; so-called RAMOGE).

protocols which had not been amended or to cover new subjects of cooperation. The present Barcelona legal system includes a framework convention and seven protocols, namely:

a) the Convention on the Protection of the Mediterranean Sea against Pollution which, as amended in Barcelona on 10 June 1995, changes its name into Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean[9] (the amendments entered into force on 9 July 2004);

b) the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona, 16 February 1976; in force from 12 February 1978), which, as amended in Barcelona on 10 June 1995, changes its name into Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea[10] (the amendments are not yet in force[11]);

c) the Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency (Barcelona, 16 February 1976; in force from 12 February 1978), which has been replaced by the Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (Valletta, 25 January 2002[12]; in force from 17 March 2004);

d) the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Athens, 17 May 1980; in force from 17 June 1983), which, as amended in Syracuse on 7 March 1996, changes its name into Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities[13] (in force from 11May 2008);

e) the Protocol Concerning Mediterranean Specially Protected Areas (Geneva, 1 April 1982; in force from 23 March 1986), which has been replaced by the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995[14]; in force from 12 December 1999);

f) the Protocol Concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil (Madrid, 14 October 1994[15]; not yet in force);

g) the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir on 1 October 1996[16]; in force from 18 December 2007);

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[9] Hereinafter: the Convention.

[10] Hereinafter: the Dumping Protocol.

[11] The amendments will enter into force on the thirtieth day following the receipt by the depositary of notification of their acceptance by three fourth of the parties to the amended protocol.

[12] Hereinafter: the Emergency Protocol.

[13] Hereinafter: the Land-Based Protocol.

[14] Hereinafter: the Areas Protocol.

[15] Hereinafter: the Seabed Protocol.

[16] Hereinafter: the Wastes Protocol.

h) the Protocol on Integrated Coastal Zone Management in the Mediterranean (Madrid, 21 January 2008[17]; not yet in force).

The updating and the additions to the Barcelona legal system show that the parties consider it as a dynamic body capable of being subject to re-examination and improvement, whenever appropriate[18]. Each of the new instruments contains important innovations, which will be reviewed hereunder. The protocols even display a certain degree of legal imagination in finding constructive ways to address complex environmental problems.

3. The Convention

The Convention, as amended in 1995, retains its character of a framework treaty that has to be implemented through specific protocols. It also retains what in 1976 was seen as a major innovation, that is the possibility of participation by the European Economic Community (now the European Community, EC) and by similar regional economic groupings at least one member of which is a coastal State of the Mediterranean Sea and which exercise competence in fields covered by the Convention (Art. 30). In fact, the EC is a party to the Convention and some of its protocols, together with seven Mediterranean States which are members of this organization (Cyprus, France, Greece, Italy, Malta, Slovenia and Spain).

In 1995 the geographical coverage of the Convention was extended to include all maritime waters of the Mediterranean Sea, irrespective of their legal condition[19]. However, the sphere of territorial application of the Barcelona legal system is flexible, in the sense that any protocol may extend the area to which it applies. For example, and for obvious reasons, the Seabed Protocol applies also to the continental shelf, the seabed and its subsoil. The Land-Based Protocol applies also to the "hydrologic basin" of the Mediterranean Sea Area, this being "the entire watershed area within the territories of the Contracting Parties, draining into the Mediterranean Sea Area". The application of the Convention may also be extended to "coastal areas as defined by each Contracting Party within its own territory", as it was recently done with the Coastal Zone Protocol.

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[17] Hereinafter: the Coastal Zone Protocol.

[18] As regards transparency within the Barcelona system, under an amendment adopted in 1988 to the Rules of procedure for meetings and conferences of the parties to the Convention, "the Executive Director [of UNEP] shall, with the tacit consent of the Contracting Parties, invite to send representatives, to observe any public sitting of any meeting or conference, including the meetings of technical committees, any international nongovernmental organization which has a direct concern in the protection of the Mediterranean Sea against pollution". Non-governmental organizations, representing both the environmentalist interests and other interests, such as those of the industrial sector, participate as observers to the meetings of the Barcelona legal system and are granted the right to take the floor. They provide a notable and competent contribution to the discussions.

[19] Taking into consideration the present multiform legislation of Mediterranean States, such waters can have the legal condition of maritime internal waters, territorial seas, fishing zones, ecological protection zones, exclusive economic zones or high seas.

The amended text of the Convention recalls and applies to a regional scale the main concepts embodied in the instruments adopted by the 1992 Rio Conference (the Declaration on Ennvironment and Development and the Programme of action "Agenda 21"), such as sustainable development, the precautionary principle, the integrated management of the coastal zones; the use of best available techniques and best environmental practices, as well as the promotion of environmentally sound technology, including clean production technologies. For the purpose of implementing the objectives of sustainable development, the parties are called to take fully into account the recommendations of the Mediterranean Commission on Sustainable Development, a new body established within the framework of the MAP, Phase II.
A new provision (Art. 15) relates to the right of the public to have access to information on the state of the environment and to participate in the decision-making processes relevant to the field of application of the Convention and the protocols. Nothing, however, is said as regards the equally important question of access of the public to justice.
Compliance with the Convention and the protocols, as well as with the decisions and recommendations adopted during the meetings of the parties, is assessed on the basis of the periodical reports that the parties are bound to transmit to the UNEP at regular intervals[20]. Such reports, which are examined by the biannual meetings of the parties, relate to the legal, administrative or other measures taken by the parties, their effectiveness and the problems encountered in their implementation. The meeting of the parties can recommend, when appropriate, the necessary steps to bring about full compliance with the Convention and the protocols and to promote the implementation of decisions and recommendations (Arts. 26 and 27). Specific reporting obligations are found in the protocols (see, for example, Art. 23 of the Areas Protocol).
In 2008 the Meeting of the parties adopted the procedures and mechanisms on compliance and established a compliance committee. The objective is "to facilitate and promote compliance with the obligations under the Barcelona Convention and its Protocols, taking into account the specific situation of each Contracting Party, in particular those which are developing countries"[21].

4. The Dumping Protocol

The Dumping Protocol applies to any deliberate disposal of wastes or other matter from ships or aircraft, with the exception of wastes or other matters deriving from the normal operations of vessels or aircraft and their equipment which are considered as pollution from ships. The protocol, as amended in

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[20] The secretariat functions are carried out by the UNEP (Art. 17), through the UNEP/MAP, located in Athens.

[21] See PAPANICOLOPULU, *Procedures and Mechanism on Compliance under the 1976/1995 Barcelona Convention on the Protection of the Mediterranean Sea and its Protocols*, in TREVES, PINESCHI, TANZI, PITEA, RAGNI & ROMANIN JACUR (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, The Hague, 2009, p. 155.

1995, presents two major changes with respect to the previous text.
First, the protocol applies also to incineration at sea, which is prohibited (Art. 7). It is defined as "the deliberate combustion of wastes or other matter in the maritime waters of the Mediterranean Sea, with the aim of thermal destruction and does not include activities incidental to the normal operations of ships and aircraft".
Second, the protocol is based on the idea that the dumping of wastes or other matter is in principle prohibited, with the exception of five categories of matters specifically listed, such as dredged materials, fish waste, inert uncontaminated geological materials. The original protocol was based on the idea that dumping was in principle permitted, with the exception of the prohibited matters listed in annex I (the so-called black list) and the matters listed in annex II (the so-called grey list) which required a prior special permit. The logic of the original text is thus fully reversed in order to ensure a better protection of the environment[22].

5. The Land-Based Protocol

The Land-Based Protocol applies to discharges originating from land-based points and diffuse sources and activities. Such discharges reach the sea through coastal disposals, rivers, outfalls, canals or other watercourses, including ground water flow, or through run-off and disposal under the seabed with access from land.
The Protocol, as amended in 1996, takes into account the objectives laid down in the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, adopted in Washington in 1995 by a UNEP intergovernmental conference. The Programme is designed to assist States in taking individual or joint actions leading to the prevention, reduction and elimination of what is commonly regarded as the main source (about 80%) of pollution of the marine environment[23].

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[22] On the world level, the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Wastes and Other Matter (London, Mexico City, Moscow, Washington, 1972) introduces a similar reversal of the logic followed in the parent convention. It is also based on the assumption that the parties shall prohibit the dumping of any wastes or other matter with the exception of those listed in an annex. In the 2000 report on Oceans and the law of the sea by the United Nations Secretary-General, the 1996 Protocol was seen as a "milestone in the international regulations on the prevention of marine pollution by dumping of wastes" and "a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials" (U.N. doc. A/55/61 of 20 March 2000, para. 159). The same words could be said about the Mediterranean Dumping Protocol as well.

[23] The Global Programme of Action strongly encourages action on a regional level as crucial for successful actions to protect the marine environment from pollution from land-based activities: "This is particularly so where a number of countries have coasts in the same marine and coastal area, most notably in enclosed or semi-enclosed seas. Such cooperation allows for more accurate identification and assessment of the problems in particular geographic areas and more appropriate establishment of priorities for action in these areas. Such cooperation also strengthens regional and national capacity-building and offers an important avenue for harmonizing and adjusting measures to fit the particular environmental and socio-economic circumstances. It, moreover, supports a more efficient and cost-effective implementation of the programmes of action" (para. 29).

As already said[24], the amended protocol enlarges its application to the "hydrologic basin of the Mediterranean Sea Area". To face land-based pollution of the sea, action must primarily be taken where the polluting sources are located, that is on the land territory of the parties. The Land-Based Protocol provides that parties shall invite States that are not parties to it and have in their territories parts of the hydrological basin of the Mediterranean Area to cooperate in the implementation of the protocol. But a party cannot be held responsible for any pollution originating on the territory of a non-party State. With the aim of eliminating pollution deriving from land-based sources, the parties "shall elaborate and implement, individually or jointly, as appropriate, national and regional action plans and programmes, containing measures and timetables for their implementation" (Art. 5, para. 2). The parties shall give priority to the phasing out of inputs of substances that are toxic, persistent and liable to bioaccumulate (Art. 1). These kinds of substances were not specifically mentioned in the original protocol.

The amended protocol was the subject of extensive negotiations – not only among the parties but also between the non-governmental environmentalist organizations and the organizations representing the chemical industry – as regards the crucial question on how to implement the obligation "to prevent, abate, combat and eliminate to the fullest possible extent pollution". Finally the following solution was found satisfactory by everybody. On the one hand, the environmentalists accepted that their initial request, that is an absolute ban by the year 2005 of any kind of discharge and emission of substances which are toxic, persistent and liable to bioaccumulate, would be impossible to achieve because of its serious economic and social repercussions. On the other hand, the chemical industry agreed to be bound by measures and timetables having a legally obligatory nature, provided that they related to specific groups of substances and were adapted to the specific requirements of the different instances.

The procedural machinery to achieve what was agreed upon is embodied in Art. 15. It provides that the meeting of the parties adopts, by a two-thirds majority, the short-term and medium-term regional plans and programmes, containing measures and timetables for their implementation, in order to eliminate pollution deriving from land-based sources and activities, in particular to phase out inputs of substances that are toxic, persistent and liable to bioaccumulate. These measures and timetables become binding on the 180th day following the date of their notification for all the parties which have not notified an objection. The result is a mechanism that is intended to be both realistic and effective.

Major changes were also made with respect to the annexes. Annex I relates to the "Elements to be taken into account in the preparation of action plans, programmes and measures for the elimination of pollution from land-based sources and activities". It provides that in preparing action plans, programmes and measures, the parties "will give priority to substances that are toxic, persistent and liable to bioaccumulate, in particular to persistent organic pollu-

[24] *Supra*, para. 3.

tants (POPs), as well as to wastewater treatment and management". It lists nineteen categories of substances and sources of pollution which will serve as guidance in the preparation of action plans, programmes and measures, including, as first entry, the organohalogen compounds and substances which may form such compounds in the marine environment[25]. Annex II relates to the "Elements to be taken into account in the issue of the authorizations for discharges of wastes" and Annex III to the "Conditions of application to pollution transported through the atmosphere". Finally, Annex IV gives the "Criteria for the definition of best available techniques and best environmental practice"[26].

6. The Areas Protocol

The 1995 Areas Protocol is very different from the previous 1982 protocol, and formally distinct from it[27]. The new protocol is applicable to all the marine waters of the Mediterranean, irrespective of their legal condition, as well as to the seabed, its subsoil and to the terrestrial coastal areas designated by each party, including wetlands. On the contrary, the application of the 1982 protocol was limited to the territorial sea of the parties and did not cover the high seas. The extension of the geographical coverage of the instrument was seen necessary to protect also those highly migratory marine species (such as marine mammals) which, because of their natural behaviour, cross the artificial boundaries drawn by man on the sea.

The purpose to establish marine protected areas also on the high seas gave

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[25] Priority is given to Aldrin, Chlordane, DDT, Dieldrin, Dioxins and Furans, Endrin, Hexachlorobenzene, Mirex, PCBs and Toxaphene.

[26] The criteria listed in Annex IV of the Land-Based Protocol are literally taken from the Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 1992; so-called OSPAR Convention). In fact, the State which proposed the criteria in question simply presented a photocopy of the relevant OSPAR annex. However, unlike the case of literary works, copying is by no means illegal in the process of drafting a legal text. In the case in question, copying was tantamount to paying tribute to the wisdom of the drafters of another regional sea treaty.

[27] The 1995 Areas Protocol implements the objectives set forth in Agenda 21. According to this instrument, States, acting individually, bilaterally, regionally or multilaterally and within the framework of IMO and other relevant international organizations, should assess the need for additional measures to address degradation of the marine environment. This should be done, inter alia, by taking action to ensure respect of areas which are specially designated, consistent with international law, in order to protect and preserve rare or fragile ecosystem (para. 17.30). Agenda 21 stresses the importance of protecting and restoring endangered marine species, as well as preserving habitats and other ecologically sensitive areas, both on the high seas (para. 17.46, *e*, *f*) and in the zones under national jurisdiction (para. 17.75, *e*, *f*). In particular, "States should identify marine ecosystems exhibiting high levels of biodiversity and productivity and other critical habitat areas and provide necessary limitations on use in these areas, through, inter alia, designation of protected areas" (para. 17.86). On the protocol see SCOVAZZI (ed.), *Marine Specially Protected Areas - The General Aspects and the Mediterranean Regional System*, The Hague, 1999; BOU FRANCH & BADENES CASINO, *La protección internacional de zonas y especies en la región mediterránea*, in *Anuario de Derecho Internacional*, 1997, p. 33.

rise to some difficult legal problems due to the lack of territorial jurisdiction in these waters. As some coastal States have not yet established their exclusive economic zone, there are in the Mediterranean extents of waters located beyond the 12-mile limit of the territorial sea which still have the status of high seas. However, if all coastal States proclaimed an exclusive economic zone, the high seas would disappear in the Mediterraneans, as no point in this semi-enclosed sea is located more than 200 n.m. from the nearest land or island. Another delicate question was the possibility to establish marine protected areas in waters where the maritime boundaries have yet to be agreed upon by the interested countries. There are in the Mediterranean several cases where a delimitation of the territorial seas or other maritime zones is particularly complex because of the local geographic characteristics. In order to overcome these difficulties, the new protocol includes two very elaborate disclaimer provisions (Art. 2, paras. 2 and 3) which have two important aims. First, the establishment of intergovernmental cooperation in the field of the marine environment cannot prejudice other legal questions which have a different nature and are still pending, such as those relating to the nature and extent of marine jurisdictional zones or to the drawing of marine boundaries between adjacent or opposite States. Second, the very existence of such legal questions cannot jeopardize or delay the adoption of measures necessary for the preservation of the ecological balance of the Mediterranean.
The Areas Protocol provides for the establishment of a List of specially protected areas of Mediterranean importance (SPAMI List)[28]. The SPAMI List may include sites which "are of importance for conserving the components of biological diversity in the Mediterranean; contain ecosystems specific to the Mediterranean area or the habitats of endangered species; are of special interest at the scientific, aesthetic, cultural or educational levels". The procedures for the establishment and listing of SPAMIs are specified in detail in the protocol. For instance, as regards an area located partly or wholly on the high seas, the proposal must be made "by two or more neighbouring parties concerned" and the decision to include the area in the SPAMI List is taken by consensus by the contracting parties during their periodical meetings.
Once the areas are included in the SPAMI List, all the parties agree "to recognize the particular importance of these areas for the Mediterranean" and - this is also important – "to comply with the measures applicable to the SPAMIs and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMIs were established". This gives to the SPAMIs and to the measures adopted for their protection an *erga omnes partes* effect. As regards the relationship with third countries, the parties are called to "invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation" of the protocol. They also "undertake to adopt appropriate measures, consistent with international law,

[28] The existence of the SPAMI List does not prejudice the right of each party to create and manage marine protected areas which are not intended to be listed as SPAMIs.

to ensure that no one engages in any activity contrary to the principles and purposes" of the protocol. This provision aims at facing the potential problems arising from the fact that treaties, including the Areas Protocol, can create rights and obligations only among parties.

The Areas Protocol is completed by three annexes, which were adopted in 1996 in Monaco. They are the "Common criteria for the choice of protected marine and coastal areas that could be included in the SPAMI List" (Annex I), the "List of endangered or threatened species" (Annex II) and the "List of species whose exploitation is regulated" (Annex III).

At the Meeting of the Contracting Parties held in 2001 the first twelve SPAMIs were inscribed in the SPAMI List, namely the island of Alborán (Spain), the sea bottom of the Levante de Almería (Spain), Cape Gata-Nijar (Spain), Mar Menor and the East coast of Murcia (Spain), Cape Creus (Spain), Medas Islands (Spain), Columbretes Islands (Spain), Port-Cros (France), the Kneiss Islands (Tunisia), La Galite, Zembra and Zembretta (Tunisia) and the French-Italian-Monegasque sanctuary for marine mammals (so-called Pelagos sanctuary, jointly proposed by the three States concerned and covering also high seas waters[29]). Other SPAMIs have subsequently been added, namely the Cabrera Archipelago (Spain) and Maro-Cerro Gordo (Spain) in 2003, Kabyles Bank (Algeria), Habibas Islands (Algeria) and Portofino (Italy) in 2005, Miramare (Italy), Plemmirio (Italy), Tavolara – Punta Coda Cavallo (Italy) and Torre Guaceto (Italy) in 2008, Bonifacio Mouths (France), Capo Caccia – Isola Piana (Italy), Punta Campanella (Italy) and Al-Hoceima (Morocco) in 2009.

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[29] On 25 November 1999 France, Italy and Monaco signed in Rome an Agreement on the creation in the Mediterranean sea of a sanctuary for marine mammals. This is the first international agreement ever adopted with the specific objective of establishing a sanctuary for marine mammals. The area covered by the sanctuary, which extends over 96,000 km^2, includes waters which have the legal status of maritime internal waters, territorial sea, ecological protection zone and high seas. It is inhabited by the eight cetacean species regularly found in the Mediterranean, namely the fin whale (*Balaenoptera physalus*), the sperm whale (*Physeter catodon*), Cuvier's beaked whale (*Ziphius cavirostris*), the long-finned pilot whale (*Globicephala melas*), the striped dolphin (*Stenella coeruleoalba*), the common dolphin (*Delphinus delphis*), the bottlenose dolphin (*Tursiops truncatus*) and Risso's dolphin (*Grampus griseus*). In this area, the water currents create conditions favouring phytoplankton growth and abundance of krill (*Meganyctiphanes norvegica*), a small shrimp that is preyed upon by pelagic vertebrates. Under the agreement, the parties undertake to adopt measures to ensure a favourable state of conservation for every species of marine mammal and to protect them and their habitat from negative impacts, both direct and indirect. They prohibit in the sanctuary any deliberate "taking" (defined as "hunting, catching, killing or harassing of marine mammals, as well as the attempting of such actions") or disturbance of mammals. Non-lethal catches may be authorized in urgent situations or for *in-situ* scientific research purposes. There is a direct connection between the Sanctuary Agreement and the Areas Protocol. As provided for in the former, as soon as the Areas Protocol "enters into force for them, the Parties will present a joint proposal for inclusion of the sanctuary in the list of specially protected areas of Mediterranean importance". This was actually done in November 2001 by France, Italy and Monaco.

7. The Seabed Protocol

The Seabed Protocol relates to pollution resulting from exploration and exploitation of the the seabed and its subsoil. Several of its provisions set forth obligations incumbent on the parties with respect to activities carried out by operators, who can be private persons, either natural or juridical. This kind of obligations is to be understood in the sense that each party is bound to exercise the appropriate legislative, executive or judicial activities in order to ensure that the operators comply with the provisions of the protocol. The definition of "operator" is broad. It includes not only persons authorized to carry out activities (for example, the holder of a licence) or who carry out activities (for example, a sub-contractor), but also any person who does not hold an authorization but is *de facto* in control of activities. The parties are under an obligation to exercise due diligence in order to make sure, within the seabed under their jurisdiction, that no one engages in activities which have not previously been authorized or which are exercised illegally.

All activities in the Seabed Protocol area, including erection of installations on site, are subject to the prior written authorization by the competent authority of a party. Before granting the authorization, the authority must be satisfied that the installation has been constructed according to international standards and practice and that the operator has the technical competence and the financial capacity to carry out the activities. Authorization must be refused if there are indications that the proposed activities are likely to cause significant adverse effects on the environment that could not be avoided by compliance with specific technical conditions. This obligation can be seen as an application of the precautionary principle. Special restrictions or conditions may be established for the granting of authorizations for activities in specially protected areas.

The parties are bound to take measures to ensure that liability for damage caused by activities to which the protocol applies is imposed on operators who are required to pay prompt and adequate compensation. They shall also take all measures necessary to ensure that operators have and maintain insurance cover or other financial security in order to ensure compensation for damages caused by the activities covered by the protocol[30].

8. The Wastes Protocol

The Wastes Protocol is applicable to a subject matter already covered, on the world scale, by the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 1989). The Basel Convention allows its parties to enter into regional agreements, provided that they stipulate provisions which are not less environmentally sound than those of the Basel Convention itself. This mean that, to have some purpose, a regional instrument on movements of wastes should bring some "added value"

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[30] On the subject of liability and compensation, see *infra*, para. 11.

to the rights and obligations already established under the Basel Convention. In the specific case, this occurs in three instances at least.
First, while the Basel Convention does not apply to radioactive wastes, the Wastes Protocol covers also "all wastes containing or contaminated by radionuclides, the radionuclide concentration or properties of which result from human activity".
Second, unlike the Basel Convention, the Wastes Protocol applies also to a particular kind of substances which are properly to be considered products instead of wastes, as they are not intended for disposal. These are the "hazardous substances that have been banned or are expired, or whose registration has been cancelled or refused through government regulatory action in the country of manufacture or export for human health or environmental reasons, or have been voluntarily withdrawn or omitted from the government registration required for use in the country of manufacture or export".
Third, the Wastes Protocol clarifies an important question that was not settled in precise terms by the Basel Convention: what are the rights of the coastal State if a foreign ship carrying hazardous wastes is transiting through its territorial sea? The Basel Convention, which is applicable to both land and marine transboundary movements of hazardous wastes, provides in general that movements may only take place with the prior written notification by the State of export to both the State of import and the State of transit and with their prior written consent. However, as far as the sea is concerned, it contains a disclaimer provision which protects both the sovereign rights and jurisdiction of coastal States, on the one hand, and the exercise of navigational rights and freedoms, on the other. Because of its wording, this provision is open to different interpretations and, indeed, has been interpreted in opposite ways by States inclined to give priority to one or the other solution. In fact, under The Basel Convention, doubt remains as to whether the export State has any obligation to notify the coastal transit State or to obtain its prior consent. The alternative is reflected in two opposite schemes, namely "notification and authorization", on the one hand, and "neither notification, nor authorization", on the other.
The Wastes Protocol gives a definite answer to the question by providing for an intermediate solution, consisting of a "notification without authorization" scheme. The transboundary movement of hazardous wastes through the territorial sea of a State of transit may take place only with the prior notification by the State of export to the State of transit. The approach adopted by the Wastes Protocol strikes a fair balance between the interests of maritime traffic and those of the protection of the marine environment. On the one side, ships carrying hazardous wastes keep the right to pass, as their passage is not subject to authorization by the coastal State. On the other, the coastal State has a right to be previously notified, in order to know what occurs in its territorial sea and to be prepared to intervene in cases of casualties or accidents during passage which could endanger

human health or the environment[31]. Yet transparency can only lead to cooperation, while attachment to secrets does not seem a promising way to ensure the protection of the marine environment.

9. The Emergency Protocol

The 2002 Emergency Protocol has replaced the previous 1976 protocol. As in the case of the Areas Protocol, the changes with respect to the previous instrument were so extensive that the Parties decided to draft a new instrument, instead of merely amending the old text. The adoption of a strengthened legal framework for combating pollution from ships is particularly important in view of the increasing maritime traffic and transport of hazardous cargo within and through the Mediterranean. The Emergency Protocol takes into account the lessons learned from the accident of the tanker *Erika* (1999). It is true that pollution from ships is a typical field where regulation at the world level is mostly appropriate. All the technical rules, such as those relating to requirements in respect to design, construction, equipment and manning of ships, need to be adopted at a global and uniform level. Navigation, which is the traditional cornerstone of the regime of oceans and seas, would be impossible if different and conflicting provisions on technical characteristics of ships were adopted at the domestic or regional level. Art. 211 of the UNCLOS, relating to pollution from vessels, explicitly refers to "generally accepted international rules and standards established through the competent international organization or general diplomatic conference". It would also be unrealistic to try to modify the allocation of enforcement powers among the flag State, the port State and the coastal State set forth in Arts. 217, 218 and 220 of the UNCLOS, which were the outcome of a difficult negotiation.

The Emergency Protocol acknowledges in the preamble the role of the International Maritme Organization (IMO), which is the competent international organization in the field of safety of navigation, and the importance of cooperating in promoting the adoption and the development of international rules and standards on pollution from ships within the framework of IMO. This is a clear reference to the various conventions which have been concluded under

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[31] The "notification without authorization" scheme of the Wastes Protocol is fully compatible with the international law of the sea, as embodied in the UNCLOS. Under the UNCLOS section on innocent passage in the territorial sea, passage must be innocent, i.e. "not prejudicial to the peace, good order or security of the coastal State" (Art. 19, para. 1). Any act of wilful and serious pollution contrary to the UNCLOS is incompatible with the right of innocent passage (Art. 19, para. 2, *h*). Foreign ships have the right to pass (Art. 17), but nowhere in the UNCLOS it is said that they have the right to pass secretly or covertly. Moreover, under Art. 22, paras. 1 and 2, of the UNCLOS some particularly dangerous ships, namely "tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances may be required to confine their passage" to sea lanes designated or prescribed by the coastal State. An obvious question can be asked in this respect: how could a coastal State exercise its right to prescribe sea lanes for ships carrying noxious substances if it were not even entitled to know that a foreign ship is carrying these substances?

the sponsorship of IMO[32] and to the competences that since longtime IMO has been exercising as regards safety of shipping (such as decisions on traffic separation schemes, ships reporting systems, areas to be avoided, etc.). All such instruments and competences are in no way prejudiced by the Emergency Protocol[33].

However, it is also true that also regional cooperation has a role to play in the field of pollution from ships. For instance, international cooperation for prompt and effective action in taking emergency measures to fight against pollution needs to be organized at the regional level. The first Emergency Protocol already provided for the setting up of an institutional framework for actions of regional cooperation in combating accidental marine pollution: the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), which is administered by IMO (International Maritime Organization) and UNEP and is located in Malta.

The Emergency Protocol is not limited (as was the former instrument) to emergency situations. It also covers some aspects of the subject matter of pollution from ships and aims at striking a fair balance between action at the world and action at the regional level. For instance, Art. 15, relating to environmental risk of maritime traffic, provides that "in conformity with generally accepted international rules and standards and the global mandate of the International Maritime Organization, the Parties shall individually, bilaterally or multilaterally take the necessary steps to assess the environmental risks of the recognized routes used in maritime traffic and shall take the appropriate measures aimed at reducing the risks of accidents or the environmental consequences thereof".

The "added value" brought by the new Protocol may be found in several of its provisions. It covers not only ships, but also places where shipping accidents can occur, such as ports and offshore installations. The definition of the "related interests" of a coastal State that can be affected by pollution has been enlarged to include also "the cultural, aesthetic, scientific and educational value of the area" and "the conservation of biological diversity and the sustainable use of marine and coastal biological resources". A detailed provision on reimbursement of costs of assistance has been elaborated.

The Emergency Protocol sets forth a number of obligations directed to the masters of ships sailing in the territorial sea of the parties (including ships

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[32] Such as the Convention for the prevention of pollution from ships as amended by the Protocol (London, 1973-1978; so-called MARPOL), the Convention on oil pollution preparedness, response and co-operation (London, 1990), the Convention on the control of harmful anti-fouling systems on ships (London, 2001) or the Convention for the control and management of ships' ballast waters and sediments (London, 2004).

[33] The Emergency Protocol also acknowledges "the contribution of the European Community to the implementation of international standards as regards maritime safety and the prevention of pollution from ships". The European Community has enacted a number of legal instruments relating to the control and prevention of marine pollution from ships which apply for its member States in addition to rules adopted under the aegis of IMO.

flying a foreign flag), namely: to report incidents and the presence, characteristics and extent of spillages of oil or hazardous and noxious substances; to provide the proper authorities, in case of a pollution accident and at their request, with detailed information about the ship and its cargo and to cooperate with these authorities. The obligations in question, which have a reasonable purpose and do not overburden ships, do not conflict with the right of innocent passage provided for in the UNCLOS. The lessons arising from the *Erika* accident are particularly evident in the provision according to which the Parties shall define strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment.

10. The 2008 Coastal Zone Protocol

To confirm the dynamic character of the Barcelona legal system, a new protocol, relating to the integrated coastal zone management, was opened to signature in 2008. It addresses the increase in anthropic pressure on the Mediterranean coastal zones which is threatening their fragile equilibrium and provides Mediterranean States with the legal and technical tools to ensure sustainable development throughout the shores of this regional sea[34]. It is the first treaty ever adopted which is specifically devoted to the coastal zone. The Coastal Zone Protocol defines "integrated coastal management" as "a dynamic process for the sustainable management and use of coastal zones, taking into the account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts" (Art. 2, *g*).

The precise delimitation of the geographical coverage of the protocol gave rise to lengthy discussion during the negotiations. The question was finally solved in a both precise and flexible way (Art. 3). The seaward limit of the coastal zone is the external limit of the territorial sea[35]; the landward limit of the coastal zone is the limit of the competent coastal units as defined by parties. But parties may establish different limits, in so far as certain conditions occur. Art. 6 of the protocol lists a number of general principles of integrated coastal zone management. For instance, the parties are bound to formulate "land use strategies, plans and programmes covering urban development and socio-economic activities, as well as other relevant sectoral polices"[36]. They shall take into account in an integrated manner "all elements relating to hydrological,

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[34] See *Report by the Coordinator for the 15th Meeting of the Contracting Parties*, doc. UNEP(DEP)/MED IG.17/3 of 21 November 2007, p. 7.

[35] Presently 12 n.m. for most Mediterranean States, with the exceptions of the United Kingdom (3 n.m.), Greece (6 n.m.) and Turkey (6 n.m. in the Aegean Sea).

[36] Art. 17 provides for the definition by parties of a common regional framework for integrated coastal zone management in the Mediterranean. Under Art. 18, parties are bound to formulate a national strategy for integrated coastal zone management and coastal implementation plans and programmes consistent with the common regional framework.

geomorphological, climatic, ecological, socio-economic and cultural systems", so as "not to exceed the carrying capacity of the coastal zone and to prevent the negative effects of natural disasters and of development". The parties are also required to take into account the diversity of activities in the coastal zone and to give priority "where necessary, to public services and activities requiring, in terms of use and location, the immediate proximity of the sea".
Art. 8 of the protocol provides for the establishment of a 100-meter zone where construction is not allowed. However, "adaptations" are allowed "for projects of public interest" and "in areas having particular geographical or other local constraints, especially related to population density or social needs, where individual housing, urbanisation or development are provided for by national legal instruments". Other important obligations of the parties relate to "limiting the linear extension of urban development and the creation of new transport infrastructure along the coast", to "providing for freedom of access by the public to the sea and along the shore" and to "restricting or, where necessary, prohibiting the movement and parking of land vehicles, as well as the movement and anchoring of marine vessels in fragile natural areas on land or at sea, including beaches and dunes".
Some provisions of the protocol deal with specific activities, such as "agriculture and industry", "fishing", "aquaculture", "tourism, sporting and recreational activities", "utilization of specific natural resources" and "infrastructure, energy facilities, ports and maritime works and structure" (Art. 9, para. 2), as well as with certain specific coastal ecosystems, such as "wetlands and estuaries", "marine habitats", "coastal forests and woods" and "dunes" (Art. 10). Due emphasis is granted to risks affecting the coastal zone, in particular climate change (Art. 22) and coastal erosion (Art. 23).

11. The Guidelines on Liability and Compensation

On 18 January 2008, the meeting of the parties to the Convention, held in Almeria, adopted a set of Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area[37]. The Guidelines, which are the outcome of lengthy works of elaboration[38], present several elements of interest. As it would be impossible to discuss all the aspects of this instrument, the remarks made hereunder will focus only on a few selected issues.
The Guidelines, as this denomination itself clearly implies, do not have a

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[37] Hereinafter: the Guidelines. For the text, see the *Report* of the meeting, doc. UNEP(DEPI)/MED. IG.17/10 of 18 January 2008, p. 133.
[38] On the preparatory works see BOU FRANCH, *Towards a Liability Protocol for Environmental Harm in the Mediterranean Sea Area*, in KOKASOY (ed.), *The Kriton Curi International Symposium on Environmental Management in the Mediterranean Region - Proceedings*, I, Istanbul, 1998, p. 207; SCHIANO DI PEPE, *Introducing an International Civil Liability Regime for Damage to the Marine Environment in the Mediterranean Sea Area*, in *Environmental Liability*, 1999, p. 8; SCOVAZZI, *As perspectivas de um instrumento legal para os danos ao ambiente marinho do Mediterrâneo*, in *Estudos Leme Machado*, São Paulo, 2005, p. 314.

mandatory character for the parties[39]. Rather than drafting a protocol (and waiting for the number of ratifications needed for its entry into force), the Parties preferred to follow a step-by-step approach, starting by a soft-law instrument. During the discussion on this question, some States called for prudence, remarking that several treaties relating to environmental liability and compensation had not yet come into force and there were doubts as to when they would actually come into force. As a first step, the parties decided to strengthen their cooperation in the field of liability and compensation through the adoption in their national legislation of a set of provisions which are as uniform as possible, being based on the model of the Guidelines.

As regards their scope, the Guidelines in principle apply to all the subject matters covered by the so-called Barcelona system, that is "to the activities to which the Barcelona Convention and any of its Protocols apply" (Guideline A, para. 4). In the determination of the scope of the Guidelines account should also be taken of the fact that they have a complementary character and do not intend to prejudice any environmental liability and compensation regimes which exist or may exist in the future (see Guideline B, para. 5), as listed in the Appendix to the Guidelines.

From the theoretical point of view, the most interesting aspect of the Guidelines is the distinction they make between two kinds of damage resulting from the pollution of the marine environment, called respectively "traditional damage" and "environmental damage", and the classification they provide of the entries falling under either of them.

The first kind of damage, that is traditional damage, is composed of four entries:

"For the purpose of these Guidelines, 'traditional damage' means:

(a) loss of life or personal injury;

(b) loss of or damage to property other than property held by the person liable;

(c) loss of income directly deriving from an impairment of a legally protected interest in any use of the marine environment for economic purposes, incurred as a result of impairment of the environment, taking into account savings and costs;

(d) any loss or damage caused by preventive measures taken to avoid damage referred to under sub-paragraphs (a), (b) and (c)" (Guideline D, para. 14).

In the light of the Guidelines, traditional damage is intended as the damage suffered by persons, either natural or juridical, such as individuals and private or public entities, including the State. The damage can consist in bodily injuries or loss of life, in loss or deterioration of property and in loss or reduction of earnings. The adjective "traditional" simply means that there is no discussion that this kind of damage can be compensated under well established general principles of law, as they are reflected since hundreds, if not thousands, of years in the national legislation of most countries.

The second kind of damage is typical of cases of pollution of natural components, including marine waters. It is suffered by the environment as such (*per*

[39] Here and hereunder the term "parties" is referred to the parties to the Barcelona Convention.

se), determining a negative change in the quality of a natural component:
"For the purpose of these Guidelines, 'environmental damage' means a measurable adverse change in a natural or biological resource or measurable impairment of a natural or biological resource service which may occur directly or indirectly" (Guideline D, para. 9).
The entries composing the "environmental damage" are the following:
"Compensation for environmental damage should include, as the case may be:
(a) costs of activities and studies to assess the damage;
(b) costs of preventive measures including measures to prevent a threat of damage or an aggravation of damage;
(c) costs of measures undertaken or to be undertaken to clean up, restore and reinstate the impaired environment, including the cost of monitoring or control of the effectiveness of such measures;
(d) diminution in value of natural or biological resources pending restoration;
(e) compensation by equivalent if the impaired environment cannot return to its previous condition" (Guideline D, para. 10).
The first three entries of environmental damage relate to costs that are borne by a person, in many cases the State or another public entity, especially where there is a need to take urgent measures or where the liable operator cannot be identified[40]. These costs can be calculated in precise monetary terms, corresponding to the sum of the "bills" for the measures taken.
As regards the last two entries of "environmental damage", the Guidelines follow an advanced approach, based on the model of some legislative texts, such as European Community Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage[41]. This instrument makes a distinction between "primary remediation", that is "any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition", "complementary remediation", that is "any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services" and "compensatory remediation", that is "any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved its full effect" (Annex II, para. 1, sub-paras. *a*, *b* and *c*)[42]. According to this logic,

[40] "The legislation of the Contracting Parties should require that the measures referred to in paragraph 10 (b) and (c) are taken by the operator. If the operator fails to take such measures or cannot be identified or is not liable under the legislation implementing these Guidelines, the Contracting Parties should take these measures themselves and recover the costs from the operator where appropriate" (Guideline E, para. 16).
[41] *Official Journal of the European Union* No. L 143 of 30 April 2004.
[42] Interim losses are defined in the Directive as "losses which result from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public until the primary or complementary measures have taken effect. It does not consist of financial compensation to members of the public" (Annex II, para. 1, sub-para. *d*).

accepted also by the Guidelines, compensation for environmental damage includes the cost of the re-establishment of the condition that existed before the pollution (primary remediation, covered by Guideline D, para. 10, entries from *a* to *c*), the cost of compensation by equivalent action to be taken elsewhere if the polluted environment cannot fully return to its previous condition (complementary remediation, covered by entry *e* of the Guideline), as well as the value of the diminution of the quality of natural components during the time when restoration is pending (compensatory remediation or interim compensation, covered by entry *d* of the Guideline). Neither complementary nor compensatory remediation can be assessed in precise monetary terms. Both correspond to a damage suffered by the environment itself and are paid by the liable operator to State or another public entity, as a trustee of the public interest in the preservation of the quality of the environment.

On the complex issue of the assessment of damage that cannot be determined in precise monetary terms, the Guidelines avoid any reference to specific criteria, such as the habitat equivalency analysis or others that are also sometimes proposed. They provide in general that "in assessing the extent of environmental damage, use should be made of all available sources of information on the previous condition of the environment (…)" (Guideline D, para. 11).

An important condition is put on what is received as complementary and compensatory compensation. It must be earmarked for environmental purposes:

"When compensation is granted for damage referred to in paragraph 10 (d) and (e), it should be earmarked for intervention in the environmental field in the Mediterranean Sea Area" (Guideline D, para. 13).

The Guidelines channel liability[43] on the operator (Guideline F, para. 17)[44], who can avail himself of limitations of liability on the basis of international treaties or relevant domestic legislation (Guideline I, para. 25). However, the question of compulsory insurance for the operators, which could be seen as linked to the benefit of limitation of liability, was the subject of lengthy discussions, due also to the lack of a sufficiently developed market for insuring environmental damage. In consideration of the doubts expressed, the Guidelines postpone to the future the question of a financial and security scheme:

"The Contracting Parties, after a period of five years form the adoption of these Guidelines, may, on the basis of an assessment of the products available on the insurance market, envisage the establishment of a compulsory insurance regime" (guideline K, para. 28).

While the basic rule is that the operator should pay for the damage, there may be cases where the operator is unknown or unable to pay or the amount of compensation goes beyond the limit of his liability. The question of the estab-

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[43] The basic standard of liability is strict liability (see Guideline G, para. 19).

[44] The operator is defined as "any natural or juridical person, whether private or public, who exercises the *de jure* or *de facto* control over an activity covered by these Guidelines, as provided for in paragraph 4" (Guideline F, para. 18).

lishment of a Mediterranean Compensation Fund (MCF) was the subject of discussions that could not reach, for the time being, a generally agreed solution[45]. Here again the Parties were prudent in reserving further action for the future:

"The Contracting Parties should explore the possibility of establishing a Mediterranean Compensation Fund to ensure compensation where the damage exceeds the operator's liability, where the operator is unknown, where the operator is incapable of meeting the cost of damage and is not covered by financial security or where the State takes preventive measures in emergency situations and is not reimbursed for the cost thereof" (Guideline L, para. 29).

12. Conclusive Remarks

When it was originally drafted, the Barcelona system served as an example for the elaboration of other UNEP regional seas instruments. A similar role can be played also today, after the updatings and additions that it has undergone. The Barcelona system has been adapted to the evolution of international law in the field of the protection of the marine environment and has addressed concrete problems in clear and sensible ways. It is to be regretted that some of the new or updated protocols take too much time to enter into force. Governments are sometimes led by different reasons to balance environmental needs with other interests and may be hesitant to promptly endorse the most advanced instruments. But the fact remains that all the present new or updated instruments of the Barcelona system constitute effective tools to preserve a common natural heritage and to face the common concerns of the bordering States. They bring an added value to the general obligation to cooperate for the protection of the marine environment already embodied in the UNCLOS and in customary international law.

A notable remark is that UNEP Mediterranean Action Plan is broadening its scope. At their 2009 meeting the parties to the Barcelona Convention adopted the Marrakesh Declaration which aims at promoting a better regional environmental governance, especially to meet the future challenges of climate change. The parties declared

"themselves concerned by the serious threats to the environment that are confronting the Mediterranean, including the destruction of its biodiversity, adverse effects on the countryside, coastline and water resources, soil degradation, desertification, coastal erosion, eutrophication, pollution from land-based sources, negative impacts related to the growth of maritime traffic, the over-exploitation of natural resources, the harmful proliferation of algae or other organisms, and the unsustainable exploitation of marine resources".

The parties also considered that climate change is the major challenge that humanity will face in the next decades. Its impacts, in particular the rise in

[45] If a fund were to be established, the complex question should be addressed of whether it would be financed by the States, by the operators concerned or by both of them and a system would have to be developed to assess the respective contributions.

the level of the sea, the increase in temperatures, the acidification of marine waters and the modification of the economic and social equilibrium of coastal communities, will have significant consequences in the specific case of the Mediterranean, in which a great majority of the population is concentrated on the coastline. In this context, the parties declared themselves aware that "it is essential to reinforce regional co-operation to identify and assess the short-, medium- and long-term impacts of, and vulnerabilities to, climate change in the Mediterranean region, and to design and implement the best adaptation and prevention options". Under the Marrakesh Declaration, the objective to promote better regional environmental governance in the Mediterranean region should be achieved through "an integrated approach that guarantees coherence between the various sectoral strategies and takes into consideration their impact on ecosystems", ensuring co-ordination among all regional institutions and initiatives.

With the Marrakesh Declaration, the prospects for the broadening of the scope of UNEP-MAP's activities seem promising. It is sometimes suggested that a Forum for Governance of the Mediterranean Basin be established as a periodical and open-ended machinery for the discussion and elaboration of rules and policies relevant for the management of the Mediterranean, as well as procedures to implement them[46]. The UNEP Mediterranean Action Plan could become a leading player in such machinery.

[46] See, for example, the study European Commission – EuropeAid Cooperation Office, *Study on the Current Status of ratification, Implementation and Compliance with Maritime Treaties Applicable to the Mediterranean Sea Basin*, Part 2, December 2009, para. 10.4 (published on the website http://ec.europa.eu/maritimeaffairs/mediterranean_en.html).

GOVERNANCE OF THE ENVIRONMENTAL PROTECTION OF THE BLACK SEA: A MODEL FOR REGIONAL COOPERATION

Ahmet E. Kideys[1], Violeta Velikova[1] Nilufer Oral[2]

[1] Permanent Secretariatof the Commission on the Protection of the Black Sea Against Pollution, Dolmabahce Sarayi, Hareket Kosku, II, Besiktas, Istanbul, Turkey
[2] Bilgi University, Istanbul, Turkey

Abstract

The Black Sea is a semi-enclosed sea ecologically linked to the Mediterranean Sea through the narrow Turkish Straits system. The Black Sea regional institutional framework for protection of the marine environment involves two regional organizations: the Commission for the Protection of the Black Sea against Pollution, established through the United Nations Environmental Programme in 1992, and the Black Sea Economic Cooperation (BSEC), also established in 1992. The BSC is the body responsible for the implementation of the Bucharest Convention and its protocols, and the Black Sea-Strategic Action Plan (BS-SAP). The legal regime for the protection and preservation of the Black Sea against pollution is made up of the1992 Convention for the Protection of the Black Sea against Pollution and its implementing protocols. The legal instruments were subsequently supplemented with the four Ministerial Declarations: the Odessa Declaration (1993), the Sofia Declaration (2002), Bucharest Declaration (2007) and the latest Sofia Declaration (2009). Most of the environmental problems in the Black Sea are of transboundary character and as such cannot be efficiently regulated by individual states. Besides, many Black Sea resources are shared and in need for a common regional policies. A new Black Sea Strategic Action Plan (BS-SAP) was adopted by the Black Sea States in 2009. This paper will review recent developments in the implementation of the new BS-SAP.

1. Introduction

The Black Sea, with the adjoining Azov Sea, forms an enclosed basin with a catchment area of over two million square kilometres. Approximately 350 km^3 of river water flows into the Black Sea annually from an area encompassing nearly one third of continental Europe. The surface area of the Black Sea is approximately 386,000 km2 with a maximum depth of 2,206 metres. The Black Sea shoreline stretches for a total of 4,340 kilometres.[1]

[1] Coastal length on the Black Sea: Bulgaria 300 km; Georgia 310 km; Romania 227 km; Russia 475 km; Turkey 1,400 km and Ukraine 1,628 km.

The Black Sea and the Mediterranean Sea are both semi-enclosed or enclosed seas as defined under Article 122 of the United Nations Law of the Sea Convention ("UNCLOS"). These two seas are connected through the narrow Turkish Straits system, consisting of the Straits of Istanbul and Çanakkale. The Strait of Istanbul, which connects the Black Sea to the Sea Marmara, measures a mere seven hundred metres at its narrowest channel. The abundance of fresh water flowing into the Black Sea from a multitude of rivers from the European and Asian continents,[2] coupled with the narrow Turkish Strait outlet to the world ocean creates an extremely slow rate of water exchange for the Black Sea, which in turn has created one of the most *anoxic* bodies of water and also one of the most poisonous. The marine life of the Black Sea is supported by a narrow layer of surface water, underneath which a 2000 meter column of *hydrogen sulphide* prevents the sustainability of marine life at lower depths. The precarious water margin within which the Black Sea biodiversity must survive has been further eroded by the anthropogenic impacts, which began during the 1970's with the so-called *green* revolution that introduced toxic run-offs from agricultural pesticides and the rapid industrialization that marked this period. The influx of nutrients, phosphorus, pesticides, industrial waste from the surrounding countries, and to a great extent introduced by the Danube River, brought the Black Sea marine environment to the precipice of irreversible damage by 1991, when the UNEP Regional Seas Programme became involved.[3] Over the past near two decades significant efforts and progresses have been made in furthering the governance of the Black Sea at the regional level for protection and preservation of the marine environment.

This paper will examine the development of the governance structure for the protection and preservation of the Black Sea at the regional level and present an overview of recent developments, including the role of new environmental management approaches such as Integrated Coastal Zone Management (ICZM), the Ecosystem Approach and Integrated River Basin Management (IRBM), which became the core of the new BS-SAP.

1. Regional governance framework for the Black Sea

1.1. Institutional framework

The Black Sea (Fig. 1) regional institutional framework for protection of the marine environment involves two regional organizations: the Commission for the Protection of the Black Sea against Pollution (known as the Black Sea Commission, or

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[2] Shalva Jaoshvili, "Rivers of the Black Sea", Technical Report no. 71 (EEA, 2002). Available online at http://reports.eea.europa.eu/technical_report_2002_71/en/tech71_en.pdf.

[3] *State of the Environment of the Black Sea Pressures and Trends 1996–2000* (Commission on the Protection of the Black Sea Against Pollution, Istanbul, 2002). Available online at http://www.blacksea-commission.org/Publications/SOE_Eng.htm.

BSC, Regional Convention Agreement), established through the United Nations Environmental Programme in 1992, and the Black Sea Economic Cooperation (BSEC), also established in 1992. The Black Sea Commission was established expressly and exclusively for the protection of the Black Sea marine environment, whereas the function of BSEC is primarily to promote economic and trade activities in the broader Black Sea region (see http://www.bsec-organization.org/Pages/homepage.aspx). Additional affiliated bodies of the BSEC include PABSEC, the Black Sea Trade and Development Bank, and the International Center for Black Sea Studies (ICBS whose focus is research only).

Fig. 1. The Black Sea

1.2 Commission for the Protection of the Black Sea against Pollution

The BSC is the body responsible for the implementation of the Bucharest Convention and its protocols, and the Black Sea-Strategic Action Plan (BS-SAP). The Commission is made up of one representative from each of the Black Sea coastal states, parties to the Bucharest Convention (Bulgaria, Georgia, Romania, Russian Federation, Turkey and Ukraine). The Commission meets annually and adopts an annual work program. The ultimate goal of the Commission is to "rehabilitate" the Black Sea, and 'to preserve it as a valuable natural endowment of the region, while ensuring the sustainable use of its marine and coastal resources for the economic development, well-being, health and security of the population of the Black Sea coastal States' (BS-SAP2009, http://www.blacksea-commission.org/_bssap2009.asp). In order to achieve this goal, the Commission has been given a number of functions under Article 18 of the Bucharest Convention, which include:

1. Promoting the implementation of this Convention and informing the Contracting Parties of its work.
2. Making recommendations on measures necessary for achieving the aims of this Convention.
3. Considering questions relating to the implementation of this Convention and recommending such amendments to the Convention and to the Protocols as may be required, including amendments to Annexes of this Convention and the Protocols.
4. Elaborating criteria pertaining to the prevention, reduction and control of pollution of the marine environment of the Black Sea and to the elimination of the effects of pollution, as well as recommendations on measures to this effect.
5. Promoting the adoption by the Contracting Parties of additional measures needed to protect the marine environment of the Black Sea, and to that end receiving, processing and disseminating to the Contracting Parties relevant scientific, technical and statistical information and promoting scientific and technical research.
6. Cooperating with competent international organizations, especially with a view to developing appropriate programmes or obtaining assistance in order to achieve the purposes of this Convention.

The actual day-to-day responsibility of implementing the work programs to fulfill the functions of the Commission falls upon its Permanent Secretariat, which is based in Istanbul. Seven Advisory Groups advise the Commission and the Secretariat. An Advisory Group consists of two representatives from each of the six Black sea countries, acting also as an intermediary between the Commission and the national authorities and other stakeholders in their respective countries. The Advisory Groups are an integral part of the institutional structure of the Commission and function as specialized subsidiary bodies. In many ways, they are to serve not only as specialized technical bodies but also as the "eyes and ears" of the Commission so as to promote more harmonious implementation of policy and consequently advance the objectives of the Bucharest Convention and the BS-SAP.

1.3 Legal framework

The Black Sea legal framework for protection of the marine environment at the regional level was established under the UNEP Regional Seas programme in 1992. The 1992 Convention for the Protection of the Black Sea against Pollution (Bucharest Convention) is the framework which sets out the overall objectives and obligations of the Parties. The Bucharest Convention, in general, provides for the obligations to be fulfilled by all the Contracting parties, which include, in particular, "the prevention, reduction and control of pollution"[4]. The Convention further imposes a positive duty

[4] Article V (2)

on each Party to take domestic action to prevent, reduce and control pollution from land-based sources[5], dumping[6], and vessel-based sources as well as to cooperate in order to prevent, reduce and combat pollution due to emergency situations[7].
The Convention requires that the Contracting Parties, as soon as is possible, adopt laws and regulations to prevent, reduce and combat pollution for activities in the continental shelf[8] and atmospheric pollution including vessels flying their flags and aircraft under their registry[9]. In addition, it acknowledges that the Contracting Parties, in taking measures consistent with international law, have the duty to cooperate in preventing pollution of the marine environment due to hazardous waste in transboundary movement[10]. The Parties further undertook to cooperate and harmonize laws for liability for damage caused to the marine environment of the Black Sea to ensure the highest degree of deterrence and protection for the Black Sea as a whole[11].

And where the Bucharest Convention set out the overall objectives and obligations of the Parties, the actual implementation of each of these is to be done though more detailed and specific protocols. To date, the Black Sea States have ratified or adopted the following implementing protocols:

- The Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-Based Sources (1994 ratified) and the revised 2009 Protocol (adopted in 2009);
- Protocol on Cooperation in Combating Pollution of the Black Sea Marine Environment by Oil and Other Harmful Substances in Emergency Situations (1994 ratified);
- Protocol on the Protection of the Black Sea Marine Environment Against Pollution by Dumping (1994 ratified); and
- The Black Sea Biodiversity and Landscape Conservation Protocol to the

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[5] Article VII and in accordance with the Protocol on the Protection of the Black Sea Marine Environment against Pollution from Land-Based Sources. For a recent analysis of UNEP land-based activities in the Black Sea, see *The Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities,* 1999 UNEP – United Nations Environmental Programme. Available at http://www.gpa.unep.org.
[6] Article X and in accordance with the Protocol on the Protection of the Black Sea Marine Environment by Dumping. The dumping of matter classified as "noxious" in Annex II requires a special permit for *each* case from the national authorities whereas matter classified as "hazardous" requires only a general permit.
[7] Article IX and in accordance with the Protocol on Cooperation in Combating Pollution of the Black Sea by Oil and Other Harmful Substances in Emergency Situations.
[8] Article XI
[9] Article XII
[10] Article XIV
[11] Article XVI

Convention on the Protection of the Black Sea Against Pollution, which was signed in Sofia, Bulgaria in 2003[12] but has not yet entered into force.

- The legal instruments were subsequently supplemented with four Ministerial Declarations: the Odessa Declaration (1993), the Sofia Declaration (2002), Bucharest Declaration (2007) and the latest Sofia Declaration (2009). The Odessa Declaration incorporated the emerging principles of international environmental law adopted in Agenda 21 by governments at the 1992 Rio Conference on Environment and Development. The Declaration underscored the dire state of the Black Sea marine environment and openly declared that existing efforts were insufficient to maintain a sustainable development of the Sea underscoring the need for urgent, comprehensive, consistent and co-ordinated action at all levels.

  Furthermore, in addition to the objective of the protection and preservation of the Black Sea, the Declaration also included the rehabilitation of the Black Sea where necessary. In order to meet the goals of protecting, preserving and where necessary rehabilitating the Black Sea, the Ministers declared their commitment to integrated management and sustainable development, in line with Agenda 21. In addition, the Ministers agreed that national policies would be based on the precautionary approach, use of low and non-waste technologies, integrated marine environmental protection with other areas of policy, use of economic incentives for the use of low and non-waste technologies, as well as the polluter pays principle and user fees and apply environmental impact assessment procedures to all sectors.

However, by 2002 it became evident that progress would be slow in the Black Sea region and this was reflected in the Sofia Declaration, which was in essence a diplomatically-worded criticism of the lack of progress. It referred to the need for prompt adoption of the Regional Black Sea Contingency Plan to the Emergency Protocol, noting the considerable delay in the implementation of the Strategic Action Plan for the Rehabilitation and Protection of the Black Sea, and the lack of commonly agreed upon indicators to assess the efficiency of measures implemented. The Sofia Declaration (2002) also served as the political foundation for the amendment to the timetable dates that had originally been agreed to and adopted by the Black Sea coastal states, which gave impetus to a fundamental revision of the Strategic Action Plan initiated a few years later.

A comprehensive and thorough review of the achievements and gaps in the Black Sea region in terms of protecting and rehabilitating the Black Sea ecosystem was presented in the report on the Implementation of the Black Sea Strategic Action Plan 2001 – 2006/7, approved by the Ministers of the Contracting Parties to the Convention in 2009. A further acknowledgement of the achievements and awareness of the need for a stronger political action

[12] Signed by Bulgaria, Romania, Turkey and Ukraine in 2003, by Georgia in 2009. Ratified by Bulgaria, Turkey and Ukraine so far.

and commitment to the protection of the Black Sea was expressed in the Declaration of the Ministers of the Contracting Parties to the Convention adopted in Sofia 2009.

2. Recent Developments

Most of the environmental problems in the Black Sea are of transboundary character (inter-state externalities), and as such cannot be efficiently regulated by individual states. Besides, many Black Sea resources are shared and in need for common regional policies. Of course, there are plenty of pollution sources of local impact, such as abandoned hazardous waste sites, small WWTP, local air pollution and others, where national governance is sufficient. However, for any emerging environmental problem since the 1970s decision-makers in all Black Sea states have relied on a combination of national legislative and administrative procedures accompanied by sets of standards to foster improvements in the natural environments of the Sea, which at that time looked already seriously damaged. The regulations were answering questions like:

- How stringent should our water quality standards be?
- How clean is clean enough?

Nonetheless, there was little reason to believe that the resulting environmental policies were efficient enough, as in the 1980s the Black Sea was already considered to be the most threatened sea in the world. Consequently, new approaches were sought in the late 1980s looking for the weakest link in a system, for instance oxygen in an eutrophicated environment, and protecting also 'the most sensitive member of a population with an adequate margin of safety', such as dolphins, for instance. Recently new paradigms in environmental protection emerged, incorporating "market-based" instruments — principally pollution taxes and tradeable permits — rather than so-called "command-and-control" instruments, and designing standards, which require the use of clean technologies and phasing-out high waste and waste-generating technologies, including the use of BAT and BEP. Besides, it became clear that the rational for a successful strategy in environmental protection of a sea with transboundary problems lies in the regional approach, uniform understanding of environmental quality objectives and joint efforts to achieve them. New environmental management approaches were identified, these are:

- Integrated Coastal Zone Management (ICZM);
- The Ecosystem Approach; and
- Integrated River Basin Management (IRBM)

All these new visions became a core of the new Black Sea Strategic Action Plan, based on sound understanding of the priority transboundary environmental problems and consequent formulation of ecosystem quality objectives. The BS-SAP2009 also includes short-, mid- and long-term targets to tackle the sources of possible degradation – municipal, industrial and riverine

discharges, overfishing, habitat destruction, ballast waters, illegal discharges from ships and other shipping-related threats, climate change, lack of integrated coastal zone management, marine spatial planning, and others. The intention is to reach 'Good Environmental Status' of the whole Black Sea and to sustain it as likewise stated in the Marine Strategy Framework Directive.
An assessment of the state of the Black Sea ecosystem (SoE2009, http://www.blacksea-commission.org/_publ-SOE2009.asp), recently carried out by scientists and experts for the Black Sea Commission showed a steady improvement of the Sea ecosystems during the last years in comparison to previous periods of investigations. However, the increased vulnerability is still there, yet many habitats are fragile and in need for "no use" protection, fish stocks are not recovered and urge for ecosystem-based management.
The challenges today remain as four priority transboundary problems expressed previously in the BS SAP 1996 and confirmed by the last diagnostic analyses. These are: eutrophication/nutrient enrichment; changes in marine living resources; chemical pollution (including oil); and biodiversity/habitat changes, including alien species introduction.
The Ecosystem Quality Objectives in the BS-SAP2009 were formulated to address the major environmental problems in the Black Sea region and they are:

2.1 Preserve commercial marine living resources through:
Sustainable use of commercial fish stocks and other marine living resources.
Restore/rehabilitate stocks of commercial marine living resources.

2.2 Conservation of Black Sea Biodiversity and Habitats through:
Reduce the risk of extinction of threatened species.
Conserve coastal and marine habitats and landscapes.
Reduce and manage human mediated species introductions

2.3 Reduce eutrophication through:
Reduce nutrients originating from land based sources, including atmospheric emissions.

2.4. Ensure Good Water Quality for Human Health, Recreational Use and Aquatic Biota through:
Reduce pollutants originating from land based sources, including atmospheric emissions.
Reduce pollutants originating from shipping activities and offshore installations

Presently, as a result of the efforts of the countries signatories to the Convention on the Protection of the Black Sea Against Pollution, numerous coastal and marine protected areas have been designated and new protected areas are assigned continuously, hot spots are addressed, environmental safety aspects of shipping are better ensured, the populations of endangered species are given time to recover while applying different measures of protection, sensitive areas are identified to proceed thoughtfully to spatial planning,

dumping is prohibited, in fishery bans, fishing-free zones, prohibited gears and other protection measures are in place (Table 1). Decreasing trends in emissions and atmospheric deposition of pollutants are observed and the amount of insufficiently treated or untreated waters decreased during the last years.

Table. 1. Protection measures in fishery

States	BG	GE	RO	RU	TR	UA
Complete ban						
Periodic ban						
Total Allowable Catch (TAC)						
Total Permitted Catch = Limit						
Minimum admissible size						
Periods for fishing bans						
Fishing Banned Zones						
Prohibited fishing gears						
Allowable mesh size for nets						

At the national level changes in legislation and policies take place to transpose international regulations and adopt new approaches. **Romania** and **Bulgaria** are in process of drafting National Action Plans for the implementation of the MSFD and outlining programs of measures to achieve good environmental status of the Black Sea. The "EU Integrated Environmental Approximation Strategy" for the years 2007-2023 of **Turkey** will be a key tool to develop program of measures and accelerate the sustainable use of environmental resources where the biological diversity will be protected, natural resources will be managed in a rational manner with an approach of sustainable development, and finally the rights to live in a healthy and balanced environment will be ensured. **Ukraine** has a program for the protection and rehabilitation of the environment of the Black and Azov Seas acting in the period 2001-2010. In **Russian Federation**, the Federal Law "On Fishery and Conservation of Water Biological Resources" (2004) and the Federal Law "On Environmental Protection" (2002) ensure the conservation of living resources and its sustainable use and protection of the Black Sea as a whole. There are no special management plans for the Black Sea in Russia, however, there are no major polluting land-based sources along the Russian Black Sea coast, the designation of protected areas is advanced and environmental safety aspects of shipping are well recognized and paid attention.

During the last years the Black Sea Protocol for Combating Pollution from Land Based Sources was in process of revision and in April 2009 the Black Sea coastal states signed this revised legal document. One of the main aspects of the revised Protocol is the extended geographical scope of its application and its emphasis on cooperation with States sharing transboundary watercourses that drain into the Black Sea. Inspired by different EU examples, the revised BS-LBSA Protocol

attempts to replace the limited 'shoreline' coverage evident in the previous 1992 BS-LBS Protocol with a significantly broader approach. The Protocol provides the legal ground and presents opportunities to enhance our cooperation with States and international bodies concerned with the protection and rehabilitation of the rivers draining into the Black Sea and relevant to the States of its ecosystem. This is of great importance for the Black Sea into which more than 300 rivers flow and where 80% of the pollution is recognized to come from activities carried out on land, either in coastal areas or further upstream in the proximity of rivers, which then transport the pollution to the sea. And the rivers remain the largest source of nutrients in the region (Table 2).

Table 2. Estimates of annual nutrient loads to the Black Sea (tonnes), (TDA2007, www.blacksea-commission.org)

Nutrient source	DIN	PO_4-P
Direct discharges from municipal waste water treatment plants serving >5000 people	6,120	2,150
Direct discharges from Industrial sources discharging >1000 m/day^3	1180	250
River loads	497,590	20,043
Atmospheric deposition	203,040-431,460	-

3. Conclusions

The Black Sea states are now in a period of time when it faces some new challenges in addition to current ones. Committing themselves to fulfilling the objectives and carrying out the measures in the new Strategic Action Plan for the Environmental Protection and Rehabilitation of the Black Sea adopted in Sofia, 2009, the states showed their political will to provide good governance that will lead to preserving the Black Sea ecosystem as a valuable natural endowment of the region, whilst ensuring the protection of its marine and coastal living resources as a condition for sustainable development of the Black Sea coastal states, well-being, health and security of their population.
'Acting nationally' and thinking regionally', embracing adaptive management as a progressive approach, the Black Sea states actively participate in the rehabilitation of the Black Sea and endeavor to ensure that the "Sea that nearly died" will never go back to the state of the "most threatened sea in the world", as referred to in media and publications on the Black Sea from the late 1980s and early1990s.
The existing cooperation today in the Black Sea region confirms the dedication of the region to conserving the global value of the natural resources and biodiversity, and the common desire for the sustainable management and protection of the Black Sea, achieving balance between the rapidly developing economy of all involved States and well-being of the environment.

ABSTRACT
GOVERNANCE OF ANTARCTICA AND NEW CHALLENGES FOR INTERNATIONAL COOPERATION IN THE ARCTIC

Gianfranco Tamburelli
Team Leader, Institute for International Legal Studies (ISGI) of the Italian National Research Council (CNR).

In spite of some common features and concerns, the Arctic and Antarctica are quite different from each other. The diversity of their legal regimes is even more evident than that of their geophysical or socio-cultural characteristics.
The IV *International Polar Year* (IPY) gave rise to a variety of initiatives in a context of increasing internationalization of polar research, and solicited great attention from world opinion, but unfortunately did not give the importance they deserve to questions related to social and legal sciences. On the other hand, the need for a parallel and comparative analysis of the main aspects characterizing the legal regimes of the two regions has emerged from the importance acquired, especially in the Arctic, by themes such as continental shelf delimitation, the exploitation of mineral resources, the opening of routes for commercial navigation, fishing and tourism activity.
Principles and concepts of general international law are applicable to Antarctica as well as to the Arctic. Some of them, such as the principle of common heritage of humankind and the concepts of general interest of the international community, have however had a certain influence on the evolution of the Antarctic legal system only.
The Antarctic Treaty is at the root of an atypical conventional law system. At its 50th anniversary, we can affirm that the legal system it has subsequently developed has been successful, and that its values are now universally recognized. The destination of the continent to pacific ends and its importance "as an area for the conduct of scientific research, in particular research essential to understanding the global environment" are clearly affirmed in international law. But some issues are still open. In particular, those relating to illegal, unregulated and unreported fishing, and increasing tourism activities.
While the Antarctic Treaty and the Antarctic Treaty System (ATS) can be considered among the 'best practices' of international cooperation and have led to an 'internationalisation' of the continent, the launching of international Arctic cooperation dates back no further than the early '90s and only recently has the advisability of defining a regional treaty been tentatively suggested. In 1991 the eight Arctic countries adopted an *Arctic Environmental Protection*

Strategy (AEPS - Rovaniemi, Finland), the first true form of regional intergovernmental cooperation. Five years later, in 1996, the Foreign Ministers of the same States agreed in the Ottawa Declaration to form the Arctic Council with a mandate to undertake a broad programme covering all dimensions of sustainable development.
The Council is a high-level intergovernmental body for promoting cooperation, coordination and interaction between Arctic states, indigenous communities and other residents in the region. It has proved to be an important forum for increased mutual understanding and cooperation between national governments, local authorities and indigenous peoples in the circumpolar area. However, it is not yet a fully-fledged international organization, but a *young i*ntergovernmental body, which has not yet completely defined its own identity. It appears that its work is strongly influenced by the changing climate of political relations among member countries, the presence of other levels of cooperation restricted to the 'five coastal States bordering on the Arctic Ocean', and by the ill – defined value attributed to reports / assessments prepared by working groups.
As regards environmental protection, in the Antarctic, the Madrid Protocol and its six Annexes, the other environmental treaties, and acts pertaining to the ATS are at the core of international and national behaviour. The Protocol establishes a comprehensive legal regime on the basis of the broad principle that recognizes the necessity of protecting the Antarctic environment and its dependent and associated ecosystems. It contains the declaration of Antarctica as a "natural reserve devoted to peace and science", whose exceptionally broad extent is widely recognized, and it establishes the Committee on Environmental Protection (CEP) (Art. 11). The Protocol can therefore be considered among the most advanced and rigorous current multilateral environmental agreements. However, it, although coordinated with the recommendations / measures taken by the Consultative Parties, is not yet sufficient to ensure full protection of the Antarctic environment and there are a number of matters on which further action is required.
On the contrary, no global or regional environmental agreement has an exclusive Arctic scope. Several global treaties – among them the UNCLOS, the 1992 Rio *Convention on Biological Diversity* (CBD), the Stockholm Convention on POPs,– and a number of multilateral and bilateral agreements and soft law acts addressing specific issues (research, fisheries, fauna and flora) form, together with the applicable national legislation, the core of the Arctic legal framework for environmental protection and sustainable development.
If the ATS has been set up and developed in accordance with the general recognition that the continent is of special importance for global ecological balance, and can be considered innovative, the current legal regime of the Arctic is definitely determined by the presence of sovereign states reluctant to recognize general interests in the area and can be considered rather conservative.
In fact, Northern communities are facing great changes in their natural environment and in their natural resources, and this calls into question the suffi-

ciency of the fragmentary whole of the environmental sector treaties and soft law to ensure the good governance of the region, which should allow for, principally, an exploitation of the mineral resources and a growth in maritime navigation which does not compromise the natural environment and which considers the cultural, social and economic needs of the inhabitants. Then, we might say that the main question is whether the strengthening of the existing regime and the development of international cooperation through bodies already active are sufficient, or if, on the contrary, it would be preferable / necessary to negotiate and stipulate a regional treaty, internationally binding.

A widespread and deeper awareness of the issues of good governance of the polar regions could perhaps help towards the opening of a discussion on the Arctic and thus in further promoting a kind of cooperation for the benefit of all mankind. In this context, and without hypothesizing a system analogous to that set up by the Washington Treaty, some aspects of the Antarctic legal system might prove useful to guide appropriate responses to instances of strengthening Arctic cooperation.

"EL DERECHO AMBIENTAL EN AMERICA LATINA"

Ramón Ojeda Mestre
Presidente de la Academia Mexicana de Derecho Ambiental
rojedamestre@yahoo.com

En uno de los museos más hermosos del mundo, el de *Quai Branly* en París, presumen orgullosos un vaso ritual de las **culturas prehispánicas** de Bolivia. La tiwanaku o Tiahuanaco con más de dos mil años de antigüedad tiene su presencia, allí en Francia, con ese vaso ceremonial o *Quero* en el que destacan elementos culturales importantísimos como la fabricación de la cerámica en sí misma, una combinación cromática perfecta, un diseño geométrico pre-euclidiano y la mixtura de esas grecas con un mundo metafísico de genial creatividad. Pero, sobre todo, esa especie de deificación o **aprecio por la naturaleza** en la estilizada figura de un jaguar, ocelote o tigrillo que fue encontrado cerca de la maravillosa Puerta del Sol y de la Pirámide de Akapana que revelan avanzadísimos conocimientos de ingeniería, urbanística, hidráulica, orfebrería, arquitectura o astronomía.

Bolivia ha sido un centro de saber, de cultura, de ciencia y de elevación social desde siempre, por eso es altamente honroso que se nos brinde la oportunidad de ser huéspedes académicos de estos pueblos hermanos de origen y destino y qué mejor que partir del medio ambiente que no es otra cosa sino la esperanzadora conjunción de natura y cultura.

El Derecho es una noción o una invocación cultural. El ambiente es, igualmente -y no debe olvidarse nunca- otro concepto o denominación cultural, una moldeable y proteica creatura humana. Entendemos por ambiente la relación plena del hombre con la naturaleza y viceversa y por **Derecho Ambiental** comprendemos **la vinculación entre la naturaleza, el hombre y la deontología**. Coloco deliberadamente en primer término a la naturaleza, aunque no sea imputable en términos kelsenianos, para tomar distancia de las críticas innecesarias del antropocentrismo peyorativo.

Si decimos en esta primera década del siglo XXI que todo el armazón jurídico mundial está en crisis, es válido decir que por ende el Derecho Ambiental también cruje y adolece lo mismo de ineficiencia que de **insuficiencia cardiaca**. *Much ado about nothing.*

La crisis, de acuerdo a su etimología griega, es un cambio brusco en el curso de una enfermedad o una mutación importante en el desarrollo de otros procesos o la situación de un asunto cuando está en duda su continuación o el momento decisivo de un negocio grave y de consecuencias importantes o una situación dificultosa o complicada.

Es en este sentido que podemos decir que en Latinoamérica **el Derecho Ambiental está en crisis** en su doble vertiente o en sus dos brazos esenciales: Sufre porque no se aplica, o porque hay una **obesidad jusambiental** o porque **sus lagunas** son tantas (deliberadas o involuntarias) que no se sabe qué transporte tomar para alcanzar la tutela efectiva de los bienes a su cargo. Y en su segundo brazo, el ambiente, las cosas están peor porque la sobrecarga demográfica y las **actividades industriales**, comerciales, de servicios, domésticas, de **consumo** y recreativas le han impuesto una carga a los elementos naturales que le imposibilitan lo que en inglés se llama *resiliency* "regresar a la posición original".

Y es que entramos en una *contradictio in términis*, puesto que **no es lo mismo** defender a la naturaleza de los embates del ser humano, con o a través del derecho, que defender el ambiente de la actividad o de la omisión del hombre con las herramientas jurídicas, toda vez que el concepto de ambiente incluye o es indisociable del *homo fáber*.

Cuando mencionamos el derecho a un medio ambiente adecuado, sano o idóneo, aludimos a su aptitud para que el hombre actual o el del futuro puedan disfrutarlo o aprovecharlo para el estilo de vida que elija **en una época determinada,** pero en todo caso implica su afectación y ese derecho al medio ambiente es también, casualmente, derecho ambiental.

No solamente **somos demasiados** en el planeta afectando la naturaleza, sino que a ese peso cuantitativo se le añade la carga negativa de la hiperactividad de mujeres y hombres de todas las edades y condiciones en el vértigo de la modernidad. Somos demasiados, haciendo demasiadas cosas, en demasiado corto tiempo. Así, el derecho deviene en un **viejo achacoso**, decrépito, impotente, cegatón y lento, incapaz, por definición, de cumplir con su tarea tutelar de la sobrevivencia y de la recuperación de la naturaleza.

El hecho de que cambien algunas leyes o reglamentos y diversas normas técnicas ecológicas, no quiere decir que el derecho en sí se modernice, se actualice o *eficientice*, no se recrea o se renueva. Cambia para **que todo siga igual** en un *gatopardismo* desesperante. ¿Para qué queremos un nuevo derecho se preguntan las sociedades atontadas con sus élites depredadoras al frente, si el derecho nos permite lucrar a costa de una naturaleza muda o silenciosa? Decía Talleyrand que las leyes no pueden ser violadas sin que griten. No se refería, desde luego, al derecho ambiental moderno.

Agreguemos a ello que la "cultura" imperante del *teantropismo* se basa ahora en la **acumulación crematística, en el dispendio, la ostentación** y la futilidad y ello se refleja en una generación y acumulación de residuos sólidos y peligrosos de magnitudes y complejidad jamás vistos en la historia de la humanidad. Y ese lucroteísmo obnubilatorio deriva también en una presión asfixiante sobre lo que los economistas y economicistas llaman **"los recursos naturales"** cuyo concepto ha ingresado ya a las legislaciones nacionales latinoamericanas.

No es que el *homo súper sapiens* no haya hecho nada para defender a la flora, la fauna, el mar, el aire o el suelo, el manto freático o el patrimonio micológico del universo, nó, lo que ha sucedido es que es más grande y **rápida**

su capacidad de destrucción y de arrasamiento, que su inteligencia, astucia u organización para recuperar, defender y prever. El **síndrome de Atila** prevalece en nosotros. Valga la expresión, cada día que pasa le heredamos menos mundo a nuestros hijos.

El derecho ambiental, como producto del estado, como emergencia del poder legislativo resulta también un engendro **contrario a la actividad económico comercial** que lo mira más como un obstáculo que como un manto protector de la naturaleza que aportó desde siempre sus mejores frutos para la supervivencia humana y para que se inventaran el trueque, el comercio, la moneda, la industria, el crédito y los servicios en general. En términos de los economicistas lo que se refiere a la naturaleza es el **sector primario** de la economía, o si se quiere, es el hombre, su labor y los elementos de la naturaleza.

La irrupción de las nuevas normas medioambientales supone un nuevo *modus operandi* para el sector económico, de manera que no sólo los entes implicados en la conservación del Medio serán destinatarios de esa normativa, sino que también, y no marginalmente, otras realidades que aparentemente nada tenían que ver con el medio Ambiente. Este nuevo catálogo de medidas normativas tiene un denominador común: están enfocadas a acabar con la dualidad antes aludida de protección ambiental frente a desarrollo, como bien ha puesto de manifiesto la última doctrina, JORDANO FRAGA entre otros.

Los "principios" que lo informan, con base a los cuales ha de articularse, nos indican que está en una fase inicial como lo han explicado los también recientes tratadistas. Hace nueve años, en Inglaterra sólo había un libro de derecho ambiental. Debe reconocerse también que ese dinamismo del nuevo derecho ambiental **condiciona** el esmero para ir recogiendo o integrando dichos principios.

Hemos dicho en **El nuevo derecho ambiental,** "Nessun dorma", que lo que hoy conocemos como derecho ambiental es extremadamente joven tanto en lo doctrinario como en lo normativo. En sólo tres décadas se ha desarrollado una **urdimbre abrumadora** de prescripciones y doctrinas de los más variados niveles y alcances en los cuerpos jurídicos.

Así, cuando hablamos del nuevo derecho ambiental, nos desplazamos conceptualmente en dos dimensiones: **todo el derecho ambiental es nuevo** y cada día hay un derecho ambiental más actualizado o reciente, más nuevo, valga la expresión.

Pero otra de sus características es también la que se desprende de la afirmación inicial y es que esta nueva rama regulatoria es muy abundante y, en muchos casos y países, incluso excesiva. Hay **demasiado derecho ambiental** en múltiples ámbitos y escaso o nulo en otros. Demasiado denso en algunas de sus zonas de cobertura y magro o ausente en otras.

Como toda incursión novedosa en el campo de las ciencias ha tenido que enfrentar una serie de **resistencias,** desde epistemológicas hasta las más elementales reacciones de núcleos académicos, sociales y de los poderes públicos. Es un derecho que requiere cada vez más de expertos en especialidades no jurídicas para su elaboración y aplicación.

Por su propia lozanía, va sufriendo una **metamorfosis** continua y ha ido buscando sus espacios en las más variadas facetas del derecho, lo mismo en el derecho civil que en el penal y principalmente en el administrativo, aunque no es ajeno a otras codificaciones como la mercantil, la internacional y prácticamente todas lo van incorporando incluso a contrapelo. He aquí otra de sus aristas que lo convierten en veces en poco aprehensible. Es un derecho muy **dinámico**.

Ha sido, sobre todo en los países no desarrrollados, un derecho que padece **raquitismo de eficiencia**, aunque es importante destacar que la tensión entre facticidad y validez no es privativa de esta rama emergente.

Sufren también por la ausencia de un entramado jurídico adecuado en un entorno de gran incultura e insensibilidad ambiental de la población. En ésta, como en muchas materias, la gente no respalda al gobierno, no le cree, no le confía y no le ayuda. A mayor pobreza, menos gobierno y a menor gobierno, menos estado y menor defensión ambiental.

Ha resultado obvio y contraproducente hacer evolucionar este derecho, ecológico de origen y que devino en derecho ambiental para apuntar hacia el derecho del desarrollo sustentable, a una **velocidad**, ritmo y complejidad muy superiores a la capacidad de los poderes públicos para dotarlo de instituciones e institutos aplicatorios.

Los gobiernos han sido sumamente lentos para dotarlo de las terminales culturales y ejecutivas necesarias para el mejor desempeño de su **cometido primigenio**: tutelar adecuadamente el valor jurídico de la seguridad ambiental.

El nuevo derecho ambiental tiene una reconocible carga internacionalizante y globalizadora y en la mayoría de los países es un **derecho calcado** o copiado, que reproduce las instituciones de los punteros, lo mismo en procedimientos como la evaluación del impacto ambiental que en los intrumentos económicos.

Se va perfilando más como un **derecho preventivo** que correctivo o sancionatorio, aunque es un fenómeno general la tendencia a punibilizarlo, a incorporar más disposiciones de índole penal en los propios códigos de la materia.

Ha avanzado también la incorporación de los conceptos de **reparación del daño** como parte de los criterios de responsabilidad ambiental a fin de restaurar un orden o equilibrio alterado con la conducta de una persona física o moral, aunque algunos países aún no lo asumen en plenitud

Su motivación normativa de alcances planetarios potencia en grado sumo las **dificultades** y multiplica la gravedad de las contradicciones que el derecho estaba acostumbrado a atender. Es por ello, un derecho cada vez más difícil.

Es también un derecho **engañoso**, los intereses que contribuyen a alimentarlo aunque se presenten siempre "revestidos con el noble manto de las preocupaciones ambientales, no siempre tienen en éstas su justificación última".

Los "principios" que lo informan, con base a los cuales ha de articularse, nos indican que está en una fase inicial como lo han explicado los también recientes tratadistas. Hace diez años, en Inglaterra **sólo había un libro** de derecho ambiental. Debe reconocerse también que ese dinamismo del nuevo derecho ambiental condiciona el esmero para ir recogiendo o integrando dichos principios.

Otra de las notas que distinguen a este novedoso macizo jurídico es la ciudadanización, o mejor dicho, la **participación ciudadana** en su integración, se dice que la sociedad civil influye cada vez más en su configuración.
Este fenómeno, empero, le ha impregnado de otra característica sui géneris, que es la de que el gobierno o el poder legislativo se convierten en muros de resistencia o contención, en óbices, para las presiones socioambientales de normación, por lo que los estudiosos han planteado la necesidad urgente de afinar al máximo las técnicas jurídicas generales y, en particular, las que conciernen al control jurídico de las **potestades discrecionales**.
Si bien la atracción de este nuevo derecho radica en su universalidad y omnipresencia, eso le imprime la mayor urgencia a la categorización. Se pugna por reconocerlo en el catálogo de los **derechos humanos** de moda aunque simultáneamente se le identifica como un derecho colectivo o de **tercera generación** frente a los públicos y los privados o de cara a los sociales e individuales.
Una más de las marcas definitorias de este campo del conocimiento para normar las conductas humanas es la utilización indispensable y cada vez más profundamente, de las "ciencias exactas" y de las ciencias naturales, y su aplicación y mandamientos van requiriendo también con inusitada frecuencia de **avances científicos** o tecnologías de punta.
Este aspecto trae aparejado un problema adicional para su vigencia o aplicación y radica en el hecho de que obliga a la mayoría de los países a agudizar su **dependencia** y su **endeudamiento**. Si la lucha por la recuperación ambiental es de suyo **onerosa**, un derecho nuevo, más complejo y puntilloso, creciente y estricto, encarece su cumplimiento y, en contrapunto, induce a su inaplicación.
Es un derecho declarativamente cada vez más **solidario**, transgeneracional, con interdependencia marcada con los derechos a la vida, a la salud, a la libertad, a la intimidad y con una necesaria simbiosis con el desarrollo económico. Es pues, a querer o no, un derecho **subordinado** a otros. Su finalidad es velar por los intereses colectivos, no individuales sino **difusos**, sobre bienes de uso y goce colectivo.
Tiene también en su singular teleología la intención de asumir la **"calidad de vida"** como valor y así se reconoce en diversas constituciones. Calidad de vida que va de la mano del reconocimiento a la dignidad humana.
El nuevo derecho ambiental empieza a insertar, desde 1987 el principio del **desarrollo sostenible** como aquel que permite el desarrollo de las generaciones presentes sin perturbar ni impedir el de las generaciones futuras. A partir de 1992 en Río de Janeiro se consolida éste, aunque plantea una "crisis conceptual" para todas aquellas naciones que no pueden lograr el desarrollo y ya se obligan a hacerlo sostenible.
Empero, para otros juristas al legislador ordinario sólo le corresponde traducir el nivel de protección, ya diseñado, en soluciones funcionales. Desde esa perspectiva, el derecho al medio ambiente tendría un contenido **más procesal que material.**
En tanto que el medio ambiente se ha transformado en una competencia transversal que inspira cualquier otra política sobre el progreso económico o

sobre el territorio, las políticas sobre ordenación del territorio, sobre urbanismo o sobre manipulación genética vegetal o animal, e incluso sobre protección de los consumidores, han de valorarse en clave ambiental y esta clave generará posiblemente un **derecho común ambiental** basado en la praxis constante y en el tratamiento avanzado de la regulación de las actividades que afecten al medio ambiente.

En el nuevo derecho, la función social ambiental forma parte del contenido esencial **del derecho de propiedad** y sus acciones no entrañarán ni privación ni expropiación. Incluso se llegará a imponer limitaciones a propiedades sin relevancia ambiental, en razón de su cercanía o proximidad con otros bienes de naturaleza ambiental. Cuando la libertad de empresa y la libre circulación de bienes se contrapongan a los valores ambientales se irá optando por estos últimos.

Se van abandonando ya las primitivas y **erróneas concepciones** y edificaciones sistémicas para comprender el medio ambiente, sobre todo ante las dificultades jurídicas y administrativas de enumerar a cabalidad cuáles son los bienes que componen el llamado medio ambiente.

Por eso es importante en el nuevo derecho ambiental disociar o desagregar lo que es el medio **ambiente en sentido jurídico**, que incluye la esfera completa de protección (recursos naturales y elementos contaminantes o agentes contaminantes e instrumentos de protección) del medio ambiente como condición o elemento necesario para el desarrollo del ser humano. El concepto jurídico del medio ambiente puede tener una **dimensión temporal** que dependerá del momento social y de la forma de protección que precisen los recursos según las perturbaciones que les acechen.

En este nuevo derecho, el medio ambiente como condición o desarrollo de la persona humana, va intensamente unido a ella, pues es lo que la persona conserva y transmite. Esta **dimensión intemporal**, imperecedera o perenne es la que necesita hoy más atención porque en la actualidad el ámbito de protección a la relación estado-ciudadano en torno a los derechos objetivos se ha desbordado y los intereses colectivos legítimos y difusos sobrepasan el ámbito de lo individual, como lo han sostenido juristas latinoamericanos y europeos.

Lo medio ambiental es el instrumento que transversalmente conduce a las restantes acciones al desarrollo sostenible.

Este nuevo derecho entiende con mayor claridad cuáles son, a partir de una nueva asunción de lo ambiental no sistémica, **las consecuencias** para el legislador, las repercusiones para la administración en el ámbito de la aplicación de la ley y desde luego en el campo de la interpretación jurídica por la jurisprudencia.

Hasta ahora, hemos visto en la comunidad internacional no solamente un nivel diferente de comprensión, sino **criterios contradictorios** entre los poderes legislativo, ejecutivo y judicial de los países, que empieza a amortiguarse muy recientemente a partir de una adopción informal de los llamados principios comunes del derecho ambiental.

El derecho ambiental moderno **es *bicrónico*** o atiende a una doble dimensión de temporalidad. Desde luego que el derecho siempre ha mirado hacia el

futuro y tiene dentro de sus principios universales la irretroactividad, sin embargo, incorporar una mención expresa a las futuras generaciones en vinculación con los elementos ambientales, va formando parte de este **derrotero actual**. La constitución japonesa, la brasileña, la rusa o la helvética afirman este postulado. El más acabado es el artículo veinte de la constitución alemana o el setenta y cuatro de la constitución helvética.

Un factor muy delicado que impondrá y viene informando la realidad moderna, es la **desaparición de las nacionalidades** tradicionales. Lentamente nuevos conceptos se van anclando, como en el caso de la Unión Europea o con los migrantes latinoamericanos en los Estados Unidos o en la adopción jurídica y formal de las dobles o múltiples nacionalidades.

En el nuevo derecho ambiental el estado es más gestor que vigilante, o, para ser más claro, los poderes públicos adquieren una nueva responsabilidad más compartida con la sociedad y gana cada vez más espacio la llamada **solución alternativa de conflictos**, la privatización o desjudicialización de la justicia ambiental y se enseñorean las viejas figuras de la mediación, la conciliación o el arbitraje.

La suma de los recursos económicos y financieros que destinan las empresas privadas y los particulares para la atención del medio ambiente es muy superior a la que asignan los **presupuestos oficiales** de los gobiernos en todo el mundo, aunque en su mayoría partan de exigencias oficiales, de opinión pública, o culturales.

Otra de las características es que los afanes normativos de los estados **tienden a debilitarse** o a suavizarse. Frente a una participación más activa y exigente de los factores productivos, los gobiernos se pliegan, bajan la guardia o se mimetizan con los intereses económicos. Los años setentas fueron la época del derecho ambiental romántico anticontaminante, los ochentas del **derecho ambiental duro** y en los noventas hay una tendencia clara hacia la especificidad y a suavizar las leyes y normas que continúa a principios del nuevo siglo. Es la época del derecho ambiental *light*.

Los perfiles de **dispersión** normativa que nos enseñaban la profusión de instrumentos jurídicos (leyes, reglamentos, normas técnicas, bandos municipales, convenios, tratados, acuerdos, declaraciones, resoluciones, jurisprudencia, laudos y dictámenes, etc.) habrán de sistematizarse. Existen más de 152 instrumentos internacionales para la protección del medio ambiente.

Avanzará cada vez más la **regla del consenso** para adoptar textos de derecho ambiental internacional por la vía de la diplomacia multilateral en la generación del *derecho blando*. Sin embargo no se ha alcanzado el grado de eficacia deseable en el cumplimiento de los tratados, nutridos ya de sus rasgos preventivos, sistémicos, con principios de solidaridad y cooperación, universalidad, precautoriedad y transversalidad de la variable ambiental.

Capítulo aparte merecería la arista comunicacional. Este reciente enfoque jusambientalista trae incluído, en casi todos los casos de los países, no sólo una mayor información, sino una apertura paulatina y creciente para que la sociedad, las empresas, los gobiernos y las instituciones educativas cuenten con un mayor acceso a la **información**. No sólo el legislador está más infor-

mado para hacer las leyes, sino también el ejecutivo para reglamentarlas o promoverlas y los particulares disponen de opciones bibliográficas, hemerográficas, y **cibernéticas** para actualizarse u obtener datos científicos y criterios para la formulación normativa participante.

El derecho ambiental nuevo afronta un grave obstáculo, o muchos, pero uno asaz preocupante. La mayoría de las personas en cualquier parte del mundo de acuerdo a las encuestas de opinión piensan siempre que la contaminación del medio **ambiente empeorará**. Un fantasma, recorre el mundo: el del autoritarismo, el de la radicalización fundamentalista. La mayoría de las personas no tienen confianza en los partidos políticos, ni en los gobiernos, ni en las instituciones, ni en las organizaciones no gubernamentales, ni en sus sistemas de vida organizada. Se habla fuerte, ya, de la Revolución Ambiental y de radicalizar las reivindicaciones sociales para la tutela de los bienes ambientales.

El nuevo derecho ambiental nada hoy contra la corriente. Y en aguas contaminadas.

Anexo 1.

Algunas características del nuevo derecho ambiental

De manera didáctica puede afirmarse que es:

Joven
Abundante
Renovable
Denso y archipielágico
Obstaculizado
Antipático
De expertos
Dinámico
Multidisciplinario
Irradiante o permeatorio
Ineficiente
Veloz
Copiado
Internacionalizante
Preventivo-correctivo
Propunitivo
Planetario
Difícil
Engañoso
Participativo
Antistablishment
De tercera generación
Moderno cientificista
Caro y complejo
Solidario
Indexado al desarrollo económico
Desarrollista
Procesalista
Transversal
Temporal
Contradictorio
Bicrónico
Transgeneracional
Antinacionalista
Desjudicializante
Tiende a adelgazar
Disperso
Consensuatorio
Informativo
Esceptizante
Radicalizante

Me atrevería a decir que en primer término habría que replantearnos la semántica conceptual del desarrollo. Hemos sido engañados en cuanto a su definición y nos da miedo orear públicamente esta cuestión. Pero suponiendo que el desarrollo fuera el mejoramiento existencial, físico, político, cultural, social y económico de las grandes mayorías de un país, la variable ambiental no podría quedar afuera y tendría que insertarse en cada segmento de ese avance.

El principal reto del llamado desarrollo es privilegiar lo social sobre lo económico, sin sacrificar la libertad, la democracia, los valores culturales y el ambiente. El crecimiento y agudización de la pobreza y la miseria son la gran vergüenza del siglo pasado y el inicio de éste. Los indicadores del "desarrollo" no son los antónimos de la depauperación. La política ambiental, la gestión, la juridificación y recuperación ambiental, requieren dinero y cultura.

Mientras la pobreza esté y crezca, la lucha ambiental es inútil y axiológicamente cuestionable. Todos los recursos de un Estado, de un gobierno, de una sociedad, toda la energía, talento, tecnología, ciencia y conocimiento de una nación deben destinarse, en primer lugar, a imposibilitar y erradicar la pobreza y la marginación. Debemos aspirar a tener un país pobre pero justo, equitativo y ambientalmente sano. Sin asimetrías afrentantes. Los paradigmas actuales ofrecen opulencia y sólo entregan deterioro de los recursos naturales.

En el mundo entero la reivindicación ambiental a través del derecho, está padeciendo un retroceso porque la pobreza se ha ensanchado al mismo tiempo que se ha dado rienda suelta a una feroz y veloz competencia económica, industrial y financiera entre países desiguales o similares que deriva en dos flagelos: el deterioro ambiental y el empobrecimiento acelerado de grandes masas.

Los problemas ambientales más acuciantes, los más graves, o los que implican un mayor desafío en el ámbito mundial, son los siguientes:

1. La pobreza, que degrada, debilita, enferma y le resta sustentabilidad a una de las especies vivas más relevantes, que es la humana.
2. El sistema económico del libre mercado sin control de los Gobiernos y la subcultura del lucroteísmo.
3. Los desechos o residuos sólidos peligrosos, que afectan ya, anárquicamente, al suelo, el agua superficial o freática incluidos los océanos, la atmósfera, la flora, la fauna y, desde luego, al hombre.
4. El desquiciamiento energético.

El derecho ambiental no lo hacen los Ministros de las Cortes, ni los integrantes de los Congresos legislativos, ni las agrupaciones civiles, los académicos o los expertos e intelectuales, lo hacemos entre todos, pero sólo el Poder Ejecutivo tiene la responsabilidad fundamental de aplicarlo. Ese ***"law enforcement"*** del que dependen la naturaleza y el olvidadizo e ingrato ser humano que forma parte de ella, lo tiene que realizar en primerísimo lugar las estructuras administrativas de los gobiernos y sus brazos judiciales, pero toca a los ciudadanos el recordarles todo el tiempo que **la soberanía** radica esencial y originariamente en el pueblo. De ello depende el medio ambiente.

CAPITOLO 4

"ENVIRONMENTAL GOVERNANCE AND ACCESS TO JUSTICE"

THE NATIONAL PERSPECTIVE

LES JUGES NATIONAUX ET L'APPLICATION DU DROIT INTERNATIONAL DE L'ENVIRONNEMENT

Prof. Dr. L. Lavrysen
Juge à la Cour constitutionnelle de Belgique
Président du Forum des juges de l'Union européenne pour l'environnement

Les initiatives du PNUE

Il y a, semble-t-il, un large consensus pour considérer que l'application du droit de l'environnement, qu'il s'agisse du droit international, du droit européen ou du droit national, est très problématique dans la plus grande partie du monde et que beaucoup de ses règles sont constamment violées sans que des sanctions adéquates soient mises en oeuvre pour y remédier. Pour faire face à cette situation, l'engagement de multiples acteurs est requis, parmi lesquels les législateurs nationaux, les administrations, les services d'inspection et de police. Mais les juges nationaux ont aussi un rôle à jouer dans l'application de ce droit. Le rôle du pouvoir judiciaire a été considéré comme si crucial dans le domaine de l'environnement que le Programme des Nations Unies pour l'environnement a jugé qu'il était approprié, avant le Sommet mondial sur le développement durable de 2002, de convier les plus hautes autorités judiciaires du monde entier à se réunir à Johannesbourg au courant du mois d'août 2002. Le but de ce symposium, où étaient présents de hauts magistrats de plus de 60 pays, était de préparer un document à soumettre aux chefs d'État durant le sommet « Rio + 10 ». L'objectif a été atteint : il s'est concrétisé dans un document intitulé « Les principes de Johannesbourg relatifs au rôle du droit et au développement durable adoptés par le Colloque mondial des juges tenu à Johannesbourg (Afrique du Sud) du 18 au 20 août 2002 ». Dans ce document, les représentants du pouvoir judiciaire venus du monde entier ont déclaré qu'ils étaient fermement convaincus que le cadre juridique international et national élaboré depuis la Conférence des Nations Unies sur l'environnement, tenue à Stockholm en 1972, fournit une assise solide permettant de s'attaquer aux principales menaces pesant aujourd'hui sur l'environnement ; ils ont estimé que ce cadre devrait être résolument renforcé par des efforts concertés et soutenus afin que les régimes juridiques soient appliqués et respectés et que leurs objectifs puissent ainsi être atteints. Ces représentants ont encore insisté sur le fait que la fragilité de l'environnement mondial suppose que le pouvoir judiciaire, comme gardien de l'état de droit, applique et exécute audacieusement et sans crainte les législations internationales et nationales qui, dans les domaines de l'environnement et du développement durable, ont été adoptées. Ils étaient conscients du fait qu'il

importe de veiller, d'une part, à ce que le droit de l'environnement et la législation en matière de développement durable occupent une place de premier plan dans les programmes de formation, dans l'enseignement du droit et dans la formation à tous les niveaux et, d'autre part, à ce qu'en particulier les juges et tous ceux qui s'intéressent au processus juridictionnel leur portent un intérêt soutenu. Ils ont relevé que la faiblesse des connaissances et les carences en matière de compétences et d'informations pertinentes touchant le droit de l'environnement sont l'une des principales causes des insuffisances constatées dans la mise en œuvre, l'application et le développement du droit de l'environnement. Ils ont invité le PNUE à élaborer un programme de travail concerté centré sur l'éducation, la formation et la diffusion d'informations, y compris l'organisation de colloques régionaux et sous-régionaux pour les magistrats. Ce programme, le « *UNEP Judges Programme* »[1] a conduit à l'élaboration de matériel de formation, en ce compris un « *Judicial Handbook on Environmental Law* » (dont une version française - le « Manuel judiciaire de droit de l'environnement » - existe, mais uniquement sur l'internet)[2], à l'organisation de réunions de planification dans plusieurs parties du monde, dont une tenue à la Cour de cassation de France en février 2005 pour les présidents des cours suprêmes des Etats francophones d'Afrique, et à l'organisation de multiples séminaires de formation régionaux ou nationaux dans presque tout les continents.

Le Forum des juges de l'Union européenne pour l'environnement

Le PNUE à aussi invité les juges à créer des forums régionaux, ce qui a été fait dans plusieurs régions du monde, dont l'Europe occidentale, avec la création du Forum de l'Union européenne pour l'environnement. Monsieur Guy Canivet, alors premier président de la Cour de cassation de France, fut le premier à en exercer la présidence, fonction que j'assume actuellement, tandis que Madame Françoise Nési en est actuellement le secrétaire général. Le Forum est constitué sous la forme d'une association internationale sans but lucratif selon le droit belge. Le Forum a pour objet, dans la perspective du développement durable, de favoriser la mise en œuvre et l'application du droit de l'environnement national, européen et international. Il vise plus particulièrement à partager les expériences en matière de formation dans le droit de l'environnement ; contribuer à une connaissance plus approfondie du droit de l'environnement ; partager les expériences en matière de jurisprudence dans le domaine de l'environnement ; contribuer à une meilleure mise en œuvre et à une meilleure application du droit de l'environnement international, européen et national. Le Forum comprend actuellement des membres dans

[1] http://www.unep.org/law/Programme_work/Judges_programme/index.asp
[2] http://www.unep.org/law/Publications_multimedia/index.asp

tous les Etats membres de l'UE et des observateurs provenant d'Etats candidats à l'entrée dans l'Union. Il organise annuellement une conférence et participe à d'autres activités au niveau international et européen. Pour ce qui est du niveau international, la Convention d'Aarhus sur l'accès à l'information, la participation du public et l'accès à la justice en matière d'environnement, reçoit évidemment une attention particulière. Le Forum participe aussi bien aux réunions des parties à cette Convention (Almaty, Riga), qu'au groupe de travail sur l'accès à la justice et aux séminaires de formation que le secrétariat organise en collaboration avec l'OCSE pour les juges dans différents sous-régions (Kiev, Tirana).

L'union européenne

Pour les juges nationaux des pays membres de l'UE, l'Union européenne joue un rôle capital dans l'application du droit international de l'environnement. L'UE est en effet partie à la plupart des traités multilateraux de l'environnement. Ces traités lient non seulement les institutions de l' Union, mais aussi les Etats membres (art. 216, alinéa 2, du TFUE). Dès leur entrée en vigueur, ils sont partie intégrante de l'ordre juridique de l'Union européenne. Dans la hiérarchie des normes, ils priment les actes des institutions de l'UE. Depuis 1972, la Cour de Justice s'est déclarée compétente pour vérifier si les actes des institutions sont conformes au droit international tandis que le droit dérivé doit autant que faire se peut être interprété conformément au droit international. Selon cette même jurisprudence, ces normes communautaires priment les normes nationales et cela, indépendamment du statut que le droit constitutionnel national réserve aux traités ou de la nature constitutionnelle, légale ou réglementaire des normes nationales en cause. En outre, ces traités peuvent avoir effet direct dans l'ordre juridique national. La CJUE l'a encore confirmé dans l'affaire du *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région (15 juillet 2004)* ; « *Selon la jurisprudence constante de la Cour, une disposition d'un accord conclu par la Communauté avec des pays tiers doit être considérée comme étant d'application directe lorsque, eu égard à ses termes ainsi qu'à l'objet et à la nature de l'accord, elle comporte une obligation claire et précise qui n'est subordonnée, dans son exécution ou dans ses effets, à l'intervention d'aucun acte ultérieur (voir, notamment, arrêts Demirel, précité, point 14, et du 8 mai 2003, Wählergruppe Gemeinsam, C-171/01, Rec. p. I-4301, point 54). »* Et la CJUE de conclure : « *Compte tenu de ce qui précède, il convient de répondre […] que tant l'article 6, paragraphe 3, du protocole [*Protocole relatif à la protection de la mer Méditerranée contre la pollution d'origine tellurique] *que l'article 6, paragraphe 1, du protocole révisé, après son entrée en vigueur, ont un effet direct, de telle sorte que toute personne intéressée a le droit de se prévaloir desdites dispositions devant les juridictions nationales.* » Cela implique évidemment que les juges nationaux doivent écarter l'application, voire prononcer l'annulation, des normes du droit national qui sont contraires à de

telles dispositions. Le caractère de droit de l'UE des traités internationaux conclus par l'UE implique aussi que la CJEU soit compétente pour interpréter de telles conventions et que les juges nationaux puissent, et même doivent dans certains circonstances, adresser des questions préjudicielles en interprétation à cette Cour. Si les juges nationaux hésitent sur l'interprétation de dispositions de droit international de l'environnement, ils peuvent donc dans la plupart des cas demander l'aide de la CJUE. Par ailleurs, la Commission (art. 258 du TFUE) et les autres Etats membres (art. 259 du TFUE) peuvent lancer des actions en manquement contre les Etats membres qui ne respectent par les traités internationaux conclus par l'UE. Il semble que les juges nationaux viennent de découvrir cette possibilité. En effet, le Conseil d'Etat belge[3], la Cour constitutionnelle belge et le *Najvy??í súd Slovenskej republiky* (Slovaquie)[4] et vient de poser dans plusieurs affaires des questions préjudicielles sur l'interprétation à donner aux articles 6 et 9 de la Convention d'Aarhus.

L'UE a aussi un rôle très important dans l'application du droit international de l'environnement d'un autre point de vue. Comme vous le savez, l'UE à pris l'habitude de mettre en œuvre des traités internationaux de l'environnement par le biais de directives, de règlements ou de décisions. En réalité, les traités et ces différentes normes en viennent à former un tout et l'on ne peut voir les uns sans les autres. Cela explique aussi pourquoi, par exemple, dans les affaires dans lesquelles le Conseil d'Etat belge vient d'adresser des questions préjudicielles sur l'interprétation de la Convention d'Aarhus à la CJUE, il pose aussi des questions sur l'interprétation à donner aux dispositions de plusieurs directives prises en exécution de la Convention d'Aarhus.

Tous ces développements semblent indiquer que le droit international de l'environnement n'est plus à considérer comme quelque chose qui ne concernerait que les diplomates, les professeurs de droit international ou les juges internationaux. Le droit international de l'environnement est devenu un droit communautaire et national qui doit être appliqué par les juges nationaux au même titre que les textes qui émanent de leurs parlements et de leurs exécutifs nationaux.

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[3] Affaires jointes C-128/09 à C-131/09, C-134/09 et C-135/09, *Antoine Boxus, Willy Roua, Guido Durlet e.a.*, *Paul Fastrez, Henriette Fastrez*, *Philippe Daras*, *Association des Riverains et Habitants des Communes Proches de l'Aéroport B.S.C.A. (Brussels South Charleroi Airport) ASBL (A.R.A.Ch.), Bernard Page, Association des Riverains et Habitants des Communes Proches de l'Aéroport B.S.C.A. (Brussels South Charleroi Airport) ASBL (A.R.A.Ch.), Léon L'Hoir, Nadine Dartois* contre *Région wallonne* et affaires jointes C-177/09, C-178/09 et C-179/09, *Le Poumon vert de la Hulpe ASBL e.a., Action et défense de l'environnement de la Vallée de la Senne et de ses affluents ASBL (ADESA) e.a., Le Poumon vert de la Hulpe ASBL e.a., Les amis de la Forêt de Soignes ASBL* contre *Région wallonne*.

[4] Affaire C-240/09, *Lesoochranárske zoskupenie VLK* contre *Ministerstvo ?ivotného prostredia Slovenskej republiky*

VERMONT ENVIRONMENTAL COURT

Merideth Wright, Judge
[Please feel free to email Judge Wright with any questions at envj.wright@gmail.com]

The Vermont Environmental Court is a trial-level judicial branch court that was created in 1990. It was initially created to improve the enforcement of Vermont's state environmental laws. Vermont has had strong environmental and state land use laws since the late 1960s and early 1970s, but the enforcement of such laws was uneven for at least two reasons. First, each of the different laws had different enforcement provisions: some provided for criminal prosecution but not for civil injunctions, and some allowed the state environmental agency to issue orders, but provided no mechanism to enforce those orders. Second, the inspection and prosecution of cases differed wildly from one of the environmental laws to another, due to the uneven workload of the environmental inspectors. The uneven enforcement or lack of certain enforcement led to unfair differences in treatment between one environmental violator and another. Those who spent money to bring their operations into compliance with the laws, or to seek a permit prior to beginning operation, felt that they were at an economic disadvantage if others were able to violate the law without being penalized. We will discuss the penalty factors in the enforcement statute that allow the court to relate the penalty amount to the economic benefit obtained by a violator from violating the law.

The Vermont Environmental Court was expanded in 1995 to handle all local land use and planning cases, and was expanded again effective in January of 2005 to hand state land use and environmental permit cases. Vermont has no intermediate-level appellate court, so that any appeals from decisions of the Vermont Environmental Court go directly to the Vermont Supreme Court. All of the Environmental Court's decisions are published and are available in electronic form which has greatly assisted the development of consistency and predictability in the areas of the law within the Court's jurisdiction.

Judge Merideth Wright was appointed[1] to the court in 1990 and was responsible initially for developing the jurisprudence and procedures for the newly-created court; she conducted all the judicial work of the court. The Environmental Court's second judge, Judge Thomas S. Durkin, was appointed in January of 2005.

From 1990 through about 1996 only a single part-time administrative clerk

[1] In Vermont, all trial court judges are appointed by the governor and are confirmed by a vote the legislature. Every six years after a judge is appointed, a legislative committee holds hearings on that judge and makes a recommendation to the entire legislature, which votes whether to retain the judge in office for another six-year term.

provided the support staff of the Court; by about 2002 the staffing of the Court was expanded to a full-time court manager, an administrative docket clerk, and a part-time law clerk. Since a major statutory change in 2005, the staff of the Court has consisted of a court manager, two administrative docket clerks, and a case manager, as well as two law clerks who directly assist the judges.

The Court's procedures are governed by the Vermont Rules for Environmental Court proceedings.[2]

The Environmental Court now has statewide jurisdiction of four major types of civil[3] cases: state environmental enforcement cases arising under Vermont's Uniform Environmental Enforcement Act (10 V.S.A. Chapter 201); local land use zoning and planning permit appeals and enforcement cases; state land use permit appeals (Act 250), and appeals of all state environmental permits and decisions of the state environmental agency, including those regulating 'heavy-cut' logging operations, as well as from state agricultural permits regulating large farming operations.

Almost all the cases are heard de novo, meaning that the Court does not review what the administrative or permit-issuing body has done, but instead hears the evidence in a trial and decides the matter itself. Trials are held throughout the state, in a courtroom in the area where the case arises, so that the litigants do not have far to travel.

Many of the cases involve several different parties: for example, the developer of a project, the neighbors or people who may be affected by the project, and the municipality or state agency responsible for regulating the project. The cases are heard by the judge sitting alone, without a jury. Trials are conducted like any other civil non-jury trial. After the parties or their lawyers have presented their evidence and have asked questions of the various witnesses or experts, the judge may ask questions of the witnesses. The Court may issue injunctive orders and stays, and may analyze local ordinances and state statutes for constitutionality, within the context of cases within the Court's jurisdiction.

Litigants may be represented by an attorney, but there is no requirement for attorney representation. People may and do represent themselves. Several of the forms we use to explain procedure to self-represented litigants are also available on the website.

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[2] available on line at www.vermontjudiciary.org/LC/Legallinks.aspx , and then click on "Vermont Statutes and Court Rules" and then click on "Court Rules" and then click on "Rules for Environmental Court Proceedings"

[3] Criminal cases and civil cases for compensation to individuals are not heard in Environmental Court under our system.

EXPERIENCES OF SWEDISH ENVIRONMENTAL COURTS

Ulf Bjällås, Environmental Court of Appeal, Stockholm, Sweden

Legislation

Swedish law is to a large extent codified. Sweden has four fundamental acts, which together make up the constitution. One of them is the Instrument of Government. It rules on how regulations of various kinds are enacted.
The Swedish parliament, Riksdagen, adopts laws in all kinds of matters, for example taxation laws and environmental laws. These acts are complemented by governmental ordinances and regulations on central, regional and local level.
In the Instrument of Government there is a general provision about environmental matters. In chapter 1, article 2, it states that the public institutions shall promote sustainable development leading to a good environment for present and future generations. In the same article the right to health is inscribed.
Case law from the Swedish courts is important within the Swedish legal system as well as statements in Government Bills and other preparatory works.
The most important piece of environmental legislation is the Environmental Code. It came into force in January 1999. It is the first integrated body of environmental legislation enacted in Sweden. It encompasses a substantial part of the laws relating to provisions on environmental protection. The Code is a framework law. It contains rules from 16 previous Acts. There are for example rules on the management of land and water, nature conservation, the protection of plant and animal species, environmentally hazardous products and waste. It integrates nature conservation, activities harmful to the environment, protection of health, water resources, chemicals and waste, emission to air, water and land, ration use of energy and noise pollution. It also includes claims for damages.
There are other laws of importance within the environmental field, for example the Forestry Ac, the Mineral Act, the Act on Planning and Building. All these acts are in some way linked to the Environmental Code.
In the Code there are procedural rules for the Environmental courts. Actually the Code is a mixture of different pieces of legislation, such as environmental law, civil law, administrative law and criminal law.
The overall purpose of the Environmental Code is to promote a sustainable development that will assure a healthy and sound environment for present and future generations.

The Environmental Code applies in principle to all human activities that my harm the environment or the human health.
Important principles, policies and goals are laid down in the Code, for instance

- Sustainable development
- The polluters pay principle
- The precautionary principle
- The prevention principle
- The burden of proof
- The best available techniques
- The location of activities
- Reuse and recycling
- Cost-benefit balancing

A characteristic feature of the entire legislation is that it is very general, it is written in general terms. Because of that, there are many guidelines, issued by various governmental agencies and public authorities. They are not legally binding but they suggest how the legislation should be applied in concrete cases and they can be a good reference for the judges when applying the general principels of the Code.

Licensing system

In order to ensure compliance with the general rules of consideration in the Environmental Code, a large number of environmentally hazardous activities and operations are subject to licensing. Such activities or operations may not be started without a permit. Activities or
Operations (about 5 000 in Sweden) for which permits are compulsory are specified in the Code or in an ordinance. They are divided in two classes, A and B. For A class (about 300-400 in Sweden) it is up to an Environmental court to issue the permit and set the permit conditions. For the others a regional or a local body is responsible.
A permit states the conditions under which an activity may be carried out. The licensing authority may refuse a permit if they find that the activity is not permissible under the Environmental Code. A holistic and integrated approach is applied, where impacts on land, air, water are jointly considered. Permits and permit conditions should benefit the aims of the Environmental Code and ensure that the requirements of its general rules of considerations are fulfilled. The conditions may concern for instance

- Purpose and scope of the operation
- Emissions limit values
- Management of chemicals
- Energy efficiency measures
- Waste management
- Compensatory measures for adverse effects
- Measures to prevent accidents

- Traffic to and from the site, in the neighbourhood of the site
- Measures to restore the site after the cessation of activities
- A financial guarantee.

Environmental Courts

There are both courts and administrative bodies within the legislative system of environmental law. There are five regional environmental courts and one superior environmental court (Environmental Court of Appeal). The regional courts are connected to district (civil) courts and the superior environmental court to an appellate civil court.

The environmental courts decide on all kinds of cases that follow from the application of the Environmental Code. The courts have legal jurisdiction, which permits integrated review of both land use and environmental areas of concern and also incorporate civil and administrative powers, but not criminal.

The courts have power to review and rule on the formal legality of a decision but also to rule on the actual content of the decision (Merits Review)

The environmental courts will from May 2011- according a proposal from the Government to the Swedish parliament - be given competence to decide on cases that follow from the application of the Act of Planning and Building. The environmental courts will be given competence to review City plans and building permits. The name of the courts will be changed and the new name will be Land and Environmental Courts.

There are also regional boards (20) and to a certain degree local environmental bodies (about 250) within the environmental legal system. Their decisions can be appealed to the environmental courts.

Regional Environmental Court

The environmental court has a panel consisting of one law-trained judge, one environmental technical advisor, and two lay expert members. They sit together to hear a case and all acts as equal when making a decision. The judge and the technical advisor are employed by the court and work full time as environmental judges.

The environmental court hears appeals coming from regional boards. There are cases about, for instance

- Permits for or permit conditions for environmental small and medium sized
- hazardous activities
- Public health
- Nature conservation
- Disposal of waste
- Orders to clean up.

As first instance the court deals with the following kind of cases and matters

- Permits for environmentally hazardous activities with a sever impact on the environment (A-class)
- Permits for water undertakings, for instance buildings in water such as

hydro-electricity operations, reservoir constructions
- Claim for damages or compensation

According to some proposals to the Swedish government, regional boards instead of the environmental courts should issue all kinds of permits. Even in Sweden it is an odd system that a court issue a permit, but for historical reasons it is difficult to change the system. So far no changes are planned.

The Environmental Court of Appeal
The Court hears appeals from the five regional environmental courts. Leave to appeal is required. Three law-trained judges participate in deciding applications for leave to appeal. If the judges have given leave to appeal the Court then is comprised of four law-trained judges, and one of them can be replaced with a technical judge, if it is appropriate and often it is.

The Court is the final instance in those cases where a local or a regional board made the first decision. If the environmental court was the first instance the Supreme Court of Sweden is the final instance. Leave to appeal is required and leave can only be given if the case is of great interest from a principle judicial point of view.

Experiences
In my opinion the Environmental Courts have high credibility and are fully accepted. The Federation of the Swedish Industry as well as NGOs have confidence in the court system. The system came into force in 1999 and there are no plans from the Governments side to change the system. It has come to stay. On the contrary the mandate for the courts will be enlarged. Cases concerning the Act on Land and Planning, which today are appealed to administrative courts, will next year be moved to the environmental courts. And because of that the name of the courts will be changed to Land and Environmental Courts
One of the forerunners of the court system was the National Licensing Board for Environmental Protection. It functioned like a court of justice and the chairman of the board and his deputies were legally trained judges coming from an Appellate Court.
The environmental courts have replaced the Board and five Water Courts. The mandate for the environmental courts has been enlarged if you compare with mandate for the Board. Now the court can judge all kinds of environmental disputes when applying the Code. But the most important task for the Board when it was judging a case has been taken over by the environmental courts, namely to balance different interest against each other, for instance to weigh the harm to the individuals against the economic benefits of the enterprise causing the harm. This is a very important – and difficult – task for a judge in an environmental dispute, to weigh different interests against each other and try to find the balance point. The decisions often have impacts beyond those of the parties directly involved. Technical expertise and trained judges makes it easier to find the balance point.

I have been judging environmental cases for many years – first as the chairman of the Board and then as the head of the Environmental Court of Appeal - and when I sometimes get the question, what is the difference between judging an environmental case and judging a criminal case, I usually say that the environmental judge looks forward asking himself what will happen if I make a decision like this or like that, and the criminal judge he or she looks backward and tries to find out what has happened, what has been proofed.
I would like to mention the following points that give credibility to Swedish Environmental System:

- The Environmental Code is a comprehensive legislation and gives the environmental courts both civil and administrative jurisdiction and a range of enforcement powers.
- The Code gives the court a possibility to make an integrated and holistic approach when ruling on a case.
- The permit system for polluting activities in first instance is a "one stop shop"
- The Code contains procedural rules for the courts. They are specially adapted to management of environmental cases.
- There are also special rules for the procedural costs. The looser normally does not pay the winner. There are no filing fees.
- The courts, both first and second instance, include technical expertises. This is very important as the court has the power to rule both on the formal legality of a decision and on the actual content of the decision (Merits Review). Technical judges working together with legal judges give confidence to the court and its decisions. This is especially important when the court tries to apply general provisions in the Code to the technical aspect of a case.
- The courts can prioritise very urgent cases more than an ordinary civil court can. I my court – The Environmental Court of Appeal – when an urgent case is submitted to the court we decide immediately, after contact with the parties, on a calendar for the entire case and we set hearing date; in about six to eight months time, and the decision from the court will normally come within two months.
- If the court has a hearing it normally travels to the site in dispute. The parties, of course, but also people concerned, living close to the site are allowed to give comments to the court. They are all allowed to represent themselves without attorneys. If it is a case about, for instance, a permit for a big installation the court often requires responsible authorities on local, regional and central level to participate in the hearing and to give comments on the case. The court can also require independent technical institutes to comment on the case.
- The hearing is, as I se it, relaxed. The court normally sends an agenda to everyone before the hearing. The chairing judge normally starts by going throw the agenda, then it is up to the judge so see that everyone sticks to the agenda; problematic sometimes when a lot people are concerned. The

judges do not wear robes or wigs (judges in Sweden never do) and the participants do not have to stand when they address the court. Often the hearing takes place in a conference room and testimony can be taken informally at a conference table. It is more like a general meeting and not like the proceeding in a criminal case in a courtroom in the appellate court.

- I have been travelling all over Sweden for many years, chairing hearings and listening to appealing enterprises, to central, regional and local bodies, to NGOs and people living close to the site in dispute, and my general opinion is that an open and user-friendly hearing is one example of good environmental governance that gives access to justice. People in general are grateful that the court has come to the site to look and listen. They are grateful that they have been allowed to address the judges and argue for what they think is right. "Thank you for coming and listening to us" I have heard many times during the years.

LE RÔLE DU JUGE NATIONAL DANS LA PROTECTION DE L'ENVIRONNEMENT

Françoise Nési
Cour de cassation, Paris, France
Ecole Nationale de la Magistrature, France
Secrétaire générale du Forum des juges de l'Union européenne pour l'environnement

La catastrophe de l'Erika, pétrolier qui transportait du fuel lourd destiné à alimenter des centrales électriques italiennes et qui a sombré en décembre 1999, après s'être coupé en deux, libérant 10.000 tonnes de fuel et occasionnant une pollution majeure du littoral français sur 400 kms, m'a paru un très bon exemple du rôle du juge dans la mise en œuvre effective du droit de l'environnement.
Tous les ordres de juridiction- tant pénal, qu'administratif ou civil- ont, par un biais ou un autre, été saisis de cet accident majeur et amenés à se prononcer sur les responsabilités et sur les préjudices. Un survol très rapide des décisions intervenues permet à mon sens de dégager trois points majeurs qui mettent en lumière le rôle du juge à cette occasion : la définition du droit applicable (l'identification du ou des textes et leur interprétation), la délimitation de l'accès au juge (qui renvoie à l'application de la convention d'Aarhus) et la consécration du préjudice écologique pur, c'est-à-dire en tant que tel, et non plus à travers ses effets sur la personne physique ou morale. Ce dernier point renvoie en particulier à la directive 2004/35/CE du 21 avril 2004 sur la responsabilité environnementale, qui a été transposée en droit national français par la loi du 1er août 2008.

I - La définition du droit applicable :

C'est bien sûr l'élément premier fondamental de toute démarche du juge : identifier le droit applicable et définir le contenu des notions essentielles.
Pour l'Erika, la question s'est avérée particulièrement complexe du fait que plusieurs textes étaient applicables, et qu'ils étaient de nature différente , le point fondamental étant de savoir s'ils devaient se compléter ou s'exclure.
Le groupe pétrolier Total s'est prévalu devant le juge pénal de plusieurs conventions internationales : la convention Marpol, qui définit les obligations de prévention et les mesures de contrôle des pollutions par hydrocarbures, en ce qui concernait la responsabilité pénale, et les conventions CLC et FIPOL[1], en ce qui concernait l'ac-

[1] Convention du 29 novembre 1969 (Civil Liability Convention on oil pollution) CLE publiée par le décret n° 75-553 du 29 juin 1975 et Convention du 18 décembre 1971 portant création du Fonds international d'indemnisation pour les dommages dus à la pollution par les hydrocarbures (FIPOL) publiée par décret n° 78-1186 du 18 décembre 1978

tion civile en réparation des dommages causés par la pollution par hydrocarbures, qui retiennent comme responsable principal le propriétaire du navire et qui mettent en place des exclusions et des limitations de garantie.
Le juge pénal a eu à examiner la compatibilité de la loi française (loi du 5 juillet 1983 insérée dans les articles L.218-10 et suivants du code de l'environnement) réprimant les infractions de pollution, avec la convention Marpol, autrement dit la conventionnalité de la loi interne avec le droit international, étant précisé que la convention Marpol laisse aux Etats, au titre de leur droit souverain, le soin d'édicter les sanctions., et qu'en vertu de l'article 55 de la Constitution française, les traités ou accords régulièrement ratifiés ou approuvés ont une autorité supérieure à celle des lois.
Bien que la loi française ait un champ d'application plus large que la convention internationale puisqu' elle ne limite pas la responsabilité pénale aux armateurs-propriétaires de navire et aux capitaines mais permet d'y inclure « tous ceux qui ont eu un pouvoir de contrôle ou de direction dans la gestion ou la marche du navire », ce qui entre dans les fonctions d'affrêteur ou dans l'activité de vetting[2], et que la faute simple permet l'incrimination en droit interne alors qu'il faut une faute intentionnelle ou inexcusable en droit international, la cour d'appel de Paris , dans son arrêt du 30 mars 2010, confirmant les peines prononcées en première instance, l'a estimée compatible avec le droit international en rappelant « *qu'une convention doit s'interpréter, aux termes de la Convention de Vienne du 23 mai 1969, à la lumière de son objet et de son but, qui en l'espèce est de prévenir la pollution ».*
Mais la multiplicité des conventions applicables a eu pour effet , sur le plan de la responsabilité civile, d'écarter la responsabilité du groupe pétrolier , puisqu'au regard de la convention CLC, Total, que la cour d'appel a retenu comme affréteur, ne pouvait voir sa responsabilité civile engagée qu'en cas de faute intentionnelle ou inexcusable. Or la cour d'appel n'a retenu à la charge de la société pétrolière qu'une faute d'imprudence consistant à avoir affrété le navire sans respecter les règles qu'elle avait elle-même mises en place pour éviter d'utiliser un navire inapte au transport de produits hautement polluants.
Cette double analyse sera soumise à l'examen de la Cour de cassation puisqu'un pourvoi a été formé contre l'arrêt de la Cour d'appel.
Les mêmes difficultés ont été rencontrées par le juge civil, saisi par l'une des communes dont le littoral avait été pollué sur le fondement de la législation sur l'élimination des déchets (directive CEE 75/442 du 15 juillet 1975, et plus particulièrement l'article 15 relatif au principe pollueur payeur, repris dans les articles L.541-1et L.541-2 du code de l'environnement français).
L'analyse des notions de détention et de production faite par la cour d'appel a semblé à la cour de cassation trop restrictive car réduite à la notion classique de garde en droit français (c'est-à-dire de pouvoir de direction et de contrôle de la chose) et ignorant la catégorie juridique du « producteur du

[2] Processus mis en place par l'affreteur visant à évaluer que le risque présenté par l'utilisation d'un pétrolier est acceptable pour lui.

produit générateur du déchet »). Compte tenu de l'enjeu et de la dimension du dossier, et de l'incertitude persistante sur ces notions malgré des arrêts déjà rendus par la CJCE[3], elle a estimé qu'il convenait de poser une question préjudicielle à la Cour de justice des Communautés, pour qu'elle éclaircisse la portée de ces notions dans le cas particulier du naufrage d'un pétrolier.
Là aussi, les sociétés Total en cause ont revendiqué, devant la CJCE, l'application exclusive des conventions internationales CLC et FIPOL (ciblant prioritairement le propriétaire du navire et non l'affréteur, et mettant en place des exclusions et plafonds de garantie), étant observé que ces conventions ont été ratifiées par la France, mais pas par l'Union européenne.
La réponse donnée par la CJCE[4] est très claire sur l'articulation du droit international, communautaire et interne : par les points 80 à 84 de sa décision, elle consacre l'obligation, pour les Etats membres, d'assurer l'application du principe pollueur-payeur à l'encontre de toute personne physique ou morale ayant contribué à générer des déchets et à créer le risque de pollution qui en résulte, et donc de garantir la prise en charge intégrale des coûts de dépollution : le juge national peut à cet effet utiliser tous les textes qui permettent de réaliser cet objectif : en l'occurrence les conventions internationales, et, si elles n'y suffisent pas (notamment du fait qu'elles ne visent qu'une catégorie de responsables (le propriétaire du navire) et qu'elles sont assorties de plafonds de garantie) tout autre texte national ou international de nature à assurer une indemnisation complémentaire. C'est donc bien une complémentarité des législations, l'Etat ne pouvant pas se dégager de ses obligations au regard des objectifs fixés par le droit communautaire.
Sur le fond du litige , la CJCE a tout aussi clairement retenu la possibilité d'une pluralité de débiteurs financiers devant supporter le coût d'élimination de la pollution par marée noire : producteur ou détenteur de la « boulette déchet » mais aussi producteur du produit générateur du déchet (en l'espèce le fuel lourd chargé dans les soutes de l'Erika) dès lors que d'une façon ou d'une autre ils ont, par leur activité, contribué au risque de survenance de la pollution occasionnée par le naufrage du navire.
Enfin, le Conseil d'Etat[5], cour suprême administrative, a lui aussi été saisi de

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[3] CJCE Van de Walle e.a C-1/03 Rec. P.1-7613 points 42, 47 et 50

[4] CJCE 24 juin 2008 C-188/07 Commune de Mesquer c/ Total France SA, Total International Ltd

[5] Conseil d'Etat n° 304803 10 avril 2009 Commune de Batz sur mer : « Considérant qu'ainsi qu'il a été dit précédemment, il résulte des articles 2 et 3 de la loi du 15 juillet 1975, transposant la directive du 15 juillet 1975 sur les déchets, telle qu'interprétée par l'arrêt de la Cour de justice des communautés européennes du 24 juin 2008, qu'il convient de distinguer la réalisation matérielle des opérations de valorisation ou d'élimination, qui sont à la charge des seuls détenteur et producteur des déchets, de la prise en charge financière de ces opérations, susceptible d'être imposée, conformément au principe du pollueur-payeur, non seulement au détenteur et au producteur, mais encore aux personnes qui, par leur comportement, sont à l'origine des déchets, qu'elles soient anciennes détentrices des déchets ou productrices du produit générateur des déchets ; qu'il s'en déduit que le producteur des produits générateurs des déchets, même s'il peut être tenu d'une obligation subsidiaire de prise en charge financière, ne saurait, en cette seule qualité, faire l'objet de la mise en demeure prévue par l'article 3 de la loi du 15 juillet 1975 »

la question du responsable de l'élimination des déchets et a complété la définition des obligations du producteur du produit générateur du déchet, à partir du même arrêt de la CJCE, en précisant qu'une mise en demeure qui lui est adressée d'enlever les déchets est illégale : il n'encourt qu'une responsabilité pécuniaire mais on ne peut pas lui imposer la prise en charge matérielle des déchets.
On voit ainsi que l'intervention du juge national est fondamentale dans la détermination du droit applicable, et qu'il a un rôle unificateur grâce au dialogue qu'il peut instaurer avec d'autres juges, qu'il s'agisse d'un autre ordre de juridiction national ou du juge communautaire.
Enfin on peut souligner que ces décisions qui intéressent diverses sociétés du groupe Total qui ne sont pas les mêmes selon les procédures mettent en lumière l'épineuse question de la responsabilité de la société mère du fait de ses filiales.

II - La délimitation de l'accès au juge :
Autre axe fondamental du procès : qui va pouvoir saisir le juge ? qui va pouvoir demander réparation d'une pollution aussi générale ?
A l'occasion du litige pénal on observe un accès plus grand au prétoire pour les associations de protection de l'environnement, mais aussi pour les collectivités et établissements publics dont l'objet social intègre la défense des intérêts collectifs, ce qui ne peut aller que dans le sens d'une meilleure application de la convention d'Aarhus.
Déjà, le tribunal avait retenu que « *les collectivités territoriales qui reçoivent de la loi une compétence spéciale en matière d'environnement leur conférant une responsabilité particulière pour la protection, la gestion, et la conservation d'un territoire peuvent demander réparation d'une atteinte causée à l'environnement sur ce territoire par la commission ou les conséquences d'une infraction* » , tout en qualifiant ce préjudice de personnel puisqu'il affectait les intérêts qu'elles étaient en charge de défendre.
La cour d'appel a encore élargi l'accès au juge pour les collectivités territoriales et leurs groupements en faisant application de l'article L.142-4 du code de l'environnement issu de la loi du 1er août 2008 (applicable immédiatement aux instances en cours) : il suffit désormais que les faits constitutifs de l'infraction portent un préjudice direct ou indirect au territoire sur lequel les collectivités territoriales exercent leurs compétences pour qu'elles puissent demander réparation , sans qu'elles aient besoin qu'une compétence spéciale pour la protection, la gestion et la conservation d'un territoire leur soit conférée par la loi.
Rappelons que pour qu'une association puisse agir sur le fondement de l'article L142-2 du Code de l'environnement, elle doit exister lors de la survenance de l'infraction, disposer d'un agrément ou être régulièrement déclarée en préfecture depuis au moins cinq ans à la date des faits et avoir pour objet statutaire la protection des intérêts visés par l'article L211-1 du même code.
Enfin n'oublions pas, en ce domaine, que l'accès au juge est fortement dépendant de la question des frais de justice : quelques avancées sont opérées

aussi sur ce point crucial :

- les défendeurs avaient soutenu que le fait que plusieurs parties civiles aient le même avocat s'opposait à ce que chacune d'elle puisse demander le paiement de frais de justice (article 475-1 du code de procédure pénale). Les juges précisent que les indemnités perçues sont destinées aux parties civiles elles-mêmes, et ne se limitent pas aux frais de l'avocat, qui n'en est que le bénéficiaire indirect.
- la cour retient également que toute partie civile intimée (qui se trouve partie dans l'instance d'appel) a droit à une indemnité, peu important qu'elle se soit désistée de sa demande ou qu'elle ait transigé avec Total.

Pour fixer le montant de l'indemnité et sa répartition entre les parties condamnées, la cour a souligné la durée de la procédure (10 ans) et l'importance des frais engagés, et a tenu compte de la <u>situation économique disparate des parties condamnées.</u>

Pour les régions les indemnités varient entre 500.000 et 600.000 euros, pour les communes entre 20.000 et _60.000 euros.
Pour les associations, la fourchette va de 7.000 à 20.000 euros, avec une somme beaucoup plus grande pour la LPO : 120.000 euros (mais dont on a vu qu'elle avait un préjudice matériel important dont elle a nécessairement du justifier)
Les personnes physiques obtiennent 8.000 euros, sauf un agent immobilier (dont le fonds de commerce a été liquidé) qui obtient 20.000 euros, étant précisé que l'indemnité couvre, généralement, la totalité de la procédure (première instance et appel).

III - La consécration du préjudice écologique pur :

Reconnu uniquement au profit d'un département et de la Ligue de Protection des Oiseaux dans le jugement de première instance, il est affirmé de façon très solennelle par les juges d'appel, même si la décision peut apparaître décevante et critiquable quant à sa réparation effective.
La cour d'appel, dans l'arrêt du 30 mars 2010, distingue les préjudices subjectifs (patrimoniaux et extrapatrimoniaux) subis par les sujets de droit du préjudice objectif autonome, que l'on peut dire « environnemental pur » dans la mesure où la cour précise « *qu'il s'entend de toute atteinte non négligeable à l'environnement naturel, à savoir, notamment, à l'air, à l'atmosphère, à l'eau, le sols, les terres, les paysages, les sites naturels, la biodiversité et l'interaction entre ces éléments , qui est sans répercussion sur un intérêt humain particulier mais affecte un intérêt collectif légitime ».*
Après avoir énuméré à la fois des textes nationaux et supranationaux (Convention européenne du paysage de Florence du 20 octobre 2000, ratifiée par la France en 2005, L.110-1 du code de l'environnement qualifiant « *les espaces, ressources et milieux naturels , les sites et paysages, la qualité de l'air, les espèces animales et végétales, la diversité et les équilibres biologiques auxquels ils participent »* de « *patrimoine de la Nation »* et la loi du 1er août 2008 transposant la directive sur la responsabilité envi-

ronnementale), ainsi que la jurisprudence de la CEDH sur l'article 8 de la convention européenne (arrêt Lopez Ostra du 9 décembre 1994) la cour d'appel retient qu'il résulte de l'interdépendance homme/nature que « *toute atteinte non négligeable au milieu naturel constitue une agression pour la collectivité des hommes qui vivent en interaction avec lui et que cette agression doit trouver sa réparation* », et que donc le déversement de la cargaison de l'Erika est venu porter atteinte , de manière directe ou indirecte, à un intérêt collectif.

Elle redit à plusieurs reprises que l'atteinte portée à la préservation du milieu naturel, dans toute la complexité de ses composantes, est distincte de celle portée aux intérêts patrimoniaux et extrapatrimoniaux des sujets de droit, raison pour laquelle elle répare de façon autonome un préjudice collectif environnemental demandé par les personnes morales que sont les associations de protection de la nature et les collectivités territoriales.

Elle distingue également clairement l'atteinte à l'intérêt général que défend le ministère public de l'intérêt général des membres d'une association de protection de la nature que celle-ci a pour objet de défendre.

La cour a aussi expressément rejeté la thèse selon laquelle la difficulté d'évaluer ce préjudice en excluait la réparation en l'absence de législation précisant les modes et les critères d'évaluation, ou les éléments de comparaison.

Les parties ont fourni au juge différents éléments d'appréciation, qu'il peut être intéressant de citer :

- dans le cas du naufrage de l'Amoco Cadiz : il a été réalisé un bilan statistique de la perte de biomasse à partir des prix de vente à la criée des poissons, crustacés et coquillages aboutissant à 1, 5 milliards de francs : la cour relève que cette méthode laissait de côté la valeur des services rendus à l'humanité par les écosystèmes océaniques ; (mais comment cela s'évalue-t-il ?)

Une approche plus complète aurait été proposée intégrant ces systèmes par le biais d'une valeur à l'hectare, mais c'est l'interaction homme / nature qui serait alors omise.

D'autres ont retenu « la perte d'aménité » des habitants , critère utilisé aux Etats-Unis après le naufrage de l'Exxon Valdès : il s'agit de déterminer quelle somme les bénéficiaires du littoral sont prêts à payer pour la préservation du littoral pollué : la cour d'appel a considéré que c'était une appréciation du préjudice beaucoup trop subjective.

Finalement, la cour d'appel a retenu les paramètres suivants :

- pour les communes : la surface d'estran[6] touchée , l'importance de la marée noire sur les lieux, l'importance de leur vocation maritime et de leur population ;

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[6] L'**estran** est la partie du littoral située entre les niveaux connus des plus hautes et des plus basses mers. On utilise aussi pour le désigner le terme « zone de marnage » ou l'anglicisme « zone intertidale » (de l'anglais *tidal* signifiant « relatif à la marée ») ; en termes administratifs et juridiques, on emploie aussi l'expression "zone de balancement des marées".L'estran est donc (au moins en partie) recouvert lors des pleines mers et découvert lors des basses mers

- pour les autres collectivités territoriales (départements , régions) : l'importance de la pollution subie par leurs rivages, l'orientation plus ou moins maritime de leur activité et de leur population ;
- pour les associations : le nombre d'adhérents, la notoriété et la spécificité de leur action , de façon à apprécier l'atteinte portée à leur « animus societatis ».

On peut largement discuter, à mon sens, de la pertinence de ces critères. Les difficultés énoncées par la cour d'appel, et le résultat assez décevant auquel elle aboutit en retombant finalement dans des appréciations classiques d'un préjudice centré malgré tout sur les intérêts de celui qui demande réparation et non pas sur ceux de l'environnement en tant que tel (comment réparer écologiquement les conséquences de la catastrophe) montre que nous ne sommes encore « englués » dans des schémas classiques d'indemnisation du préjudice, centrés sur la personne physique ou morale, qui en demande réparation.

Ainsi la lecture de la décision fait ressortir la difficulté, dans certains cas, de distinguer le préjudice moral (mais d'intérêt collectif) propre à la personne morale en tant que telle, du préjudice environnemental pur . On peut aussi y déceler des doubles réparations quand à la fois la commune, le département et la région obtiennent une indemnisation au titre du préjudice environnemental pur alors que, même s'il s'agit d'échelons administratifs différents, le territoire atteint est, au moins pour partie, commun aux trois entités.

On trouve cependant dans cette décision une amorce de caractérisation d'un préjudice écologique « pur » par référence à la nécessité d'entreprendre des études pour restaurer correctement le milieu , mais aussi à des obligations spécifiques de gestion pour compenser les conséquences défavorables de la pollution.

La reconnaissance d'un tel préjudice est néanmoins incontestablement un progrès , car c'est l'atteinte première et fondamentale qu'il convient de réparer et dont dépend la préservation ou la restauration des intérêts de toutes les victimes pour l'avenir.

La tâche du juge est singulièrement compliquée, sur ce point, par le fait que des éléments scientifiques sont indispensables à la fois pour apprécier les atteintes et définir les mesures de réparation : or à l'heure actuelle, les écologues ou les ingénieurs en sont eux-mêmes au stade des études et des groupes de travail pour définir les éléments à prendre en compte, les indicateurs de l'état des écosystèmes, les fonctions et services rendus par ces derniers et leurs interactions.

Autre difficulté nouvelle : détacher l'appréciation du préjudice environnemental de la personne physique ou morale qui en demande réparation et sortir d'un mode de raisonnement binaire qui oppose l'individuel au collectif, le patrimonial à l'extrapatrimonial, le subjectif à l'objectif pour se concentrer sur l'environnement dans toutes ses dimensions et interactions et y rajouter des préjudices dérivés.

Il n'est donc pas surprenant de devoir passer par des phases de tatonnements et d'insatisfaction : mais, au regard de notre sujet on peut considérer

que tenu en tout état de cause d'assurer la réparation de tout le préjudice, mais rien que le préjudice, y compris environnemental dès lors que le principe en est heureusement consacré, le juge peut avoir un rôle fédérateur de disciplines complémentaires (écologues, économistes, juristes) pour mettre en place des critères assurant une réparation tout à la fois efficace et objectivée, gage de sécurité et d' égalité pour les justiciables.
Dialogue des juges, fédération des disciplines sont ainsi des éléments de gouvernance fondamentaux que les procès concernant cette catastrophe écologique font ressortir comme indispensables à une mise en œuvre effective du droit de l'environnement.

MAGISTRADO DEL TRIBUNAL SUPREMO DEL REINO DE ESPAÑA

Rafael Fernandez Valverde
Corte Suprema di Madrid, Spagna

I. - Regulation actuel

En Espagne, la directive 90/313/CEE, du 7 juin 1990 concernant la liberté d'accès à l'information en matière d'environnement a été transposée en droit interne espagnol au moyen de la loi 38/1995 du 13 décembre 1995 relative à la liberté d'accès à l'information en matière d'environnement, une loi qui venait compléter les questions en la matière non abordées dans la loi 30/1992, du 26 novembre 1992 portant régime juridique des administrations publiques et de la procédure administrative commune (*Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*).
Le Parlement européen et le Conseil ont adopté, par la suite, une seconde directive, nº 2003/4/CE, le 28 janvier 2003, concernant l´accès du public à l´information en matière d`environnement et qui a emporté abrogation de la directive précédente. Cette seconde directive a été également transposée en droit espagnol par la loi 27/2006, promulguée le 18 juillet 2006, portant réglementation des droits d'accès à l'information, de participation du public et de l'accès à la justice en matière d'environnement. Le règlement d'application de ladite loi est en cours d'approbation.
Ladite loi a pour objet de réglementer les droits suivants :

1. En ce qui concerne le droit à l'information, son objet est double et complémentaire :
a) Elle réglemente le droit à l'accès à l'information relative à l'environnement dont dispose l'Administration ainsi que celle dont dispose, au nom de celle-ci, d'autres sujets de droit.
b) Elle garantit également la diffusion et la mise à la disposition du public de l'information relative à l'environnement, de façon graduelle et avec l'ampleur et la systémique et la technologie la plus large possible.

2. En ce qui concerne la participation, elle met en place les procédures pour la prise de décision dans les matières se rapportant directement ou indirectement à l'environnement, décisions dont la teneur ou l'approbation appartient à l'Administration.

3. En ce qui concerne l'accès à la justice, elle prévoit les mécanismes permettant de déclencher la révision administrative et judiciaire des actes et des

omissions rapportables à toute autorité publique et qui constitueraient des atteintes à la réglementation en matière d'environnement.

II. - Sont considérées comme personnes concernées (2º.2):

a) Toute personne physique ou morale réunissant l'une quelconque des conditions prévues à l'article 31 de la loi 30/1992, du 26 novembre 1002 portant régime juridique des administrations publiques et de la procédure administrative commune.

b) Toute personne morale à but non lucratif remplissant les conditions prévues à l'article 23 de ladite loi.

Le concept de personne concernée est différent de celui de « public ». En effet, au sens de la disposition 2º.1, il s'agit de *« toute personne physique ou morale, ainsi que de leurs associations, organisations et groupes constitués conformément à la réglementation à eux applicables ».*

III.- Les techniques de contrôle judiciaire

En ce qui concerne le droit à être entendu en justice et à celui du contrôle administratif en matière environnementale, trois aspects sont à souligner dans cette loi 27/2006, une loi qui a transposé en droit interne espagnol la Convention d'Aarhus et les directives communautaires prises en application de celle-ci :

1º.- Recours administratifs et judiciaires.

L'article 20 de ladite loi reconnaît au public (article 2º.1) le droit d'engager les recours suivants, lorsqu'il se serait produit un acte ou un défaut d'agir rapportable à une autorité publique (2º.4) portant atteinte aux droits institués dans ladite loi en matière d'information et de participation publique. Dans tous les cas, et ceci est à souligner, nous sommes en présence de procédures relevant du droit administratif :

a) Les recours administratifs prévus sous le titre VII de la loi 30/1992 du 26 novembre 1992 portant régime juridique des administrations publiques et de la procédure administrative commune et autres normes applicables.

b) Le cas échéant, le recours contentieux-administratif prévu par la loi 29/1998, du 13 juillet 1998 portant régime de la juridiction du contentieux administratif.

Ce renvoi générique à la loi juridictionnelle soulève une question qui reste à trancher : est-il possible de recourir à la procédure prévue à l'article 53.2 de la Constitution espagnole et qui porte sur la protection des droits fondamentaux du justiciable, procédure définie à l'article 114 et suivants de ladite loi juridictionnelle? En effet, l'article 45 de la Constitution espagnole ne rentre pas dans

le champ d'application dudit article (articles 14 à 29 de ladite Constitution). D'une part (1), la norme constitutionnelle non plus que la norme légale ne semblent écarter l'élargissement du droit de saisine du Conseil constitutionnel à cette matière, d'autre part (2) le droit d'obtenir justice en matière de droit de l'environnement, qui est le sujet qui nous occupe ici, se trouverait, du point de vue processuel, compris dans l'article 24 de la Constitution espagnole. Enfin et d'autre part (3), la Convention d'Aarhus, qui est celle transposée par la loi, fait obligation aux Hautes Parties, dans son article 9 (lequel article porte sur le droit de saisir la justice), de veiller à ce que les personnes concernées aient droit, dans les matières traitées, *« à une procédure rapide ».*

Par ailleurs, du moins en ce qui concerne le domaine juridictionnel, il semble possible de contester, outre les actes et les défauts d'agir (c'est à dire tout type d'inactivité de l'Administration), les voies de fait (articles 25 et 30 de la loi juridictionnelle).

2º.- Réclamations à l'encontre de tiers

L'article 21, à la différence de l'article précédent, prévoit la possibilité de contester (de dénoncer, de réclamer) par la voie administrative les actes des personnes concernées (tiers). Il y est dit, à ce sujet, que : *« le public qui considèrerait qu'un acte ou un défaut d'agir rapportable à l'une quelconque des personnes visées à l'article 2.4.2 a porté atteinte aux droits prévus dans la présente loi, pourra déposer une réclamation auprès de l'Administration ayant autorité sur l'exercice de l'activité de l'auteur de l'acte ou du défaut d'agir ».*

3º.- Action populaire1 en matière de protection de l'environnement

Enfin, la nouvelle loi institue un nouveau cas d'action publique, dénommée ici action populaire (à l'image de celle instituée en matière de droit de l'urbanisme, droit de protection des côtes, des sites historiques classés…) en l'assortissant des caractéristiques suivantes :

a) L' action (*acción popular*, droit pour certaines personnes de se porter partie civile en raison des intérêts collectifs qu'elles représentent) ne peut mettre en cause que les actes ou, le cas échéant, le défaut d'agir imputables aux autorités publiques (y rentreraient également les voies de fait) qui porteraient atteinte aux normes relatives à l'environnement énumérées audit article 18.1. Cependant, l'action populaire ne pourrait être engagée à l'encontre des actes ou défauts d'agir rapportables aux autorités publiques et commis par des personnes physiques ou morales assumant des responsabilités publiques, exerçant des fonctions publiques ou fournissant des services publics en matière d'environnement (article 2.4.2).

b) L' intérêt pour exercer une telle action n'est reconnu qu'aux seules « personnes morales n'ayant pas un but lucratif et qui satisfont aux condi-

tions prévues à l'article 23 », c'est à dire :

1. Les personnes morales ayant, parmi les objectifs définis dans leurs statuts, le but de protéger l'environnement, que ce soit en général ou certains aspects environnementaux.
2. Ces personnes devront avoir été constituées deux ans, au moins, avant l'exercice de ladite action et avoir oeuvré de façon active aux fins prévues dans leurs statuts.
3. Qu'au sens de leurs statuts, elles mènent leur activité dans une zone territoriale concernée par l'acte ou, le cas échéant, par le défaut d'agir de l'Administration.

c) Cette action populaire pourra être exercée dans les deux voies, c'est à dire celle judiciaire et celle administrative, tel que décrit auparavant, c'est à dire, par le biais des voies de recours prévues sous le titre VII de la loi 30/1992 du 26 novembre 1992 portant régime juridique des administrations publiques et de la procédure administrative commune et autres normes applicables, ainsi qu'au moyen du recours contentieux-administratif prévu par la loi 29/1998 du 13 juillet 1998 portant régime de la juridiction du contentieux administratif.

4º.- La Cour suprême espagnole a rendu plusieurs arrêts dont, notamment, celui du 28 novembre 2003 (acte inachevé), celui du 17 février 2004 (acte relatif à une fuite radioactive dans une centrale nucléaire) celui du 2 avril 2006 (relatif à l'intérêt à agir d'une association écologiste) et celui du 4 avril 2006 (relatif à la diffusion de données périodiques sur l'environnement).

CONCILIATION, ENFORCEMENT AND EFFECTIVENESS IN THE PUBLIC CIVIL ACTIONS

Vladimir Passos de Freitas[1]
Mariana Almeida Passos de Freitas[2]

1. Introduction

In Brazil, the public civil actions, ruled by the innovative Law 7.437 (July 24, 1985), are the most ancient and effective way for claiming rights collectively. At first, used only in cases of recovery and civil indemnity for damages against the environment, they spread to other matters, such as consumer rights and cases of managerial improbity.

The experience of 25 (twenty-five) years of existence of Law 7.347 reveals the legislator's discernment, as well as all those who worked in preparing the bill. Due to this federal Law and to the right of action it gave to the Public Prosecution, Brazil, at present, is among the most progressive countries in the world. Our environmental jurisprudence encompasses the most varied topics and reveals the state of development and effectiveness in which we are.

In this continuous evolution, however, there is still one aspect that deserves special attention: conciliation and enforcement of the environmental public civil actions. A great part of the legal community still faces the agreements in this kind of action with suspicion. On the other hand, there are decisions whose enforcement is impossible, which deserve a more careful exam. In short, we still have to develop in these two fields, in our incessant search for perfection.

2. Conciliation in public civil actions

Conciliation, nowadays, is acknowledged as an efficient way of solving environmental issues. It hasn't always been like that. Along the first years of the short existence of Environmental Law this topic raised many discussions. In a historical decision (1993) about the import of meat from Eastern Europe, presumably contaminated by the nuclear release at Chernobil power plant, the Federal

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[1] Consultant in Environmental Law. Former Prosecutor in the states of Paraná and São Paulo, retired Chief Justice of the Federal Court of Appeals 4th Circuit, where he was Corregedor and President. Master and PhD in Law by Universidade Federal do Paraná. Professor of Environmental Law at Pontifícia Universidade Católica do Paraná. Author and co-author of 10 books on Environmental Law, Director of the Federal Judicial School of Paraná. Site: www.vladimirfreitas.com.br.

[2] Clerk at the Federal Environmental Court in the State of Paraná, Brazil. Master in Law by Pontifícia Universidade Católica do Paraná. Doctorate course in progress. Author of 2 books on Environmental Law. Professor at the Federal Judicial School of Paraná.

Court of Appeals of the 4th Circuit denied the possibility of transaction, considering the environment as an inalienable right. This is the summary:

> PUBLIC CIVIL ACTION – CONSUMER'S DEFENCE – IMPORT OF MEAT AFTER THE ACCIDENT AT CHERNOBYL POWER PLANT – TRANSACTION WITH A VIEW TO REEXPORT THE PRODUCT – DOUBT, SUPPORTED BY SCIENTIFIC OPINION, ABOUT THE LEVELS OF RADIATION OFFICIALLY FIXED AS NOT HARMFUL TO HUMAN HEALTH.

It's inalienable for the Federal Public Prosecutor, as the petitioner of the public civil action (Law n. 7.347 de 24 07 1985), the material right object of the litigation. Public health, everybody's right and State's duty (Federal Constitution, clause 196), is an inalienable right, protected under the Law, even against the will of its holder (Code of Civil Procedure, arts. 320,- II, 351 and 333, only §, item I). Impossibility of transaction, resulting from clause 1.035 of the Civil Code.[3]

However, reality overcame theory. Time showed that conciliating is better than judging, since the protection of the environment is respected and clearly delimited in the agreement. Time and complex proofs are saved, as well as a not always successful enforcement.
At present, with different names, agreements are made in civil inquiries initiated by the Prosecutor to investigate environmental damages (Law 7.347, of 1985, clause 5, § 6), in administrative actions begun by environmental organs (Law 7.347, de 1985, clause 5, § 6 and Law 9.605, of 1988, clause 72, § 4 and Decree 6.514, of 2008, clause 143), in environmental crimes of low offensive potential (Law 9.099, of 1995, clause 73, transaction) and in the environmental penal actions whose minimal punishment goes up to 1 (one) year (Law 9.605, of 1995, clause 89, process suspension).
The agreement made before the environmental organs or the Prosecutor is called Conduct Adjustment Agreement (TAC). It is not rare that one of the parties breaches one of the clauses. In such case, it is up to the public organ to bring an action for the enforcement of the agreement, according to clause 585, item II of the Civil Procedure Law.
When making a TAC it is crucial to have the maximum caution and protection against a possible breach, since it is unacceptable that the enforcement fails after making the agreement. For example, if the TAC was made with a municipality, it is essential to consider the possibility of a government change, because the next mayor may be against that measure.

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[3] The whole decision may be found at Revista do Tribunal Regional Federal da 4ª. Região, volume 1, number 4, p. 109 -151, Embargos Infringentes em matéria cível n. 90.04.09456-3/RS, Rel. Juiz Teori Zavaski, j. 17/10/90.

3. Enforcement of the environmental decision

At present, regarding environmental public civil actions, we can observe that, although the phase of examining the petition and the evidence has its difficulties, the stage that has caused more controversy is the enforcement of the sentence, which will give the real effectiveness to the environmental protection granted. It happens mainly due to the complexity of the matter that often has a multidisciplinary character and comprises issues related to other areas of Law, such as Civil, Administrative and Criminal.

Also, it has to be taken into account the necessary urgency in the decision making process. Besides, the Brazilian environmental legislation still has some gaps and, therefore, a constant need of interpretation by part of the judges. It is worth noting that a great part of these norms are administrative acts, whose constitutionality, sometimes, raises doubts.

It is important to highlight that, in regard to the enforcement of the sentence in a public civil action, Law 7.347, of 1985, doesn't provide much about. In this case, it is important to read clauses 11, 13, 15 e 20 of the mentioned Law, where we can see that, in the absence of specific provisions, the procedure to be adopted will be the traditional one, with all the formalities and bureaucracy inherent to the Code of Civil Procedure.

3.1. Application of the Code of Civil Procedure

The enforcement in an environmental public civil action may have, basically, three forms: obligation to do (specific performance), for example, demolishing a construction, obligation not to do, for example, don't go on delivering pollutant gases, and indemnity. Here the effectiveness of each of them will be analyzed.

It is known that, regarding Environmental Law, in the event of a positive condemnation it is ideal that the enforcement is really an obligation to do, since the most important thing is the recovery of the environmental good that was damaged. A second hypothesis is the compensation of the damage, as provided in clause 14, § 1, of Law n° 6.938/81 and clause 225, § 3, of the Federal Constitution. In the words of Édis Milaré "Brazil adopted the theory of the integral reparation of the environmental damage, which means that the injury caused to the environment will be recovered in its totality and any legal norm that provides otherwise or that intends to limit the amount of the indemnity will be unconstitutional"[4].

At this point it is important to note that the conversion of the enforcement into damages should be avoided. In Environmental Law, what really matters is, first of all, to prevent the environmental damage to occur, based on the prevention and precautionary principles. Secondly, the reconstitution of the damaged environmental good, as mentioned above. Thirdly, the compensation elsewhere, if the damaged good can't be restored. Finally comes the payment

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[4] MILARÉ, Edis. *Direito do ambiente: a gestão ambiental em foco*. 5 ed. São Paulo: RT, 2007, p. 900.

of the indemnity, only in cases when the reconstitution or compensation are impossible.
Thus, in the event of enforcement of a sentence in an environmental public civil action of specific performance, clause 461 from CPC will be used, which gives the judge a large range of acting. If appropriately used, it will provide means for a really effective enforcement. It is worth noting the *caput* of the clause, which states that the judge "will order the right measures to assure a practical result equivalent to the compliance". This means that the sentence has to be compulsorily complied with, and it is up to the judge to take all the legal steps he considers to be appropriate.

3.2. Subrogation

Starting from what was mentioned above, it is important to note that the fulfillment of the sentence is not always a simple task. Sometimes, it is impossible to enforce an order. Imagine, for example, a polluter enterprise which has been sentenced to install some equipment that would cease the illegal behavior. For the fulfillment of the order it is enough to buy and install the equipment which, for an industry economically strong, will not be a big sacrifice nor demand much time. However, the enterprise may be having financial problems. How should the judge act if the enterprise can't afford the obligation?
The judge must be cautious and try conciliation, even in the enforcement phase. Contingently, the judge may even give a different solution from what had been specifically decided in the sentence, that is to say, he may take a measure to effectively cease the environmental damage. In extreme cases, being proved that the legal entity was created aiming the practice of environmental crimes, the judge may order the disregard of the corporate veil or even the end of the enterprise's activities (Law 9.605, of 1998, clause 24).
Professor Kazuo Watanabe explains the situation as follows: "Let's think, for example, in the legal duty of not polluting (obligation not to do). The obligation not to do, if not complied with, may be subrogated into obligation to do (*v.g.* install a filter, build a system to install a filter, build an effluent station treatment etc.), and if not complied this subrogated obligation to do may be converted again in another obligation not to do, such as don't go on with the harmful activity. The enforcement of this last obligation may be reached coactively, through executive acts determined by the judge and enforced by his assistants, including the request, if necessary, of police force (§ 5 of clause 461). These are subrogatory means that the judge should always adopt as long as the specific protection or the acquisition of an equivalent practical result are possible, under § 1 of clause 461"[5].
Another aspect to be mentioned about the subject is that, regarding natural

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[5] WATANABE, Kazuo. Tutela jurisdicional dos interesses difusos: a legitimação para agir. In: GRINOVER, Ada Pellegrini (Org.). *A tutela dos interesses difusos* . São Paulo: Max Limonad, 1984. p. 44-45.

resources, the situation *de facto* may sometimes change from the filing of a suit to the moment of the enforcement of the affirmative sentence. It is widely known that environmental problems frequently evolve, get worse or even go back to the original state.
In such cases, the enforcement must be readdressed, seeking not exactly and literally what the sentence says, but interpreting it, seeking its aim, extracting from the sentence the real intention of the judge and adapting the decision to the new concrete situation. The rules of hermeneutics must be analogically applied.

3.3. Fixing the values in a judgment

In regard to public civil actions, the sentences should ideally be clear, with the exact values, and objective. Generic decisions may generate problems at the time of enforcement and make the effectiveness more distant. By defining the controversy in details and making it as explicit as possible, the need of a posterior liquidation by clauses or arbitrage will be avoided.
It is important to remind that liquidation is not a simple procedure and, depending on the case, it may become as or more complex than the phase of examining the petition and the evidence. It happens mainly when the liquidation by arbitrage is needed, that is, with the appointment of an expert for the due evaluation (clauses 475-C and 475-D of the Code of Civil Procedure). In such case, all the difficulties faced during the phase of examining the petition and the evidence, especially in the stage of production of evidence, reappear, with a new delay in the procedure. It will be necessary to appoint an expert, with all inherent difficulties, such as: to find an impartial professional specialized in the subject, to fix his fees and to decide the issue of the payment, sometimes a complex task.
Therefore, more difficult than the environmental recovery or compensation is fixing the amount of a possible indemnity. How to measure an environmental damage to evaluate the indemnity amounts, especially taking into account that some environmental goods are inestimable? What about the environmental moral damage?
The eminent judge Marga Inge Barth Tessler presents some criteria to evaluate environmental damages[6]. However, none of them is totally satisfactory and many refer almost only to economic issues. At the end, she comments very appropriately that "Reasonability, thus, must guide the choice of criteria and the fixation of amounts. A realistic posture of the Judge will lead to an appropriate application of the environmental laws, which for certain are not perfect and need, in some aspects, to be dissolved in the daily reality of our country, where unfortunately life itself and human dignity are not appropriately respected and valorized".
In cases of enforcement of a sentence for damages to the cultural or historic

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[6] TESSLER, Marga Inge Barth. *O valor do dano ambiental*. *In:* FREITAS, Vladimir Passos (org.). Direito ambiental em Evolução n° 2. Curitiba, Juruá, 2000, pp. 165- 181.

environment, difficulties are even bigger. It is known that, depending on the damage caused to the cultural good, its recovery is impracticable, v.g. the demolition of a listed historic house, or the destruction of a sculpture. Therefore, the enforcement turns, inevitably, to the payment of indemnity. But how to measure in terms of money a historic or cultural good? What is the importance of such good for the population? Here it is necessary an examination by experts, including evaluation of the importance of the good. There is even the need of a psychological and sociological evaluation of the population affected by the loss of the good.

Another situation that can not be forgotten is the existence of individual indemnities, fixed as consequence of an environmental damage that results in individual damage. Here the specific situation of each individual must be taken into account, because it is not possible to determine an indemnity of generic form. However, as I have said, "the Law of Public Civil Action is not applied to the restoration of individual damages. Actually, on a parallel with the collective damage, there is another one, of private nature. (...) Of course, in such cases there is a private right besides the public right, and both deserve protection"[7].

It is not possible to forget the cases in which the environmental damages will appear only in the future. For example, how to compensate the future generations, protected by clause 225 of the Constitution? The judge, in such cases, should have to use subjective and reasonable criteria, fixing the exact values early in the sentence. For example, an environmental damage to a water table, that will damage the consumption of water by future generations, may be object of indemnity to be calculated on basis of the hypothetical number of births in the next 20 years, using the statistics, and by fixing a value for each new person (for example, one minimum wage) to be deposited in the Fund referred to in clause 13 of Law 7.437, of 1985.

4. Coercive measures in the enforcement

In the words of Carlos Alberto de Salles, "the enforcement measures of coercion are a core element for the effectiveness of the judicial orders, a fundamental requirement for the court protection of the specific performance"[8]. Note that in Brazil there is no Contempt of Court as in North-American Law. Thus, the first clause about coercive measure for the fulfillment of mentioned obligations is clause 461 from Code of Civil Procedure. Besides this one, there is also clause 14, V, and only paragraph of the same Code, which describes "attempt against the jurisdictional practice", as follows:

> Clause 14. Duties of the parties and of all those who, in any way, participate of the process:

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[7] FREITAS, Vladimir Passos. O dano ambiental coletivo e a lesão individual. In: KISHI, Sandra Akemi Shimada *et all* (org.). *Desafios do direito ambiental no século XXI: estudo em homenagem a Paulo Affonso Leme Machado*. São Paulo: Malheiros, 2005, p. 801.

[8] SALLES, *op. cit.,* p. 91.

(...)
V – to obey precisely the ordered provisions and don't create difficulties to put into effect the judicial provisions, are they of anticipatory or final nature. Only paragraph. Except for the lawyers that are subject only to the statutes of OAB, the violation of clause V of this clause constitutes an attempt against the jurisdictional practice, and the judge can, besides the appropriate criminal, civil and procedural sanctions, fine the violator an amount to be fixed according to the seriousness of the conduct and not above twenty per cent of the value of matter in dispute; if not paid until the deadline, starting from the transit in re judicata, the fine will always be recorded as active debt of the Federal Union or the State".

The clause above is very used nowadays and is effective at the enforcement phase, when judicial orders are not obeyed.
But, actually, the most effective legal measure to force the convicted to comply with the sentence in a public civil action is for sure the monetary penalty – a fine – provided in clauses 14, only §, 287, 461, § 4 and 645, all of them from Code of Civil Procedure. It is worth noting that the fine can be applied by the judge ex-officio, without request of the party, as provided in clause 461, § 4.
It is also important to mention the more radical measures, provided in § 5 of the same clause: "To put into effect the specific protection or to obtain the equivalent practical result, the judge can order, ex-officio or by request, the necessary measures, such as a fine for delay, search and seizure, removal of people and things, demolition of constructions and prohibition of the harmful activity, with the support of police force if needed".
All things considered, the inevitable conclusion is that the judge has a wide range of options to enforce the sentence given in an environmental public civil action, with the possibility of reasonable application of the several coercive measures indicated above, in order to enforce the decision and, consequently, to grant everybody's right to an ecologically balanced environment.

5. Enforcement of preliminary injunctions granted in a sentence

When the sentence is delivered, it is very common to grant preliminary injunctions, that is, measures that should be taken immediately by the defendant, without need to wait for the final decision. Especially regarding environmental matters, decisions must be enforced as soon as possible, in order to prevent the environmental damage to happen or even to get worse. Therefore, in the greatest part of such cases the grant of urgent measures is necessary and must be enforced while the decision is non-final.
Actually, it is certain that in cases of injunction granted by sentence, possible appeal will be received, at least regarding part of the sentence, only in the devolutive effect (see clause 14 of Public Civil Action Law - LACP), and the urgent part, the injunction, can be immediately enforced. So, how to act effectively in such situations?
The legal procedure, in this case, is the provisional enforcement of the sentence,

that is, the enforcement is anticipated while the final decision is not delivered. The whole procedure is provided in the Code of Civil Procedure, more specifically in clause 474-O, which provides in its *caput* that "The provisional enforcement of the sentence will be, as far as possible, in the same way as the definitive", provided, of course, that some norms listed in the clause are observed.
An interesting case was sentenced by the Special Environmental Chamber of the Court of Justice of São Paulo, with the following summary:

> Public civil action. Environmental damage. Request of anticipated tutelage granted. Suit judged to have merit. Implicit confirmation of injunction. Appeal received only in the devolutive effect. Expedition of sentence order that doesn't allow another period to appeal. Intempestivity of the review that now claims for the suspensive effect for the appeal, based on clause 520, VII of the Code of Civil Procedure. Moreover, situation that doesn't allow such concession according to clause 14 of Law n. 7.347/85. Interlocutory appeal denied[9].

6. Analysis of sentence enforcement cases

The enforcement of environmental sentences is not always a simple task. The complexity may range from the evaluation of an animal killed by a hunter, whose valuation shouldn't be the mere market price of the meat, to complex situations encompassing social and economic interests. Let's see two examples.

6.1 Innovative court decision

In the distant year of 1984, in the town of Itapecerica da Serra, SP, the Public Prosecutor Edis Milaré filed a Public Civil Action against the mayor of the town of Embu, for having thrown a party in which hundreds of roast birds were served to the guests. The case, known as "A passarinhada do Embu", was affirmed in part by the judge of first instance, who fixed in 3.000 the number of birds, but left the estimate for the enforcement. An appeal was filed at the Court of Justice of São Paulo, which reversed the judgment. This is the summary:

> INDEMNITY. Civil liability – Damage to the environment due to extermination of small birds served in a barbecue in the town of Embu – Confirmation of the ecological damage – Joint and several liability of the Mayor and the co-defendant was recognized – Indemnity to be paid – Appeal granted[10].

At the enforcement phase, in 1986, an agreement was made and the

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[9] TJSP, Agravo de Instrumento 592.058.5/6-00, Câmara Especial do Meio Ambiente, Rel. Des. Aguiar Cortez, j. 31.10.2006.
[10] The whole decision may be found at Revista de Jurisprudência do Tribunal de Justiça de São Paulo (RJTJSP).Apelação Cível nº 70.393-1, Comarca de Itapecerica da Serra. São Paulo: LEX, volume 105, p. 134-137.

convicted compromised to pay the debt. It was the first Conduct Adjustment Agreement made in the history of Environmental Law.

6.2 Social and environmental problem

The Superior Court of Justice judged a complex environmental case about invaders of a water supply area called Billings Reservoir, which supplies water to the city of São Paulo, and ordered that about 200 families who were living there should leave the area.[11]

It happens that, in spite of the fairness of the decision, it hasn't been complied yet. Actually, moving out 200 families without an appropriate place to house them, together with the natural difficulties originated from the faults of public service, made the decision useless. It is a deplorable fact, because it eliminates the respect and trust that should exist regarding judicial decisions.

Thus, it is possible to conclude that it is not enough for the judgment of merits to be adequate to the Positive Law, in the phase of examining the petition and the evidence. It needs to be analyzed from the point of view of feasibility of enforcement. If possible, although improbable, conciliation must be tried before the sentence is delivered. If there is already a final sentence, conciliation should be tried at the enforcement phase.

6.3 Mining and environment

In1993 the Public Prosecutor's Office filed a public civil action before the Federal Justice of Criciúma, Santa Catarina state, against coal enterprises, their directors and majority partners, Santa Catarina state and the Federal Government, aiming the recovery of the environmental damages caused by the exploitation of mineral coal in the south region of that state. In 05.01.2000 the Federal Judge Paulo Brum Vaz sentenced the defendants jointly to present environment recovery projects for the region which included waste disposal areas, open mining areas and abandoned mines, as well as to dredge, steady river ravines, decontaminate and rectify water flows. In 22.10.2002 the Federal Court of Appeals 4th Region, judging the appeals, excluded one enterprise (Nova Prospera S/A), Santa Catarina state and the partners of the coal enterprises. The Court also delayed the term for enforcement of the sentence to 10 years, keeping the term of 3 years for recovering the land area. In May 15, 2007, the Superior Court of Justice judged an appeal and decided that the Federal Government is, actually, co-liable for the environmental liabilities, since it failed in its inspection duty. The same decision ordered the re-inclusion of the coal enterprises partners as defendants in the action and also alleviated the clause of joint liability, saying that each enterprise is directly responsible for recovering the damages it generated. If the enterprise and its partners don't comply for any reason, the Federal Union may be ordered to recover the damages.[12]

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[11] STJ, REsp/SP 403.190/SP, 2ª. Turma, Rel. Ministro João Otávio Noronha, j. 27.6.2006.

[12] STJ, REsp 647493/SC, Registro 2004/0032785-4, 2ª. Turma, Relator Min. Carlos Mathias, j. 15.05.2007

With the remittance of the proceedings to the original Federal Court, the enforcement started. For sure, it was not an easy task. The recovery comprised 6,191.59 hectares of degraded areas, three river basins (rivers Araranguá, Tubarão and Urussanga) and 768 abandoned mines.
Federal Judge Marcelo Cardoso da Silva organized a public hearing with experts in the subject, Federal Prosecutor, Federal Government Attorney, authorities from Santa Catarina and entrepreneurs, when the matter was comprehensively discussed. Each degraded area was identified, where the anthropic action occurred, with loss of some of its physical, chemical and biotic characteristics, enough to harm the balance of the ecosystem and negatively affect its social and economic potential. Then, the enforcement started, with the separation of one suit to each convicted. All of them had to present a Recovery Plan of Degraded Area – PRAD. Each one received a timetable and the environmental standards to be reached.
The enforcement of the PRAD was subject to previous environmental license, under clause 10 of Law 6.938/81, and a group of technical assistance to the court was created. The discussion changed from legal to technical. The areas are being recovered. Certainly, it will take some years. But without loss of the mine workers jobs. This is one of the most difficult enforcements and a successful case. It proves that it is not enough to sustain an action, it is also necessary to take care for its enforcement to be effective. And it only happened due to the effort of the Federal Judge Federal Marcelo Cardoso da Silva and the cooperation of all those who follow the enforcement of the sentence. All measures taken by the Judge da Silva may be examined in the site created (www.jfsc.jus.br/acpdocarvao).

7. Conclusions

1) Environmental conflicts have been taking, lately, alarming proportions, and the environmental protection became not only a legal issue, but also the survival of mankind.
2) When an environmental offense is committed, the biggest goal becomes the restoration of the degraded area, so that an agreement towards restoration must always be stimulated. However, it is necessary to be extremely careful when elaborating the Conduct Adjustment Agreement, by avoiding clauses that have no importance to recover the environmental damage, and by including other ones that may be easily enforced in the event of non compliance.
3) The sentence should, whenever possible, be clear and easy to enforce, avoiding the non enforcement after the final decision, which would lead to lack of effectiveness and respect to Justice.
4) However, there are areas where the protection of Environmental Law proves to be weak, by force of inefficiency of administrative action, such as the environmental damages practiced in agricultural activities, in the exploitation of underground waters or in the professional marine fishing.

THE INTERNATIONAL PERSPECTIVE

PRESENTATION OF THE SECRETARY-GENERAL OF THE PCA
THE WORK OF THE PERMANENT COURT OF ARBITRATION IN THE FIELD OF ENVIRONMENTAL DISPUTE RESOLUTION

Christiaan M.J. KRÖNER, Segretario Generale,
Corte Permanente di Arbitrato, L'Aja, Paesi Bassi

I. Introduction

Good afternoon ladies and gentlemen. It is my pleasure to share some thoughts and insights with you today on the very pertinent topic of environmental dispute resolution, and the initiatives that the Permanent Court of Arbitration ("PCA") has taken in these regards. As many of you are well-aware, the PCA is an intergovernmental organization headquartered at the Peace Palace in The Hague. Its mandate is to provide a permanent framework within which arbitral tribunals, constituted to resolve specific disputes, can operate. Since its founding over a century ago, the PCA has grown into a modern, multi-faceted arbitral institution situated at the juncture between public and private international law. Today, the PCA provides services for the resolution of disputes involving various combinations of States, State entities, intergovernmental and non-governmental organizations, and private parties. The PCA is currently experiencing the most activity in its history since its creation in 1899. The charge placed on the PCA by the international community is to aid the resolution of disputes of international concern. Disputes relating to the environment—which can include a broad spectrum of disputes implicating environmental preservation and sustainability,[1] remedies for environmental damage,[2] or rights relating

[1] For example, the *Belgium v. The Netherlands* arbitration (commenced in July 2003 and resolved by an Award dated 20 September 2005) concerned the reactivation of an historical railway line from Belgium to The Netherlands. Designated parts of the route traversed nature reserves that protected birdlife and preserved noise abatement. The case dealt with the issue of which Party was responsible to bear the costs of environmental protection measures in the reactivation of the railway.

[2] For example, *Ireland v. United Kingdom* (the "MOX Plant Case") (instituted in October 2001 and terminated by a Termination Order issued on 6 June 2008 following Ireland's withdrawal of its claim against the UK on February 15, 2007) concerned a nuclear waste plant located in the United Kingdom and its alleged pollution of the Irish Sea marine environment and its impact on Ireland. Also, the *Netherlands v. France* arbitration (instituted in October 1999 and decided by a Final Award dated 12 March 2004) concerned the sum to be repaid by France to The Netherlands for the joint financing of measures taken, pursuant to the Convention on the Protection of the Rhine against Pollution by Chlorides (the "Convention"), to reduce chloride discharges from the Alsace Potassium Mines into the Rhine river.

to natural resources[3] —certainly fall within that charge. The PCA has indeed given much attention to the development of the rapidly growing and increasingly important area of international environmental law and dispute resolution. Perhaps the PCA's greatest contribution to date is its development of mechanisms that facilitate the efficient and peaceful resolution of environmental disputes when they arise. The PCA was motivated to contribute to the international legal order as it concerned environmental disputes.

II. The role of the PCA in environmental dispute resolution

As you well know, there are hundreds of international treaties aimed at resolving the growing number of issues related to environmental protection and natural resource usage, a number of which are multilateral.[4]

Not only as a result of such multilateral treaties, but also by subsequent agreement of the parties, the PCA has frequently been called upon to administer international arbitrations that involve environmental or natural resource issues. For instance, the PCA has administered four such arbitrations under the dispute resolution provisions of UNCLOS,[5] one arbitration under the OSPAR Convention,[6] one

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[3] The PCA has administered many cases involving disputes over rights to natural resources. Some examples of such cases include *Eritrea v. Yemen* (commenced pursuant to an arbitration agreement dated 3 October 1996 and resolved by an Award dated 17 December 1999) in which the Tribunal's decision held implications for the fishing rights of nationals from each country, as well as with respect to rights under petroleum contracts and concessions entered into by Yemen or Eritrea; *Guyana v. Suriname* (submitted in 2004 to an arbitral tribunal constituted under UNCLOS Annex VII and decided by a Final Award dated 17 September 2007) concerned the delimitation of the maritime boundary between Guyana and Suriname which affected, *inter alia*, petroleum exploration concessions; *Barbados v. Trinidad and Tobago* (submitted under Part XV of UNCLOS to an arbitral tribunal constituted under Annex VII of UNCLOS and decided by a Final Award dated 11 April 2006) concerned the delimitation of the Exclusive Economic Zone and Continental Shelf between the two parties, and the question as to whether Barbados fisher-folk had access to fisheries within the EEZ of Trinidad & Tobago; the *Abyei Arbitration* (submitted to arbitration on 8 July 2008 and resolved by an Award dated 22 July 2009) also involved issues concerning access to territories and rights to the use of land including rights to graze cattle and move across certain areas.

[4] Notably, the Convention on International Trade and Endangered Species of the Wild Fauna and Flora (1973); the Convention on the Conservation of Migratory Species of Wild Animals (1979); two regional Conventions on the Conservation and Management of Highly Migratory Fish Stocks (WCPF and SPRFMO Conventions); and the Protocol to the Antarctic Treaty on Environmental Protection (1991).

[5] The MOX Plant case, *Barbados v. Trinidad and Tobago*, *Guyana v. Suriname*, and also *Malaysia v. Singapore*. The latter case (submitted in July 2003 by Malaysia to an arbitral tribunal constituted under Annex VII of UNCLOS and terminated by an Award on Agreed Terms dated 1 September 2005) concerned land reclamation by Singapore in and around the Straits of Johor.

[6] *Ireland v. United Kingdom* (the "OSPAR" Arbitration) (submitted in June 2001 to an arbitral tribunal constituted under Article 32 of the OSPAR Convention and decided by a Final Award rendered on 2 July 2003) concerned Ireland's request for access to material deleted from published reports prepared as part of the approval by the United Kingdom for the MOX Plant.

under the Rhine Chlorides Convention,[7] and several cases under the North American Free Trade Agreement.[8] Each of these conventions provide for arbitration as a dispute resolution mechanism.

The PCA has also administered several arbitrations under bilateral treaties and private contracts that involve environmental and natural resource components.[9] Indeed, arbitration, alongside adjudication, has become one of the favored means of environmental dispute resolution, consistent with Principle 26 of the Rio Declaration and Article 33 of the UN Charter.[10]

A well-known example of an arbitration involving environmental issues administered by the PCA is the MOX Plant arbitration between Ireland and the United Kingdom. This case, initiated under Annex VII of UNCLOS, concerned a nuclear waste plant and the alleged pollution of the local marine environment. This case began in October 2001 when Ireland instigated proceedings under UNCLOS against the United Kingdom, requesting that the tribunal find, among other things, that the United Kingdom had failed to take measures to correctly assess, prevent, reduce, and control pollution of the Irish Sea marine environment from discharges of radioactive materials.

The PCA acted as registry in this arbitration from the constitution of the tribunal, through Ireland's request for provisional measures and six procedural orders, until the tribunal put on record Ireland's withdrawal of its claim following the declaration by the European Court of Justice in May 2006 that it had competence over the dispute.

The PCA also acted as registry in the related OSPAR arbitration which concerned the dispute between Ireland and the United Kingdom over access to information that had been redacted from reports published as part of the approval process for the commissioning of the MOX Plant.

The point to be made here is that the arbitral tribunals in these disputes had to draft their own rules of procedure. Yet as our experience has shown, negotiating procedures under each and every new instrument can be a costly and time-consuming affair. The PCA recognized that there was a need for dispute resolution procedures tailored especially for disputes involving environmental

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[7] *Netherlands v. France* (see *supra* footnote 2).

[8] For example, *Bilcon of Delaware et al v. Canada* (commenced in May 2008 and still pending) concerns the environmental impact assessment of a basalt quarry and marine terminal in Nova Scotia, Canada; *Vito G. Gallo v. Canada* (commenced in 29 March 2007 and still pending) involves environmental approvals to operate a landfill on a site whose lands included a former iron ore mine in Northern Ontario.

[9] These cases are subject to confidentiality restrictions.

[10] Principle 26 of the Rio Declaration states that: "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations."

Article 33(1) of the UN Charter provides:

"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

and natural resource issues. And allow me to avail myself of this opportunity to recognize most cordially and gratefully Dr. Alfred Rest who has been the auctor intellectualis of this forward looking and far reaching initiative.

III. The PCA Optional Environmental Rules

Consequently, the PCA set about drafting a set of procedural rules especially designed for arbitrations relating to the use of natural resources and the environment. The PCA Environmental Rules were drafted by a special working group chaired by Professor Philippe Sands. It took roughly two years for the Member States to finally agree, matters relating to sovereignty being at the heart of the debate. The rules were eventually released in 2001. Shortly thereafter, the PCA released a similar set of procedural rules for conciliation proceedings.

Thus the PCA Environmental Rules addressed a *lacuna* that existed in environmental dispute resolution, especially in matters relating to the appointment of experts, confidentiality, interim measures, speed of the arbitral proceedings, and the enforceability of the final decision. The Rules strengthen confidentiality guarantees, thus allowing parties to comply with their national laws and manage any sensitive information or political constraints. As time is often of-the-essence in environmental disputes because of the possibility of irreversible damage to the ecosystem, the Environmental Rules also have tailored provisions for swift appointment procedures where a party has failed to appoint, and the ordering of provisional measures. Tribunals acting under the Rules apply "the national and/or international law and rules of law it determines to be appropriate" given that in international environmental law, issues often arise in a national context and become transnational at a later stage. Parties adopting the PCA Environmental Rules may draw from a list of experts in international environmental law and arbitration maintained by the PCA in order to assist them in constituting a tribunal with the requisite expertise in the subject matter of the dispute – something that is often indispensable for the proper resolution of the more technical aspects of environmental cases. The PCA also maintains a list of experts in environmental science, and the Environmental Rules allow a tribunal to appoint one or more of these experts directly for assistance in resolving more nuanced scientific issues, such as assessing the magnitude of environmental risk and identifying the cause of environmental damage. These expert lists may be found on the PCA's website at www.pca-cpa.org.

The Environmental Rules were thus designed to provide an efficient procedural framework for the resolution of environmental disputes that would be prêt-à-porter and could be incorporated by reference into treaties and contracts.

Presently, there are two arbitrations being administered by the PCA under its Environmental Rules. Both of these arbitrations concern carbon emissions in the context of the Kyoto Protocol.

The first dispute concerns an alleged breach of an agreement for certified emission reductions in the context of carbon emission trading under the Kyoto Protocol. This arbitration illustrates the growth of the carbon market as a

mechanism established by States to meet their international environmental obligations, and involving private actors in their implementation. An increase in the number of disputes in this area may reasonably be expected.

The second dispute involves the alleged expropriation of an investment in the area of reduction of carbon emissions during the distribution of natural resources. The underlying contract concerns carbon credits sold to carbon-emitting entities to offset their emissions in excess of Kyoto Protocol quotas. The Claimant in this dispute alleges breach of the agreement by the Respondent – a State – and claims compensation through carbon credits as opposed to monetary damages.

The PCA has monitored the number of references to the PCA Environmental Rules in Kyoto Protocol emissions trading contracts and has noted a dramatic increase.[11] Numerous public and private entities are referring to the PCA Environmental Rules as the arbitration procedure of choice in their emissions trading and related contracts. Indeed, the International Emissions Trading Association recommends the PCA Environmental Rules in its various Model Emissions Reduction Purchase Agreements.[12] The PCA's lists of experts also include emissions-trading experts that can be relied upon for the constitution of an arbitral tribunal or to serve as tribunal-appointed experts.

The PCA is currently investigating the possible need for the establishment of a further set of Optional Rules to meet dispute resolution requirements that the international community might have in the future.

Today we live in an era of globalization and industrialization that directly affects our environment. As the recent Copenhagen Climate Change Conference showed, progress towards international agreement on major environmental issues is still alarmingly slow. In an area of continued divergence, it is of the essence that parties to environmental disputes are able to make use of internationally endorsed specialized dispute resolution mechanisms that provide a solid and reliable procedural framework to their proceedings. It is within such a uniform context, endorsed by the International Community, that crucial jurisprudence over environmental issues, so decisive to the strengthening of the international legal order, may best develop. It may thus promote environmental governance and access to Justice.

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[11] See Note by the Secretariat of the United Nations Convention to Combat Desertification dated 18 July 2007: http://www.unccd.int/cop/officialdocs/cop8/pdf/8eng.pdf at para. 13.

[12] See for example htpp://www.ieta.org/ieta/www/pages/index.php?IdSiteTree=1130.

LE RÔLE DE LA COUR INTERNATIONALE DE JUSTICE DANS LA PROTECTION DE L'ENVIRONNEMENT

Mohamed Bennouna
Juge à la Cour internationale de Justice

La Cour internationale de Justice a rendu un arrêt le 20 avril 2010 dans l'affaire relative à des *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*. En dehors du fait que cet arrêt aura un effet positif sur les relations de coopération entre les deux pays riverains du fleuve Uruguay, il représente incontestablement la première contribution majeure de la CIJ au développement du droit international de l'environnement. En effet, cette affaire, qui concerne un différend relatif à l'interprétation et l'application du traité conclu le 26 février 1975 entre les deux pays et portant Statut du fleuve Uruguay, a été l'occasion pour la Cour de préciser les normes et les mécanismes destinés à la protection de l'environnement ainsi que les modalités de leur interprétation et de leur application. Lorsqu'il s'agira, à l'avenir, d'évoquer la jurisprudence de la CIJ en matière de droit international de l'environnement, l'arrêt du 20 avril 2010 sera considéré certainement comme un document de référence. Certes, la Cour a eu l'occasion de se prononcer sur certains aspects du droit international de l'environnement, dans des affaires contentieuses ou consultatives, mais sans que cette branche du droit ait été réellement centrale dans leur traitement. On peut citer les affaires des *Essais nucléaires (Australie c. France et Nouvelle-Zélande c. France),* ordonnances du 22 juin 1973 et arrêts du 20 décembre 1974 ; l'avis consultatif du 8 juillet 1996 sur la licéité de la menace ou de l'emploi d'armes nucléaires ; et le projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), ordonnance du 5 février 1997 et arrêt du 25 février 1997. Il faut avoir à l'esprit cependant que, depuis l'affaire du *Détroit de Corfou (Royaume-Uni c. Albanie),* arrêt du 9 avril 1949, la Cour avait déjà eu l'occasion de se référer à certains principes et règles en matière de dommages transfrontières qui vont trouver à s'appliquer directement dans le domaine du droit international de l'environnement.

La première question que s'est posée la doctrine, à ce sujet, est de savoir si la CIJ est outillée pour trancher des différends en matière de droit international de l'environnement, en particulier en ce qui concerne l'établissement des preuves qui portent souvent sur des questions scientifiques et techniques complexes[1].

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[1] - Malgosia Fitzmaurice "The International Court of Justice and the environment", in *Non State actors and international law,* Brill NV, 2004, vol. 4, issue 3, p. 173-197;
- Gilbert Guillaume, « La Cour internationale de Justice et le droit international de l'environnement – introduction », in *The role of the judiciary in the implementation and enforcement of environmental law*, Amedeo Postiglione (ed.), Bruylant, Bruxelles, 2008, p. 3-15.

La réponse ne peut être que positive puisque la Cour peut non seulement inviter les Parties à « produire des moyens de preuve ou à donner des explications », mais aussi à « faire déposer un témoin ou un expert pendant la procédure » (article 62 du Règlement de la Cour). Elle a aussi la possibilité d'aller plus loin en confiant « une enquête ou une expertise à toute personne, corps, bureau, commission ou organe de son choix » (article 50 du Statut de la Cour). Cette procédure doit être adoptée par ordonnance et les Parties ont la possibilité de donner leurs observations sur le rapport des experts.

La Cour a été critiquée pour n'avoir pas eu recours dans l'affaire des *Usines de pâte à papier sur le fleuve Uruguay,* notamment à l'enquête ou expertise prévue à l'article 50 de son Statut[2] ; mais encore faut-il que la Cour en ressente le besoin et qu'elle estime que les moyens de preuve et le débat contradictoire entre les Parties ne lui ont pas permis de trancher les questions de fait en cause. Ce qui n'a pas été le cas dans cette affaire. Ainsi que l'a souligné le Juge Keith dans son opinion "*So far as the quality of the information provided by the two Parties is concerned, neither Party challenged any of the detail of the data, many thousands of items, gathered by the monitoring stations, up and down the river and at the effluent point at the plant, and recorded in the many tables included in the documents before the Court. Rather, they disagreed about how those data were to be interpreted*."[3] Et, manifestement, il revient aux Membres de la Cour de procéder à cette interprétation sur la base de la masse d'informations qui lui ont été fournies par les Parties.

D'autre part, la Cour a observé que les témoins et experts présentés aussi bien par l'Argentine que par l'Uruguay faisaient, en réalité, partie de l'une ou l'autre des délégations de ces pays en tant que conseils, et qu'il aurait mieux valu qu'ils aient été présentés en tant que témoins ou experts indépendants et soumis à un contre-interrogatoire (articles 57, 64 et 65 du Règlement), mais elle a rappelé aussi qu'il lui revient en fin de compte de se prononcer sur les faits et d'en apprécier la force probante. On peut penser, qu'à l'avenir, les Etats concernés prendront en compte le rappel à l'ordre de la Cour à ce sujet : « Elle [la Cour] considère en effet que les personnes déposant devant elle sur la base de leurs connaissances scientifiques ou techniques et de leur expérience personnelle devraient le faire en qualité d'experts ou de témoins, voire, dans certains cas, à ces deux titres à la fois, mais non comme conseils, afin de pouvoir répondre aux questions de la partie adverse ainsi qu'à celles de la Cour elle-même » (arrêt, par. 167).

Il convient de rappeler également que la Cour internationale de Justice avait cru nécessaire, au lendemain du Sommet de Rio sur le développement durable qui a adopté, le 13 juin 1992, la fameuse déclaration sur « l'environnement et le déve-

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[2] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt du 20 avril 2010,* opinion dissidente commune des juges Al-Khasawneh et Simma, déclaration du Juge Yusuf, opinion individuelle du Juge Cançado Trindade et du Juge *ad hoc* Vinuesa.

[3] Opinion individuelle du Juge Keith, jointe à l'arrêt, p. 2, par. 7.

[4] Raymond Ranjeva « L'environnement, la Cour internationale de Justice et sa chambre spéciale pour les questions d'environnement », AFDI, 1994, p. 433-441.

loppement », de créer, en juillet 1993, une chambre spéciale (paragraphe 1 de l'article 26 du Statut) pour les questions d'environnement[4]. Cette chambre n'ayant pas rencontré beaucoup de succès, la Cour a décidé de la supprimer en 2006, les Parties ayant toujours la possibilité de demander la création d'une chambre *ad hoc* sur la base du paragraphe 2 de l'article 26 du Statut. En effet, les Parties ont préféré, jusqu'à présent, comparaître devant la Cour en formation plénière, comme dans l'affaire du *Projet Gabčíkovo-Nagymaros* précitée et dans une autre affaire, centrée sur la protection de l'environnement, celle relative aux *épandages aériens d'herbicides (Equateur c. Colombie)* dont la Cour a été saisie par requête introductive d'instance le 31 mars 2008[5].

On doit avoir à l'esprit que les organisations non gouvernementales, très impliquées dans les questions de protection de l'environnement, n'ont pas d'accès directement à la CIJ, ce qui limite nécessairement le rôle de cette juridiction qui n'est ouverte, en matière contentieuse, qu'aux Etats. Quant aux organisations du système des Nations Unies, elles ne peuvent s'adresser à la Cour, dans certaines conditions, qu'en matière consultative.

Enfin, la protection de l'environnement nécessite le plus souvent une action préventive pour éviter la survenance de dommages irréversibles ou irréparables. Le Statut de la CIJ lui confère « le pouvoir d'indiquer quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire ». C'est ainsi que, par ses ordonnances du 22 juin 1973, dans l'affaire des *Essais nucléaires (Australie c. France et Nouvelle-Zélande c. France)*, la Cour a demandé au Gouvernement français de s'abstenir de procéder à des essais nucléaires provoquant le dépôt de substances radioactives sur le territoire australien, de la Nouvelle-Zélande, des îles Cook, de l'île Nioué ou des îles Tokélaou.

Ce pouvoir d'édicter des mesures conservatoires est d'autant plus important aujourd'hui depuis que la Cour, dans l'affaire *LaGrand (Allemagne c. EtatsUnis d'Amérique),* a décidé que les ordonnances édictant des mesures conservatoires avaient un caractère obligatoire (ordonnance du 3 mars 1999).

Dans l'affaire des *Usines de pâte à papier*, alors que la Cour n'a pas ordonné la suspension de la construction des usines, n'étant pas convaincue du risque d'un préjudice irréparable, il lui a été reproché de ne s'être pas prononcée *prima facie* sur la plausibilité d'un droit de non construction, invoqué par l'Argentine, selon lequel la Partie qui initie le projet ne devrait pas le réaliser avant que la Cour n'ait rendu un jugement[6].

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[5] La CIJ aura probablement à se prononcer sur d'autres litiges relatifs à la protection de l'environnement, puisque près d'une trentaine de conventions internationales multilatérales, en la matière, prévoient sa compétence.

On notera que l'Australie a saisi la Cour d'une requête introductive d'instance contre le Japon, le 31 mai 2010, dans l'affaire de la chasse à la baleine dans l'Antarctique, en alléguant la violation par ce dernier de ses obligations en vertu de la Convention internationale pour la réglementation de la chasse à la baleine (Washington, 2 décembre 1946).

[6] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay),* demande en indication de mesures conservatoires, ordonnance du 13 juillet 2006, opinions individuelles du Juge Abraham et du Juge Bennouna, *C.I.J. Recueil 2006,* p. 136-146.

Il a fallu attendre l'ordonnance du 28 mai 2009 dans l'affaire relative à des questions concernant *l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)* pour que la Cour consente à se pencher sur l'existence *prima facie* d'un droit, au stade des mesures conservatoires : « Considérant qu'à ce stade de la procédure la Cour n'a pas à établir de façon définitive l'existence des droits revendiqués par la Belgique ni à examiner la qualité de la Belgique à les faire valoir devant la Cour ; et que ces droits, en tant que fondés sur une interprétation possible de la convention contre la torture, apparaissent en conséquence plausibles » (ordonnance, par. 60).

A notre avis, c'est bien au stade des mesures conservatoires que la Cour aurait dû se prononcer, *prima facie,* dans l'affaire des *Usines de pâte à papier*, sur l'existence ou non d'une obligation de non construction à la charge de l'Uruguay et d'un droit de l'Argentine que l'activité soit suspendue. En effet, au moment de l'adoption de l'ordonnance sur les mesures conservatoires, le 13 juillet 2006, l'usine Orion (Botnia) n'avait pas encore été mise en service, elle ne le sera, sur autorisation de l'Uruguay, que le 8 novembre 2007. Il est vrai cependant que la Cour, dans son ordonnance du 13 juillet 2006, a tenu à affirmer que « la construction des usines sur le site actuel ne p[ouvait] être réputée constituer un fait accompli ». Autrement dit, si l'Uruguay entreprend la construction et la mise en service des usines, il le fait à ses risques et périls, y compris le démantèlement éventuel des installations.

Le statut du fleuve Uruguay prévoit des obligations procédurales et de fond à la charge des riverains, ce qui amènera la Cour à rappeler, tout d'abord, dans son jugement du 20 avril 2010, l'existence d'un lien fonctionnel entre ces deux catégories d'obligations. Elle souligne ainsi l'une des caractéristiques essentielles du droit international de l'environnement, en estimant que « c'est en coopérant que les Etats concernés peuvent gérer en commun les risques de dommages à l'environnement qui pourraient être générés par les projets initiés par l'un ou l'autre d'entre eux, de manière à prévenir les dommages en question, à travers la mise en œuvre des obligations tant de nature procédurale que de fond prévues par le statut de 1975 » (arrêt, par. 77)

Analysant les obligations procédurales, la Cour a conclu que l'Uruguay n'a pas respecté celles qui sont à sa charge et qui consistent, au sujet des projets qu'il a initiés, à informer, à notifier et à négocier. Sur le plan institutionnel, la Commission du fleuve Uruguay (la CARU) joue, selon la Cour, un rôle central dans le mécanisme de coopération prévu par le traité de 1975 ; elle ne peut dès lors être réduite à une simple courroie de transmission entre les Parties. La Cour relève, au travers de l'ensemble des obligations procédurales prévues par le statut, qu'il s'agit de mettre en œuvre le principe de prévention, en tant que règle coutumière (arrêt, par. 101). Ces obligations consistent tout d'abord en une information de la CARU de tout projet susceptible de causer un préjudice sensible, avant de le notifier ensuite à l'autre Partie pour que celle-ci puisse évaluer son impact sur le fleuve, en tant que ressource partagée, et négocier, s'il y a lieu, les aménagements nécessaires pour éliminer ou réduire le risque de préjudice. La Cour a souligné, qu'à ce stade, l'obligation de l'Etat d'origine de l'activité de procéder à une évaluation de l'impact sur l'environnement est « une pratique acceptée si largement par les Etats ces

dernières années », qu'elle relève désormais du droit international général, en tant que norme coutumière (arrêt, par. 203). Quant à la négociation entre les Parties, elle est régie par le principe de bonne foi, ce qui implique que, tant qu'elle se déroule, l'Etat concerné par le projet ne doit ni l'autoriser ni procéder à sa réalisation.
Enfin, la Cour a estimé que si le traité permet en cas de persistance du désaccord entre les Parties, à l'issue de la période de négociation, de saisir la Cour, il n'impose pas de suspendre les projets jusqu'à la décision finale de celle-ci. Cependant, certains juges, se fondant sur une autre lecture du traité, ont considéré que l'activité ne pourrait être ni autorisée ni entreprise avant le prononcé du jugement de la Cour, car, si tel n'était pas le cas, cela signifierait que les Parties auraient accepté la possibilité qu'un dommage soit occasionné au fleuve, en contradiction avec l'objet et le but du statut[7].
La violation de ses obligations procédurales par l'Uruguay ayant été constatée, la Cour s'est penchée ensuite sur le respect par cet Etat des obligations de fond, en ce qui concerne l'usine Orion (Botnia) mise en service depuis novembre 2007.
La Cour a rappelé qu'il appartient à la Partie qui avance certains faits d'en démontrer l'existence, qu'il s'agisse du demandeur ou du défenseur, et que si le premier doit apporter les éléments de preuve pour étayer sa thèse, cela ne signifie pas par autant que le second ne devrait pas coopérer avec la Cour, en produisant tout élément de preuve en sa possession.
Comme elle l'a fait pour les obligations procédurales, la Cour va passer en revue les obligations de fond prévues par le statut de 1975 et, en premier lieu, l'obligation de contribuer à l'utilisation rationnelle et optimale du fleuve. Celle-ci traduit, selon la Cour, le lien étroit entre l'utilisation équitable et raisonnable d'une ressource partagée et le développement durable des pays riverains.
D'autre part, les deux Parties sont tenues, par le statut, de coordonner l'adoption de mesures propres à éviter une modification de l'équilibre écologique ; ce qui nécessite une action concertée au travers de la Commission du fleuve Uruguay. Elles doivent également respecter l'obligation d'empêcher la pollution et de préserver le milieu aquatique (article 41 du statut du fleuve Uruguay). Pour ce faire, les riverains établissent, à titre préventif, des normes et des mesures dans leurs systèmes juridiques respectifs en conformité avec les accords internationaux applicables et, le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux. La pollution est définie par le statut (article 40) comme « l'introduction directe ou indirecte par l'homme de substances ou d'énergies nocives dans le milieu aquatique ». C'est l'analyse des normes établies à cet égard par la CARU et par les Parties qui va permettre à la Cour de déterminer s'il y a eu violation par l'Uruguay de l'obligation d'empêcher la pollution et de préserver le milieu aquatique, compte tenu de l'évaluation de l'impact sur l'environnement.
La Cour a noté que l'usine Orion (Botnia) a utilisé les meilleures techniques disponibles en matière de prévention et de réduction de la pollution, en cours

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[7] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt du 20 avril 2010,* déclaration du Juge Skotnikov, opinion dissidente commune des juges Al-Khasawneh et Simma, opinion dissidente du Juge *ad hoc* Vinuesa.

dans l'industrie de la pâte à papier, et que de l'analyse des données réunies après la mise en service de l'usine, il ne ressort pas que les rejets de l'usine Orion ont excédé les limites fixées par les normes applicables relatives aux effluents. Dès lors, la Cour conclut que l'Uruguay n'a pas violé les obligations de fond imposées par le statut. Elle estime cependant que les Parties doivent poursuivre leur coopération avec la CARU dans l'exercice de ses fonctions de surveillance de la qualité des eaux et que l'Uruguay doit, de son côté, continuer à s'acquitter de ses obligations de contrôle et de suivi de l'usine Orion (Botnia). Ce pays est donc tenu par une obligation continue de coopérer avec l'Argentine afin de prévenir à l'avenir toute atteinte à la qualité des eaux du fleuve du fait du fonctionnement de l'usine Orion (Botnia)

En conclusion :

La Cour internationale de Justice a pris date, au travers du traitement de l'affaire des *Usines de pâte à papier,* en affirmant nettement son rôle dans la protection de l'environnement et en consacrant essentiellement le principe de prévention en tant que règle coutumière. Il s'agit là d'un principe cardinal en la matière qui est fondé sur la détermination du risque de dommage transfrontière.

La Cour a consacré également la pratique largement acceptée par la communauté internationale de l'établissement, pour tout projet susceptible de générer un tel risque, d'une évaluation de l'impact sur l'environnement.

Dès lors, la prévention consiste non seulement en la production des normes de référence appropriées mais aussi en la coopération entre les différents acteurs pour leur mise en œuvre. La Cour n'est pas allée cependant jusqu'à la reconnaissance d'un principe de précaution qui serait applicable si une incertitude scientifique persiste quant au risque encouru. Un tel principe, s'il se retrouve dans une certaine pratique conventionnelle, notamment dans le cadre de l'Organisation mondiale du commerce et de son accord SPS, sur les mesures sanitaires ou phytosanitaires, ne fait pas encore partie du droit international général. Il convient d'avoir à l'esprit que, dans sa grande majorité, la doctrine considère qu'il ne peut s'agir au mieux que d'une règle émergente du droit international[8]. La Cour dans l'affaire des Usines de pâte à papier s'est prudemment référée à « une approche de précaution » qui peut se « révéler pertinente pour interpréter et appliquer les dispositions du statut », mais elle ne lui a pas reconnu l'effet que le demandeur a prétendu lui attribuer quant au renversement de la charge de la preuve (arrêt, par. 164).

A notre avis, le principe de précaution est certes revendiqué aujourd'hui en tant que règle de bonne gouvernance, mais il ne peut accéder au statut de règle de droit international général que s'il est entouré des garanties nécessaires, afin de s'inscrire dans le contexte du développement durable et des équilibres qui le caractérisent.

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8 - P.M. Dupuy, « Le principe de précaution, règle émergente du droit international général », *Le principe de précaution, aspects du droit international et communautaire* (sous la direction de Charles Leben et Joe Verhoeven), LGDJ, Paris, 2002, p. 95-111.

- *Review of the European Community and International Environmental Law*

THE EXPERIENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN ENFORCING ENVIRONMENTAL LAW

Juliane Kokott
Advocate General

Introduction

EU legislation on environmental law covers most relevant areas, in particular air, water, waste, chemicals, biodiversity and procedural aspects. Therefore the European Court of Justice often deals with environmental questions. I would estimate that in the last five years about 12 % of our cases, that's around 300, raised issues of environmental law.

Many measures of EU environmental law implement international commitments of the EU, such as the Framework Convention on Climate Change[1] and the Kyoto Protocol[2], the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[3] or the Convention on Biological Diversity.[4] Though these conventions are integral parts of the EU legal order,[5] court cases typically are not directly based on them but on EU implementing measures. For instance, the Court has issued approximately 50 judgments on the Habitats Directive, which aims to contribute to the objectives of the Convention on Biological Diversity. Only in exceptional cases the Court has enforced obligations derived directly from international law when EU law did not cover the specific issue.[6] However, such

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1 – Approved by Council Decision 94/69/EC of 15 December 1993 (OJ L 33, 7.2.1994, p. 11).

2 – Approved by Council Decision 2002/358/EC of 25 April 2002 (OJ L 130, 15.5.2002, p. 1).

3 – Approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

4 – Approved by Council Decision 93/626/EEC of 25 October 1993 (OJ L 309, p. 1).

5 – Cases 181/73 *Haegeman* [1974] ECR 449, paragraph 5, 12/86 *Demirel* [1987] ECR 3719, paragraph 7, and C-344/04 *IATA and ELFAA* [2006] I403, paragraph 37.

6 – See cases C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357 and C-239/03 *Commission v France* [2004] ECR I-9325 on the Convention for the protection of the Mediterranean Sea against pollution, signed at Barcelona on 16 February 1976 and approved on behalf of the European Economic Community by Council Decision 77/585/EEC of 25 July 1977 (OJ 1977 L 240, p. 1) and the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, signed at Athens on 17 May 1980 and approved on behalf of the European Economic Community by Council Decision 83/101/EEC of 28 February 1983 (OJ 1983 L 67, p. 1).

cases raise difficult questions of direct effect[7] and of the delimitation between EU law and national law if the case concerns a so called mixed agreement, concluded by the European Union and by Member States.[8] As I am supposed to address enforcement I cannot cover these questions in detail today.
Most environmental cases in the ECJ concern enforcement. I will discuss the two main procedural ways to bring such a case to the Court: Around 80 % of these cases arrive by way of the infringement procedure under Articles 258 to 260 TFEU and most of the rest is introduced by means of the preliminary reference procedure under Article 267 TFEU. I will not address direct actions which account for approximately 5 % of the caseload and normally are not of practical concern for the enforcement of European environmental law.

II - On the infringement procedure

In general, the infringement procedure applies to disputes between the Commission and Member States over compliance with EU law. In theory, such a procedure is also applicable between two Member States; in practice this case is hardly relevant.[9] In the area of environmental law Member State obligations can result from EU directives or regulations but also from international agreements concluded by the EU.[10]
As the applicant, the Commission bears the burden of proof. In cases concerning the practical application of environmental law, e. g. the authorisation of a road project crossing a protected site, such proof may be very difficult to obtain because the technical issues at hand are often very complex. However, Member States are obliged to co-operate in the investigation of the case.[11] In particular, assessments or studies prepared by Member States' authorities can help the Commission to make its case. For instance, in several cases the Commission demonstrated an infringement of the Birds Directive and the Habitats Directive by reference to environmental impact assessments.[12]
As far as the actual enforcement of EU environmental law is concerned, the procedure itself goes a long way to ensure compliance. It requires an intensive dialogue between the Commission and the Member State in question. This dialogue aims to achieve an amicable resolution of the dispute without the involvement of the Court. In practice this goal is often achieved. Most cases

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7 – See case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 53 et seq.
8 – Cf. Cases C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraphs 84 et seq., and C-239/03 *Commission v France* [2004] ECR I-9325, paragraphs 30 et seq..

9 – Only three cases are known: 141/78 *France v United Kingdom* [1979] ECR 2923 on fisheries, C-388/95 *Belgium v Spain* [2000] ECR I-3123 on designations of origin, and C-145/04 *Spain v United Kingdom* [2006] ECR I-7917 on the status of Gibraltar in European elections.
10 – Case C239/03 *Commission v France* [2004] ECR I9325.
11 – Case C-494/01 *Commission v Irland* [2005] ECR I-3331, paragraphs 41 et seq.
12 – E. g. cases C-186/06 *Commission v Spain* [2007] ERT I-12093, points 33 and 34, and C-304/05 *Commission v Italy* [2007] ERT I 7495.

are resolved before they even go to Court, some more before the Court issues its judgment. You may have heard of the *Rospuda* valley case, an infringement procedure against Poland over a motorway project that should cross a very important wetland. Though the Commission introduced this case a judgment was not necessary because Poland decided not to pursue the project.
If judgments are rendered they are usually implemented by the Member States. Therefore, the enforcement procedure calling for monetary sanctions, as foreseen in Art. 260 TFEU is rarely resorted to. Under this procedure the Commission can initiate a second procedure before the Court and apply to impose a lump sum or a penalty payment on the Member State. However, the first such judgment concerned the environment, namely an illegal landfill on the island of Crete,[13] the second dealt with the implementation of the Bathing Water Directive by Spain[14] and another one with the legislation on genetically modified organisms in France.[15]
Finally, interim measures should be mentioned as another instrument of enforcement. The Commission has obtained such measures in a number of recent cases, most prominently in the *Rospuda* valley case[16] but also in some bird hunting cases concerning Italy[17] and Malta.[18] Such measures can help to avoid irreversible damage to the environment while the case is pending in Court. However, they require clear cut cases and a speedy handling by the Commission.

III - On the preliminary reference and environmental rights of individuals

Let us now turn to the preliminary reference procedure. It provides for co-operation between Member State Courts and the European Court of Justice to advance the uniform application of EU law. If national courts deal with cases that raise questions of EU law they may turn to us to provide them with the interpretation of EU rules or to decide on the validity of EU legislation. Courts which decide in the last instance are obliged to refer such questions unless there is no reasonable doubt how to resolve them. The enforcement of environmental law mostly raises questions of interpretation. However, questions of a regulation's or directive's validity may also occur.

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13 – Case C387/97 *Commission v Greece* [2000] ECR I5047.
14 – Case C278/01 *Commission v Spain* [2003] ECR I14141.
15 – Case C-121/07 *Commission* v *France* [2008] ECR I-9159. There were six more judgments imposing a lump sum and/or a periodic penalty payment but they did come under environmental law as such: Cases C-304/02 *Commission v France* [2005] ECR I-6263 (fisheries), C-177/04 *Commission v France* [2006] ECR I-2461 (product liability), C-70/06 *Commission v Portugal* [2008] ECR I-1 (public procurement), C-109/08 *Commission v Greece*, nyr. (technical standards and regulations), C-568/07 *Commission v Greece*, nyr. (opticians), C-369/07 *Commission v Greece*, nyr. (state aid).
16 – Order of the President of the Court of 18 April 2007, case C-193/07 R *Commission v Poland*.
17 – Orders of the President of the Court of 27 February 2007, case C-503/06 R *Commission v Italy*, and of 10 December 2009, case C-573/08 R *Commission v Italy*.
18 – Order of the President of the Court of 24 April 2008, case C-76/08 R *Commission v Malta*.

It is important to be aware of the fact that in this procedure the ECJ will not ultimately decide a case or directly enforce environmental law. The final decision remains with the national court. Therefore, the enforcement of any final judgment depends on the national court and the instruments available under national law. The ECJ will only clarify the interpretation of EU law. Moreover, the Court will not address all issues of EU law that may be relevant for the case but normally only the issues raised by the national court.[19] Only in exceptional circumstances will the Court take the initiative to raise additional issues of EU law that it considers to be important for the case.[20]

Nevertheless, the preliminary reference procedure is of particular importance for the enforcement of European environmental law by the European Court of Justice. In principle, everyone who is party to a national court procedure raising questions of European environmental law potentially has access to the ECJ. However, there are several hurdles to negotiate before such a question arrives at the Court.

First of all, the party needs to have access to the national court. A question of EU environmental law only arises if it can be raised in the context of the national court procedure. In principle, this depends on national law. However, EU law grants rights to individuals which can be invoked in court.

For example, under the Directive on ambient air quality[21], Member States must ensure that certain atmospheric pollutants do not exceed limit values in ambient air. If ambient air does not meet these requirements the authorities must draw up an action plan to reduce pollutant levels to the parameters set by the directive.

Under traditional German administrative law it was thought that such plans would not be made in the interest of certain individuals but in the general interest. Therefore, individuals would not have *locus standi* to require that the competent authorities draw up an action plan. However, the German Federal Administrative Court was not sure whether this position complied with EU law and therefore referred a question to the Court of Justice.

The Court considered that the Directive creates an unconditional and sufficiently precise obligation for Member States to draw up the action plan. Therefore the obligation is directly applicable and individuals are entitled to rely on it against public authorities. The Court furthermore stressed that this consideration applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health.[22] As a consequence, Germans can rely on EU environmental

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[19] – See case C-378/08 *ERG and others*, nyr. It does not address the issues raised by my opinion in this case, points 130 to 138, which were not the object of a question, though they might be relevant for the resolution of the national procedure.

[20] – E. g. case C-2/07 *Abraham and others* [2008] ECR I-1197, paragraph 24.

[21] – Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55).

[22] – Case C237/07 *Janecek* [2008] ECR I-6221, paragraphs 35 to 37.

law to obtain results that they could not get under national law.
Still, European environmental rights of individuals alone do not guarantee that the European Court of Justice can contribute to the enforcement of environmental law in national court procedures. In practice the cost of judicial proceedings can discourage court actions. Where an action is introduced, a reference will only be made if national courts are convinced that a question of EU law needs to be resolved to decide the case. Even if such a question is recognised only courts of last instance are under an obligation to make the reference. Finally, EU law does not provide individuals with a remedy if these courts do not comply with this obligation. In theory, such an infringement of EU law could be sanctioned by an infringement procedure or – in some Member States – by the national Constitutional Court[23] and – in exceptionally arbitrary cases – by the European Court of Human Rights[24] in Strasbourg. However, in practice these remedies are rarely effective.[25]

IV - Conclusion and outlook

To conclude, the European Court of Justice has the procedural means to contribute effectively to the enforcement of European environmental law. And, on initiative of the Commission and European citizens, the Court has successfully applied these means to advance the effective application of European environmental law.
Regarding the future, one of the most interesting current developments is the integration of the Århus Convention[26] into European environmental law. As you know, one of the topics of this Convention is access to courts in environmental matters. The Court has already stressed that the EU transposition of the Convention aims to ensure 'wide access to justice' and to provide judicial remedies.[27] In addition, it has indicated that the implementation of the Convention requires clear rules to limit the costs of environmental judicial procedures[28] though the appropriate level of costs is not yet clear.
Moreover, currently cases are pending on the implementation of access to justice under the Convention. A central question concerns the extent of the substantive and procedural control available under Article 9 paragraph 2.[29] The legislation in question is limited to the authorisation of certain types of

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[23] – On German constitutional law see the Federal Constitutional Court BVerfGE 73, p. 339 (p. 366 et seq.) – Solange II.
[24] – E. g. the decision of the European Court of Human Rights *Pedersen and Pedersen v Denmark*, no. 68693/01, 12 June 2003, under 2 a).
[25] – On this subject see Juliane Kokott, Thomas Henze and Christoph Sobotta, *Die Pflicht zur Vorlage an den EuGH und die Folgen ihrer Verletzung*, [2006] Juristenzeitung p. 633.
[26] – Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).
[27] – Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening*, nyr, point 45.
[28] – Case C427/07 *Commission v Ireland*, nyr., points 92 to 95.
[29] – See cases C-115/09 *Trianel*, communicated in [2009] OJ C 141, p. 26, and. C-128/09 and others *Boxus and others*, communicated in [2009] OJ C 153, p. 18 et seq.

projects. Additionally, there is a case pending that concerns the effects of Article 9 paragraph 3 of the Convention.[30] This provision covers all other infringements of environmental law. An EU directive to transpose the latter part of Århus has been rejected by the Council. Nevertheless, this provision could have certain effects in combination with European environmental law. And, finally, the effects of the Regulation on the application of the provisions of the Århus Convention[31] on the EU institutions have not yet been analysed by the Court.[32]

[30] – Case C-240/09 *Lesoochranárske zoskupenie*, communicated in [2009] OJ C 233, p. 3.

[31] – Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 13).

[32] – But see the restrictive position of Court of first instance in case T-91/07, *WWF-UK v Council*, not reported in the ECR, point 82; further clarification might result from pending case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission,* communicated in [2009] OJ C297, p. 28.

IMPROVING ENVIRONMENTAL GOVERNANCE AND ACCESS TO JUSTICE IN THE ASEAN

*Amado S. Tolentino Jr.**

**An environmental law pioneer, the presentor is Executive Governor (for developing countries) of the International Council of Environmental Law. He served as Philippine Ambassador to Papua New Guinea and Qatar.*

(Note: ASEAN (Association of Southeast Asian Nations) was established by the ASEAN Declaration (Bangkok Declaration) on 8 August 1967. Its founder members are Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam joined in 1985, Vietnam 1995, Lao People's Democratic Republic and Myanmar 1997 and Cambodia 1999.

The Bangkok Declaration stated, inter alia, as one of its aims, the acceleration of economic growth and promotion of matters of common interest, inter alia, economic fields. Although no mention was made of cooperation in environment, world events in the area of environment culminating with the Stockholm Declaration 1972 which called for regional cooperation in environment, led to ASEAN's sub-regional Environment Programme beginning in 1978.

An Asean Charter entered into force on 15 December 2009. The Charter bestowed a legal personality upon Asean which, for the past 42 years, has operated as a coalition of nations born out of the Bangkok Declaration mentioned above. To realize the purposes of the Charter, Asean leaders adopted a Roadmap for an Asean Community by 2015 composing three community blueprints – political security, socio-cultural and economic.

Asean chose to celebrate 2009 Asean Day with the theme "Green Asean" demonstrating Asean's commitment to environmental protection/sustainable development. The theme reflects the challenge of a new Asean – a people-centred organization respecting and living in harmony with nature.

A word must be said about the ASEAN way of doing things. Cooperation is done through consensus. There is no ASEAN Parliament to issue laws/regulations/directives to its member and no enforcement agencies.)

Serious concern over the environmental problems in the ASEAN countries began as early as the 1980s when the problem of environmental degradation was recognized in the Manila Declaration on the ASEAN Environment (1981). The document provides that member countries shall cooperate in the progressive implementation of projects under the ASEAN Environment Programme (ASEP) and encouraged the enactment and enforcement of environmental protection measures.

Thirty years later, ASEAN countries demonstrate a growing commitment to

the goals of environmental protection/sustainable development. The recognition of the imperative of sustainable development as a central national agenda has been accompanied by specific legislative and institutional developments including the establishment of appropriate judicial precepts and techniques for translating sustainable development policies into action. Beginning with the incorporation of environmental principles in national constitutions and the integration of environmental planning in the overall national socio-economic planning, this commitment has been demonstrated in a variety of ways and through a continuing process of legal and institutional innovation including the emergence of integrated and ecosystem oriented legal regimes.

Brief Background on Environmental Governance Developments in the ASEAN

In the beginning, ASEAN countries saw no need to institutionalize protection of the environment because it was not considered a serious problem. Soon thereafter, environmental issues were assigned to a range of divisions, departments or authorities as a matter of "policy". The next development is the designation of specific departments among the ministries to look after the environmental issues, the most prominent of which is pollution. Subsequent requirements for specialized needs and skills necessitated the creation of a full time environmental ministry, agency or board specially committed to environmental protection.

Through the years, ASEAN saw the emergence of environmental institutions with varying degrees of responsibilities ranging from policy making to regulatory, implementing and enforcing, coordination, advisory, or a combination of some or all of those functions. Right now, ASEAN countries have agencies entrusted with environmental management. In the design of their institutional structure, the institutional policy (IP) aspects and the executive policy (EP) aspects are distinguished in some countries as follows: Brunei Darussalam (Ministry of Development (IP) and Ministry of Environment (EP); Lao People's Democratic Republic (Office of the Prime Minister (IP) and Science, Technology and Environment Agency (EP); Vietnam (Ministry of Natural Resources (IP) and Office of Natural Resources and Environment (EP).

Different countries have institutional coordination scheme. In Singapore, there is an Environment Council set up as an umbrella organization to facilitate coordination between NGOs and other green groups. In Indonesia, the Environmental Impact Management Agency (BAPEDAL) coordinates with line ministries and, at the regional level, by the regional government and BAPEDAL regional offices. In Lao PDR, coordination is by the National Environment Committee.

Aside from constitutional provisions on the right to a healthy environment as in the Philippines, many ASEAN countries have environmental framework legislation also known as "umbrella" legislation in order to cover the various aspects of environmental management. Among them are Indonesia's Environmental Management Act (1997) and Vietnam's Law on Environmental Protection (1999). These framework laws convey a new technique with strong environmental policy coordination. Their purpose is to establish an

overall coherent policy and provide a basis for the coordinated work of different government agencies with operational responsibility for the environment and natural resources. There are instances when legislations grant regulatory powers to agencies to meet certain issues affecting the environment.

Among the areas covered by the framework laws are: prevention of air and water pollution; prevention of unsustainable use of natural resources; and laws on the integration of environmental consideration into the development process through an environmental impact assessment requirement.

Aside from training workshops and seminars for government officers on environmental law compliance, implementation and enforcement, use of various types of economic incentives and disincentives such as user fees, licensing fees and the polluter-pays-principle, the following trends in environmental law development were noted in the ASEAN countries: (i) imposition of new types of liability or increased penalties for environmental offenses in order to secure better environmental quality. In Thailand, under the National Environmental Quality Act (1992), the penalty for failure to meet the environmental standards was raised to one year imprisonment and/or fine of up to 100,000 baht. (ii) Some countries have also broadened liability for environmental offences. Strict liability schemes for damage to the environment are attracting attention as is personal liability of directors and managers of companies as well as government officials (Malaysia's Environmental Quality Act (1974) on director's liability for actions of company and principal's liability for actions of agents (Art. 43). (iii) Broad powers have been given to pollution control authorities in an attempt to control polluting activities. The Philippines' Pollution Adjudication Board has been authorized to issue e*x parte* orders to cease and desist and to close a facility causing pollution.

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters vis-a-vis The ASEAN.

Mention should be made at this juncture of the relevance of the Aarhus Convention to the ASEAN countries. No doubt, while the Convention is regional in scope, it is of global significance in the area of environmental democracy. It "links environmental rights to human rights, government accountability, transparency and responsiveness to environmental protection and focuses on interaction between people and public authorities in a democratic context. In brief, the Aarhus Convention grants the public rights and imposes obligations on governments regarding access to information, public participation and access to justice, all for environmental accountability." To be more specific, access to administrative and judicial proceedings is closely related to access to information. It is also closely related to public participation by all stakeholders. As such, access to information, public participation and access to justice are frequently grouped together as key elements of effective environmental governance.

How do ASEAN countries fare in regard to the Convention's target on effec-

tive environmental governance through access to information, public participation and access to justice?

Public Participation and the People's Right to Know

Public participation is mainly concerned with involving, informing and consulting the public in planning, management and other decision-making activities which can be considered part of the political process. It relates to how to involve people in environmental governance. Who should participate in the major policy decisions affecting the environment? How should those affected by environmental policy choices be appropriately involved in the decision-making process? Often, representation is claimed to be biased towards small, well-organized groups with few claims to represent the public. In Vietnam, for instance, public participation is project-based depending on the requirements of the project's country donor. In the Philippines, there is stakeholder involvement in national planning and implementation of plant genetic resources activities through membership from government and non-government agencies in the National Committee on Plant Genetic Resources. The Committee, after lengthy consultations with stakeholders, determines the overall direction of all plant genetic resources activities in furtherance of the objectives of the Convention on Biological Diversity Conservation. In Thailand, a Regional Community Forest Training Centre exists at the Kasetsart University which trains groups like women's association on the mechanics of public participation. Public participation, however, is usually done during the monitoring stage of a project's existence because planning is mostly done by the government side.

A major requirement of constructive participation of civil society is provision of environmental-development information. This is best exemplified by public access to information relating to compliance with the environmental impact assessment (EIA) requirement for development projects. A number of procedures in the EIA process provide opportunities for interested groups to inform agency deliberations about their concerns and preferences or to contribute formative ideas to the decision-making process. Current thinking in the Philippines considers the EIA as the only way of protecting disadvantaged groups like the indigenous tribal communities who are most often affected by construction in or around their ancestral lands of environmentally critical projects such as power plants, dams and the like.

The most important aspect of public participation is the people's right to know. Citizens have the right to be informed about threats to their well-being whether it is a factory to be put up in a neighbourhood or an impending change in their natural resources base like a mangrove area. This is an essential democratic precept and the protection of the environment cannot be ensured without safeguarding this fundamental principle. Unfortunately, both the state and private enterprises find it difficult to part with vital information. Many documents are often classified as "confidential" or "secret". For instance, the authorities putting up the Nam Choan dam in Thailand or Tembeling dam in Malaysia or Chico dam in the Philippines never clearly stated how much forest

or wetland areas will be completely submerged as a result or how many people would be affected by the dam project. Factory owners are even more secretive and often seek shelter under the excuse that they cannot part with information on the ground that it would prejudice their industrial processes and commercial secrets.

Be that as it may, the city state of Singapore among the Asean countries should be cited for its success at environmental governance specifically at providing public information including avenues for complaints, feedback and adequacy of response to enforce environmental laws. Its anti-littering law which imposes a fine or a corrective work order underwent extensive public information before implementation. The same is true with its law making it an offense not to flush a public toilet after use. Singapore embarked on a serious "Keep the Toilets Clean" awareness campaign before enforcement of the law. Today, no person has been prosecuted for failing to flush toilets in a long while.

Constraints to Public Participation in the ASEAN

Poverty is perhaps the greatest impediment to public participation. When people are caught up in the daily efforts to survive they have neither the time nor the inclination to resist an environmental threat. If people hardly speak up their thoughts, it is seldom likely they are able to participate in any action or organization that can withstand environmental destruction. This situation is true in the rural and urban areas. Conversion of wetlands into fishponds in the ASEAN countries, for example, were not met with protests by people living close by an account of the expectation of employment or income in the fishpond venture.

Another hindrance to popular participation is illiteracy. To illustrate, environmental threats are often a technical nature. Illiterate people are not able to comprehend what the presence of a contaminant in their environment means to their health. In rural areas, such lack of education leads to fatalism. All of often, droughts and floods are believed to be wrath of divine forces than the handiwork of humans.

Inadequacy of political mechanisms also prevents public participation in environmental issues. Often, the victims of environmental degradation are not heard in political or parliamentary fora. Politicians are more concerned with short-term gains from development projects and are indifferent or unconcerned about their negative impacts in the long term. In addition, some agencies of the government view environmental movements as obstacle to development. This is particularly true in countries where institutions for environmental protection are just emerging for which reason the watchdog role that the public can play is greatly diminished.

Access to Environmental Justice in the Asean

As the Asean administrative approach to public participation now extends from Lao PDRs principle of "known, discussed, done and examined by the people" in its development process to Indonesia's leeway at public participation during any stage of the EIA process at the discretion of the *Amdal* (EIA) committee,

the Asean judiciary made landmark decisions strengthening access to environmental justice in the region.

Thailand. In 2004, lawsuits were filed against the Electricity Generating Authority of Thailand (EGAT) by several hundred villagers who were affected by pollution caused by its Mae Moh power plant in Lampang province. Sulphur dioxide emissions from the power plant have had a severe impact on the health of people, damage to crops and useable lands in 16 villages. Based on the Pollution Control Department's air quality reports, the level of ambient sulphur dioxide in the Mae Moh was beyond the legal limit at 780 micrograms per cubic metre.

In 2009, the Chiang Mai Administrative Court ordered that EGAT will have to pay each resident up to Bht. 246,900 ($ 7,000) plus interest and to cover relocations costs for families and find each of them new farmlands at least 5 kms away from the plant, to rehabilitate the environment at the coal mine and to replace the golf course with trees.

Throughout the proceedings, the villagers had the support and assistance of the Council of Work and Environment-related Patient Network of Thailand, the Thailand Environment Institute and its coalition partners.

This *Mae Moh case* yields findings that clearly reflect the situation in other cases of similar environmental and health impact problems in Thailand. Existing laws do facilitate access to justice of litigants and clearly define the scope of responsibilities of agencies and organizations that handle complaints and appeals. However, such laws require improvement through the determination of time frame to finish trial proceedings. In terms of governmental effort, while state agencies have made an effort to disseminate environmental information to the general public, still it is hard for local communities to access the information because the disclosed information is sometimes too technical and distributed through limited channels. In terms of effectiveness, apart from the court adjudication to have the plant operator provide compensation to villagers together with other measures to mitigate negative health and environmental impacts on the people in general, effective measures to control pollution are also required to ensure that the power plant would no longer cause social and environmental impacts to their communities.

The victory of the villages in this case signifies a new era whereby the grassroots people have a better access to justice in the area of environmental management than in the past. However, capacities of local agencies and local people must be developed, so that they would acquire knowledge about laws related to the environment and are able to participate in investigations of violation of such laws and monitoring implementation of the court orders.

Philippines. A procedural device, also a form of community participation, available in the Philippines perceived as useful in environmental litigation is a class suit which allows a large number of people who have suffered small, individual wrongs to seek redress together. The *Minors Oposa et al v Factoran et al case* was a class suit brought by forty-four minors together with their parents and sought to have the defendant Secretary of the Department of Environment and Natural Resources rescind all existing Timber License Agreements

(TLA) and to desist from renewing or approving new agreements.
The Supreme Court did not decide on the issue of whether or not existing TLAs should be cancelled. It is a landmark for judicial recognition of the principle of intergenerational equity. This principle was accepted in so far as the petitioners were permitted to represent unborn generations in their pursuit of the right to a healthy environment. On the issue of *locus stand,* it was simply held that the matter of complaint was of common and general interest to all citizens of the Philippines. Therefore, the matter is a valid class suit with the plaintiffs representing all present and future citizens of the Philippines.
Worthy of mention is the more recent case of *Metro Manila Development Authority (MMDA) et al v Concerned Citizens of Manila Bay et al* which started when respondents filed a complaint before the Regional Trial Court against several government agencies, among them the petitioners, for the cleanup, rehabilitation and protection of the Manila Bay. The complaint alleged that the water quality of the Manila Bay had fallen way below the allowable standards set by law, specifically the Philippine Environment Code. In their individual causes of action, respondents alleged that the continued neglect of petitioners in abating the pollution of the Manila Bay constitutes a violation of their constitutional right to a healthy environment as well as a string of legislations including, but not limited to, the Sanitation Code, the Marine Pollution Law, the Toxic and Hazardous Wastes Law.
The Supreme Court ruled in favour of the respondents, concerned residents of Manila Bay, in a decision handed down in 2008. The Court directed MMDA, local government units and government agencies to undertake joint efforts to cleanup Manila Bay so it would be fit for swimming, skin-diving and other forms of recreation. The Department of Environment and Natural Resources (DENR) was directed to fully implement its operational plan for the rehabilitation and conservation of the Manila Bay as soon as possible. The cleanup involves the dismantling of illegal structures along the waterways in Metro Manila and all provinces surrounding Manila Bay, as well as having commercial establishments along Manila Bay and its waterways install wastewater treatment facilities and septic tanks.
The latest development in this case is the failure of the government officials to comply with orders handed down by the Supreme Court to submit quarterly updates on their respective agencies' efforts to clean up Manila Bay. To date, only the DENR and MMDA have submitted their reports. As a result, the respondents Concerned Citizens of Manila Bay asked the Supreme Court to issue a contempt order against the chiefs of government offices identified in the case saying, "….If there is a lack of political will on the part of the government agencies, it is the function of the judiciary to supplant it with the will, the force and the power of the law…..A contempt order from the Supreme Court would serve as a strong message that the Court is serious about enforcing the judgement to clean up the bay." Indeed, expansion of legal standing provisions to include the public and NGOs is one way of improving access to environmental justice. Allowing the public and civil society to challenge acts and omissions by public authorities empowers citizens to serve as enforcers of the law in their own right.

Malaysia. The *Bakun Dam Case* involved three indigenous people from Bakun in Sarawak who filed a case against the Federal Government, the Sarawak Natural Resources and Environmental Board (NREB), the Director General of Malaysia's Department of Environment (DOE) and the project proponent. The crux of plaintiff's argument was that the project proponent did not comply with the EIA procedures and that the other departments had no right to give powers to NREB to approve the dam's EIA report. The public participation element was also missing from the report, thus the plaintiffs did not have a say about the development which was going to flood their ancestral grounds forever.

The presiding judge found for the plaintiffs on the basis that a valid assessment of an EIA can not be made without some form of public participation. This is a vital component of EIA reports because the interaction between the people and their environment is fundamental to the concept of environmental impact. Furthermore, the power given to NREB to approve the EIA was invalid because the Director-General do not have the power to allow NREB to approve EIA reports to the DOE. There is no provision in the Federal Constitution which allows a government minister to transfer federal powers (approval of the EIA in this case) to a particular State.

The High Court case is a landmark where the importance of public participation in environmental management was highlighted to be the basis of the decision.

Indonesia. The Indonesian Forum for the Environment (WALHI) brought suit against five government agencies and the company PT Inti Indorayon Utama. The case arose when the Piti Inti pulp and paper factory was established in Harangan Ganjang Village close to Lake Toba, the tourist center of North Sumatra. The factory was controversial from inception because of its high pollution potential proven true when Waduk Lagoon which filtered Piti Inti's chlorine waste burst. A foul smell ensued, strong enough to disrupt the daily activities of the population. In fact, part of the Sibatu forest was destroyed. WALHI applied to sue Piti Inti and the government.

WALHI gained standing in the Jakarta District Court although the environment group did not have a "tangible interest" as required by the traditional concept of standing. Recognition was based on public interest to protect the right of the people to a healthy environment and to demand legal redress guaranteed by the Environmental Management Act. The fact that the Act recognizes the role of NGOs helped in ruling WALHI with full legal capacity to protect the community interest in environmental matters. The Court also relied on the 1986 Dutch *Nieuwe Meer case* where the Supreme Court recognized the standing of an NGO to defend the environment as a public interest. It was the first time in The Netherlands that it was not necessary to prove that a specific individual interest has been harmed.

Reforms in Environmental Governance and Access to Justice

Popular participation largely depends upon public perception and attitude towards environmental issues. Such perception and attitude underwent considerable changes during the last two decades when the emphasis was for strong environmental legislation and technological solutions to environ-

mental problems through efforts of individuals, local groups and communities. Among ASEAN countries, the Philippines went a step further when, in 1992, it incorporated direct public participation in a legislation which further enriched the Philippine environmental jurisprudence. Referred to here is Republic Act 7586, otherwise known as the National Integrated Protected Areas Act. The law lays down a process for the formulation, preparation and approval of management plans with the participation of local people as well direct involvement by people in protected area management.

Specifically, the law adopts a two-tiered management plan. There shall be a general management planning strategy on the first level, to serve as a guide n the second level will effectively address peculiar situations in the area. It will also afford a more direct participation by the private sector in protected area planning and management through the management board. Most important of all, participation of indigenous and other local communities is included in the management scheme. This is on the theory that community benefits from the protected area in the form of livelihood sources and essential to the successful management of protected areas. In reality, the management board takes the role of local protected area administrator.

Another development is the establishment of an Environmental Ombudsman (EO) within the Office of the Ombudsman in 2004. A task force on environmental concerns, it shall seek to monitor and promote compliance of national and local government units with environmental laws. It is also responsible for the filing of necessary complaints against public officials and employees who violate laws pertaining to the environment. An Environmental Team of Investigators and Prosecutors, comprising 17 lawyers from across the country, was duly established to assist the EO in investigating breaches of environment and natural resources laws.

Most recently, the task force has launched the Environmental Compliance Assessment program (ECA). It is a comprehensive, systematic and periodic review of the compliance of the local government units with the Solid Waste Management Law and the Fisheries Law. The ECA will focus on *barangays* (villages) and municipalities located along the coasts of the Visayan Sea, as this particular sea has been identified as the richest in the Philippines in terms of marine biodiversity.

Another significant development is the designation by the Philippine Supreme Court of 117 trial courts as "environment courts" to hear cases involving violation of laws protecting the country's natural resources and to speed up their resolution. In a resolution, the tribunal approved the recommendation of the Philippine Judicial Academy to designate such courts for "improved environmental adjudication" in the country. There will be forty-eight "first level" courts which consists of Metropolitan Trial Courts and twenty-five "second level" courts consisting of the Regional Trial Courts. According to the Chief Justice, "the environmental courts will be manned by "green judges" – skilful judges who not only master environmental laws, but also understand the philosophy of environmentalism." As part of the program, the tribunal conducted training seminars for the personnel of the environmental and appellate courts.

Just last month, specifically on 13 April 2010, the Philippine Supreme Court promulgated new rules of procedure for environmental cases. Described as a new remedial measure under the category of special civil actions, a petition for writ of *kalikasan* (nature) is meant to immediately stop an alleged violation of an environmental law like the Clean Air Act, Clean Water Act, Solid Waste Management Act, Wildlife Conservation and Protection Act, etc. The promulgation of the groundbreaking rules aim at hastening resolution of environmental cases based on the fact that the right to a healthy environment guaranteed by the Constitution is a demandable legal right. It makes environmental justice more accessible to everyone. The rules have opened the courts from the regular courts to the Court of Appeals and the Supreme Court to ordinary Filipinos seeking judicial redress over environmental complaints. It grants a 72-hour temporary environmental protection order, similar to a restraining order, if the case at hand is a matter of "extreme urgency" where the petitioner faces "grave injustice and irreparable injury." The writ may later convert the order to a permanent one or extend its status until environmental protection or rehabilitation is given assurance.

The writ of *kalikasan*, a Philippine contribution to international jurisprudence, is a follow up to the "green courts" initiative of the Supreme Court. It is the equivalent of the writ of *habeas corpus* which originated in England and the writ of *amparo* of Mexico in terms of protecting the environment.

Environmental Law Education in Furtherance of Environmental Governance and Access to Justice.

A common recommendation in Asean meetings is the introduction of environmental law as course in the law schools in the region. The target is to create a cadre of environmental lawyers uniquely qualified in the field of environmental law. Thus far, some Asean countries (Indonesia, Thailand, the Philippines, Singapore, Malaysia) have introduced Environmental Law in the law School curriculum. For one, the subject had always been thought to be embraced in the old natural resources law course which is "use-oriented" compared to the new environmental law subject which is "resource-oriented." Another is the absence of national textbooks setting out the overall relationship between law and the environment. Furthermore, at the law schools, environmental law still has to compete with the basic subjects such as criminal law, civil law, political law, etc.

Fortunately, in 1996, an Asia-Pacific Center for Environmental Law (APCEL) was set up at the University of Singapore through the efforts of the World Conservation Union (IUCN) Commission on Environmental Law with the support of UNEP and the Asian Development Bank "…to develop the capabilities of the Asian and Pacific region to deal with the complex legal and regulatory requirements of the post UNCED environmental order…."

APCEL's projects include capacity training of legal educators (Training the Trainors) and also the training of government officials with supporting programs like the legal database and a research project on environmental law in Asean countries. Specifically, the objective of the training course is to

enable a law instructor to develop a curriculum and apply techniques suitable to the cultures and legal systems of the participant countries. For example, the political culture and needs of countries like Cambodia, Vietnam and Lao PDR are carefully considered in terms of the role of environmental legal education, training and research.

The time is opportune for law schools in the region to examine the state of their countries' environment to determine whether environmental law merits to be taught as a compulsory subject rather than as an optional course as it is now.

On the part of the judiciary, the Chief Justices of the Asean countries have already met in Manila and Bangkok and came out with an environmental law judiciary program "to strengthen the capacity of judges to deal with environmental disputes, especially as they discharge their roles as guardians of the rule of law in torts, criminal and administrative proceedings, and in order that they can be instruments to protect human health and safeguard the natural environment for present and future generations." The meetings were follow-ups to the 2002 Global Judges Symposium held in South Africa where they affirmed commitment to combating environmental degradation through the application of environmental law. The Johannesburg Principles adopted at the Symposium called for improved environmental education, including for the judiciary. After all, citizens need a judiciary which understands environmental law and is receptive to its special needs. The Asean Chief Justices also drew up a needs-responsive plan of activities at national and regional levels for capacity building in the area of environmental law. The end in sight is a network among the judiciaries, the legal profession, the university law faculties to share data and information on environmental law *vis-à-vis* the important role of the judiciary in realizing effective environmental governance and access to environmental justice. UNEP provided the lead in this regard.

In pursuance thereof, national environmental law forum for judges, prosecutors and lawyers were already held in some Asean countries like Cambodia, Vietnam and Lao PDR. In the Philippines, environmental law is a course in the mandatory continuing legal education program for practicing lawyers. Mention of the proposed International Court of the Environment in those fora elicited genuine interest about which a more active information campaign need to evolve.

Conclusion

There is a varying degree of development in environmental governance and access to justice in the ASEAN countries owing to, among others, the differences in population, territories, development, economy, history, and government. A close look at their respective laws would readily reveal the intricate mosaic of legal systems in existence in the region. It is not simply a choice between common law or civil law or a mixture of both. While one system is founded on Islamic or Hindu law, a few others share traditions of British law super-imposed upon Islamic foundations, modified by modern indigenous legal innovations. Others have indigenized eclectic legal systems which have inte-

grated concepts from American, Spanish, Italian and French legal systems. Intricate as it is, the mosaic is even more elaborate when seen in detail, with a great variety of ethnic and customary laws. This fact should be appropriately considered in any attempt at improving environmental governance and access to justice in the ASEAN countries. For one, ASEAN's latest members, Vietnam, Lao PDR, Myanmar and Cambodia, have substantial needs in building their capacity for environmental protection, specifically, and sustainable development more broadly.

Before the effectivity of the Aarhus Convention (2001), the basic groundwork for environmental management in some ASEAN countries have been spelled out in the form of basic constitutional rights, laws to protect the environment and, in some instances, very basic public participation procedures. Those few countries, however, are still in the introductory stage of creating an ideal system leading to making good use of the people as a partner in environmental protection/sustainable development. In this regard, there is a need to introduce provision of adequate financial assistance to cover the cost and resources to participate in the public involvement process. Of course, the process entails expanse in trained manpower as well as a strong administrative machinery to carry out effective public participation strategies. In connection therewith, the least developed aspect of public participation comes to mind – environmental education. Continuing education in the objectives, methodologies and techniques for promoting public participation is needed for the general public, consumers, producers, politicians, decision-makers and opinion leaders.

The issue of meaningful participation and engagement in decision-making through the EIA process has been agreed on as particularly deficient in the ASEAN. It is still very moderately practiced despite availability of multi-stakeholders participation handbooks in the Philippines, training on people's participation in Thailand and a new law on access to information in Indonesia. Strengthened and formalized best practice procedures for involvement; channels for participation to provide proper direction for the public to make their contributions should therefore be made clear and known.

In regard to access to courts in environmental matters, some ASEAN countries lead in judicial recognition of standing of citizens and groups representing public interests. A UNEP Judges Programme on continuing environmental law education is being implemented in the region. Green courts were already identified in the Philippines and a Green Bench was set up in Thailand's Supreme Court. The Philippine Supreme Court came out with rules of procedure for the new writ of *kalikasan* (nature). Access to courts, however, should not be limited to cases where participatory rights are infringed. Access should be granted to affected persons to challenge the substantive legality of an administrative decision for judicial redress. This should be backed up by a continuous access for citizens to accurate information on the state of the environment.

Not to be lost in the discussion are the benefits to be derived from the use of the Internet or any other structured, computerized and publicly accessible

data base to further popularize the right of access to environmental information, public participation in decision-making and access to justice in environmental matters including procedural details and guidelines for their effective implementation, i.e., participatory approaches; standards for public participation of informed and trained public, innovative forms of networking for engagement by civil society. Additionally, let it be known that there is felt need for more information in the ASEAN countries about the proposed International Court of the Environment.

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ENFORCING THE RULE OF LAW FOR A BETTER ENVIRONMENT: THE ELEMENTS OF STATE RESPONSABILITY/LIABILITY, ERGA OMNES OBLIGATIONS AND JUDICIAL ACCESS

Dr. jur. Alfred Rest
Academic Director (retired) of the Institute of Public International Law and Comparative Public Law, University of Cologne, Germany

I. Introduction

The report will attempt to demonstrate how by the application of the rule of law – imbedded in the UN Charter and reflected in principles of international law – and its special elements of State responsibility and liability, obligations erga omnes and judicial control, the protection of the environment could be enhanced.

II. UN Programme on the Rule of Law at the National and International Levels

The new challenges of the 21st century, in particular the growing number of international conflict situations and war, on-going and increasing environmental degradation [1] as well as the necessary reform of the UN structure, especially of the internal justice system have urged the UN to recall the indispensability and necessity of the rule of law and to set up a special programme to stress the further development, implementation and enforcement of the rule of law. The General Assembly has considered rule of law as an agenda item since 1992. With renewed interest since 2006 it has adopted various Reports and Resolutions at its last three sessions [2]. Accordingly Resolution 63/128 of the UN General Assembly reaffirmed in January 2009 the need for universal adherence to and implementation of the rule of law at both the national and international level. The implementation at the national level is an indispensable condition for the implementation of the rule of law at the international level. Although no common understanding of the term „rule of law" and the content of its various elements in the community of States exists and for the time being a definition is lacking, there is a general consensus on the indispens-

[1] Cf. *A. Rest*, Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration, in: *A. Postiglione (ed.)*, The Role of Judiciary in the Implementation and Enforcement of Environmental Law, Bruxelles 2008, pp. 459

[2] For further details see *A. Rest*, UN Programme on the Rule of Law, in: (40) Environmental Policy and Law 2010, pp. 90; *A. Rest*, The Rule of Law at the National and International Levels - ICEL Statement - , in: (40) Environmental Policy and Law 2010, pp. 130

ability of the rule of law. In numerous statements, reports and resolutions – also in the Security Council – States have emphasized their conviction „ that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, as well as for the protection of the environment "[3]. Undoubtedly the legal instruments of inter alia governance, State responsibility and liability including erga omnes obligations and the control by judicial means are basic elements of the rule of law.

In order to contribute to the adoption of measures that promote the rule of law, the *International Council of Environmental Law (ICEL)* in November 2008 submitted inter alia the following suggestions to the Chair of the Sixth Committee for consideration by the General Assembly:

„ Ways and means should be considered for promoting State responsibility and liability concepts and their demarcation from civil and criminal liability approaches to achieve a well balanced system of all concepts;

dispute settlement instruments should be promoted to strengthen the role of national and international courts granting legal access not only to the subjects of public international law but also to legal and physical private parties – including foreign individuals;

the protection and preservation of the Global Commons should be promoted by legally binding erga omnes obligations ".

Further suggestions concern the establishment and development of basic regulations of the national constitutions, the recognition of compulsory jurisdiction of the International Court of Justice and other courts and tribunals, procedural means for the enhancement of the protection of the Global Commons and finally ways for promoting civil rights and human rights.

III. Aspects of State Responsibility and obligations erga omnes

The final text of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* [4] was adopted by the International Law Commission (ILC) in August 2001. In Resolution 56/83, the UN General Assembly „commended [the articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action" [5]. It took nearly 45 years, more than thirty reports, and extensive work by Special Rapporteurs to reach agreement on the text with commentaries. The Articles on State Responsibility reflect the principles governing when and how a state is held responsible for a breach of an international obligation. Rather than setting forth any particular obligation, the rules of State Responsibility determine, in general, when an obligation has been breached, as well as the

[3] GA Res.63/128

[4] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifthy-third Session, UN GAOR, 56th Sess.Supp. No. 10, p.43, UN Doc A 56/10 (2001)

[5] GA Res. 56/83, para. 3 (Dec. 12,2001)

legal consequences of that violation. In this way they are „secondary" rules that address basic issues of responsibility and remedies available for breach of „primary" or substantive rules of international law. This indispensable distinction allowed the framework law of State Responsibility to be set out without going into the content of the various multifaceted obligations, which can underlie a process of evolving and developing fluctuations. In practice it would be an impossible task for the ILC to rule and formulate such changes in the whole range of international law – including (special) treaty law, law principles and customary law - as stated by *James Crawford* the last Rapporteur [6]. Because of their generality, the rules can be studied independent of the primary rules of obligations.

The articles on State Responsibility, which are a *combination of codification and progressive development*, are organized into four parts.

Part 1, dealing with „The Internationally Wrongful Act of a State" determines that „every internationally wrongful act of a State entails the international responsibility of that State" (Art. 1). According to Art. 2 „there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a *breach* of an international obligation of the State". The next chapters on the attribution of conduct, on the breach of an international obligation, on responsibility in connection with the act of another State, as well as on the circumstances precluding wrongfulness, reflect the basic concept elaborated by special Rapporteur *Roberto Ago*.

Part II „Content of the International Responsibility of a State" rules the legal consequences of an internationally wrongful act. It creates new obligations for the responsible state, principally duties of cessation and non-repetition (Art. 30) and a duty to make full reparation (Art. 31). Art. 33 characterizes these secondary obligations as being owed to other states or to the international community as a whole (Art. 33, para. 1). These Articles also acknowledge in a savings clause that states may owe those obligations to non-state actors such as individuals or international organizations (Art. 33 para.2). After the determination of the various forms of reparation such as restitution, compensation and satisfaction, the following Chapter regulates serious breaches of obligations under peremptory norms of general international law (Art. 40).

Special attention merits *Part III* on „The Implementation of International Responsibility of a State" due to its innovative character concerning the enforcement of collective interests and interests of the international community as a whole which are of eminent importance, inter alia, in the environmental law field. While Chapter I addresses the problem of who can claim a breach of State responsibility, Chapter II concerns countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation. The relevant Articles 42

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[6] *J. Crawford,* The International Law Commissions Articles on State Responsibility – Introduction, Text and Commentaries, Cambridge 2003, p. 15

– 48 are state-centered and regrettably the ILC does not address or even acknowledge the important role of non-state entities and individuals in invoking state responsibility [7]. The key provisions distinguish between injured states (Art. 42) and States that have not been injured (Art. 48).

Art. 42 titled „Invocation of responsibility by an *injured* State" rules that „A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State, or (ii) is of such a character as radically to change the position of all other States to which the obligation is owed with respect to the further performance of the obligation". The commentary makes clear that the definition of injury is „closely modeled on article 60 of the Vienna Convention on the Law of Treaties [8], which deals with material breaches of treaties. The expression „individually" in paragraph (a) indicates that under these the circumstances, the performance of the obligation was owed to that State. This could occur under a bilateral agreement or a unilateral commitment, such as not to fish in a specific zone. It may also be the case under a general rule of international law, for example, in rules concerning the non-navigational uses of an international watercourse that may give rise to individual obligations as between one riparian State and another. Finally it could be the case under a multilateral treaty where states have specific obligations toward each other, as in the Vienna Convention on Diplomatic Relations [9]. Under Art. 42 paragraph (b) (i), one State may be „specially affected " even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States or the international community as a whole. The wrongful act may have particular adverse effects on one State or on a smaller number of States. „ For example a case of pollution of the high seas in breach of Art. 194 of the UN Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed " [10]. In that case, independently of any general interest of the States parties to the 1982 Convention for the Preservation of the Marine Environment, those coastal States parties should be considered as injured. Paragraph (b) (ii) deals with the breach of a special category of obligations which affects per se every other State to which the obligation is owed. A breach of the Limited Test Ban Treaty or the prohibition on sovereign territorial claims in the Antarctic Treaty may serve as examples [11].

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[7] Cf. *E. Brown Weiss*, Invoking State Responsibility in the Twenty-First Century, (96) AJIL 2002, pp. 798, p.799

[8] See Commentary , Art. 42, para. 4

[9] Cf. for these examples: Commentary, Art. 42 para. 6; Vienna Convention on Diplomatic Relations, 500 UNTS, p. 95

[10] Cf. Commentary, Art. 42, para. 12

[11] Cf. *E. Brown Weiss*, op. cit., AJIL 2002, p. 802; see to the examples of the disarmament and nuclear free zones treaties: Commentary, Art. 42, para.13

A very important innovation and potentially progressive development of international environmental law is strengthening of the concept of *erga omnes obligations* represented by Art. 48. According to this provision States can invoke responsibility for a breach of an obligation owed to the international community as a whole, even though the States had suffered no „injury" in the traditional use of that word [12].
Art. 48 titled „ Invocation of responsibility by a State *other than an injured State* " reads: „1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. 3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1".
As clarified by the commentary, the obligations in Art. 48 (1) (a) must apply between a group of States and have been established in some collective interest. They might concern the environment or security of a region, or a regional system for the protection of human rights [13]. This provision reflects the *SS. Wimbledon* case, in which the Permanent Court of International Justice granted standing to states party to a multilateral treaty even when some of them had not suffered direct injury [14].
Most innovative is the ruling that any State other than the injured State may invoke responsibility if the obligation in question was owed to „ *the international community as a whole*" (Art. 48, para. 1 (b)). As emphasized by the commentary [15], the provision intends to give effect to the judgment of the International Court of Justice in the *Barcelona Traction case*, where the Court at first drew an „essential distinction" between obligations owed to particular States, i.e. reciprocal obligations in the field of diplomatic protection that were actually at stake in this case and obligations „owed towards the international community as a whole" [16]. Regarding the latter the Court went on to state „ that it is [i]n view of the importance of the rights involved, [that] all States can be held to have a legal interest of *obligations ... erga omnes* " [17]. To facil-

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[12] In this sense also *E. Brown Weiss,* op. cit. , AJIL 2002, p. 803
[13] Commentary, Art. 48, para7
[14] SS „Wimbledon" (Germany v. UK, France, Italy, Japan), !923 PCIJ (ser. A) No. 1 at p.
[15] Commentary, Art. 48, para.8
[16] Barcelona Traction, Light and Power Company Limited, Second Phase, ICJ Reports 1970, p.3 , at p. 32 para. 33
[17] ICJ Reports 1970, p. 32 para. 33; for a comprehensive analysis of the Barcelona Traction dictum cf. *Ch.J. Tams*, Enforcing Obligations Erga Omnes in International Law, Cambridge 2005, pp. 117; pp. 162

itate the identification of this new category of obligations of erga omnes the Court referred by way of example to „the outlawing of acts of aggression and of genocide“ and to „the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination“ [18]. That these examples have erga omnes status and are widely accepted today is evidenced by Arts. 5 et seq. of the Rome Statute of the International Criminal Court [19]. More recently the Court has gone beyond these narrowly defined examples by applying the right of peoples to self-determination [20] or the rules of international humanitarian law [21] erga omnes. It is worth mentioning that following the dissenting opinion of Judge *Weeramantry* in the Gabèikovo-Nagymaros case the more generally, environmental obligations protecting the planetary welfare have been proposed as erga omnes obligations [22]. The Barcelona Traction dictum has been followed up till today by no less than eight other proceedings dealing indirectly with the erga omnes concept, such as in the orders or judgments in the Namibia, Nuclear Tests, Nicaragua, East Timor, Genocide, Gabèikovo, Armed Activities (Congo-Rwanda) and Israeli Wall cases [23]. Although the Barcelona Traction judgment has laid the basis for the recognition of the erga omnes concept the exact identification of these obligations is still problematic. Thus the question remains open if there is an interrelation between jus cogens and erga omnes obligations [24]. Nevertheless, the more important problem is how can States respond to erga omnes breaches and by which means can they be enforced ? Who has standing? Which countermeasures may apply ? All these problems have been debated very controversially within the ILC and are still under discussion in academic law and legal science circles. Until today States have not yet initiated ICJ proceedings based directly and only on violations of erga omnes obligations. That would be the „acid test of the erga omnes concept“ [25]. Even if all States had standing to institute ICJ proceedings, they would be unlikely to make frequent use of this right. On the other hand the absence of erga omnes claims manifests the uncertainty about rights of protection triggered by erga omnes breaches.

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[18] ICJ Reports 1970, p. 32 , para.34

[19] For the text of the Statute of 17 July 1998 cf. *Ch. Rosbaud/ O.Trifterer,* (eds.), Rome Statute of the International Criminal Court, Baden-Baden 2000

[20] East Timor case, ICJ Reports 1995, p. 102, para. 29; Israeli Wall Case, available at www.icj-cij.org., ,para.88

[21] For the „elementary considerations of humanity“ see: Israeli Wall Case, ibid., paras 155 and 157

[22] Gabèikovo-Nagymaros Case, Separate Opinion Weeramantry, ICJ Reports1997, pp. 117 - 118

[23] See *Ch. J. Tams*, op.cit., p. 97

[24] *S. Kadelbach,* Jus Cogens, Obligations Erga Omnes and other Rules - The Identification of Fundamental Norms, in: *Ch. Tomuschat / J.M. Thouvenin (eds.)*, The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes, Leiden/Boston 2006, pp.21; p.27

[25] Cf. *Ch. J. Tams*, op.cit.,p.158 with further references.

As to the aspect of identifying erga omnes obligations, their sources and their distinction from other customary law rules and jus cogens, reference is made to the recent and comprehensive analysis of *Ch. J. Tams* [26]. In his thesis he states: „ Obligations erga omnes derive from general international law. Despite considerable academic (and some jurisprudential) support attempts to introduce a treaty-based counterpart, so-called „obligations erga omnes partes" are of limited usefulness. Whether and by which means States can respond against treaty breaches largely depends on an interpretation of the relevant treaty. Obligations erga omnes differ from other obligations of international law in that they protect *values of heightened importance*. Although the threshold requirement of importance is inherently vague and conceptually unsatisfactory, the identification of obligations erga omnes will usually not present unsurmountable problems. Obligations arising under (substantive) jus cogens rules are by necessity, valid erga omnes; as consequence the considerable State practice and jurisprudence relating to peremptory norms can be used as evidence. Outside that core of obligations erga omnes, the ICJs jurisprudence and international practice indicate a number of factors by reference to which the importance of a particular obligation can be assessed. These notably include its recognition in widely ratified treaties, the practice of UN organs, or the character of other States responses against breaches " [27].

With regard to the judicial enforcement problem of a *jus standi* the following can be said: when a State is empowered to respond to a breach of an erga omnes obligation by claiming such substantive right it is a logical consequence that the State also has a standing to enforce it by procedural means. Otherwise the erga omnes concept would only be of theoretical value. Thus *Judge Ammoun* in his separate opinion to the Barcelona Traction dictum expressly endorsed the right of States to institute ICJ proceedings in response to breaches affecting „the principles of an international or humane nature, translated into imperative legal norms (jus cogens)" [28].

To sum up, it seems fair to say that by recognizing the legal interests of all States in the observance of obligations erga omnes, the Court in Barcelona Traction and further Jurisdiction since 1970 [29], indeed seemed to accept that all States – even in the absence of any special treaty-based clause – have standing to respond to erga omnes breaches by instituting ICJ proceedings [30]. As this is a matter of ICJ institutional law, the Court can only exercise juris-

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[26] *Ch. J. Tams*, Enforcing Obligations Erga Omnes in International Law, Cambridge 2005, for instance Chapter 4, pp.117

[27] *Ch. J. Tams*, op. cit., p. 311, theses 2 - 4

[28] Cf. ICJ Reports 1970, p.325. See also ibid., p. 326 where Judge Ammoun invoked the 1962 South West Africa Case judgment, as well as a number of international conventions providing for a general right to respond to violations, in support.

[29] As to the problem and existence of the actio popularis cf. their joint Disssenting Opinion of Judges Ortyeama, Dillard, Jiminez de Arechaga and Sir Humphrey Waldock to the Nuclear Test case, ICJ Reports 1974, 253

[30] S*o Ch. J. Tams*, op. cit., p.164 et seq; p. 310 - 311

diction where both parties to the proceedings have consented to it. This limited scope of jurisdiction, especially in disputes on breaches of customary obligations, such as obligations erga omnes, severely restricts the effectiveness of ICJ enforcement [31]. Perhaps, outside the Court the instrument of countermeasures may act as a couterbalance.

IV. Relevance of erga omnes obligations in environmental law

Today the existence of the general erga omnes concept in international environmental law, as well as its indispensability is beyond question. It may preserve and protect the fundamental values and elements of the environment which are necessary and indispensable for the survival of mankind. In particular, the *Global Commons* beyond national jurisdiction need preservation. The existance of the erga omnes concept is manifested by a countless number of environmental conventions and agreements. Multiple declarations, resolutions, programmes, law principles, soft-law rules and environmental concepts established by international State practice as well as by international jurisdiction are evidence that obligations erga omnes have evolved into an essential part of environmental international customary law. Thus, the erga omnes concept is reflected in numerous environmental Conventions implementing the general aim of the concepts of „common concern", „common interest" or „common heritage of mankind". For reasons of clarification it is worth noting that the concept of „common concern" does not connote specific rules and obligations, but in the form of „political directive" it establishes the general basis for the concerned international community to act[32]. Included in this group of treaties, to name but a few, are: the Antarctic Treaty (1959) and its relevant Protocols; the Bonn Convention on the Conservation of Migratory Species of Wild Animals (1979), the World Charter for Nature (1982), the Convention for the Protection of the Ozone Layer (1985) with Protocol and the UN Framework Convention on Climate Change (1992) and its Protocol [33].
Under the group of „common heritage of mankind" treaties, understood in the narrower meaning [34], are the UN Convention on the Law of the Sea (1982) and the Moon Treaty (1979). Elements of common heritage are also incorporated into the World Heritage Convention for the Protection of the World Cultural and Natural Heritage (1972), as well as in the Convention on Biological Diversity (1992).
Numerous basic principles and concepts in international environmental law are stressed and implemented by State practice by way of resolutions and programmes and serve as evidence that the existence of the erga omnes

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[31] Cf. *Ch. J.Tams*, op. cit. p.160; see under footnote 8 further references on the discussion of that problem.
[32] Thus *A. Kiss / D. Shelton*, International Environmental Law, 3rd ed., Ardsley, New York 2004, p. 34
[33] To further examples of Coventions cf. *A.Kiss / D. Shelton*, op. cit. pp.31.
[34] To this approach cf. *P.W. Birnie / A. E. Boyle*, International Law and the Environment, Oxford, 2002, p.143

concept is today well recognized. Thus Principle 21 of the Stockholm Declaration (1972) as well as Principle 2 of the Rio Declaration (1992) determine, that activities of the State „within their jurisdiction or control do not cause damage to the environment of other States or of *areas beyond* the limits of national jurisdiction". Thereby, the protection of the Global Commons should be assured. Aditionally the concept of „common but shared responsibility" in Art. 13 of the Rio Declaration, which is a special element of the general concept of „sustainable development" could be used as an instrument to provide evidence of the existence of erga omnes obligations. The Montevideo and Johannesburg Results, as well as the Millenium Declaration (2000) and the World Summit Outcome (2005) have always stressed the importance of the common concern idea. As shown before, the ILC in Art. 48 (1)(b) has now codified the erga omnes concept and incorporated international State practice. Insofar, the statement of the Special Rapporteur *James Crawford* in his Third Report on State Responsibility is worth quoting. He says: „If there are no specific, identifiable victims (as may be the case with certain obligations erga omnes in the environmental law field, e.g. those involving injury to the „global commons"), and if restitution is materially impossible, then other States may be limited to seeking cessation, satisfaction and assurances against repetition. Again, however, these are significant in themselves, and any State party to the relevant collective obligation should be entitled to invoke responsibility in these respects" [35].

In this context it may be recalled that in former times, to prove the existence and importance of erga omnes obligations, practicing environmental lawyers, politicians and academicians referred to Art. 19 para. 3(d) of the provisionally adopted ILC Draft on State Responsibility (1996). This provision explicitly determined „a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas" as an international crime [36]. After very long and controversial debates within the ILC, this Article was deleted as it had the potential to destroy the project as a whole. In the end, a „depenalization" of State Responsibility was generally welcomed [37]. Given the recognition of the erga omnes obligations as *international customary law*, this could be applied for the protection, and in particular, the preservation of the global commons, such as the high seas, the seabed beyond national jurisdiction, the atmosphere, outer space, the Antarctic, or to living resources found in or passing through those areas. Even if special treaty regulations exist to rule such cases, the erga omnes concept could provide helpful guidance in situations

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[35] Cf. *James Crawford*, Third report on State responsibility, ILC, Fifty-second session August 2000, A/CN.4/507/Add.4,p.8 under para.379

[36] To the Text of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on First Reading 1996, cf. *J. Crawford*, The International Law Commission?s Articles on State Responsibility, Introduction, Text and Commentaries, Cambridge 2003, pp. 348 et seq.

[37] Cf. to the deliberations in ILC, *J. Crawford*, op.cit. pp. 20, 36

of necessary interpretation of the norms concerned or be useful in dispute settlement situations. If there is no special treaty norm or a gap exists – as for instance in the scope of climate change at the moment - the concept perhaps could bring a certain pressure on the responsible politicians to speed up their activities to renew and amend the climate change instruments.
Nevertheless, the legal tool of „erga omnes obligation" can never reset the sometimes lack of will and preparedness on behalf of the States to promote the protection of goods which belong to the community as a whole. On the other hand the erga omnes concept in general is very valuable in giving incentives and creating more consciousness for the governance and protection of Global Commons. This is evidenced in an example given by *James Crawford* in the context of Art. 48 (1)(a). Accordingly „a group of States with rainforests may undertake an obligation for the protection and the preservation of the rainforests not only for their own benefit but also for the benefit of the international community at large" [38]. Although this example shows the progressive and innovative approach in Art. 48 on one hand, on the other it also manifests the dilemma that in practice at least for now, and in only relatively few cases the obligations concerned could be invoked. First, the applicant State is likely to have been induced to bring a claim because it had suffered some form of material damage and not because it primarily wishes to bring a claim to protect the interests of the international community. Nevertheless, this opportunity is now possible and would hopefully be used in future. Second the greatest hindrance for an effective application is evident in the fact that *only States* can invoke the rights of Art. 48, which is inherent in the whole structure of the State responsibility concept. Further problems may arise in the identification of the „violator" i.e. the respondent State and in limiting a possible abuse of an „actio popularis" [39]. Concerning the consequences of cessation of wrongful acts and assurances and guarantees of non-repetition (Art. 48 (2)(a), these may not create a greater problem. However, the question to whom compensation should be paid and how to evaluate the potential damage to the Global Commons still requires a qualified answer. Nevertheless, by not requiring an injury, Art. 48 represents an innovative and progressive approach, which could serve as a model for the further development of protecting common goods. Thus a reasonable basis for future recognition of the rights of actors other than states to invoke State responsibility in these circumstances could be given. Non-state actors who may similarly find it difficult to show direct injury should have an easier time in asserting competence to claim for breaches of obligations owed to the international community as a whole. *Edith Brown Weiss* convincingly shows that there is precedent at the national level for the right of groups and individuals to raise claims for breaches of environmental obligations even though the group or individual has not been directly injured [40].

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[38] Cf. *J. Crawford*, op.cit., p.43
[39] To the „actio popularis concept" and various international law cases, decided in particular by the GATT Dispute Settlement Panel and the WTO Appellate Body, see *P. Sands*, Principles of International Environmental Law, Cambridge 2003, pp. 187
[40] Cf. *E. Brown Weiss*, Invoking State Responsibility in the Twenty-First Century, (96) AJIL 2002, p. 803, pp.808 et seq.

The instrument of *countermeasures* is covered in Chapter II Articles 49 – 54. Art. 49 determines generally that countermeasures can only be taken against a State which is responsible for an internationally wrongful act and must permit the resumption of performance of the obligations in question. Art. 50 states that countermeasures shall not affect: „(a) the obligation to refrain from the threat or use of force, (b) obligations for the protection of fundamental human rights and (c) obligations of a humanitarian character prohibiting reprisals or (d) other obligations under peremptory norms of general international law ". The countermeasures must satisfy the requirements of necessity and proportionality (Art. 51). Measures taken by States other than an injured State, i.e. in the situation of erga omnes obligations, are incorporated in Art. 54 saying: „This Chapter does not prejudice the right of any State, entitled under article 48 paragraph 1 to invoke the responsibility of another State to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached ". Admittedly numerous problems with regard to countermeasures are still unsolved [41]. Therefore Art. 54 is unduly restrictive and unfortunate.
Part IV of the Draft on State Responsibility containing General Provisions, is less relevant.

V. International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (State Liability)

Parallel to the State responsibility programme, the ILC in 1970 decided to give separate treatment to „questions relating to responsibility arising out of the performance of certain lawful activities" as based on the so-called *responsibility for risk*. Under the guidance of the special Rapporteur *P. S. Rao* of India, the Commission completed a series of *Draft articles on „Prevention of Transboundary Harm from Hazardous Activities"*, and adopted a comprehensive commentary in 2001 [42]. The provisions are formulated in the form of legally binding articles giving instructions for action. Sometimes they can be characterized as statements to the prevention principle. The 19 articles are of special interest for the protection of the environment and comprehensively incorporate a long-standing State practice as well as the most recent trends of international environmental law in preventing environmental risks.

a) Prevention of Transboundary Harm from Hazardous Activities

The Draft articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities posing a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty deals with the phase prior to the situation where significant harm or damage might actually occur [43].

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[41] See *Ch. J. Tams*, op. cit., p.311

[42] Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at pp. 148. For the text and the comprehensive commentary see UN Doc. A/56/10 (2001). Cf. further YILC 2001, vol. II, Part Two. The documents are also available online at http://www.un.org/law/ilc

[43] Cf. Report of the International Law Commission, ibid., Commentary at p. 148, para.1

According to Art. 1, „the present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences." Through the wording „not prohibited by international law" the topic is separated from State Responsibility. „Territorial jurisdiction" is the dominant criterion to limit the scope of the articles. This is evidenced by the definition of „State of origin" (Art. 2 (d)) which „means the State in the territory or otherwise under the jurisdiction or control of which the activities …. are planned or are carried out" and by the definition of „transboundary harm". The latter „means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin …" (Art.2 (c)).
This clarifies that harm to the Global Commons outside the territory and beyond national jurisdiction is not addressed. Nevertheless, outer space or high sea areas can be ruled by the application of the „Flag State Principle [44]. Art. 2 (a) defines the concept of the „risk of causing significant transboundary harm "as encompassing a low probability of causing disastrous transboundary harm [45] or a high probability of causing significant transboundary harm ". Because of the interrelationship between the concepts „risk" and „harm" and their relationship to the adjective „significant", the commission chose the right structural approach in defining the two concepts in the expression „risk of causing transboundary harm". The term „significant" is not without ambiguity and a determination has to be made in each specific case [46]. „Harm" means harm caused to persons, property or the environment" (Art. 2 (b)) and thus, the special value of the environment per se is emphasized. Art. 3 „Prevention" is based on the fundamental principle of „sic utere tuo ut alienum non laedas"[47] and is in its very nature a statement of principle. It reads: „The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". As stressed by the commentary, the obligation to take preventive or minimization measures is one of due diligence [48]. This article together with Art. 4 prescribing a cooperation in good faith with other States and with competent international organizations, provides the basic foundation for the articles on prevention. Concerning the implementation of the provisions of the present articles, „States concerned shall take the necessary legislative, administrative or other action, including the establishment of suitable monitoring mechanisms" (Art. 5). Art. 6 sets forth the fundamental principle that the prior authorization of a State is required for activities which involve a risk, i.e. governmental authorities must grant permission to conduct an activity covered

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[44] Cf. Commentary, p. 151, para. 10

[45] This is normally the characteristic of ultrahazardous activities

[46] According to the commentary, p. 152, para. 4 „ it is to be understood that „significant" is something more than „detectable" but need not to be at the level of „serious" „substantial". The detrimental effects must be susceptible of being measured by factual and objective standards".

[47] Cf. to this principle *A. Rest,* International Protection of the Environment and Liability – The Legal Responsiblity of State and Individuals in Cases of Transfrontier Pollution - , Berlin, 1978, p. 116

by the provisions. Furthermore, it addresses changes of the activity and the review and termination of the authorization. An assessment of risk, in particular by an impact assessment is provided in Art. 7. Timely notification and information about the risk and its assessment (Art. 8), as well as consultations on preventive measures (Art.9) shall enable solutions based on an equitable balance of interests. In a detailed manner Art. 10 determines the various factors involved in an equitable balance of interests. Thus, the importance of the activity , taking into account its overall advantages of a social, economic and technical character for the State of origin must be compared in relation to the potential harm and disadvantages of the State likely to be affected (Art. 10 (b)). Subparagraph (c) compares the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibility of restoring the environment. The commentary explicitly stresses „ that it is neccessary to emphazise the particular importance of protection of the environment“ [49]. Having ruled the general exchange of information after an activity has been undertaken (Art. 12), the important information to the public is addressed (Art. 13). This article is inspired by new trends in international law, in general, and environmental law, in particular. It seeks to involve individuals as well as interest groups in decision-making processes by providing them with a chance to present their views [50]. The aspects of national security, industrial secrets and intellectual property which may limit information, are addressed in Art. 14. The non-discrimination principle is incorporated in Art. 15 stating: „... a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, [persons, natural or juridical], in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress“. Under „emergency preparedness“ the development of contingency plans is covered (Art. 17). The following provisions concern the notification of an emergency (Art.17), the relationship to other rules of international law (Art. 18) and the settlement of disputes concerning the interpretation or application of the present articles (Art. 19).
To sum up: the Draft articles are an excellent instrument offering various effective means for the prevention of transboundary harm from hazardous activities. They certainly can contribute to an enhanced protection of the environment.

b) Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities

Having finished the work on the prevention of transboundary harm, the ILC then turned to the question of liability for such harm. In August 2006 it adopted the *Draft principles on the allocation of loss in the case of trans-*

[48] Commentary, p. 154, para. 7
[49] Commentary, p.162, para. 5
[50] Commentary, p.165, para.3

boundary harm arising out of hazardous activities, with commentary[51]. The principles on liability provide guidelines for the creation of mechanisms to compensate victims of transboundary harm, particularly in cases of transboundary pollution. As guidelines they cannot impose liability directly but attempt to identify issues and suggest solutions to be implemented by unilateral State actions or agreements negotiated on a bilateral, regional, sectoral or global basis. A convention on liability for transboundary harm appeared unlikely to obtain wide ratification and thus the Commission decided in favour of a „non-binding declaration of draft principles" [52].

Principle 1 determines the scope of application nearly in the same way as Art. 1 of the Draft on Prevention but in less detailed wording. It states „The present draft articles apply to transboundary damage caused by hazardous activities not prohibited by international law". By defining „transboundary damage" as " damage caused to persons , property or the environment in the territory or in other places under the jurisdiction or control of a State, other than the State of origin" [53] the territorial criterion is emphasized. It clarifies that damage to the Global Commons is not covered. The term „not prohibited by international law" distinguishes the liability concept from the articles on State responsibility. The liability principles deal with other situations, for example , where a state acts in compliance with international norms but harm or damage nonetheless results inadvertently or because of factors beyond state control. The recommendatory character and somewhat limited scope of the principles enabled the Commission to adopt progressive and expansive substantive provisions that reflect developments in international practice in recent decades, as embodied in a host of international agreements, national and international decisions, national legislation, and the work of the UN Compensation Commission [54]. The definition of damage meaning „ significant damage caused to persons, property or the environment" (Principle 2 (a)) and the detailed list of elements of damage Subparagraphs (i)-(v) is broad and in keeping with these progressive developments. In addition to the general standard elements of „loss of life or personal injury" and „loss of or damage to property"[55], the list includes „ loss or damage by impairment of the environment", „the costs of reasonable measures of reinstatement of the property, or environment, including natural reresources" and „the costs of reasonable response measures". The „environment" includes, for this purpose, „natural resources, both abiatic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the charac-

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[51] Cf. Report of the International Law Commission on the Work of Its Fiftty-eight Session, UN GAOR, [61 st] Sess. Supp. No. 10 , at 110, 11; UN Doc A/61/10 (2006) [hereinafter Report 2006]

[52] For an excellent overview on the ILCs work cf. *M.J. Matheson*, The Fifty-eighth Session of the International Law Commission, (101) AJIL 2007, p. 407 et seq.; p.408

[53] Cf. Principle 2 (e)

[54] See *M.J. Matheson*, ibid., p. 410 with further references

[55] „including property which forms part of the cultural heritage" according to Principle 2 (a) (ii)

teristic aspects of the landscape"[56]. The commentary confirms that the principles apply, among other things, to loss of income deriving from any use of the environment [57], damage to the environment per se, including „loss of ecological or aesthetic values"[58] and reasonable costs of restoration of damaged or destroyed components of the environment or, where this is not possible, the introduction of the „equivalent of these components into the environment" [59]. The granting of claims concerning damage to the *environment per se* is very progressive and welcome. As stated by the commentary „this is damage … to the environment itself with or without simultaneously causing damage to persons or property and hence is independent of any damage to such persons or property. The broader reference to claims concerning the environment…thus not only builds upon trends that have already become prominent as part of recently concluded international liability regimes but opens up possibilities for further developments of the law for the protection of the environment per se"[60]. The earlier reluctance to accept liability for damage to the environment per se, without linking such damage to damage to persons or property is gradually disappearing. [61]. The definition of „victim" meaning „any natural or legal person or State that suffers damage" [62] is linked to the question of standing as emphasized by the commentary referring to numerous public interest litigation and national laws[63]. Principle 2 (g) also determines the „operator" as „ any person in command or control of the activity at the time the incident causing transboundary damage occurs". The general purposes of the present Draft Principles are twofold as expressed in Principle 3. The purpose is to ensure prompt and adequate compensation to victims suffering damage from transboundary harm and to preserve and protect the environment per se as a common resource of the community[64], „especially with respect to mitigation of damage to the environment and its restoration or reinstatement". Concerning the latter aspect the aim is not to restore or return the environment to its original state if the restoration measures and costs are disproportionate to the results desired, but instead to enable it to maintain its permanent functions[65]. Principle 4 calls on the State of origin to take all necessary measures „to ensure that prompt and adequate compensation is available„ to all victims. Such measures specifically include the imposition of liability – without proof of fault – on the *operator*, or where appropriate other person or entity, such as the owner, user

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[56] Cf. Principle 2 (b)
[57] Report 2006, Commentary to Principle 2, p. 129, para. 13
[58] Ibid. p. 129-130, para. 14
[59] Ibid. p. 130-131, para. 15
[60] Ibid. p.127-128, para. 11. To the numerous references in Literature, International Agreements and Italian Court decisions cf. Footnotes 342 and 343
[61] In this sense cf. Commentary , ibid., p.143, para. 8
[62] Principle 2 (f)
[63] Ibid., p. 136-138, paras. 30, 29
[64] Thus, the Commentary, ibid., p. 140, para. 1
[65] Ibid., p.142, para.7

or disposer [66]. The state is also called on to require the operator or other person or entity „to establish and maintain financial security such as insurance, bonds or other financial guarantees", and in „appropriate cases to require „the establishment of industry-wide funds at the national level" to provide compensation [67]. If these measures are insufficient, the state is urged to „ensure that additional financial resources are made available"[68]. Any conditions, limitations, or exceptions to the strict liability of the operator or other entities are to be consistent with ensuring prompt and adequate compensation, with the logical consequence that limits on the liability of one actor are to be accompanied by the imposition of corresponding financial responsibility on other entities. All these provisions represent the worldwide application of standards of tort liability and remedies found for instance in the legislation of numerous European Member States, in the U.S. and judicial precedent [69]. Through imposing liability on the operator, the classical State liability concept partially has been shifted into a civil liability concept. A similar approach is incorporated in the *IUCN Draft Convention on Compensation for Transfrontier Environmental Injuries* of 1976 [70].
To implement these measures, the State under Principle 6 (1) is called on to give its domestic judicial and administrative bodies the necesssary jurisdiction and competence and to ensure that they have „prompt, adequate and effective remedies available". Victims of transboundary damage are to be granted access to such remedies that are at least – according to the non-discrimination principle – equal to those given to victims suffering damage from the incident within the State of origin [71]. The state has discretion in deciding what form these remedies should take, and no particular level of compensation is guaranteed. However, victims must have an adequate opportunity to recover [72]. Principle 6 (4) acknowledges that states may satisfy the objective of providing adequate remedies to victims by „recourse to international claims settlement procedures" such as negotiated lump sum payments, international arbitral proceedings, or referral to international claims bodies such as the UN Compensation Commission [73], so long as the these procedures „are expeditious and involve minimal expenses". „Access to information relevant for the pursuance of remedies, including claims for compensation" is provided in Prin-

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[66] Cf. Principle 4 (2); see Commentary, 1bid., p. 154 – 155, para. 10
[67] See Principle 4 (3) and (4)
[68] Principle 4 (5)
[69] For further details and examples in national legislation cf. *A. Rest*, Convention on Compensation for Transfrontier Environmental Injuries – Draft with explanatory notes -, Berlin 1976, pp.38 et seq.
[70] To the text and commentary of the convention cf. *A. Rest*, ibid., Berlin 1976
[71] Cf. Principle 8 (2); to similar provisions on non-discriminatory access to judicial and other proceedings cf. Articles 5 and 15 of the Draft Prevention of Transboundary Harm from Hazardous Activities (2001)
[72] Cf. to the agreement on a lump-sum amount , Commentary to Principle 4, ibid., p. 154, para. 8
[73] Cf. Commentary , ibid., p. 176-177, paras. 10 and 11

ciple 6 (5). Principle 7 goes on to call for the conclusion of global, regional, or bilateral agreements on particular categories of hazardous activities that would include arrangements for industry or state funds to supply supplementary compensation in the event that the operator does not have sufficient financial resources to provide adequate compensation. Response measures going beyond compensation are contained in Principle 5. It provides that the State of origin shall promptly notify all states likely to be affected by an incident, and to „ensure that appropriate response measures are taken" with the involvement of the operator and reliance on „the best available scientific data and technology" [74]. „The State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them"[75].

To summarize: all of these substantive principles, taken as a whole, represent an important consolidation and development of recent advances in this field of State liability [76] and environmental protection.

c) UNEP Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment

Most recently, on 26th February 2010 the UNEP Governing Council/Global Ministerial Environment Forum at its eleventh special session in Bali adopted, inter alia, 14 *Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment* [77]. Parallel to the liability Guidelines, the Governing Council adopted 26 *Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters* [78]. According to the introductory remarks „the purpuse of the guidelines is to highlight core issues that States will have to resolve should they choose to draft domestic laws and regulations on liability, response action and compensation for damage caused by activities dangerous to the environment. The guidelines discuss key elements for possible inclusion in any such domestic legislation and offer specific textual formulations for possible adoption by legislative drafters. It is envisaged that they will be of assistance to, in particular, developing countries and countries with economics in transition, in devising, as they deem appropriate, domestic legislation or policy on liability,

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[74] The Commentary to Principle 5, at p.168, para. 4 states: „ The role of the State envisaged under the present draft principle is thus supplementary to the role asssigned to it under draft articles 16 and 17 of the Draft articles on Prevention, which deal with requirements of „emergency preparedness" and „notification of emergency".

[75] Cf. Principle 5 (c)

[76] In this sense also *M.J.Matheson*, The Fifthy-eight Session of the International Law Commission, (101) AJIL 2007, p.412

[77] Cf. Annex to decision UNEP GC SS.XI/4 II

[78] See Annex to decision UNEP GC SS.XI/4 I

response action and compensation". The guidelines are *voluntary* and do not set a precedent for the development of international law [79].
Guideline 1 determines that the „objective of the present guidelines is to provide guidance to States regarding domestic rules on liability, response action and compensation for damage caused by activities dangerous to the environment, taking into account the polluter pays principle." „They are not intended to apply to damages …that are covered by other domestic laws establishing special liability regimes or that principally relate to national defense, international security or natural disaster management"[80]. As to the definitions in Guideline 3 „the term „activity dangerous to the environment" means any activity or installation defined under domestic law". Thus it remains to the authority of the national legislator to determine the exact content of a „dangerous activity" and to distinguish it from the term „hazardous activity" as used in the Draft liability principles. The value of the environment per se is manifested by Guideline 8 (2) determining that „ domestic law may allow claims for compensation for environmental damages" as well as by the definition of „environmental damage". The term „means an adverse or negative effect on the environment that: (a) is measurable taking into account scientifically established baselines recognized by a public authority that take into account any other human-induced variation and natural variation; (b) is significant according to especially determined factors [81]. The whole liability and response action concept is centered on the *operator*. It is defined identically as the term „operator" in the Draft liability principles [82]. Thus, Guideline 5 (1) states: „ The operator should be strictly liable for damage caused by activities dangerous to the environment". Para. 2 reads: „Without prejudice to paragraph 1, any person should be liable for damage caused or contributed to by not complying with applicable statutory or regulatory requirements or through wrongful, intentional reckless or negligent acts or omissions. A violation of a specific statutory obligation should be considered fault per se". This wording reflects the basis of civil tort law. The following Guidelines rule the aspects of exoneration from liability, joint and several liability, claims for compensation and other claims, financial limits, financial guarantees and time limits for presentation of claims. „Claims with foreign elements: applicable law" are addressed by Guideline 13: „… any claim for compensation that raises a choice-of-law issue should be decided in accordance with the law of the place in which the damage occurred, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred". This welcomed provision refers to and takes into account the „*more favourable law principle*" which playes an important role in transfrontier environmental law

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[79] Cf. Decision SS.XI/4 II under para. 1
[80] Guideline 2 (2)
[81] To the various factors cf. Guideline 3 (3) (b) (i) - (v)
[82] The term „operator" means any person or persons, entitiy or entities in command or control of the activity, or any part thereof at the time of the incident", cf. Guideline 3 (4)

and numerous court decisions [83]. Guideline 14 (1) is of special practical importance ruling: „Domestic law should provide for lists of hazardous substances and their threshold quantities, activities or installations dangerous to the environment, to make apparent the nature and scope of operators risk of environmental liability and thereby strengthen the insurability of the risk of damage". Such lists should be exhaustive rather than indicative [84]. To achieve this aim by permanently updating the lists is a tremendous but albeit indispensable task for the national legislator.

d) UNEP Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters

Concerning the *Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters*, it can be stated that these reflect approaches in a more detailed form that are incorporated in the aforementioned Draft on Prevention of Transboundary Harm and the Draft on Liability. Therefore only three important Guidelines on access to justice will be emphazised here. Guideline 18 aims at improving the standing of the potential injured or damaged person. It says: „States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice". Guideline 22 calls on States „to ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies". Guideline 26 is more future-oriented according to which „States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate".

VI. Summarizing Conclusion

Numerous recent projects in the field of general international and national responsibility and liability law, in particular in the scope of environmental law, are evidence of the progress made with regard to the necessary implementation and enforcement of such law provisions. Thus, the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, being completed after nearly 45 years, as well as the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* and the *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, taken as a whole, represent an important consolidation of a long-running international law practice and the development of recent advances in the fields concerned. Although the rules are sometimes very general in character and still need to be made concrete, they serve as an excellent basis for

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[83] For the details of this principle and to numerous court decisions cf. *A.Rest*, The More Favourable Law Principle in Transfrontier Environmental Law – A Means of Strengthening the Protection of the Individual ? -, Berlin, 1980

[84] Cf. Guideline 14 (2)

an enhanced protection of the environment and sustainable development and will contribute to a more effective implementation and enforcement of law as postulated in the recent *UN Rule of Law Programme*. The most recent *UNEP Guideline for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment* based on the „operators liability concept", as well as the *Guideline for the development of national legislation on access to information, public participation and access to justice in environmental matters*, both enable a better protection of the injured victim and of the environment. It is worth emphasizing that all projects mentioned stress the importance of the specific values of the environment and call upon States to protect the *environment per se*. This is a very progressive development reflecting an emerging trend in environmental law. Even more progressive and innovative is the approach in Art. 48 of the *Draft on State Responsiblity* which has incorporated the concept of *erga omnes obligations*. This provision entitles any State, even if it is not injured itself, to invoke State responsibility if an obligation is breached and owed to the international community as a whole. This is of eminent importance and a welcomed step for the protection of *Global Commons* and Common Heritage being as they are not protected under a special treaty regime. Admittedly numerous questions concerning *standing* and *countermeasures* still require answering. Until today, no claim concerning a direct obligation erga omnes - which would be the „acid test" - has been brought to the International Court of Justice. As only States have access to this institution, there is need to also grant *access to non-state actors*, in particular NGOs, environmental interest groups and even individuals. It cannot be expected that the ICJ will change its proceedings. Thus for instance, the broader competence of the *Permanent Court of Arbitration* in environmental matters [85] as well as the importance of the various *regional Human Right Courts* [86] and other judicial instruments may be recalled.

All told, it now depends on the preparedness and willingness of the States to fill the numerous progressive legal instruments with life, to enforce them, and to promote and further develop national as well as international law for the protection of the environment.

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[85] To the jurisdiction and decisions of various international and national courts and of the Permanent Court of Arbitration cf. *A. Rest*, Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration, in: *A. Postiglione (ed.)*, The role of the judiciary in the implementation and enforcement of environmental law, Bruxelles 2008, p.459 et seq.: *T. Stephens*, International Courts and Environmental Protection, Cambridge 2009, p. 30 et seq.

[86] *E. Brown Weiss*, Invoking State Responsibility in the Twenty-First Century, (96) AJIL 2002, pp. 805 et seq.

CAPITOLO 5

“A CIVIL SOCIETY PERSPECTIVE”

ADVANCING GLOBAL ENVIRONMENTAL GOVERNANCE: A CIVIL SOCIETY PERSPECTIVE

Prof Dr Klaus Bosselmann, University of Auckland
Director, New Zealand Centre for Environmental law
IUCN Commission on Environmental Law
Chair, Ethics Specialist Group

Abstract:

Most theories consider the nation state as the cornerstone of global governance. While there is considerable scope for locating new institutions and structures around traditional notions of international law and governance, a strong case could be made for moving beyond such nomenclature in order to overcome conceptual and practical dichotomies between governmental and non-governmental institutions.

From a civil society perspective, more emphasis should be placed on unifying paradigms such as the universality of human rights, the protection of global commons and the interconnectedness of planetary ecosystems. A suitable starting-point for more effective global environmental governance is, therefore, the integrity of ecological systems. This is best expressed in the Earth Charter. The Earth Charter is the first document created by global civil society and endorsed by international organizations (e.g. UNESCO, IUCN) and several states. Its origins, contents and legal status deserve full recognition of the international community (of states, institutions, citizens and scholars).

The paper explores some of the Earth Charter's implications for the development of effective global environmental governance.

OFFSHORE DISASTER
THE GULF OIL SPILL FROM THE DEEPWATER HORIZON

Alessandro Giannì, Direttore Campagne, Greenpeace Italia, Roma

Foreword

On April 20, 2010, a British Petroleum (BP) offshore oil rig exploded, killing 11 workers on the rig and spilling tens of thousands of barrels of crude oil into the Gulf of Mexico. BP's Deepwater Horizon oil well, located 5,000 feet below the ocean's surface, leaked 5 million barrels (205.8 million gallons) of crude oil into Gulf Coast, with devastating consequences for Gulf Coast communities and the fragile wetlands, bayous, and coastal waters on which they depend. The spill, which was estimated to be more than 130 miles long and 70 miles wide, has impacted the coastlines of Louisiana, Alabama, Mississippi, and Florida. The crude oil released from BP's leak threates hundreds of species in the Gulf of Mexico, including critical habitat for endangered species, such as whales, sea turtles, and migratory birds.

The oil plume from the Gulf oil spill is expected to cause long term damage to the coastlines of Louisiana, Alabama, Mississippi, and Florida and to irreversibly alter the Gulf Coast ecosystem. The Gulf Coast is home to pristine ecosystems and some of the nation's most prized wildlife refuges and conservation areas. The Gulf of Mexico provides habitat for hundreds of species, and each year, approximately five million migratory birds make their way through the region. According to The Times-Picayune, the threatened area is a vital wintering or resting spot for more than 70 percent of the nation's waterfowl including the brown pelican, Louisiana's state bird. In addition, many endangered species rely on Gulf waters, and fragile populations of North Atlantic bluefin tuna, four species of sea turtles, six whale species, sharks, and dolphins are in the spill's impact zone.

According to Associated Press reports, damages from the Gulf oil spill could amount to billions of dollars. This disaster will undoubtedly exact a severe toll on the coastline industries that rely on Gulf Waters, such as Louisiana's oyster and shrimp harvest. Just in Louisiana alone, annual retail seafood sales are $1.8 billion, recreational fishing generates approximately $1 billion in retail sales, and saltwater sport fishing generates about $757 million each year, in addition to the thousands of jobs supported by these industries.

Ecological Impacts of BP's Gulf Oil Spill

The long-term ecological impacts of the Gulf oil spill have yet to be fully understood: following the leaking from BP's Deepwater Horizon rig 5 million barrels (205.8 million gallons) of crude oil were released into the Gulf of Mexico. The

spill, which at one point was estimated to be more than 130 miles long and 70 miles wide, impacted the coastlines of Louisiana, Alabama, Mississippi, and Florida, and threatened hundreds of species in the Gulf of Mexico, including endangered and rare species.

The fragile Gulf ecosystem

Unfortunately, the fragile Gulf of Mexico ecosystem is no stranger to oil spills. After Hurricanes Katrina and Rita several oil rigs sunk into Gulf waters, many were damaged, others completely lost at sea. In the Gulf region, oil spills have proven to be a regular consequence of nations' continued reliance on fossil fuels. No one knows the cumulative impact that repeated oil spills will have on the Gulf ecosystem, but experts predict that the effects of the BP's Gulf oil spill will be pervasive. Looking at examples from the past, a recent study reports that Alaska wildlife are still ingesting oil from the Exxon Valdez spill over twenty years later.
The timing of BP's Gulf oil spill was particularly devastating to the Gulf ecosystem because it happened at peak spawning and nesting season for many species of fish, birds, turtles and marine mammals. Many species remain in long-established breeding areas during this time, some of which are in the direct path of the oil spill. Similarly, the gulf coast provides millions of acres of coastal wetlands and marshes that are critical habitat for migrating birds, including the brown pelican, Louisiana's state bird, and numerous designated "Important Bird Areas" where endangered birds are known to take refuge.
Although no one can predict the full impact of the spill on the Gulf, Gulf coast beaches, marshes, and bayous, the sheer number of rare and endangered species in the area create an urgent need to protect the fragile Gulf ecosystem from further damage from fossil fuel pollution. As oil continues spreading through the water column, and pollution continues travelling up the food chain, several important and endangered species are at risk.

At risk species:

North Atlantic Bluefin Tuna: On the brink of extinction due to overfishing: the bluefin tuna spawn in the Gulf of Mexico between mid-April and mid-June.
Sea Turtles: Several species of sea turtles, including endangered species, live, migrate and breed in the Gulf region, especially in the warm waters south of Mississippi.
Sharks: Shark species spawning in the Gulf are known to raise their young in the grassbeds south of the Chandeleur Islands, very close to the oil spill.
Whales and Dolphins: The BP Gulf oil spill poses a unique threat to marine mammals, such as whales and dolphins that must reach the water's surface, even if it is covered by oil slick, to breathe. The oil slick itself, as well as the air toxins created by the oil spill, will pose serious threats to the known population of sperm whales in the spill area, and could contaminate food sources.
Brown Pelicans: The BP Gulf oil spill has affected the barrier island nesting grounds and coastal feeding areas of the brown pelican, Louisiana's state bird. Although no longer listed as endangered species, the oil could pose a threat to the pelican's reproductive success.

Shorebirds: Many shorebirds migrate and nest along the Gulf coastline, and are particularly vulnerable to shoreline oil pollution. The oil spill could affect the beaches and coastal waters that shorebirds such as terns, sandpipers, egrets and other shorebirds use to feed, migrate and nest. In addition, some migratory shorebirds stop on Gulf islands to rest and feed during migration.

Impact on fisheries

The ecological damage from the BP Gulf oil spill could also extend to the commercial fisheries and shrimp farms that extend along the Gulf coast. Oyster farms are particularly sensitive to oil pollution because oysters are filter feeders, and likely to ingest oil particles as well as chemical dispersants and oil-soaked plankton. Any seafood that is harvested from the Gulf Coast will need to be monitored closely to ensure that it is safe for human consumption.

Economic Impacts of the Gulf Oil Spill

The economic costs of the Gulf oil spill has being counted in billions of dollars, according to recent news reports, and will hit coastline industries, such as Louisiana's oyster and shrimp industry, the hardest. Tourism along the Gulf Coast is suffering, and will continue to do so, as visitors who normally flock to the coast for recreation, fishing, swimming and boating will be deterred by cleanup efforts, beach closures, and the fear of the long term effects caused by the spill. For those who live and work on the coast, the impact will be most severe, as coastal fisheries are the lifeblood of these communities.

BP Deepwater Horizon vs. Clean Energy

When the true costs associated with the Gulf oil spill involving BP's Deepwater Horizon drilling rig are tallied, the spill could end up costing BP and taxpayers billions. When we compare the costs of offshore drilling to the cost of developing a clean energy future, it becomes clear that fossil fuel development and the environmental damage it causes, far outweigh the costs of clean, renewable energy development. For example, the American Wind Energy Association (AWEA) states that wind power development can cost around $2 million per megawatt (MW) of generating capacity installed. And new electric vehicles that can run on renewable energy are entering the market and cost in the range of $30,000–40,000. If we compare that to the estimated costs of the Gulf oil spill cleanup we find:

The cleanup costs are estimated to cost $6 million per day. Investments in wind power at that rate would result in 3MW of new wind capacity each day, which is enough to power up to 900 homes. This same amount of money could buy 180 Nissan Leafs or 150 Chevrolet Volts, either of which could run on renewable energy instead of oil.

Some experts predict that damages from the Gulf oil spill could be as much as $12 billion. These costs are equal to 6GW of installed wind capacity, enough to power 1.8 million homes (more than the entire states of Louisiana and Mississippi combined). $12 billion is enough to purchase 370,000 Nissan

Leafs, which would eliminate the need for 55 million barrels of oil over their lifetime.

BP'S COST SAVING MEASURES

BP could have installed a remote shut-off device, a safety feature that is required in Brazil and Norway to prevent catastrophic spills like the Deepwater Horizon disaster. In fact, the U.S. Minerals Management Service (MMS) considered mandating the use of remote switches since at least 2000, but the oil industry lobbied against it, and in 2003 MMS stated, "[remote] systems are not recommended because they tend to be very costly." In fact, just last year BP lobbied U.S. policymakers to forgo requiring additional safety and security requirements for offshore drilling projects.

The estimated cost of a remote shut-off device is $500,000. To put this number in perspective, BP held a multi-year lease on the Deepwater Horizon oil rig for $181 million per year, or roughly $500,000 per day. In addition, during the first quarter of 2010, BP made $6 billion in profit and spent $3.5 million on lobbying that same quarter.

GULF COAST FISHING AND TOURISM

The Gulf oil spill has put the billions of dollars generated from commercial fishing and beach tourism along the Gulf Coast at risk. Significant quantities of oil reaching land forced closures of oyster beds and shrimp operations, which generate about $962 million in annual retail sales in Louisiana.

In addition to lost tourism revenues, the oil spill threatens oysters, menhaden and other marsh-dwelling fish, shrimp, and blue crab. Louisiana's coastline is home to some of the most productive oyster farms in the country. Oyster farms are particularly sensitive to oil pollution because oysters are filter feeders, and likely to ingest oil particles and chemical dispersants. Similarly, coastal marshes are critical habitat for Louisiana shrimp and blue crab — both staples of the seafood industry.

THE SOLUTIONS

1. »»The Gulf oil spill and other catastrophes like it are predictable outcomes of our reliance on fossil fuels. We must change course.
2. »»Put stricter regulations in place for the coal and oil industries to make them safer and more accountable for the damage they do.
3. »»Place a ban on new offshore drilling.
4. »»There should be an immediate end to all subsidies for fossil fuels and nuclear energy and investments should be focused on clean renewable energy, efficiency technology, and infrastructure development.

CITIZENS' INITIATIVE INTRODUCED BY THE LISBON TREATY: CIVIL SOCIETY AS LINCHPIN IN THE EU FRAMEWORK

Isabelle Larmuseau
President of the Flemish Environmental Law Association (VVOR)
Initiator of the Network European Environmental Lawyers (NEEL)

I. The 'European Citizens' Initiative' as first transnational instrument of participatory democracy

In the context of growing environmental degradation, the need to create effective environmental governance structures is receiving increased attention. Environmental governance is usually executed by the legislative, executive and judicial authorities. In this respect, the role of the civil society as linchpin in the development of environmental governance, urgently needs more attention, as the future of this planet largely depends on the lifestyle and ambitions of the citizens.

Citizens who want to make themselves heard, now dispose of a new *'participatory democracy'* tool, introduced in the European Union. The new instrument is called the 'European Citizens' Initiative' (ECI) and allows at least one million citizens from at least one third of EU Member States to invite the European Commission to bring forward legislative proposals in areas where the Commission has the power to do so.[1]

Whereas the functioning of the European Union shall continue to be founded on '*representative democracy'* and European citizens will continue to be directly represented at Union level in the European Parliament, the ECI widens up the sphere of public debate, allowing citizens to participate more intensively in the democratic life of the Union. Whilst the Commission retains its right of initiative and will therefore not be bound to make a proposal following a citizens' initiative, it is committed to carefully examine all initiatives that fall within the framework of its powers in order to consider whether a new policy proposal would be appropriate.

This new provision is a significant step forward in the democratic life of the Union. It provides a singular opportunity to bring the Union closer to the citizens and to foster greater cross-border debate about EU policy issues, by bringing citizens from a range of countries together in supporting one specific issue.

[1] This right of initiative may not be confused with the right to petition. A petition is directed to the Parliament in its role as the direct representative of citizens at Union level, while a citizens' initiative is directed to the Commission. Whereas a petition is a method of remonstrance, usually focusing on perceived infringements of European Law, an initiative is a grassroots proposal for new legislation.

II. Procedures and conditions required for the ECI

The rejected *Treaty establishing a Constitution for Europe* already included a limited indirect initiative right. The proposal of introducing the European Citizens' Initiative (ECI) was that one million citizens, from minimal numbers of different member states, could invite the European Commission, to consider any proposal '*on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution'*.

A similar scheme under the same name, European Citizens' Initiative (ECI), has been put forward in the Lisbon Treaty, which entered into force on 1 December 2009. The key features of the citizens' initiative are enshrined in Article 11(4) of the Treaty on European Union, providing that *'not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.'*

Article 11(4) Treaty on European Union and Article 24 Treaty on the Functioning of the European Union provide that the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which citizens must come, shall be determined in a Regulation to be adopted by the European Parliament and the Council on a proposal from the European Commission.

The Commission launched a broad public consultation with the adoption of a Green Paper on 11 November 2009. The consultation elicited 330 replies. A public hearing was held for all respondents to the Green Paper on 22 February 2010 in Brussels. On 31 March 2010, the European Commission adopted the proposal for a Regulation on the citizens' initiative.[2] The Council and Parliament will hopefully reach final agreement on the ECI before the end of this year, to allow the first initiatives to be brought forward in 2011.

The following requirements were deemed necessary in order to ensure that the instrument remains credible. Some fear that these requirements are too restrictive and risk killing the ECI before it is born:

- An initiative must be backed by at least one million citizens from at least one third of the Member States.

[2] Proposal for a Regulation of the European Parliament and of the Council on the citizens' initiative, 31 March 2010, COM (2010) 119 final.

- In each of these Member States, the minimum number of signatures required will be calculated by multiplying the number of Members of the European Parliament from that country by a factor of 750.[3]
- The minimum age for signatories will be the age at which people are entitled to vote in the European Parliament elections.[4]
- Proposed initiatives must be registered on an online register made available by the Commission.
- Registration can be refused if the initiative is manifestly against the fundamental values of the EU.
- There are no restrictions as to how statements of support should be collected, but national authorities will have to check whether online collection systems comply with certain security and technical requirements and this verification must be done within three months.
- The organiser has one year to collect the necessary signatures.
- The organiser must ask the Commission to check the admissibility of the initiative once 300.000 signatures have been gathered from three Member States.

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[3] The minimum number of signatories per Member State is mentioned in Annex I of the Proposal for a Regulation on the citizens' initiative:
Austria: 14.250
Belgium: 16.500
Bulgaria: 13.500
Cyprus: 4.500
Czech republic: 16.500
Denmark: 9.750
Estonia: 4.500
Finland: 9.750
France: 55.500
Germany: 72.000
Greece: 16.500
Hungary: 16.500
Ireland: 9.000
Italy: 54.750
Latvia: 6.750
Lithuania: 9.000
Luxembourg: 4.500
Malta: 4.500
Netherlands: 19.500
Poland: 38.250
Portugal: 16.500
Romania: 24.750
Slovakia: 9.750
Slovenia: 6.000
Spain: 40.500m
Sweden: 15.000
United Kingdom: 54.750

[4] The age of 18 in all Member States except Austria (the age of 16).

- The Commission will have two months to decide whether the initiative falls within its powers and is in an area where legislation is possible. This admissibility test will not prejudge the Commission's decision on the substance of the initiative.
- If the initiative is judged admissible and once the signatures have been verified, the Commission will have four months to examine the initiative itself. It will then have to decide whether to make a legislative proposal, to follow up the issue for example with a study, or to not take any further action. It will then have to explain its reasoning in a public document.

III. End of the concept of the 'makeable society'?

The concept of the 'makeable society' implies that the society can be shaped in what is seen as a desirable way through government measures. Political participation can lead to the end of the concept of a 'makeable society': through its participation, the society 'makes itself' and the authorities (only) have to take care of a correct translation of this process into legislation and regulation.[5] Anyway, thanks to the 'experiment'[6] of the ECI, more and better research on the relation/balance between 'representative democracy' and 'participatory democracy' will be made possible.

IV. The civil society will 'make' the ECI

The Network European Environmental Lawyers (NEEL) and the Flemish Environmental Law Association (VVOR) already created a website (see www.eucitizensinitiative.eu and www.europeesburgerinitiatief.be) in order to 'make'/support environment-related citizens' initiatives.

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[5] E. LANCKSWEERDT, *Handboek burgerparticipatie – Een juridische verkenning toegespitst op het lokale bestuursniveau, met verdere beschouwingen over de ontwikkelingsmogelijkheden van onze democratie*, Brugge, Die Keure, 2009, nr. 1092.

[6] Given the absence of any experience at EU level with this form of participatory democracy instrument, a review clause is provided for, requiring that the Commission should report on the implementation of the ECI-Regulation after five years (see Article 21 of the Proposal for a Regulation on the citizens' initiative).

THE CASE FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

Stephen Hockman QC
Six Pump Court Temple, Londra
ICE Coalition-Coalizione per una Corte Internazionale dell'Ambiente, Londra, Regno Unito

1. The Nature of the Problem

In his Foreword to the first edition of "Principles of International Environmental Law" by Philippe Sands, Sir Robert Jennings QC, sometime Whewell Professor of International Law in the University of Cambridge, and former President of the International Court of Justice (ICJ), wrote: *"It is a trite observation that environmental problems, although they closely affect municipal laws, are essentially international; and that the main structure of control can therefore be no other than that of international law".*[1] Jennings wrote those words in 1995, many years before the potential effects of climate change had transformed public perceptions of this topic. And yet, even today, after all the many millions of words that have been written on the subject of climate change and its causes and consequences, many may think that we are hardly any further forward in establishing, in Jennings' words, a *"structure of control"*. Indeed, Jennings' observation that the problem is mainly to be solved by legal means might now seem, not so much *"trite",* as unorthodox, bold or even eccentric. Of course no-one doubts the scale of the problem. When Jennings wrote in 1995, the problems were perceived mostly in terms of major cases of environmental pollution which were regarded as having potentially international implications. Perhaps the most infamous case of environmental liability on the part of a trans-national corporation occurred on 2nd December 1983 in Bhopal, India, when Union Carbide, a multi-national company incorporated in the United States, released 40 tonnes of toxic methyl isocyanate from its plant, killing 3,500 people and affecting over 200,000 others. Proceedings brought in the United States courts having failed, the injured parties settled the ensuing litigation in the Indian courts for some $470 million (an average of about $15,000 per deceased person).

Scroll forward to 2010, and, the potential effects of climate change have of course been given an altogether new and critical focus by a number of recent developments, including reports by the Intergovernmental Panel on Climate

[1] Sands, P., 2003. *Principles of International Environmental Law*. 2nd Edition. Cambridge University Press. Page 187

Change and by Nicholas Stern on behalf of the UK Government. Few now deny the urgency of a solution to these problems, though even fewer claim to have to hand a serious and comprehensive set of solutions. Statements emanating from international summits only confirm the diplomatic efforts involved in attaining linguistic (not to mention policy) consensus.

In these circumstances, it seems at least timely (a) to review those international legal instruments which already exist to facilitate a solution to the problem, and (b) to suggest that the creation of a new instrument deserves consideration.

I do entirely acknowledge that to many distinguished international environmental lawyers this idea is still heterodox. Indeed I understand that Robbie Jennings himself may have disclaimed support for the idea. On the other hand, Jennings himself in the Foreword which I have already mentioned pointed out that what is urgently needed today is a more general realisation in the contemporary global situation of the need to create a true international society. And if the inspiration of former President of the International Court of Justice is insufficient, let me also cite the views of our last and perhaps most distinguished Senior Law Lord, Lord Bingham of Cornhill, who in his recent book, 'The Rule of Law'[2] lamented the fact that the compulsory jurisdiction of the ICJ is accepted by only a minority of member states of the United Nations, and by only one of the five permanent members of the Security Council (namely the United Kingdom). Lord Bingham states: "*if the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order".*

2. Dispute Resolution Systems

I now turn to review some of the existing provisions and mechanisms for dispute resolution. The oldest legal institution dedicated to resolving international disputes is the Permanent Court of Arbitration (PCA), established at The Hague by intergovernmental agreement in 1899. The PCA has jurisdiction over disputes when at least one party is a state (or an organisation of states) and when both parties to the dispute expressly agree to submit their dispute for resolution. It has been suggested in the past that the Permanent Court of Arbitration might be an interim forum for resolving international environmental disputes. In 2001 the PCA adopted some 'optional rules' for arbitration of disputes relating to the environment and/or natural resources. However, as already indicated, at least one party to any dispute must be a state, the Court has no compulsory jurisdiction and, importantly, its decisions are not, as I understand, made available for public inspection.

Turning to the ICJ, this was established (as a successor to the earlier Permanent Court of International Justice) in 1945. In this case, jurisdiction depends on whether two or more states have consented to its jurisdiction. While the ICJ may accept cases that are environmentally related, only states have standing. The ICJ established within its structure in 1993 a Chamber specif-

[2] Bingham, T., 2010. *The Rule Of Law.* Allen Lane. Pages 128-9.

ically to deal with environmental matters. However, no state has ever submitted a dispute to that environmental Chamber and the Chamber has now been disbanded. On rare occasions, the ICJ has heard a case in an environmental context, including most recently the case of the *Pulp Mills on the River Uruguay*, in which Argentina brought proceedings against Uruguay based upon the allegedly unlawful construction of two pulp mills on the river Uruguay which are said to jeopardise conservation of the river environment. The case has been fully argued (with British Counsel on either side) and a decision is awaited.

In 1992, representatives from 176 States and several thousand NGO's (non-governmental organisations) met in Brazil for the United Nations Conference on Environment and Development. At this Conference, often referred to as the Earth Summit, there was adopted the Rio Declaration on Environment and Development, Principle 10 of which provides that *"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 available"*.

The Rio Declaration of 1992 (and accompanying Framework Convention on Climate Change) famously led on to the Kyoto protocol signed in Japan on 11th December 1997. This Protocol, for the first time, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels. It had been agreed that the Kyoto Protocol would only come into force when countries emitting 55% of the world's carbon dioxide had proceeded to ratification. The 55% trigger was finally met in February 2005 after ratification by Russia. The protocol was ratified by Australia in December 2007, leaving the United States of America as the only developed nation not to have ratified. However, constraints upon enforcement remain in the view of many, a significant weakness.

Another important method of dispute resolution is international arbitration. An environmental treaty can provide for the submission of disputes to arbitration by mutual consent of the relevant parties, and cases like the *Trail Smelter* case in 1935 reflect the historical importance played in inter-state cases by arbitration in the development of international environmental law. Also relevant is the ITLOS regime.

At the European level, the European Union has, for many years, legislated on environmental matters; and compliance with European environmental law is regulated by the European Commission, with disputes being referable to the European Court of Justice in Luxembourg. Within the European Union, there was established from January 2005 an emissions trading scheme, based on the allocation and trade of carbon allowances throughout the Union. Significantly too, in 1998, a number of states, principally European, entered into the so-called *"Aarhus Convention on Information, Public Participation in Decision-making and Access to Justice in Environmental Matters",* ratified by the UK in February 2005. Recent studies (including for instance, a report by working group under the chairmanship of Sullivan J) suggest that a number of member states within the European Union may not be fully in compliance

with Aarhus' requirements concerning access to justice. The Aarhus Compliance Committee has recently heard just such a complaint against the United Kingdom. Moreover, the Aarhus Convention of course only applies to its signatory states. There is no global equivalent.

An important dispute resolution mechanism not directly relating to the environment arises under the procedures of the World Trade Organisation, created by an inter-governmental conference in 1994 for the purpose of furthering free trade and facilitating implementation and operation of international trading agreements. Under these arrangements, difficult questions have arisen as to whether the WTO can regulate issues that do not themselves involve trade, but which have a direct impact on conditions of trade, for example the establishment of health, safety, or environmental standards for goods or agricultural produce traded internationally. As Boyle and Redgwell point out in 'International Law and the Environment'[3], in these areas, other international bodies with primary responsibility for international regulation already exist, and there are no hard and fast jurisdictional boundaries between these organisations and the WTO. It is therefore possible, they say, to advance policy arguments both for and against the WTO taking on a more expansive role in regard to the regulation of such matters. As the authors state, it might well make sense to link negotiations on trade issues with setting standards for reducing CO2 emissions and promoting energy efficiency, since it is far from obvious why a country which subsidises pollution by failing to take action on climate change should reap the benefits of free trade. In a fascinating lecture last Easter at the Commonwealth Law Conference in Hong Kong, Professor Gillian Triggs of the University of Sydney showed how the internal WTO dispute resolution mechanism including its Appellate body based in Geneva, grapples with these issues. There is however, no provision for panels adjudicating on environmental cases to have specific environmental expertise, although there is a requirement that panels adjudicating on financial matters should have the necessary financial services expertise.

3. Institutional Reform

There is no doubt that the notion of international reform and restructuring is now beginning to gather momentum. Even before the recent Copenhagen summit held under the UNFCCC, Chancellor Merkel of Germany, and President Sarkozy of France, in a letter to the U.N. Secretary General, called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to progress the creation of a World Environmental Organisation (WEO). More recently, last month, ministers and officials from more than 135 nations converged on the Indonesian island of Bali for the United Nations Environment Program (UNEP) annual meeting. UNEP was established by the UN general assembly in 1972, with headquarters in Nairobi in order to

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[3] Birnie, P., A. Boyle, and C. Redgwell, 2009. *International Law and the Environment*. 3rd Edition. Oxford University Press. Page 79

enhance cooperation in Environmental matters. Its Executive Director, Achim Steiner, has stated that environmental governance reform was a key part of the discussions at this annual meeting and that governments raised the possibility of a World Environment Organisation. He said that a high level ministerial group had been established to continue the process with greater focus and urgency and that "*the status quo is no longer an option*". This ministerial group is chaired by representatives from Kenya and Italy.

As Philippe Hugon has said in 'After Copenhagen: An International Environmental Agency Needed'[4] a WEO might unite four parties in its drive to advance the environmental cause: scientists, entrepreneurs, governments, and environmental organisations. Firstly, the scientific community needs a forum where it can voice its concerns and recommendations. Secondly, participation by business enterprises is equally important since they have to put into practice the recommendations made by the scientists. A third party at the conference table would obviously consist of the respective governments which have to put in place the requisite legislative and tax-related measures to protect the environment. Thirdly, a WEO would also do well to integrate existing environmental organisations, which have done much to promote environmentally-conscious thinking worldwide.

Those of us who support the case for an ICE do not in any way exclude the notion that an ICE could sit alongside or be part of a WEO. Mr Steiner said that a WEO could be modelled on the WTO which as already mentioned, has its own dispute resolution mechanisms. The same point was made some months ago by former Euro-Commissioner Lord (Leon) Brittan. A WEO might be granted jurisdiction to refer cases to an ICE and indeed it might be provided that complaints intended to be referred to the ICE should first be referred to the WEO for consideration and investigation.

The topic of international governance arrangements in the environmental and sustainable development fields seems likely to feature strongly on the agenda for the forthcoming conference in 2012 –"Rio +20" at which I hope the ICE coalition will be represented.

4. A New Proposal

In these circumstances, it may be thought that the establishment of an International Court for the Environment (ICE) is a valuable goal that would add to the body of jurisprudence in international environmental law and provide a forum both for states and for non-state entities. Ideally, as explained in more detail below, the arrangements for such a Court would include (i) an international convention on the right to a healthy environment, with broad coverage; (ii) direct access by NGO's and private parties as well as states; (iii) transparency in proceedings; (iv) a scientific body to assess technical issues; and (v) a mecha-

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[4] Hugon, P., 2010. *The Need for an International Environmental Agency* . IRIS. Available at: http://www.atlantic-community.org/index/items/view/The_Need_for_an_International_Environmental_Agency

nism (perhaps to be developed by the Court itself) to avoid forum shopping.
Let me acknowledge at once that this is not a wholly new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment. The proposals then considered defined the functions of the Court as including:
(i) adjudicating upon significant environmental disputes involving the responsibility of members of the international community;
(ii) adjudicating upon disputes between private and public parties with an appreciable magnitude (at the discretion of the President of the Court);
(iii) ordering emergency, injunctive and preventative measures as necessary;
(iv) mediating and arbitrating environmental disputes;
(v) instituting investigations, where necessary, to address environmental problems of international significance.
A similar proposal has been under consideration by a Foundation based in Rome (see also below).
Moreover, it may be thought that the potential benefits of an International Court for the Environment, particularly for the global business community, would include:
(i) a centralised system accessible to a range of actors;
(ii) the enhancement of the body of law regarding international environmental issues;
(iii) consistency in judicial resolution of international environmental disputes;
(iv) increased focus on preventative measures;
(v) global environmental standards of care; and perhaps also
(vi) facilitation and enforcement of international environmental treaties.
The establishment of such a Court might be thought particularly appropriate at the present time, just as the public generally are becoming so much more aware of environmental problems and of the culpability of those who cause them. As Michael Mason has said, "it is the intersection of individual rights and responsibilities with inter-State obligations that offers concrete possibilities for citizen participation in Global decision making."[5]
Such a Court could also influence the world business community to develop risk management programmes and improve present practices which would produce a corresponding reduction in the risk of environmental catastrophe.
As to the feasibility of any such proposal, I will say more in a moment, but an encouraging precedent is surely the establishment, after sustained pressure by NGOs and others of the International Criminal Court, different though that is from the notion of an ICE as we have been developing it to date.

5. Possible Objections

I would like next to discuss some of the objections to this proposal which have been raised in the course of discussions. I would classify these objections

[5] Mason, M, 2006. *Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law.* Global Governance 12 (2006) 283-303.

under three headings. Firstly the question is raised, what would be the law to be applied by such a body; secondly, why is it necessary for there to be a new body when existing juridical or dispute resolution institutions already exist to undertake the role envisage for an ICE; thirdly, what would be the point of establishing a new international judicial body such as an ICE if it was unable to enforce its decisions.

As to the first issue, my tentative submission would be that international law is already sufficiently developed to enable the court itself to decide upon the appropriate law to apply to a dispute. Clearly if the dispute arises in an area to which a specific bilateral or multilateral treaty relates, then the terms of that treaty will be influential or decisive but on other issues one might expect and indeed hope that the court itself would develop the law. I refer again to the approach to the future of international relations advocated by Sir Robert Jennings and by Lord Bingham, and venture to suggest that the objectives that they have identified are too important to be left solely to the grindingly slow process of inter-state discussion.

As to the second issue, I do not in any way rule out the idea that one or more of the existing institutions grappling with some of these problems might enlarge its role. Indeed as I have indicated the WTO Appellate body has moved in this direction. But it seems doubtful to me that any individual existing institution will be able to assume a role of the kind which we envisage for an ICE. Appropriately and understandably, an international institution such as the ICJ, with an established and hugely distinguished reputation, is content to rest upon its established jurisdictional limits and does not feel it necessary or appropriate to argue for or even consider a possible expansion of those limits.

As to the third issue, there is an interesting answer to this objection in the textbook which I used in Cambridge in 1966 called 'An Introduction to International Law' by J. G. Starke.[6] "*Assuming however that it be a fact that international law suffers from the complete absence of organised external force, would such circumstance necessarily derogate from its legal character. In this connection, there is a helpful comparison to be made between international law and the canon law, the law of the Catholic Church. The comparison is the more striking in the early history of the law of nations when the binding force of both systems was founded to some extent upon the concept of the "law of nature". The canon law is, like international law, unsupported by organised external force, although there are certain punishments for breach of its rules, for example, excommunication and the refusal of sacraments. But generally the canon law is obeyed because as a practical matter the Catholic society is agreeable to abide by its rules. This indicates that international law is not exceptional in its lack of organised external force… In other words the problem of the binding force of international law ultimately resolves itself into a problem no different from that of the obligatory character of law in general".*

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[6] Starke, J. G., 1963. *An Introduction to International Law.* 5th Edition. Butterworths. Pages 28-29

6. The early stage ICE

I now turn to consider how one might move towards the establishment of an ICE. I acknowledge that establishing a court at the international level will be a difficult task which will almost certainly require an international treaty. To get to that stage will also be likely to require a campaign over a number of years. To that end there has been established the ICE Coalition, a company limited by guarantee, to which many enthusiasts, young and old, have already lent their support.

There are two points however to make in relation to this first stage of the effort. The first is as to the work already done in this field; the second is as to how, ahead of reaching the ultimate goal of a court, the ICE proposal might be advanced in the meantime.

As to the first point, it is worth taking note of the considerable work already done in this field by other organisations with aims broadly similar to or consistent with the ICE Coalition. For example, an organisation called ICEF, in Rome, has for a number of years being looking at the possibility of creating an ICE. It is to be hoped that cooperation with organisations such as ICEF and with other sympathetic bodies will enable the ICE campaign to move forward swiftly. I shall shortly be speaking at an ICEF event in Rome, alongside the Rt Hon Lord Justice Robert Carnwath, perhaps our most distinguished environmental lawyer at judicial level.

As to the second point, one possibility to consider is that, en route to the ultimate goal, the ICE is constituted as something less than a fully mandated international court, more akin to an arbitral tribunal, providing declaratory relief and dispute resolution services to those who agree to submit to its jurisdiction. It is envisaged that, on this approach, the ICE would from the outset be able to perform the role of an arbitral tribunal – providing declaratory clarification and adjudication and general dispute resolution to those who agree on an ad hoc basis, or by prior agreement, to submit to its jurisdiction. States, NGOs, corporations and individuals would all be able to agree to use and have access to the ICE. This role requires no international treaty; it merely requires the establishment of the body, it being proffered to potentially interested parties as means of resolving disputes in environmental matters, and their agreement to use it. The ICE might well sit at a number of different locations.

It is also envisaged that this straightforward arbitral tribunal model would be able to perform a valuable role as the dispute resolution institution of choice under specific international agreements. For example, Article 14 of the UNFCCC, adopted also *mutatis mutandis* in the Kyoto Protocol, provides that dispute resolution is to be by way of reference of the dispute to the ICJ or by arbitration by a procedure to be agreed by the parties. A problem with this is that, as discussed earlier, the ICJ allows only states to have standing. As to the arbitration option under Article 14, there has been no agreement as to what the arbitration procedure should be. The ICE Coalition envisages the ICE as being able to fill this gap in the legal architecture of the climate change agreements, including any successor agreement reached in Mexico or subsequently.

7. The ultimate goal

Ultimately, it is envisaged that the ICE might be mandated as the international environmental tribunal. On the basis that the ICE will, on the interim approach set out above, be offering its services to a wide cross-section of the international governmental, non-governmental and business communities, and on the basis that this creates a positive view of the ICE in the policy debate, the final step of mandating the ICE as the international environmental tribunal might not be so controversial a step as it would otherwise seem to be. It may indeed be that the ICE, by that stage, has become in any event the default port of call for the resolution of international environmental issues requiring clarification or in dispute. This is of course, however, a best case scenario, and it could be on the other hand, that the preparatory effect of an "interim" ICE is minimal.

The ICE, as an international court, could, on this longer term view, sit above and adjudicate on disputes arising out of the UN "environmental" treaties, including the UN Convention on Biological Diversity 1992 and the UN Framework Convention on Climate Change 1992, the Kyoto Protocol (and any successor text to Kyoto and addition or amendment to the UNFCCC that is agreed at the post-Copenhagen Conference of the Parties (COP) in 2010), the UN Convention on the Law of the Sea 1982, any other applicable UN environmental law and, in addition, customary international law. The aim might be for it to incorporate all of the work of the existing tribunals under the existing UN environment treaties (e.g. the Kyoto Protocol Enforcement Branch). However, to the extent that any such incorporation is not possible or not possible to start with, there could be a *"carve out"* of the ICE's jurisdiction so as to prevent overlap with these existing bodies. The aim would be, ultimately, to achieve one single court dealing with all UN environmental law. The additional aim would be for the consolidation of the various environment-related treaties to be incorporated into one single document, the interpretation of which would be within the ICE's jurisdiction.

In addition, it is envisaged that the ICE could provide a judicial review function in respect of environmental decisions made by bodies involved in the interpretation of international environmental obligations – e.g. the Kyoto Enforcement Branch, or any successor or replacement institution established by the COPs under the UNFCCC Kyoto processes; the WTO; and the International Finance Corporation (IFC) and its interpretation of the Equator Principles.[7]

A possible additional feature of the ICE might be the establishment of specialist panels – e.g. relating to aviation or shipping or extractive industries. This feature could be present in both the interim (arbitral tribunal) version and in the final version of the ICE.

Depending on the views of signatory states, there might be a restriction to investigate only the "most serious" breaches – in line with a similar restriction upon the International Criminal Court's jurisdiction. Equally, there might well

[7] See Kingsbury, B. and others, 2005. *The emergence of global Administrative Law.*

be a restriction of the remedies available to non-State actors purely to declaratory relief.
The sanctions imposed could include declaratory relief, fines and, along the lines of the EU Environmental Liability Directive, sanctions of restoration and rehabilitation of damaged habitats. The ICE could also be empowered to hand down declarations of incompatibility as regards Signatory State legislation where it conflicts with the UN environmental rules. In addition it could sanction Signatory States for failures to permit enforcement of judgments. There would also be provision for interim measures, specifically, injunctions, enforceable in Signatory States.
It is suggested that the ICE would produce a half-yearly or annual report listing its activities and possibly naming and shaming wrongdoers (be they those who have breached the law or Signatory States which permit failures to enforce judgments). It is also suggested the ICE has a panel of environmental experts to assist it.

8. Recent steps

The proposals set out above have been the subject of considerable discussion over the past few years, including at a symposium on "Climate Change and the New World Order" in November 2008, at the British Library, hosted by my Chambers at 6 Pump Court, Temple – and a seminar on *A Case for an International Court for the Environment* hosted by the ICE Coalition and Global Policy, and chaired by Lord Anthony Giddens at the LSE in November 2009. More recently, the ICE Coalition has met with the Legal Counsel to the UN Secretary General in New York. It has also lobbied and made a presentation at COP 15 at Copenhagen in December 2009. I have been fortunate enough to have the opportunity to talk about the project in the 8th Steinkraus Cohen lecture to the United Nations Association and in a presentation to the World Bar Conference at (where the proposal received the endorsement of Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales). A draft Protocol setting out the "constitutional rules" of an ICE is in the course of preparation.

9. Overall conclusion

Many may feel that some of these ideas are very idealistic, but 100 years ago the same would have been said of the idea of the UN itself. For further details of the ICE Coalition, please see www.environmentcourt.com. It is to be hoped that support will be forthcoming. At stake is our very survival.

BIOPOLICY: INTERNATIONAL COURT OF THE ENVIRONMENT A PRE-REQUISITE FOR BUILDING A GREEN SOCIETY

Professor Agni Vlavianos Arvanitis
President and Founder, Biopolitics International Organisation,
10 Tim. Vassou, Athens 11521, Greece
e-mail: bios@otenet.gr www.biopolitics.gr

One of Ancient Rome's most outstanding and enduring contributions to modern civilisation was the creation of the Roman Law, which largely still remains timely. Today, an Italian judge proposes and has strived for years to implement a vision for the creation of an International Court of the Environment, a vision which the Biopolitics International Organisation (B.I.O). has always supported. We have also always emphasized that, instead of relying on a punitive function, it is essential for the International Court of the Environment to develop as an institution that can provide new guidelines and set standards for international cooperation and understanding by overcoming the negative prototypes of the past. A beacon, conveying the needed values to help society put an end to the crisis that has resulted in our economic and environmental downfall and to empower a new structure of hope.

The world has been struck by a tsunami of epic proportions; we are witnessing simultaneous crises affecting both the global economy and the global environment. The financial crisis has lead to the loss of jobs and income, unavailability of credit, and economic stagnation. On the environmental front, issues of concern include climate change, a declining resource base and pollution of the air, water and soil. Numerous species of plants and animals are becoming extinct, and fish are disappearing from our oceans. These problems are all inter-related and resolving them will require an unprecedented level of international cooperation. The dual crises are also an unprecedented opportunity to rethink our values, adopt new ethics and build a "Green Society," a society of environmental harmony and the preservation of life.

In this effort, sound global environmental governance is key. Environmental and economic threats are growing because enlightened leadership is in scarcity in the world today. Effective environmental governance can spur environmental and economic progress by creating the context for change. This requires committed individuals, who can challenge traditional notions of governance with progressive participatory techniques through multi-stakeholder dialogue, systems thinking, and inclusive cross-cultural processes. Priority needs to be given to "green" models for curbing unemployment, eradicating poverty,

protecting biodiversity, and promoting clean energy, education, international cooperation and intercultural dialogue. Priority also needs to be given to a new dimension of profit; not profit in terms of money only, but also in terms of values and of ways of rebuilding society.

These elements, however, are like the branches of a tree. Without the right ethical and legislative framework, the tree cannot bear fruit. This framework can be provided by the International Court of the Environment Foundation and by all concerned educators, leaders and decision-makers who see the need for new mechanisms to protect the environment and ensure sustainable development.

For the past 25 years, B.I.O. acts as a driving force to inspire the necessary paradigms for change. We strive to "plant" new ideas and catalyse cooperation by mobilising the collective talent of our network in 151 countries. Through innovative projects and programmes in "biopolicy," we help to implement worldwide action for sustainable development and peace.

Global governance with environmental sensitivity and vision can encourage action-oriented programmes between governments, business and civil society. Technological developments provide numerous opportunities for the control of emissions from a wide range of sources, and for the remediation of waste sites and polluted waters. Nanotechnology revolutionises the development of "green" products and processes that minimise the production of undesirable by-products. Hydrogen energy production from algae adds new dimensions to the renewable energy sector. Cleaner production and low carbon technologies contribute to climate change mitigation and offer a win-win scenario for businesses everywhere. The concept of "zero-emission" cities brings new hope in urban management, while "green jobs" in areas as diverse as tourism, agriculture and transport improve quality of life, curb unemployment and boost the development of strategies for sustainable livelihoods. Moreover, progressive educational models, such as the International University for the Bio-Environment (I.U.B.E.) launched by B.I.O. in 1990, can help to inspire policy-makers with an environmental vision. The I.U.B.E.'s latest project is an extensive e-learning programme, which comprises more than 20 courses and is carried out in cooperation with 119 countries. This programme makes available a wealth of material and resources online, placing environmental education at the fingertips of every concerned citizen.

Improving our response to worldwide environmental harms also requires institutional support and coordination to implement international environmental agreements and enhance national and global environmental policy making. Biodiplomacy – international cooperation in environmental protection – can provide the needed momentum in this direction, infusing society with new values and leading to responsible and committed leadership.

It is therefore essential that we fully support the efforts of Honorary President Judge Conso and Director & Founder Judge Postiglione to create the necessary institutional framework for enforcing and protecting sustainable development. I hope that this conference will lay fertile ground for the further growth of this vision, and will encourage global environmental governance development as a vital tool for inspiring the needed societal change.

FINAL OUTLINE FOR AN INTERNATIONAL ENVIRONMENTAL COURT

By Ph.D. Eduardo A. Pigretti
Universidad de Buenos Aires

1. Preliminary Words

A long way has been followed since Judge Amedeo Postiglione resolved, many years ago, to become the leader of an international movement with the purpose of forming an international court for environmental issues.
In a short time, such purpose was taken up by the Court of Cassation of Italy and the initiative gave rise to special meetings in multiple places -among other- meetings in Rome, Castel Gandolfo, Tokyo, Florence, Rio de Janeiro and New York during this year.
Politicians and scholars sent their comments and articles regarding this issue, which was summarized in several books giving rise to a true philosophy on the issue.
Perhaps one of the best summaries of the positions adopted by international experts of Argentina, Australia, Brazil, Canada, Czechoslovakia, Chile, Colombia, Denmark, Philippines, France, Japan, Great Britain, Greece, Ireland, Italy, Yugoslavia, Luxemburg, Mexico, the Netherlands, Peru, Germany, Spain, Switzerland, Hungary, Uruguay and the United States of America has been the work: *Per un Tribunale Internazionale del' Ambiente*, which summarizes all the works filed at the meeting held in Rome between April 21 and 24, 1989.
Among the multiple works performed, that of Ph.D. Graciela Berra Estrada should be emphasized. Such work proposes a regulation to rule the international court life (See Page 59: *Per un Tribunale Internazionale del' Ambiente*, DOTT, A. GIUFRÉ Editor. Milan. 1989).
Without contravening such guidelines, it is high time that the final design of the court be resolved, without prejudice to acknowledging that a court has its own life once it is established, and thus changes and adjustments are necessary and also impossible to avoid.
We devote this work to such purpose.

2. Project Defenders and Opponents

Before continuing towards the final design of our court, it shall be noted that the idea has not had final approval yet, especially for the interests of the nations that believe they are in fault regarding the environment and, consequently, expect to be punished by such court.
In fact, some authors -influenced by this issue- did not deem convenient to

provide full adhesion to such court, while the tenor of their writings makes us think that it is a "political" position impeding them to adhere in whole to the ideas of this so much qualified purpose. We regret those desertions based mostly upon a kind of legitimate patriotism by such erudite authors, who, nevertheless, we still expect to correct their position for the good reasons that are still exposed in favor of the thesis of this court.

3. Conclusions of the International Scientific Seminar held in Florence (May, 1991)

We cannot forget to state -among the multiple progresses that the international scientific doctrine has produced- the conclusion reached in Florence on the date aforementioned. Such conclusions were oriented to the need to constitute an international environmental agency and create an international court as well.

Section 10 of such declaration will at least be transcribed into this document, hoping that it will become true in the substantive international laws based upon the conclusions of this congress.

Section 10 is worded as follows:

"International Environmental Court. An "International Environmental Court" shall be set up as permanent body of the "United Nations".

"Court Organization. The Court shall be made up by 15 independent judges, appointed by the General Assembly of the United Nations from a list filed by the Secretary General."

"Judges shall remain in office for a term of 7 years and may be re-elected."

"The President of the Court shall directly be appointed by the General Assembly of the United Nations and may be re-elected."

"Judges shall be empowered with absolute independence as regards their States of origin and they shall receive a fee to be supported by the budget of the United Nations."

"Duties. The Court duties shall be:

"a) To protect the environment, as a fundamental human right, on behalf of the international community."

"b) To resolve any dispute within court scope as regards the international environment, which may involve the responsibility of States regarding the international community and which is not resolved through conciliation or arbitration within a term of 18 months."

"c) To issue a decision on any dispute regarding damages to the environment, caused by private or state subjects, including the States in which it is presumed that, due to the extension, characteristics and type of damages, they affect fundamental interests to safeguard and protect the human environment on Earth."

"d) To adopt urgent and preventive measures in the event of any ecologic disaster involving the international community."

"e) To provide, upon request of United Nations bodies and other members of the international community, recommendations regarding important issues concerning the environment at worldwide level."

"f) To exercise functions of arbitration, upon request, without prejudice to the

judicial role of the Court."

"g) To carry out, upon request, research and inspections, with the assistance of independent technicians and scientific bodies, in the event of risks or damages to the environment and *ex officio* if deemed necessary and urgent."

Preliminary judgments. A national court may require the Court to issue a preliminary judgment on the nature -whether national or international- of an issue which has been filed with it."

"Court Procedure. The Court procedure shall provide that:

"a) Court hearings shall be public."

"b) All parties shall be entitled to defense."

"c) A judgment shall establish the grounds therefor and same shall be final."

"d) Civil compensation shall include a temporary or final interdiction, or an order stating that the party against whom judgment shall be applied, undertakes to pay the cost of restoration of the damage caused to the environment to the extent possible, and otherwise, to compensate damages, paying a settled amount to the World Environment Fund."

"e) Compliance with the judgments shall be entrusted to the Security Council of the United Nations."

"The Court shall hold session with 5 judges. The President of the Court shall appoint the judge to chair the hearing and the reporting judge."

"Procedural Rules. The Court shall set forth its own rules and shall determine its own procedures."

"Legitimacy. The following may file a claim with the Court:

"a) natural persons;"

"b) environmental non-governmental bodies;"

"c) States;"

"d) supra-national organizations, such as the EC;

"e) International bodies depending on the United Nations and individual bodies thereof."

"The legal action of a natural person or environmental non-governmental organization shall be subject to two conditions: a) that a prior claim has been filed with the national courts, having been declared non-admissible for lack of legitimacy under the relevant national laws, or that the case has been dismissed for being deemed unfounded and without due grounds or evidence; and b) that the level of admissibility not exclusively referring to legitimacy admitted pursuant to the relevant general international principles regarding the proposed issue be exceeded, (the case of prior admissibility shall be resolved by the Environmental International Court and such decision shall be final and not subject to appeal)".

"Natural persons or organizations may file a claim for violation of human rights against the environment based on the fact that they have been impeded access to information, they have not been able to participate in the processes of decision making regarding environmental issues or filing an action, or for gross or serious risks for the environment or damages of international significance caused by any person in violation of the international law."

"Punishments and Penalties. Should the Court render a decision in favor of a natural person or organization, it shall adopt any measure deemed necessary to remedy the right infringed, instructing any action that the party, or even the State, deemed guilty for the alleged violation or infringement shall carry out or omit, according to the circumstances."
"Should the claim of a natural person or organization relate to damage to the environment, judgment shall instruct offender to pay the cost of restoration of the damaged and impaired environment, and shall compensate both the relevant claim of such person or organization and that of the international community."
"Should the claim for compensation for general environmental damage of a natural person or organization be admitted, an order in favor of the World Environment Fund shall be issued, while any individual claim for residual damage may only be filed before national courts and claimant shall only be entitled to costs before the International Court."

4. A PROPOSED INNOVATION

We propose to entrust the Latin Notariat International Union to the secretariat of the International Court.
In the event that it is not possible to obtain within the scope of the United Nations, the full constitution of the court we have so much been struggling for, our aim is that the tasks of the permanent secretariat be entrusted to the Latin Notariat International Union. The main administrative office of the administrative secretariat of such institution is located in the City of Rome at Via Flaminia Nr. 158. As it is already known, notaries exercise -as acknowledged- a kind of willful jurisdiction and "perform a magistracy". To procure peace regarding social and legal relations, it is possible to integrate to the court a secretariat which may constitute a possible body to cooperate with the enormous bulk of work entrusted to an international court devoted to the environment.
We deem it convenient to settle, as permanent secretariat for the court, the so-called Latin Notariat International Union, since such organization is an entity of worldwide scope with secretariats in almost all countries around the world where it functions as Permanent Notarial Office of international exchange. Such entity was created by initiative of Argentine Notary Mr. José Adrián Negri and started on October 2nd, 1948, within the First International Congress of Notariat.
The idea to constitute the court with the international secretariat of the Union aforementioned is proposed, thus implying a suggestive reduction in costs and internationalized support in the majority of the countries which will inure in the maximum benefit of our civilization.

5. RECENT HISTORY

Dr. Amedeo Postiglione, Judge of the Court of Cassation of Italy, came to Argentina in two occasions, the last one in the year 2000. In both occasions he explained the need of an "International Environmental Court", as a system

to perfect environmental difficulties. Postiglione states that "All the necessary legislation is created in the national and international world", but there are always difficulties that the State, in the event of a claim, will have a slight problem to accept or not.

While the International Environmental Court is not settled, a group of specialists has created a "willful" and "moral" International Court. Such Court is in charge of arbitrations and renders advisory opinion as that included in the issue *Jurisprudencia Argentina* on December 22nd, 1998. Such advisory opinion, which I had the honor to help answer together with Dr. Ramón Martín Mateo, Eckar Rebinder, Mary Sancy and Ricardo Zeledón Zeledón (also Judge of the Supreme Court of Costa Rica), in a similar conflict between Mexico and the U.S.A., stated that: "The current trends of liability admit the imputation to States of the acts carried out by individuals acting within their jurisdiction". Such advisory opinion is just a set of poetry written on paper. But the world is changing many things and this document was sent to governor Bush in Texas, neighboring American state which was in conflict with a state in Mexico.

Thanks to this, today we count on the International Mexican-American Commission that is in charge of the problem as to which such advisory opinion has been issued; *i.e.*, any person may file a claim with a body so that the main issue being discussed regarding the environment be resolved.

I still have to mention that dangerous or potentially dangerous activities, such as the use of oil (since atomic energy is not the only dangerous activity, and environmental legislation is also concerned about dangerous activities such as oil, gas, etc.) give rise, according to a document of this year of the European Commission (White Book on environmental responsibility, filed by the Commission of European Communities, in Brussels on 2.9.2000, COM (2000) 66 *in fine*), to strict liability for traditional damages that are those included in the Civil Code and to strict liability for polluted places. Compensation for pollution is owed not to the water owner (in this case, the State) but to nature. Nature up to now is not deemed as capable of holding legal rights and obligations. But it should be deemed as such, since we are killing its body and soul, if any, and its spirit, in an animistic consideration of the issue.

FINAL RECOMMENDATIONS

The ICEF International Conference on *Global Environmental Governance*, assembled in Rome at the Italian Ministry of Foreign Affairs, on 20-21 May 2010,

Deeply concerned that human activity has caused irreparable damage to the environment of the Earth,
Anticipating the work the of United Nations General Assembly's Preparatory Committee for the United Nations "*Rio plus 20*" conference on environment to be held in 2012,
Aware that the Governing Council of the United Nations Environment Programme (UNEP) is undertaking an assessment of measures needed to enhance international environmental governance (IEG) in the short-term and the long-term,
Appreciative of the extensive analyses of the International Court of the Environment Foundation, over two decades, regarding the measures needed for States to resolve environmental disputes transnationally and globally,
Concurring with the proposals made by many States, that a new architecture for international environmental governance may be today required to more effectively address the Earth's growing environmental crises and overcome the fragmentation and sectoralism that characterizes environmental law,
Considering the positive role that religions can serve in encouraging stewardship of life on Earth, as for instance in the Encyclical of Pope Benedict XVI, *Caritas in Veritate* (2009), which concerns the need for a "world political authority" capable of assisting States to protect the environment as an integral part of sustainable development, and capable of providing international solidarity for attaining the ethical objectives of preventing and remedying environmental damage,
Grateful for the many national and regional measures in providing legal foundations for environmental stewardship, including ensuring the access to justice and environmental information and participation in environmental decision-making, and implementing the other principles of the 1992 Rio Declaration on Environment and Development,
Recognizing that environmental governance is achieved through institutions and mechanisms for protecting the environment and resolving disputes concerning the environment, with a scope that includes all human activities capable of affecting the environment,
Understanding that environmental governance must keep in mind criteria for openness, participation, accountability, effectiveness, coherence, proportion-

ality and subsidiarity, as expressed by the European Union for good governance, and also environment ethical principles as expressed in the Earth Charter, endorsed by UNESCO and The International Union for the Conservation of Nature and Natural Resources (IUCN),
Acknowledging science as the first pillar of environmental governance, accompanied by ethical, religious and cultural values, applied through civil society and governmental and nongovernmental institutions,
Convinced of the need to find a solution for the problem of States which have not signed up to the multilateral agreements accepted by the majority of other States: these States should not be allowed to become "free riders" and take advantage of the self-limitation measures agreed to by other States, with serious economic repercussions at a time of globalisation.
Aware of the urgency to preserve and strengthen the link between Human Rights in general and the Human Right to the environment in particular,
Recalling the recommendations of the Global Symposium of Judges convened by the United Nations Environment Programme in 2002 at Johannesburg, and of the other regional judicial symposia convened by UNEP and IUCN Commission on Environmental Law,
Appreciating the experience of the International Court of Justice, the Permanent Court of Arbitration and the International Tribunal of the Law of the Sea, and also the Court of Justice of the European Communities, in securing observance of environmental law and enforcing international environmental law,
Conscious of the establishment of national judicial innovations around the world, such as the *Writ of Kalikason* (Writ of Nature) by the Supreme Court of the Philippines, the recent establishment of 12 provincial environmental courts in China and establishment of four federal courts in the Amazon of Brazil, the Parliamentary adoption of the Green Courts legislation in India, and the functioning of more than 350 environmental courts and tribunals around the world, all of which substantial enhance environmental access to justice,
Recognizing that, notwithstanding the enhancement of national environmental legislation, international agreements at regional and global levels, and the new judicial capabilities, scientific reports indicate the environmental deterioration continues to become worse across all regions of the Earth,
Alarmed that as our Conference deliberates, the world experiences its worst oil spill, in the Gulf of Mexico, underscoring the urgent need for States to fill the remaining gaps in international environmental marine protection law,
Troubled that the effects of global climate change, sea level rise and land degradation will exacerbate all these negative environmental trends, and cause the migration of peoples and produce ecological refugees, whose Human Rights will be at risk,
Grateful to the Italian authorities and international organizations that have sponsored and sustained the deliberations of this ICEF Conference to explore how to strengthen environmental governance,

Now therefore the Conference:
1) *Expresses profound thanks* for the Patronage of the Presidency of the

Italian Republic, the Italian Presidency of the Council of Ministers, the Minister of Foreign Affairs, the Minister of the Environment, Land and Sea, and the scientific cooperation of UNEP, IUCN Commission on Environmental Law, the Biopolitics International Organization, the European Forum of Judges on the Environment, and other organizations and institutions for their support of this ICEF International Conference, and

2) *Reaffirms* the obligation of all States to observe the international general principles of environmental law, the duties contained in the multilateral environmental agreements and regional environmental agreements, and to foster the progressive development of environmental law and recognize that any regression is incompatible with both Human Rights law and environmental law, and
3) *Supports* the establishment of national and subnational environmental courts, chambers within courts, and specialized tribunals and welcomes the proposals of the IUCN Commission on Environmental Law, in conjunction with the Judicial Institute of the State of New York and Pace University School of Law, to launch an International Judicial Institute for Environmental Courts and Tribunals, in cooperation with the United Nations, for the comparative exchange of environmental judicial practices and with a view toward building the capacity of judicial practices and strengthening the rule of law, and
4) *Urges* the enhancement of regional environmental governance, such as the environmental legal systems for the Black Sea or the Mediterranean Sea, the Alpine or Carpathian mountain regions, or the Danube or Rhine and other international rivers, as well as the establishment of new regional environmental regimes as necessary in the Arctic, the Himalayas, the Balkans, the Caucuses, and in other transnational settings, and
5) *Calls Upon* States to cooperate immediately to strengthen protection of the marine environment by strictly adhering to the Precautionary Principle in all human activity affecting the oceans, beginning with off-shore oil extraction,
6) *Proposes* a close collaboration with the World Health Organization in order to support strengthening all measures for public health and to reduce exposure to environmental threats, and
7) *Recommends* that States enhance existing facilities for global environmental governance, and negotiate earnestly to establish new international, intergovernmental environmental institutions before 2012, and
8) *Supports* the establishment of compliance mechanisms to encourage and sustain international cooperation and to ensure the observance, implementation and effectiveness of the undertakings by States through multilateral environmental agreements, and
9) *Endorses* the establishment of new judicial institutions to further access to justice and the settlement of transnational environmental disputes, emulating the success of the Court of Justice of the European Union, and in particular to create an international court for the environment, and
10) *Recommends* that States undertake a thorough assessment of the

several proposals of the International Court of the Environment Foundation concerning strengthening international environmental governance and also to study the recommendations of the several symposia of judges convened by UNEP and IUCN Commission on Environmental Law,

11) *Endorses* the strengthening of the rule of law at the international and national levels, especially through the application and enforcement of environmental law.

APPENDIX

PROPOSAL OF THE POPE BENEDICY XVI FOR A "WORLD POLITICAL AUTHORITY" FOR GOVERNING THE ECONOMY AND PROTECTING THE ENVIRONMENT

The "Caritas in Veritate," or "Charity in Truth," encyclical signed in Rome on June 29, 2009, and published on July 7, 2009, contains, in paragraph 67 of the V chapter on the Cooperation of the Human Family, a specific and challenging proposal for a "true" World Political Authority.
The model is not that of a "a dangerous universal power of a tyrannical nature", but of a World Political Authority organized in a subsidiary and stratified way that democratically guarantees cooperation and free initiative on various levels. The World Political Authority is not conceived as a bureaucratic superstate but as a political, juridical and economic body aimed at reaching the common good (in relation to problems with a global nature), without sacrificing the role of States, civil society, business or individuals.
The encyclical considers that global institutional reform is necessary even in this delicate field and this should be interpreted as a significant innovation.

- The Church does not stop at declaring that there are reasons for concern but proposes a political and juridical solution globally even in this sector that is linked closely with the others.

- Respecting the "duties" of protecting "the intrinsic balance of creation", that is, the "grammar" that nature itself suggests for its wise use and not its reckless exploitation, is a necessary condition for guaranteeing true integral human development: the encylical establishes a strict relationship between human development and environmental protection, something already perceived in the UN Conference in Rio de Janeiro in 1992;

- With clarity and precision it points out that "it is contrary to authentic development to view nature as something more important than the human person": consequently, two distorted views are condemned, firstly, the "purely naturalistic" idea that considers nature to be an "untouchable taboo" and leads to attitudes of neo-paganism or a new pantheism, and the opposite view of unlimited utilisation that aims at "total technical dominion" over nature;

- The encyclical talks about the "responsibilty" (not only moral but also juridical,

political, economic and cultural responsibility) of human beings, in relation to development and of "duties" towards nature and future generations, the environmental position proposed cannot be defined as purely "anthropocentric", because realistically it indicates the individual as the person responsible for the natural balance on the planet and, in the meantime, permits sustainable development;

- On the energy problem, the encyclical condemns the fact that "some States, power groups and companies hoard non-renewable energy resources [that] represents a grave obstacle to development in poor countries" and asks the international community "to find institutional means of regulating the exploitation of non-renewable resources" in the name of "renewed solidarity", without obviously forgetting to improve energy efficiency while, at the same time, encouraging research into alternative forms of energy;

- In more political terms, it asks the international community and individual governments to succeed in countering harmful ways of treating the environment, with a clear reference to the prevention and remedying of environmental damage, including international environmental damage;

- To combat climate change, desertification, decline in productivity in vast areas of the planet, the water crisis and to prevent conflicts among the peoples involved, it asks "all international leaders to act jointly and to show a readiness to work in good faith";

- The decisive issue is considered to be "the overall moral tenor of society", because when human ecology is respected then environmental ecology will benefit";

- The Pope's proposal for a World Political Authority is closely connected to the institutional reform of the United Nations and the reform of economic institutions and international finance: it is true to say that only a few basic points regarding this new institution are indicated (its competence; the exercise of effective powers of coordination; the power to enforce the decisions of the States and international organisations; the power to guarantee security and justice; the responsibility to protect the balance of the socio-economic development of all countries), but it is reference to the reform of the U.N. and existing finalcial institutions that enables us to believe that a framework of stability in flexibility (principle of subsidiarity) has been defined, therefore, the long awaited and urgent institutional reforms will be to benefit from the "umbrella" constituted by the new World Political Authority;

- For the environment, in conclusion, in our opinion, we should heed the Pope's teaching, in the sense of creating new institutions that do not break

up the unitary nature of international law but open up a common path in relation to the particular characteristics of the subjectmatter;

- Since 1992, the epoch of the U.N. Conference of Rio de Janeiro on the "Environment and Development", reform proposals with regard to the environment have been put forward by the European Parliament and by a specific Foundation called ICEF (International Court of the Environment Foundation) that originated in Italy under the patronage for scientific issues of the Italian Supreme Court .

They have made two proposals for:

- the creation of a specialised Agency at the United Nations (the project has already acquired political value in view of the creation of a United Nations Environment Organization (UNEO);
- the creation of an International Court of the Environment, accessible not only to States but also to international organisations and civil society.

In both these proposals, ICEF has played a role as forerunner and has performed its role as scientific promoter of these ideas with continuity and conviction for over 20 years on a global level. The courageous position of Pope Benedict XVI encourages us to continue these efforts in order to guarantee human development that is compatible with the environment universally, under the banner of justice and equity .

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[1] There are two reference points in Christian tradition: the message "Ora et Labora" and the precious social and cultural work done by Saint Benedict in the VI centuray A.D.; and the extraordinary experience of Saint Francis in the XIII century, still very much to be found in the Franciscan communities around the world.
More recently, the social doctrine of the Catholic Church on the environment, has been enriched by addresses by the Pope and also by emblematic initiatives (the eucumenical prayers in Assisi with representatives of the great religions beginning on 27 October 1986) in the name of peace and the protection of the creation.
The Protestant churches (for example, Rowan Williams, Archbishop of Canterbury) and the Orthodox Church (the present Patiarch of Constantinople, Bartolomew I) have also been extremely sensitive to environmental issues.

ICEF PUBLICATIONS

1) THE GLOBAL ENVIRONMENTAL CRISIS : THE NEED FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT
Author : Amedeo Postiglione
Publisher : Giunti Gruppo Editoriale, Firenze
Year: 1996
This is a report on the activities by the ICEF worldwide, until 1996, to support the creation of an International Court of Justice, sent to all the Governments and Parliaments of the States.

2) GIUSTIZIA ECOLOGICA NEL MONDO (ECOLOGICAL JUSTICE WORLDWIDE)
The origin and evolution of the idea of an International Court of Justice
Author : Amedeo Postiglione
Publisher : Istituto Poligrafico e Zecca dello Stato
Libreria dello Stato, Rome
Year: 1996
This is a report on the activities by the ICEF worldwide, until 1996, to support the creation of an International Court of Justice at national level.

3) THE GLOBAL ENVIRONMENTAL CRISIS : THE NEED FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT
Author : Amedeo Postiglione
Year: 1998
This is a report on the activities by the ICEF a livello mondiale fino al 1998 per la promozione di una International Court of Justice, sent to all the Governments and Parliaments of the States.

4) International Report 2000
THE GLOBAL ENVIRONMENTAL CRISIS : THE NEED FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT
Author : Amedeo Postiglione
Publisher : Edizioni Scientifiche Italiane
Year: 2000

5) PER UN TRIBUNALE INTERNAZIONALE DELL'AMBIENTE (IN SUPPORT OF AN INTERNATIONAL ENVIRONMENTAL COURT)
Amedeo Postiglione

Publisher: Giuffré, Milano
Year: 1990
The proceedings of the international conference held in Rome, on 21-24 April 1989, on "The effectiveness of international environmental law".

6) THE GLOBAL VILLAGE WITHOUT REGULATIONS
Ethical, economical social and legal motivations for an international court of the environment
Author : Amedeo Postiglione
Author : Giunti Publisher, Firenze
Year: 1992
Sets out the project for the establishment of an International Court of Justice, presented at the UN Conference in Rio de Janeiro in 1992.

7) TRIBUNALE INTERNAZIONALE DELL'AMBIENTE (THE INTERNATIONAL ENVIRONMENTAL COURT)
(A new global judiciary body for the environment)
Author : Amedeo Postiglione
Publisher : Istituto Poligrafico e Zecca dello Stato
Libreria dello Stato, Rome
Year: 1992
Contains the proceedings of the Florence Conference of 10-12 May 1991 "A Proposal for an International Court of the Environment within the United Nations".

8) TOWARDS THE WORLD GOVERNING OF THE ENVIRONMENT
Author : Amedeo Postiglione e Giovanni Cordini
Publisher : Gianni Iuculano Publisher, Pavia
Year: 1996
The proceedings of the international conference "Towards the world governing of the environment", held in Venice on 2-5 June 1994.

9) IL GIUDIZIO DELLE DONNE (THE JUDGEMENT OF WOMEN)
A ruling by the International Evironmental Court
Author: Various Authors
Publisher: A.R.C.A.
Year: 1997
The book relates to an international seminar on "Dalle Donne Ambiente Giustizia Diritto al Futuro" (From Women, the Environment, Justic, Law to the Future), held in Venice, by the ICEF, at the CNR, in May 1995.

10) LA GIURISPRUDENZA AMBIENTALE EUROPEA E LA BANCA DATI ENLEX DELLA CEE (EUROPEAN ENVIRONMENTAL CASE LAW AND THE EEC ENLEX DATABASE)
Author : Amedeo Postiglione
Publisher : Multa Pacis Dott. Giuffrè Publisher, Milano

Year: 1998
The proceedings of the conference held in Rome on 14-16 May 1987.

11) AMBIENTE E CULTURA. PATRIMONIO COMUNE DELL'UMANITÀ (THE ENVIRONMENT AND CULTURE. A COMMON HERITAGE FOR MANKIND)
Author : Amedeo Postiglione and Giovanni Cordini
Publisher : Edizioni Scientifiche Italiane, Napoli
Year: 1999
The proceedings of the international conference on "The Environment and Culture. A Common Heritage for Mankind" held in a Paestum on 6-10 June 1997.

12) DANNO AMBIENTALE. STRUMENTI GIURIDICI ED OPERATIVI (ENVIRONMENTAL DAMAGE. LEGAL AND OPERATIONAL INSTRUMENTS)
Author : Amedeo Postiglione
Publisher : Edizioni Scientifiche Italiane, Napoli
Year: 1999
The proceedings of the Environment Day held on 11.12.1998 at the Corte di Cassazione .

13) Second Environment Day held by the Corte Suprema di Cassazione. PREVENZIONE, CONTROLLO, ATTUAZIONE DELLE NORME, INFORMAZIONE, FORMAZIONE, PARTECIPAZIONE, ACCESSO (PREVENTION, MONITORING AND IMPLEMENTATION OF THE REGULATIONS, INFORMATION, TRAINING, PARTICIPATION, ACCESS).
The role of the Judiciary, the Scientific World, Government, Police, Civil Society and Businesses.
Author : Amedeo Postiglione
Publisher : Edizioni Scientifiche Italiane
Year: 2001
The proceedings of the Second Environment Day organised by the ICEF at the Corte di Cassazione on 6.10.1999.

14) GIURISIDIZIONE E CONTROLLO PER L'EFFETTIVITÀ DEL DIRITTO UMANO ALL'AMBIENTE (JURISDICTION AND CONTROL FOR ENHANCING THE EFFECTIVENESS OF THE HUMAN RIGHT TO THE ENVIRONMENT)
Author : Amedeo Postiglione
Publisher : Edizioni Scientifiche Italiane
Year: 2001
The proceedings of the 2000 Environment Day organised by the ICEF at the Corte di Cassazione.

15) LE DONNE NELLA DIFESA DELL'AMBIENTE (WOMEN AND THE DEFENCE OF THE ENVIRONMENT)
A ruling by the International Environment Court
Author: Pinuccia Montanari

Publisher: The Meridiana, Molfetta (BA)
Year: 2001

16) GIUSTIZIA E AMBIENTE GLOBALE. NECESSITÀ DI UNA CORTE INTERNAZIONALE (JUSTICE AND THE GLOBAL ENVIRONMENT. THE NEED FOR AN INTERNATIONAL COURT)
Author: Amedeo Postiglione
Publisher: Giuffrè
Year: 2001.

17) IL PRINCIPIO D'INTEGRAZIONE DEI SISTEMI GIURIDICI NAZIONALI, COMUNITARIO E INTERNAZIONALE NELLA PROSPETTIVA DEL GOVERNO MONDIALE DELL'AMBIENTE (THE PRINCIPLE OF INTEGRATION OF NATIONAL, COMMUNITY AND INTERNATIONAL LEGAL SYSTEMS, IN A PERSPECTIVE OF GLOBAL ENVIRONMENTAL GOVERNANCE)
Author : Giovanni Cordini and Amedeo Postiglione
Publisher : Palazzo Vargas Edizioni
Year : 2004
The proceedings of the 4th Environment Day held on 16.11.2001 at the Corte di Cassazione.

18) PREVENTION AND REMEDYING OF ENVIRONMENTAL DAMAGE
Author : Amedeo Postiglione and Giovanni Cordini
Publisher : Bruylant, Bruxelles
Year: 2005
The proceedings of the international conference on the "Prevention and remedying of environmental damage" held in Ostia Antica on 27- 28 May 2005.

19) L'EFFETTIVITÀ DEL DIRITTO ALL'AMBIENTE IN ITALIA (THE EFFECTIVENESS OF ENVIRONMENTAL LAW IN ITALY)
Author : Giovanni Cordini and Amedeo Postiglione
Publisher : CIPRIS Edizioni
Year : 2006
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20) THE PROTECTION AND SUSTANAIBLE DEVELOPMENT OF THE MEDITERRANEAN-BLACK SEA ECOSYSTEM
Author : Amedeo Postiglione
Publisher : Bruylant, Bruxelles
Year: 2007
The proceedings of the international Conference on "The Protection and Sustanaible Development of the Mediterranean-Black Sea Ecosystem" held in Venice il 24, 25 and 26 May 2007.

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Author : Amedeo Postiglione
Publisher: Bruylant
Year: 2008
The proceedings of the Conference on "The role of the judiciary in the implementation and enforcement of environmental law" held in Rome, at the Consiglio Superiore della Magistratura on 9-10 May 2003.

22) ECONOMIA E AMBIENTE: PROFILI ECONOMICI, GIURIDICI E SOCIALI DELLO SVILUPPO SOSTENIBILE IN ITALIA (THE ECONOMY AND THE ENVIRONMENT: ECONOMIC, LEGAL AND SOCIAL PROFILES OF SUSTAINABLE DEVELOPMENT IN ITALY)
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Publisher: Franco Angeli
Year: 2008
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Author: Amedeo Postiglione
Publisher: Bruylant, Bruxelles
Year: 2010

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