

UNITED NATIONS ACTIVITIES

UNEP GC-24 / GMEF

First Meetings with New Executive Director

by Donald Kaniaru*

Introduction

The 24th session of the UNEP Governing Council/Global Ministerial Environment Forum (GMEF) was held on 5–9 February 2007 at a crucial moment, barely months into the new term of the 5th Executive Director, Achim Steiner (Germany) who had assumed the headship of the United Nations Environment Programme mid-June 2006, following the departure of Klaus Töpfer (4th UNEP Executive Director/UNON Director General), the second-longest serving ED after Mostafa Kamal Tolba (2nd UNEP Executive Director, serving 1975–1992).

With such a short time to prepare for the policy meetings of the Council and the Forum, their lofty agenda, and to catch up with the underlying works of the organisation, the mood of the Council and attendees was something to watch, not without anxiety and anticipation. The substantive work had to be done, as other aspects were attended to as well. The new ED inherited key vacancies that the outgoing ED wisely left open in order not to “fix” the successor. Action on these was of the essence, preparation of the reports and their timely delivery, imminent as it was, fully engaged the team Achim Steiner found. He stayed put in Nairobi largely to effect this, contrary to past belief that the ED of UNEP was everywhere on the globe except Nairobi.

To his credit, while new to UNEP, he was not new to the environment. He embraced it both broadly and in-depth. He had a grasp of issues and an understanding of both the civil society/NGOs and governments, from whom he had relatively warm goodwill. Coming from the head of IUCN – The World Conservation Union, a long-time partner of UNEP, he already had a foot in UNEP through various projects that UNEP partnered with IUCN. Incidentally this was the first time an IUCN high official had assumed the highest post in UNEP. In the past it had worked the other way: UNEP high officials had left UNEP to head IUCN as D-G. These included David Munro (Canada), former head (Assistant Executive Director), for Programme; Genady Golubev (USSR) in the same position; and a Senior Adviser and former President of the GC from the UK, top scientist Sir Martin Holdgate. At staff

level there were exchanges as well. What would Achim Steiner do, now at the top of UNEP? Would IUCN take over the environment in Nairobi, while in Gland, Switzerland, it kept its other foot in conservation, or what type of collaboration would be enjoyed between the two organisations? Only time would tell.

With the documentation prepared in a timely fashion, and additional credit for putting staff teams together and working with them successfully, the new ED was not content to do business as usual. Of course he could not; he was never a part of the “usual”, either in the UNEP secretariat or its Governance processes. He undertook new initiatives with the format of the Governing Council/GMEF, particularly with the way the Plenary would engage with

Governments and heads of the UN family in round tables, in which he eloquently took an active part, with panelists debating and responding to issues with ministers and senior officials rather than making statements as had happened before, and as is commonly done in many UN fora. This was a gamble that ultimately worked and was fully embraced as mentioned below. The “usual” did run side by side with innovation. The Committee of the Whole (COW) under the guidance of Shafqat Kakakhel, the

longest serving Deputy Executive Director in UNEP to date, had a long list of issues, including some of great complexity, such as chemicals and the interaction on climate issues (in which the chair, IPCC’s Dr R. Pechauri addressed the committee as past chairs did before him.) Working Groups and Drafting Groups on a variety of issues extended the negotiations overnight on several occasions – some were only able to conclude their work on the Friday, 9 February, barely in time to report to the Plenary in the afternoon.

The GC session has sat at the apex of 24 regular sessions and nine special sessions since June 1973. That is, a total of 33 sessions¹ in an organisation that in its 35th year, under the 5th ED, has to be considered mature. Voluntarily funded and with a modest regular budget contribution from the UN budget (of some US\$5 or so million a year), UNEP is addressing key issues remarkably well. It still attracts a top-level and broad attendance confirming that the international community has not tired of environmental concerns in three decades. The GC had an impressive



* ICEL representative to the United Nations in Nairobi: W. Burhenne, Executive Governor, also covered the Council.

attendance: 141 governments which included 57 of the 58 Governing Council members: for the first time ever in a Governing Council, six heads of UN agencies, heads of MEAs, NGOs, private sector, civil society and others. In

UN Secretary-General's Message

The world has reached a critical stage in its efforts to exercise responsible environmental stewardship. Despite our best intentions and some admirable efforts to date, degradation of the global environment continues unabated, and the world's natural resource base is being used in an unsustainable manner. Moreover, the effects of climate change are being felt across the globe, with increasing risks for human health and the loss of ecosystems. The projections contained in the latest assessment by the Intergovernmental Panel on Climate Change tell us yet again that all countries will feel the adverse impacts. But it is the poor – in Africa, small island developing states and elsewhere – who will suffer most, even though they are the least responsible for global warming. Action on climate change will be one of my priorities as Secretary-General. I am encouraged to know that, in the industrialised countries from which leadership is most needed, awareness is growing that the costs of inaction or delayed action will far exceed the short-term investments needed to address this challenge.

It is also becoming increasingly clear, in North and South alike, that there is an inextricable, mutually dependent relationship between environmental sustainability and economic development. This means that respect for the environment, and recognition of the crucial link between environmental and economic policies, could enjoy better prospects of being put at the centre of our efforts to conquer poverty and achieve the Millennium Development Goals.

As the principal United Nations body in the field of the environment, UNEP has a key role to play in making this happen. Progress will depend on forging meaningful partnerships with civil society and the business community. Closer cooperation with UN system partners will also be crucial, and UNEP's strengthened cooperation with the UN Development Programme augurs well for mainstreaming the environment into development planning. The UN's environmental activities are also receiving closer attention from Member States, including through the recommendations put forward last year by the High-level Panel on System-wide Coherence. I very much look forward to working closely with you as we press forward with making this work as effective as possible, and in meeting the challenge of building a safer, more prosperous, more sustainable world. In that spirit, please accept my best wishes for a successful outcome to your deliberations.

all, over 1000 participants were hectically and cheerfully engaged in one or other of the meetings, round tables and activities set up at the UN complex.

Regular sessions are held in odd years for one week, unlike in the early years of UNEP, when they were two weeks annually (eventually deemed too long and too frequent for high-level attendance of governmental and other officials). Special Sessions, which are held each even year and have, since the adoption of UN General Assembly resolution 53/242 rotated in different regions, are for half a week. Thus concluding business in that time, and engaging governments, inter and non-governmental organisations, MEAs and civil society has become an exacting task, while preparing for the sessions has not reduced the complexity of discharging secretariat tasks and overall reporting and interaction with the locally based Committee of Permanent Representatives (Decision 19/32). Alas, the need for night sessions, and rushing from one meeting to another, will probably not disappear but rather continue to increase.

The round tables focused on a few critical issues including globalisation and the environment, with heads of

the World Trade Organisation, UNDP, UN Industrial Development Organisation, UN World Tourism Organisation and UN-Habitat who, under UNGA resolution 32/162, are charged with the duty of addressing the Governing Council of UNEP. UN Reform also raised issues of strengthening UNEP and transforming it into a United Nations Environment Organisation (UNEO) that caused a "storm" amongst the local media and Kenyans who are touchy on the subject because they fear it will actually weaken UNEP or that eventually it will result in UNEP's relocation. The substance of this matter is shrouded with issues of location of UNEP, and this is not helped by the fact that these discussions are led by EU States (France, Germany). In the case of France a meeting of a group of governments was held in Paris, 2–3 February 2007, barely days before the Council. Other issues included the IEG (International Environment Governance), a matter that has been on the agenda of UNEP and of the General Assembly since the WSSD in Johannesburg South Africa in September 2002.

Outcome of the Governing Council/GMEF

The session was one of the most productive in UNEP's recent history. Though not without controversy over numerous issues, it succeeded in adopting 16 Decisions (see Selected Documents) that will now occupy the ED and the Secretariat in their implementation and reporting to the next sessions: the tenth special session in 2008 and the 25th session in 2009.² They embrace Implementation of SS.VIII/I on international environmental governance (in six parts – decision 24/1); World environmental situation (24/2); Chemical management (24/3 in four parts and 38 operative paragraphs);³ Prevention of illegal international trade (24/4); Waste management (24/5); Small island developing states (24/6); Committing resources toward the implementation of decision 23/11 (24/7); Support to Africa in environmental management and protection (24/8); Budget and programme of work for the biennium 2008–9 (24/9 with 35 operative paragraphs); Management of trust funds and earmarked contributions

Fast Facts

In the six roundtables of ministers, in addition to the fruitful discussions ...

- 809,000 leaves of paper were disseminated
- 140 countries were present
- 150 civil society groups participated
- 71 Ministers or equal representatives attended
- 18,000 bottles of water were distributed
- 16 decisions were adopted.

(24/10); Intensified environmental education for achieving sustainable development (24/11); South-South cooperation in achieving sustainable development (24/12); Amendment to the instrument for the establishment of the restructured Global Environment Facility (24/13); Declaration of the decade 2010–2020 as the United Nations Decade for Deserts and the Fight against Desertification (24/14); Provisional agendas, dates and venues for the tenth special session and the 25th session (24/15); and

Key Decisions of 24th UNEP / GC

Upon the convening of the 24th Session of the United Nations Environment Programme, the majority of decisions had been through the Committee of Permanent Representatives. As normally is the case, these drafts undergo substantial changes once the governmental representatives arrive from the capitals.

The longest and most difficult discussions during the Session concerned the various questions related to chemicals.¹ In the end, the Council adopted two decisions on chemical matters:

- Decision 24/4 on the prevention of illegal international trade, specifically inviting governments to accede to the Basel, Rotterdam, and Stockholm Conventions and to provide UNEP with sufficient resources to implement paragraph 18 of the Overarching Policy Strategy (OPS) of the Strategic Approach to International Chemical Management (SAICM).²
- Decision 24/3 on SAICM issues. Given the unwillingness of the Council to consider a legally-binding instrument on mercury (with or without also covering lead and cadmium), the decision is somewhat unambiguous. Many likened these negotiations to a "Land Rover stuck in the mud".³ In the end, there was a general feeling that the GC missed a great opportunity to do something progressive.

Regarding the World Environmental Situation, the first draft decision created some controversy, but consensus eventually was found in the form of Decision 24/2, inviting governments, UN bodies, financial institutions, the private sector and civil society to consider the environmental challenges reported in such publications as the Millennium Ecosystem Assessment, the Global Biodiversity Outlook 2, and the 2nd Africa Environment Outlook. It cites environmental degradation resulting from human activity and natural processes as essential barriers to the attainment of internationally agreed development goals. Governments are asked to consider undertaking a systematic review of the effectiveness of their legislative, institutional, financial, implementation and enforcement measures at the national level, as a vehicle for determining how best to address the degradation of the global environment.

In Decision 24/13 the Council agreed on the need to amend the Instrument for the Establishment of the Restructured Global Environment Facility (GEF Assembly-2 Decision 22/19) to include land degradation, primarily desertification and deforestation, and persistent organic pollutants as new focal areas of GEF.

Decision 24/16 calls for an Updated Water Policy and Strategy of UNEP for 2007–2012. An extensive paper (UNEP/GC/24/CW/L.3) on this topic was distributed in the Committee of the Whole and a lengthy annex as it relates to freshwater for the period is included with the decision.

Decision 24/14 recommends to the UN General Assembly to declare, during its 62nd session, the decade 2010–2020 as the UN Decade of Deserts and the Fight Against Desertification.

Decision 24/9 approved appropriations for the Environment Fund to the amount of US\$152 million, based on the Council's review and acceptance of a report of the Advisory Committee on Administrative and Budgetary Questions.⁴

In this connection, the delegation of Egypt supported by the Group of 77 expressed their disappointment that the GC did not agree to their draft sponsored by Kenya and Uganda to request the Executive Director and the Chief Justice of the Supreme Court of Egypt to expeditiously advance the ongoing consultations relating to the establishment and operation of the International Judicial Training Centre on Environmental Law. This draft was also intended to call upon the international community, donor governments, and agencies to consider supporting UNEP and the Supreme Court of Egypt in this important initiative to provide financial and other resources required for implementing the activities of the Training Centre.

Developing countries announced several times that they appreciated the references in discussions made to national and regional level implementation and the Bali Strategic Plan. Decision 24/1 reflects these discussions and highlights the Council's support for strengthening international environmental governance through technology support and capacity building, increased membership, a strengthened scientific base of activities, strengthened financing, increasing the coordination and synergies among MEAs, and enhanced coordination across the UN system.

It was agreed in Decision 24/15 to hold the 25th Session of the GC/Global Ministerial Environmental Forum in February 2009 in Nairobi; a provisional agenda for the session was approved in this connection. (WEB/ATL)

Notes

1 See Lewis article, in this issue at page 305.

2 EPL 36/2 at page 62.

3 Earth Negotiations Bulletin, "GC-24/GMEF Highlights: Thursday, 8 February 2007" online at <http://www.iisd.ca/vol16/enb1659e.html>.

4 UNEP/GC/24/9/Add.1.



Updated water policy and strategy of the UNEP (24/16 – freshwater and coasts, oceans and islands with annex of summary of final updated water policy.)

Conclusion

The above Session was a challenging one and its positive outcome is no doubt attributable to the goodwill that the Council extended to the new ED and to his eloquent and active participation throughout as well as intense prior preparations. He had also extended invitations to key players from the UN family that for the first time frankly participated in the different issues. The MEAs too were present at Executive Secretary level in large measure and played their part well. The gamble the ED took in restructuring discussions in the Plenary paid off and are expected, without doubt to be the basis of future deliberations.

The next session will, unlike the current one, have a full complement of senior staff on board, able to oversee how ropes are pulled and tied. The road to the GA is still there to wrap up certain issues on governance and eventually reporting to next Council sessions. Should UNEP not do even better? Nothing less can be expected.

Notes

1 Wolfgang Burhenne and the writer have attended many of the GCs since 1973. Wolfgang all of them, and the writer two less, *i.e.* 31. We noted the original group for the Stockholm preparation process had dwindled to only three; the third was the Executive Secretary of the Basel Convention, Sachiko Kuwabara-Yamato.

2 The full text of Decisions adopted by the Governing Council/Global Ministerial Environment Forum at its twenty-fourth session can be downloaded at: http://www.unep.org/gc/gc24/docs/GC24_decisions.pdf.

3 See Lewis, at page 305.



Deliberations on Global Environmental Governance

Some of the key elements of the 24th Global Ministers of Environment Forum meeting focused on the questions of global environmental governance. Noting that 13 new international instruments (conventions, protocols and amendments)¹ have entered into force in the past two years, and an additional five new instruments² have been negotiated and concluded in the same time period, the discussion considered the growing recognition that environmental issues, which cannot be restrained by national borders, will significantly benefit by international governance. (Summarised in this issue at page 360).

Toward this end, in addition to continued development of international instruments, UNEP is providing integrated support and scientific/technological development through, among other things, its headline “Environmental Watch” proposal, which has undergone an important (and ongoing) evolution, since it was initially proposed in UNEP-GC-23. The most current proposal conceives of Environmental Watch as a “multi-year strategy” – called “Vision 2020”. It is built around the three generic “pillars” that appear in virtually every action plan and working pro-

South cooperation component, for which a support unit has already been established within UNEP;⁴

- collaboration with UNDP (particularly on issues of poverty and environment), a formerly problematic issue, on which the Secretariat presented detailed information, including coordination through the mechanism of the UN Development Group;⁵ and
- the Secretariat’s more systematic strategy for improving its performance in the next two years of implementation of the strategy.

Parallel to these discussions, the Council’s decision (see page 358) focuses heavily on these basic issues, with very simple statements calling for the Secretariat to accord “high priority” to implementation of the Bali Strategic Plan, authorising its continued work on the Environmental Watch Programme, support to the multilateral environmental agreement and continued improvement in coordination with UNDP. In addition, two continuing issues maintain high priority – the inevitable discussions of financing, and the question of universal membership of



Adil Najam, Senior Associate, IISD, presented the results of the Global Environmental Governance study produced by IISD and funded by the Danish Ministry of Foreign Affairs

Courtesy: IISD

gramme or strategy adopted under any of the relevant international instruments or programmes in the past 15 years: (i) capacity-building/technology-transfer; (ii) networking/information-sharing; and (iii) assessments of the state of the environment and outlook for its short-, medium- and long-term futures, including through networking of individual environmental assessments undertaken by various countries.

One of the most important elements of UNEP’s governance discussions related to “national ownership” – particularly in the implementation of the Bali Strategic Plan for Technology Support and Capacity Building.³ The UNEP Secretariat’s reports on the first year of implementation of the plan focused on:

- partnership issues, including especially the South-

the UNEP Governing Council (whether to allow all UN member countries to be included in the Council, or to retain the current 58 state member Council to be selected by the General Assembly) continues under consideration, with no specific decision, once again. (TRY)

Notes

1 Listing the following: Protocol of 2002 to the Occupational Safety and Health Convention (Geneva, 20 June 2002, in force 9 Feb. 2005); Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 Dec. 1997, in force 16 Feb. 2005); World Health Organisation Framework Convention on Tobacco Control (Geneva, 21 May 2003, in force 27 Feb. 2005); 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund (in force 3 Mar. 2005); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, (Gothenburg, 30 Nov. 1999, in force 17 May 2005); Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (London, 17 June 1999, in force 4 Aug. 2005); Amended

text of the International Plant Protection Convention (Rome in Nov. 1997, in force 2 Oct. 2005); Protocol of 1997 to the International Convention for the Prevention of Pollution from Ships, Annex VI Regulations for the Prevention of Air Pollution from Ships (in force 19 Nov. 2005); Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (Strasbourg, 22 June 1998, in force 2 Dec. 2005); Framework Convention on the Protection and Sustainable Development of the Carpathians, (Kiev, 20 May 2003, in force 4 Jan. 2006); European Convention for the Protection of Animals during International Transport (Revised) (Chisinau, 6 Nov. 2003, in force 14 Mar. 2006); 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London, 7 Nov. 1996, in force 24 Mar. 2006); Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva on 23 Nov. 2003, in force 12 Nov. 2006). Although many of the listed instruments above are regional, the list omits a number of regional agreements that have been concluded during this period. For a more complete list, contact IUCN Environmental Law Centre, Documents Unit, in care of ELCSecretariat@iucn.org.

2 Amendment to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Almaty, 27 May 2005); International Tropical Timber Agreement, 2006 (Geneva, 27 Jan. 2006); Promotional Framework for Occupational Safety and Health Convention (Geneva, 15 June 2006); Southern Indian Ocean Fisheries Agreement (Rome, 7 July 2006); Amendment to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (concluded in London, 2 Nov. 2006).

3 UNEP GC decision 23/1, prepared and adopted pursuant to UNEP-GCSS Decision VIII/1 (31 March 2004), establishing a high-level open-ended working group with the mandate to prepare an intergovernmental strategic plan for technology support and capacity-building.

4 UNEP/GC/24/3/Add.1.

5 *Id.* and UNEP/GC/24/INF/19.



Strengthening the Environmental Arm of UNEP

Not only in the panel, but on many other occasions, delegates shared their perspectives on the need for UN reform (strengthening the UN) and their diverging views on the institutional framework.

The US Secretary of State Representative commended UNEP's work and recent partnerships. Germany's Minister of Environment on behalf of the EU insisted on a stronger international framework and supported the upgrade of UNEP to a United Nations Environmental Organisation (UNEO) as a specialised agency with its seat in Nairobi. India referred to concerns in connection with UNEP's mandate of reflecting the interests of a majority of its member States, especially in its role of assisting developing countries through capacity building and strengthening governance. France supported the creation of a UNEO. Japan was in favour of streamlining UNEP, but remained open about the reorganisation. The Republic of Korea supported the establishment of a specialised agency. China recognised UNEP's leading role, but required the involvement of other international organisations in connection with the UNEP reform.

In general, the delegates had been satisfied with the progress of the meeting and supported, in varying ways, the need for strengthening the role of UNEP. The main argument against upgrading UNEP to a specialised agency was that "it is not the name of the organisation, but the mandate that is the overarching issue". They voiced their concern that a broader competence could only be fulfilled if, at the same time, more funds were available. It was also mentioned that the intentions of those who are in favour of creating a UNEO could also be achieved under the existing organisational structure. (WEB/ATL)

ILC

Landmark Decisions on Transboundary Liability and Shared National Resources

The UN International Law Commission's most recent session has produced at least two results of indubitable importance in the field of environmental law:

- a set of guidelines on "transboundary harm from hazardous activities and allocation of loss in the case of such harm"; and
- a first draft of articles on the law of transboundary aquifers, viewed in terms of the responsibility of states, and considered as "shared natural resources".

These two issues have proven both difficult and important over recent decades, as countries have increasingly recognised the importance of concepts such as environmental protection and sustainable natural resources management. The impacts of human-caused water pollution, air emissions, land subsidence, invasive species introductions, poaching and other activities are seen to spread over time, causing damage, harm and risks to human health, property, livelihoods, ecosystems and species well beyond the site of the original wrongful or uncontrolled action. Governmental or other natural-resource-management actions (or failures to act) are increasingly a source of conflict, where the ecosystem or natural resource affected crosses national boundaries. International measures to

address these questions have been either very general in focus (such as Articles 3 and 14.2 of the Convention on Biological Diversity)¹ or very specific (such as the case-by-case development of specific "peace parks" and other trans-border arrangements regarding protected or important natural areas).² The ILC's focus on these two issues has resulted in the development of important and useful information, including not only the final guidelines, but also the collection and analysis of national and international legal documents (laws, case law and other documents), leading to an understanding of the state of the law relevant to these two points.

Allocation of Loss in the Case of Transboundary Harm

The work on this issue commenced in the context of the earlier negotiation of Draft Articles on the "Prevention of Transboundary Harm from Hazardous Activities", adopted in 2001.³ At that point, it was felt necessary to complete and adopt the Prevention articles, but to save the still controversial work on liability (allocation of loss) for separate completion. The ensuing six years of work have finally borne fruit, with the adoption of these principles.

In adopting the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, the Commission emphasised that these allocations were civil rather than criminal *i.e.*, that the actions that caused the harm are not illegal. Accordingly, these principles are the embodiment of the “polluter pays” principle, seeking only to ensure that the injured parties have appropriate ways to obtain compensation from the person who caused the harm or from the country where that cause originated. In this work, the ILC took on a task that few countries have accomplished – the creation of a system for valuing and compensating losses to the environment, as well as persons and property.

Even in adoption, the Articles remain controversial, with significant division still remaining as to several questions, including whether the principles should be proposed as an international convention. On one hand, the principles are thought to have been very speculative, since there are few cases or experiences with liability of this type, as yet. On the other hand, that same lack of existing rules has been posited by some as a reason that an international system should be formally adopted. Another alternative was offered – that the principles will be mentioned in the draft Articles on Prevention, when actions are taken to carry the latter into a more formal and binding instrument. In the end, it was noted that the Principles are “innovative and aspirational in character, rather than descriptive of current law... and too broadly stated to constitute a desirable direction for *lex ferenda*”.

Other concerns and discussions of the principles focused on content questions regarding the liability system, including:

- the “significant” threshold for damage (the Principles apply only in the case of “significant harms”), which might create unequal treatment between domestic and foreign victims in some cases;
- the relatively minimal role of the State in which the harmful actions originated in compensating the victims, where that State failed to prevent environmental damage or where the entity that caused the damage “was incapable of providing prompt and adequate compensation, especially where that State (or another) benefited from the action”.

Ultimately, the General Assembly “took note” of the principles, and commended them to governments, deciding also to raise the next steps relating to the overall work on Prevention of Transboundary harm to the attention of the 62nd session.⁴

Draft Articles on the Law of Transboundary Aquifers

This product of the Commission’s Working Group on Transboundary Groundwaters has been offered for comments from governments after the Commission adopted its first reading. The UN News Agency describes them as “a follow up to the Commission’s previous work on the codification of the law of surface waters, which led to the

UN Convention on the Law of Non-Navigational Uses of International Watercourses (adopted 1997, not in force)”.⁵

In their present form, the draft Articles address sovereignty over groundwaters as unequivocal, even where the aquifer is shared with another State. However, they call for the exercise of that sovereignty to occur “in accordance with the present draft articles”. The draft includes provisions for equitable and reasonable (and sustainable⁶) utilisation of transboundary aquifers, measures to “prevent the causing of significant harm to other aquifer States” whether in their use of the aquifer or in other actions that affect the aquifer or the system of groundwaters that interlink with it, specific obligations to prevent, reduce and control harm to shared aquifers (including in times of armed conflict), and duties of monitoring and data-sharing.

In its decision on this issue, the General Assembly noted the “importance for the International Law Commission of having their views on various aspects involved in... in particular the draft articles and commentaries on the law of transboundary aquifers.”⁷

Other Important Decisions

In addition to these two bodies of work, the ILC has produced two other works of interest to environmental law and policy – a set of Guidelines on the unilateral declarations of States capable of creating legal obligations, and a set of conclusions on the topic of “fragmentation of international law”.⁸ (TRY)

Notes

1 Article 3 provides, in relevant excerpt, that “States have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Article 14.2 says only that “The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.” This duty is expressed in the same article as a provision calling on states to adopt and apply EIA processes that take cross-border impacts into account. Article 5 addresses cross-border resources, noting only a duty to “as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organisations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.”

2 This concept (“transboundary protected areas”) was a focus of attention, and of international technical assistance funding in the late 1990s and early years of the new millennium. An excellent summary of the current examples of this kind of developing cooperation, as well as initial attempts to draw lessons from them is found in the 2003 “portfolio” entitled *Transboundary Conservation: Promoting Peaceful Cooperation and Development while Protecting Biodiversity*, co-sponsored by IUCN-WCPA, ITTO and the World Bank, as well as national-level agencies from seven countries (available online at <http://www.tbpa.net>).

3 UNGA Res. 56/82, and see the ILC’s report of its 53rd session, UN Doc A/56/10 and Corr.1) paras 91, 94 and 97.

4 UNGA Resolution A/RES/61/36.

5 As of October 2006, the Convention had garnered 14 of the 35 ratifications/accessions/etc. necessary for it to enter into force. Four of the ratifying states are developed countries (all European – Finland, Norway, the Netherlands and Portugal). A total of 18 countries have signed the Convention, 11 of which along with three non-signatories having since ratified it.

6 Article 4(d) specifically notes that “Aquifer States... shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.”

7 UNGA Resolution A/RES/61/34, at paras 5 and 26.

8 Both of these documents are included in the ILC’s report of its 58th Session (2006).



International Law
Commission



“Delivering as One” for the Environment – Reflections on the Report of the UN Panel on System-Wide Coherence –

by Soledad Aguilar and Elisa Morgera*

Introduction

In November 2006, a High-Level Panel established by the former UN Secretary-General Kofi Annan issued a novel report on how to reform the UN structure for Development, Humanitarian Assistance and the Environment, entitled “Delivering as One”.¹ The Panel’s mandate² responded to the 2005 UN World Summit’s request to consider how the UN System can most effectively respond to the global development, environmental and humanitarian challenges of the 21st century by strengthening the management and coordination of UN operational activities.³ The Panel worked in the broader framework of the UN reform process spearheaded by Kofi Annan, in an intellectual and political search of ideas for enhanced efficiency, sharpened cooperation, and a more synergistic approach to on-the-ground implementation by UN agencies.

The first noteworthy feature of the Panel’s Report is the alarming, yet predictable, conclusion that “mainstreaming the environment” within the UN System is far from being a reality.⁴ Although the links between environmental sustainability and humanitarian relief, and that between poverty reduction and sustainable development, are now widely understood, this understanding has not yet been reflected in the broader *modus operandi* of the UN family. The second aspect highlighted by the Panel is the problem (all too well-known to the environmental community) of duplication and fragmentation within the institutional structure devoted to environmental protection.⁵ The need to pursue environmental integration throughout the UN System and to achieve coherence in environmental activities both at the international and at the national level were therefore the two facets of the view of the UN environmental architecture developed by the High-Level Panel in the course of 2006 – quite a short period of time to undertake such a challenging assessment.

Following the endorsement of the report of the High-Level Panel by the newly appointed UN Secretary-General Ban Ki-Moon,⁶ this paper will be formally released, and will analyse the Panel’s main recommendations related to the UN environmental architecture⁷ and the delivery of funding for environment-related activities, namely: consolidating all UN programme activities at the country level; and upgrading the status of the United Nations Environment Programme (UNEP) as the UN’s “environmental policy pillar”. The final paper will focus

on the possible implications and questions arising from the Panel’s Report, and will conclude by linking the Panel’s Report with the other, ongoing UN reform processes and in particular the informal consultations on the environment held under the aegis of the UN General Assembly (UNGA).

“One UN”: Consolidating all UN Programme Activities at the Country Level

The core of the Panel’s recommendations to improve the efficiency of UN work on the ground, relies on the proposed consolidation of all UN programme activities at the country level within a single operative and budgetary framework, in order to have “One UN at the country level, with one leader, one programme, one budget and, where appropriate, one office.”⁸ The Panel recognises that one of the main failures of the UN delivery of results on the development and environment fronts has been caused by the systemic fragmentation of its activities. “Inefficient and ineffective governance and unpredictable funding have contributed to policy incoherence, duplication and operational ineffectiveness across the system. Cooperation between organisations has been hindered by competition for funding, missions creep and by outdated business practices.”⁹

The unified approach to country programmes is an idea that has already been implemented by other institutions like the World Bank through the approval of Country Assistance Strategies (CAS). World Bank’s CAS are prepared for active borrowers and take as their starting point the country’s own vision for its development, as defined in a Poverty Reduction Strategy Paper or other country-owned process.¹⁰ The proposed “One UN” programme shares the World Bank’s CAS country-driven focus and outcome-based structure.

To spearhead this idea, the Panel’s Report recommends a number of country pilots, which are currently being implemented in eight countries.¹¹ Initial responses from participant countries have been enthusiastic,¹² but the actual impact of these pilot initiatives on the success of environment-related efforts remains yet unknown.

The main implication of the “One UN” approach in terms of institutional organisation at the country level is the empowerment of the “Resident Coordinator” who will be formally attached to the UN Development Programme (UNDP) but operate in the framework of an effective oversight mechanism to ensure system-wide ownership,¹³ and focus on ensuring a coherent delivery of funding for project activities in the country. To achieve this, the Panel recommends – with a suggested deadline of 2008 – that UNDP “focus and strengthen its operational work on policy coherence and positioning of the UN country team, and [withdraw] from sector-focused policy and capacity work be-

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ing done by other UN entities.”¹⁴ This recommendation may be interpreted as implying that UNDP should also withdraw from its purely environmental activities, which are already carried out by other UN entities (most notably, UNEP) and concentrate on operational aspects rather than environment-related normative work. And indeed, the Report continues by outlining for UNDP a niche role in environmental matters confined to supporting the integration of the Millennium Development Goals (MDGs) into national development strategies,¹⁵ including MDG-7 on environmental sustainability, in cooperation with UNEP and other agencies.

The “One UN” idea has received wide support within the UN system. Originally a donor-led idea to ensure aid effectiveness, it has been well received by developing countries as a way to increase the level of recipients’ input into their development programmes. The G-77 has, however, cautioned that this idea should not bring about new conditionality for aid and that the outcome-based perspective should look at impacts on recipient countries to improve and increase overall levels of funding rather than resulting in a mere cost cutting exercise.¹⁶

The proposed “One UN” at the country level is welcome as a potentially successful proposal to improve work by the UN on environment and development. However, as the precise design of the new architecture is yet unknown, several thought-provoking questions arise:

- In those countries where UNEP has no permanent presence, who will be in charge of mainstreaming the environment into all UN programme activities at the country level? Who will have the main responsibility for implementing environment-related projects?
- Will funds from the Global Environment Facility (GEF), currently being channelled through UNEP or UNDP, be included in the “One UN” strategy?
- How will the new structure, including tailoring aid to national priorities, outcome-oriented aid and budget support affect funding for environmental objectives?

Division of Labour

The Panel’s Report makes some suggestions on the respective roles of UNEP and UNDP at the country level, but does not suggest precisely how, in light of their actual capacities, UNEP and UNDP should share the burden of on-the-ground environmental activities. So far, there has been a quite chaotic division of labour between UNDP and UNEP at the country level. As opposed to UNEP’s thirteen offices,¹⁷ UNDP has a much wider network of country offices with a presence in 166 countries. In terms of overall size, UNDP is a much larger programme than UNEP.¹⁸ UNDP’s impact on country level implementation is therefore significantly larger and has a richer potential than UNEP, thanks to the proximity to the country needs and accessibility for national counterparts.

UNDP has a large portfolio of energy efficiency, and access to water and sanitation projects that constitute the core of its work on the environment, thus mostly focusing on the more “human development” side of environmental protection, in line with its mandate. Against this background, one significant challenge is to ensure that the

purely “ecological” side of the equation, *i.e.* funds for biodiversity conservation, climate change mitigation, prevention of land degradation, sound management of chemicals, etc. also gets the necessary attention and is streamlined into development projects at the national level.

The Panel does state that, bearing in mind that environmental sustainability is the foundation for achieving all the other MDGs, there must be a strengthening of human, technical and financial capacities in developing countries to mainstream environmental issues into national decision-making, particularly through the Resident Coordinator,¹⁹ calling for cooperation between UNDP and UNEP. According to the Panel, while UNDP should further strengthen its *operational* capacity, UNEP should instead step up its *normative* and *analytical* capacity. Accordingly, while the Report states that UNDP should retire from sector-specific programme activities that are the object of other UN entities’ work,²⁰ it points to a promising and pragmatic way to ensure UNEP’s presence at the country level without replicating UNDP’s network of country offices: that is integrating UNEP’s environmental expertise into UN country teams.²¹ How these proposed arrangements will play out in practice remains to be seen, although a positive result may be generated by the streamlining of environment into all development projects through a larger effort in this regard by Resident Coordinators and effective deployment of UNEP expertise at the country level.²² The risk that a fracture between the environmental normative and operational work of the UN may lead to making UNEP, even if strengthened, an “irrelevant talk shop...disconnected from implementation activities”²³ should also be averted by UNEP expertise having an effective role at the country level.

Will Substantive Funds for the Environment Fall under the “One UN” Strategy?

In order to analyse the impact of the “One UN” proposal, it is important to have an idea of environmental institutions’ funding sources for programme support. A key issue to consider in this regard is that both UNDP and UNEP rely mostly on GEF resources to fund their activities on the ground.

UNDP’s 2005 Annual Report gave account of 1,750 GEF projects on the ground in more than 155 developing countries, mostly focused on using energy more efficiently and reducing greenhouse gas emissions. In 2005, in support of these projects, UNDP secured US\$284.5 million from GEF and attracted US\$1.02 billion in co-financing from governments and donors.²⁴ For the same year, UNEP’s GEF portfolio included 600 projects in 153 countries with more than US\$500 million in GEF resources and total resources of around US\$1 billion after including co-financing. UNEP/GEF resources are channelled to activities in support of Multilateral Environmental Agreements (MEAs), most notably biodiversity conservation, land degradation, supporting national legal frameworks for the management of persistent organic pollutants and biosafety, as well as climate change.²⁵

GEF funds constitute the core support of UNDP and UNEP to the environment cluster and, interestingly

enough, are likely to remain independent from the “One UN” system, as they are funds managed by the GEF Council and entrusted to the World Bank Group, and are already accounted for in the World Bank’s Country Assistance Strategies. Unlike the UN, the GEF Council has a “weighted” voting system where donors have a larger say over the destiny of their funding. Along the same lines, funds originating in MEAs (UNEP is depository of 26 trust funds from environmental Conventions, which are managed by independent governing bodies) or through other development banks like the Inter-American Development Bank or the African Development Bank, may also continue to follow their own guidelines and mandates.

This situation seems unlikely to change, thus the largest share of funds for the environment may well remain outside the “One UN” scope, unless UN-generated funds for the environment receive a substantial increase or a specific agreement between GEF and countries engaged in the “One UN” programme is adopted. It should also be noted that, although lively debates about the need for reform of the GEF were held before the Panel,²⁶ the Report was quite laconic on this matter, just pointing to the need for simpler policy requirements and operational procedures that should be more compatible with the development framework at the country level.²⁷

The new, unified funding strategy is thus likely to affect most development-focused funding going through UNDP and only a small portion of funds for specific environmental projects. Against this backdrop, it seems that increased efforts will be necessary to streamline environmental objectives into better-funded development strategies.

Implications of the New Funding Approach for the Environment

A contentious issue that is worth mentioning is the potential for the – otherwise welcome – approach of country-driven outcome-oriented funding for development, to result in a lack of priority being given to environmental objectives within country strategies. As experience shows, the environment is not a priority for most developing countries as reflected in their own budget planning (thus the “country-driven” aspect and the “budget support” may run counter to environmental objectives) and outcomes are hard to measure in the environmental field. Therefore, in some cases, it may be necessary to generate incentives for UN country officers to integrate the environment into project development and country strategies, and ensure that a reasonable proportion of funds are channelled towards environmental objectives. It is key for resident coordinators not to be penalised for seeking challenging environmental goals that may prove hard to achieve or account for. In this regard, increasing UNEP’s officers within country teams may be an effective means to achieve this end.

Headquarters Level: Upgrading UNEP

The Panel’s Report refers to UNEP’s need for a renewed mandate and improved funding, in order to have “real authority as the environmental policy pillar of the UN system.”²⁸ This phrase contains a cautious and condensed synthesis of an ongoing debate on the status of

UNEP within the UN. During the UN 2005 World Summit, the European Union (EU) proposed starting intergovernmental negotiations to strengthen international environmental governance (IEG) and upgrade UNEP into a UN specialised agency, to be named the UN Environment Organisation (UNEO). The significance of this statement was basically that of bringing a long-time stalled discussion from the UNEP Governing Council to the UN General Assembly level.²⁹ Although the EU did not manage to gather sufficient support for its initiative (which was opposed for example by the USA and Japan), a general reference to the need to “upgrade UNEP” has since become a catch-phrase whose real meaning is yet unclear, and will need to be determined by international negotiations. And indeed some recognition was reflected in the Summit Outcome in very tentative terms, by referring to the need to “explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies.”³⁰

Instead of providing a precise answer to the question of a more coherent institutional framework for the environment, the Panel also reverts to the general expression of “upgrading UNEP”, without necessarily supporting the shift from a UN programme to a UN specialised agency for the environment. In addition, the Panel stresses the need to make more effective cooperation among UN entities on a thematic basis and through partnerships,³¹ once again without going into the details. In more pragmatic terms, the Panel further suggests strengthening the technical and scientific capacity of UNEP, to act as an environmental early warning mechanism for the international community (networking existing scientific centres and MEA’s subsidiary bodies); and proposes that UNEP work to incorporate environmental issues into national development plans by quantifying environmental costs and benefits.³²

With regards to the environmental architecture at the international and headquarters level, therefore, the Panel perhaps raises more questions than it actually answers. Some of the key questions that arise from the proposed “upgrading” of UNEP within the Panel’s Report are the following:

- Will the transformation of UNEP into a specialised agency imply increased visibility, credibility and efficacy for UNEP? Will a higher status within the UN System help UNEP in securing a more significant and more secure budget?
- What will be the role of the “new” UNEP in relation to MEAs?
- What will be the relation between an upgraded UNEP and the proposed sustainable development board or the existing sustainable development institutions within the UN System?

UNEP as a Specialised Agency

One of the main arguments in favour of upgrading UNEP to a specialised agency is that the new, higher status would facilitate its role as the coordinator of environment-related activities within the UN System. One of the

practical ways to do so, at least according to submissions by NGOs,³³ would be for UNEP to receive reports from all international and regional institutions working on development and environment on the impacts of their activities on the environment. Whether such a role may be facilitated or not by the specialised agency status is open to debate: looking at UNDP's acknowledged coordinating role, for example, in the areas of post-disaster and post-conflict transition and governance,³⁴ it seems that its status as a UN Programme has never been called into question as a limit for its coordinating role. On the other hand, empirical research has shown that UNEP's programme status prevented it from coordinating environmental act-



High-Level Panel members with Secretary-General Kofi Annan Courtesy: UN

ivities of other UN bodies that see themselves as higher up in the UN institutional hierarchy.³⁵

Another hope related to the status of specialised agency is that a UNEO would be more capable of "pushing environmental issues into becoming policy priorities" on the basis of timely, reliable and critical environment-related information and scientific advice.³⁶ According to the EU, a UNEO could help achieve the essential reform by "injecting ambition and political weight". It is therefore expected that a higher status would reflected the recognition of the increased profile of environmental issues as a precondition for their more effective mainstreaming into development and other policy areas.³⁷ Yet another longstanding item of the debate was that a specialised organisation would be on the same level playing field as the World Trade Organisation (WTO). In this respect, it should be noted that the emphasis on the UNEP-WTO relationship has been decreasing considerably and the change in label of upgrading proposals from *World Environment Organisation* to *UN Environment Organisation* provides some evidence to this effect. Nonetheless, the EU and others are still hoping that a UNEO would be able to mainstream the environment within the WTO and international financial institutions.³⁸

Another bundle of issues related to the upgrading of UNEP regards expected positive budgetary implications. UNEP has a long-standing problem related to the underfunding of its core budget. As the larger portion of its funding comes from voluntary contributions and ear-marked funding, the absence of a predictable and reliable source of funds complicates the prospects of any kind of medium and long-term planning.³⁹ Steps are being taken to establish more predictable funding through an indicative scale

of assessments, although UNEP's General Council emphasises the need for greater support for UNEP from core-UN funding sources, which at present only represents less than 10% of its programme and support budget.⁴⁰

The question is thus, whether an UNEO would in itself imply an increase in net funding for this organisation. The answer is not necessarily in the positive. In fact, the EU, proposer of an UNEO has specified that upgrading UNEP into a specialised agency *per se* will carry limited financial implications, by building on UNEP's existing structures and premises, but negotiations on the budget of UNEO would necessarily be tied to the higher status of the proposed specialised agency. As a consequence, it is fair to say that even though upgrading UNEP may improve the predictability and certainty of its funding, for example by requiring binding rather than voluntary contributions by member States, there is no evidence of a direct causal relation between upgrading UNEP and increasing net funding for its activities. Both aspects, mandate and budget, should thus be addressed and negotiated in parallel to ensure that a worst-case scenario of an upgraded UNEP with an undersized budget does not materialise.

UNEP and MEAs

A large portion of work on environmental issues at the global and local levels is led by initiatives originating in multilateral environmental agreements. Consequently, the framework of MEAs' own governance structures as well with their own financial mechanisms or using GEF as their financial mechanism, is an important consideration regarding the value of an upgraded UNEP – how would it contribute to this group of independent – and sometimes unruly – institutional arrangements. When the Panel calls for UNEP to be awarded "real authority...normative and analytical capacity and... broad responsibility to review progress towards improving the [environmental] pillar",⁴¹ some wonder if it is a veiled reference to the need for an UNEO or a call for streamlining MEA activities. One of the perennial questions in the international environmental governance debate is precisely that of clarifying the role of a strengthened UNEP with respect to multilateral environmental agreements (MEAs).

The Panel does not take a vigorous stand on this point, but seems to present an array of options currently on the table. For example, the Panel recommends more effective cooperation among UN bodies on a thematic basis and through partnerships with a dedicated agency at the centre,⁴² but does not explicitly mentions the "clustering approach" and the possible role that UNEP could play in this regard. The only concrete statement regarding MEAs concerns the need to avoid treaty fatigue rather than increase substantial coherence of the institutional framework, and is the suggestion to: establish one comprehensive annual national report format for MEAs; promote management efficiencies among MEAs; and reduce the frequency and duration of MEA-related meetings.⁴³

These mild suggestions do not address the key role of the independence of MEAs' governance structures from other UN programmes and bodies and their varying membership in the broader framework of international envi-

ronmental governance. While many government representatives would surely benefit from a more coherent approach to international environmental governance, the value of diversity within MEAs as the source of flexibility, innovation and world-leading expertise should not be underestimated either. As always, the devil is in the detail, and a detailed proposal on the role of UNEP in re-defining the delicate balance between MEAs' independence and their coherent contribution to international environmental governance was not really provided by the Panel.

At this point in negotiations, it seems unlikely that any substantive changes to MEA operational activities will take place. MEA country parties and their national focal points cherish their relative independence from formal UN procedures, which they perceive as bureaucratic and slow. Most MEAs manage to handle complex global problems with very limited budgets and a small group of dedicated staff, so unless an offer of substantive budgetary growth were presented, it would be unlikely for countries to decide on a different path. What is more likely to happen is for UNEP to be awarded a sort of synthesising role, to present MEA achievements and outcomes to the UN, but this would be more of a communicational rather than an operative change.

UNEP and the Proposed Sustainable Development Board

One of the already divisive Panel suggestions is the establishment of a sustainable development board within the UN to: provide oversight for the "One UN" Country programmes, promote system-wide coherence, ensure coordination, and monitor performance of global activities. This would be achieved by merging existing joint meetings of the Boards of UNDP, the UN Population Fund, the UN Children's Fund (UNICEF), and the World Food Programme into this strategic body, and reporting to the UN's Economic and Social Council (ECOSOC). According to the Panel, the Board should comprise a representative sub-set of member states on the basis of equitable geographic representation, and enhance the participation and voice of developing countries. It would be responsible for endorsing the "One UN" country Programme, allocating funding, and evaluating its performance against the objectives agreed with the Programme country. The Board would also maintain a strategic overview of the system to drive coordination and joint planning between all funds, programmes and agencies, and to monitor overlaps and gaps. A separate idea for a Sustainable Development Organisation was mentioned (presented by IUCN and WWF) with a view to coordinating UN operational activities on the ground by focusing on the three pillars of sustainable development.⁴⁴

What the Panel does not clarify is the relationship between the Board and UNEP, and surprisingly does not propose the inclusion of UNEP into this new body. It is thus unclear how the environmental pillar is represented in the proposed sustainable development board and how an upgraded UNEP would be taken seriously and perform its coordinating function within the UN if were to be ex-

cluded from such a body. Nor is included the possible relationship of the Board with the Environmental Management Group (EMG),⁴⁵ which is mentioned in appreciative terms by the Panel, but in a separate and apparently unrelated section of the Report,⁴⁶ where the Panel simply mentions that that EMG should be "linked with the broader framework of sustainable development coordination".

Another issue that merits further analysis is the effect of such a Board on the Commission on Sustainable Development (CSD), and the *value added* by the latter in particular in consideration of the proposed sustainable development section for ECOSOC. Although these changes may increase the visibility of sustainable development issues, the Panel left unclear what role would be left for the CSD to ensure the integrated consideration of environmental, economic and social issues. The Panel limited itself to suggesting that the CSD abandon its current focus on "environmental issues alone", which has contributed to the overlaps and unclear divisions of labour,⁴⁷ which implicitly would support UNEP as the only environmental pillar of the UN, but no reference was made as to its linkages with the Sustainable Development Board.

As to ECOSOC, some fear that the Board will just be an additional intermediary body between ECOSOC and the reports from specialised agencies, so an additional layer of bureaucracy without real value added.⁴⁸ Indeed, in its 2006 resolution, the UN General Assembly recalled ECOSOC's role in overseeing system-wide coordination of economic, social and environmental aspects of UN policies and programmes aimed at promoting sustainable development. The text also reaffirmed that the Commission on Sustainable Development should continue to be the high-level body responsible for sustainable development within the UN system.⁴⁹

Even though the idea of having a sustainable development board to oversee and guide "One UN" activities seems relevant, it is yet unclear whether the proposed structure would be able to effectively convey this result. As a new organ it would need to be fitted within existing UN structures, and its relation to UNEP and the CSD further clarified. The Sustainable Development Board is thus one of the proposals most likely to generate lively debates, and in its current presentation seems mismatched with a "seriously" upgraded UNEP.

It seems at this stage that a more specific proposal on environmental governance is needed, and this may be the reason why the Panel proposed an independent evaluation of international environmental governance, to be completed in 2007.⁵⁰ In this regard, it should be noted that Secretary-General Ban Ki-moon stated that he will "be giving due attention, in light of intergovernmental process, to the Panel's recommendation [to] commission an independent and authoritative assessment of the current United Nations system of international environmental governance."⁵¹ If such an exercise were to guarantee a participatory and transparent process and focus on making proposals beyond those already on the table, or at least systematise the scattered proposals on the table into a "coherent" upgrading package, it may provide a way to move the process forward.

Final Remarks: The Panel's Report within the UN Reform Processes

In analysing the environment-related recommendations of the Panel, it is necessary to place them not only in the larger framework of ongoing discussions on UN reforms, but also against the background of other institutional reforms suggested by the same Panel, particularly in relation to sustainable development.

The Panel's Report must be understood within the wider UN Reform process, where several other initiatives to improve environmental governance are simultaneously taking place. These include, most notably, the UN General Assembly's informal consultative process on environment institutions. Other processes also include UNEP Governing Council's discussions on international environmental governance, and an autonomous initiative by a group of countries "Friends of an UNEO" that met in Morocco in April 2007 and will meet again in Latin America to gather consensus towards the establishment of a new specialised agency.⁵²

The UNGA informal consultative process was initiated in 2006 but then put on hold to await the Panel's recommendations, and has been resumed in 2007 and is now expected to take into account the Panel's Report. In fact, in February 2007, during the UNEP's Governing Council and Global Ministerial Environment Forum meetings in Nairobi, Kenya, delegates had a chance to receive an update from the co-chairs of the UN Informal Consultations, Ambassadors Berruga of Mexico and Maurer of Switzerland, on the status of informal negotiations. The governing Council did not, however, provide a strong signal in response to the co-chairs' presentations, a missed opportunity according to some.⁵³

From preliminary assessment of this Report, it is clear that opportunities for great improvement lie in the "One UN" approach to implementation of environmental objectives at the country-level. The Panel's Report generated a positive reaction to its call for preventing overlaps, and the much needed streamlining of aid delivery. It also generated enthusiasm about prospects for a more profound and coherent streamlining of environmental aspects into development programmes and efforts to achieve the MDGs.⁵⁴ This excitement about the positive implications of the Panel's proposal for a "One UN" strategy, however, raised some concerns from an environmental perspective that should be duly accounted for when taking the proposals forward.

One concern relates to the possibility that a recipient-led priority setting may lead to a low priority for environmental objectives within country-development strategies. Thus particular care should be taken by the UN country team to sustain the integration of key internationally backed environmental objectives at the national level and minimise the risk of losing the little ground that environmental programmes have at present. This should be a significant task for the UN country team, particularly for the UNEP in-country experts backed up by the Resident Coordinators. At the same time, ensuring that national priority-setting exercises do not leave out environmental considerations, but rather focus on establishing which are the top envi-

ronmental objectives for a country, could possibly be achieved by establishing a minimum proportion of funds that should be applied towards environmental projects or environmental components of development programmes when negotiating the "single UN budget" with countries.

The second concern relates to the impact of proposed reforms on international funding levels for environmental activities on-the-ground. In this case, there seems to be no cause for alarm as most international funding for key environmental objectives today comes from non-UN sources, namely GEF, MEAs and regional development banks. Therefore, the "One UN" strategy could affect funding levels by streamlining environmental objectives into development plans, but seems unlikely to significantly impact existing projects.

A more complex panorama is presented at the international level, calling for additional work on the design of a more efficient architecture for environmental governance while respecting specialised institutions, like UNEP and MEAs, that are responsible for most of the achievements to-date. The limited level of detail of the recommendations of the High-level Panel, for example on an upgraded UNEP, may imply that these recommendations have been purposely left ambiguous.

In fact, the Panel's Report seems to have fallen short of proposing how to streamline UNEP, MEAs and the UN's environment work, in the face of established bureaucracies and agencies, each with a specific perspective on environmental matters. The Panel's Report does not take a stand in the long-standing disagreement on whether a new specialised agency is needed. In this case, the EU posits that a new agency will improve the status and mandate of UNEP to guarantee a more coherent international environmental governance framework, while two of the main donors, the USA and Japan, express concerns about the potential ineffectiveness of additional funding provided to this endeavour. The neutral response of the Panel on this specific point leaves the question once again to be tackled from scratch through intergovernmental negotiations.⁵⁵

At the same time, it is clear that adequate resources to perform its new functions should accompany and be negotiated in parallel to any increase in the actions required of UNEP under a new mandate. Developing countries, however, still seem unclear about their own stakes in this arrangement and fail to visualise any possible advantages or change in services that would result from an upgraded UNEP. Perhaps, having to choose between additional funding being channelled to an upgraded UNEP or an upgraded GEF they would prefer the latter as it has a more visible and direct impact on environmental projects on the ground.

The short timeframe for the delivery of the Panel Report has provided evidence of the importance of the issues, and the number of open questions may demonstrate the complexity of the international environmental architecture and the particular sensitivities involved. It may highlight the need to improve the participation opportunities of developing countries and civil society to enable a negotiated outcome that is accepted globally. A new

opportunity to complete these discussions and include a wider audience is presented by the proposal to commission an independent paper on environmental governance by the UN Secretary-General.

The main decision to be taken in the next few months is now, whether the Panel's Report will be addressed as a whole by the General Assembly with a view to adopting a resolution on this topic, or whether it will be split and fed into the different ongoing processes on environmental governance. In this regard, during the presentation of the Panel's Report to the General Assembly on 17 April 2007, several countries emphasised that recommendations from the Panel would be taken on board by existing reform processes, such as the informal consultations on the environment and the triennial comprehensive policy review of operational activities.⁵⁶ The Secretary-General, however, proposed that the Panel's recommendations be reviewed as an integrated and coherent whole, by the General Assembly, in order to adopt a resolution during 2007 defining the next steps for its implementation.⁵⁷ It is still unclear how this process will be taken forward as informal negotiations continue, and too soon to say whether the time has finally come for gathering the shared political will and necessary financial resources needed to ensure wider and more efficient impacts of UN efforts on the global environment.

Notes

- 1 Secretary-General's High-Level Panel on UN System-wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment, "Delivering as One", 9 November 2006 (hereinafter, "Panel's Report").
- 2 The basis for the mandate of the High-Level Panel can be found in the UN 2005 World Summit Outcome Document, UN Doc. A/60/1, 24 October 2005, para. 169 where it reads "Inviting the Secretary-General to launch work to further strengthen the management and coordination of United Nations operational activities so that they can make an even more effective contribution to the achievement of the internationally agreed development goals, including the Millennium Development Goals, including proposals for consideration by Member States for more tightly managed entities in the fields of development, humanitarian assistance and the environment".
- 3 The 2005 UN World Summit (High-Level Plenary Meeting of the 60th Session of the United Nations General Assembly on the Follow-up to the Outcome of the Millennium Summit) took place on 14–16 September 2005, at the UN headquarters in New York. For a discussion of the environmental significance of the UN Summit, see E. Morgera, "The 2005 UN World Summit and the Environment: The Proverbial Half-Full Glass?" *15 Italian Yearbook of International Law* 2005 (published in 2006), at 53–80.
- 4 Panel's Report, *supra* n. 1, paras 30–32.
- 5 Panel's Report, *supra* n. 1, paras 35–36.
- 6 Report of the Secretary-General: Recommendations contained in the report of the High-level Panel on United Nations System-wide Coherence in the areas of development, humanitarian assistance and the environment, UN Doc. A/61/583, 9 April 2007.
- 7 On this aspect, see H. Wilkins, "United Nations Secretary-General's High-Level Panel on System-wide Coherence and the Environment: Incremental Change or UN Reform?" *International Journal of Global Environmental Issues*, Vol. 6, No. 4, 2006, 285–300.
- 8 Panel's Report, *supra* n. 1, at 2–3.
- 9 Panel's Report, *supra* n. 1, at 1.
- 10 Oriented toward results, the CAS is developed through a consultative process including government authorities, civil society organisations, development partners, and other stakeholders. A typical CAS would include a comprehensive diagnosis of the development challenges facing a country and key areas for the Bank's assistance to have the largest impact on poverty reduction. The CAS is increasingly results-focused and will include clear targets and indicators to monitor performance in achieving stated outcomes. World Bank, 2007, <http://go.worldbank.org/4M75B176J0>.
- 11 Albania, Cape Verde, Mozambique, Pakistan, Rwanda, Tanzania, Uruguay and Viet Nam are implementing "One UN" country strategies.
- 12 General Assembly Press Release, 17 April 2007.
- 13 Panel's Report, *supra* n. 1, para. 18.
- 14 Panel's Report, *supra* n. 1, para. 19 (emphasis added).
- 15 Panel's Report, *supra* n. 1, para. 19.
- 16 Statement on behalf of the Joint Coordinating Committee of the Group of 77 and the Non-aligned Movement (New York, 16 April 2007), <http://www.g77.org/statement/getstatement.php?id=070416b>.
- 17 UNEP has six regional offices (Europe, Africa, North America, Asia and the Pacific, West Asia, and Latin America and the Caribbean), three liaison offices (UN-New York; EU-Brussels and Arab League- Cairo) and four country offices (China, Brazil, Russia and Ethiopia).
- 18 In 2005, UNDP had a core budget of US\$921 million and channeled US\$326 million for capacity-building projects for energy and environment. UNEP's budget for the same year was US\$64.6 million, and even including the additional funds channelled through earmarked funding (approximately US\$22.5 million in 2005) and trust funds directly supporting its Programme of Work (approximately US\$40 million), UNEP still only has at its disposal about a third of UNDP's environment and energy programme funds. *UNDP Annual Report 2005 "Global Partnership for Development"*, pp. 4, 34; *UNEP Annual Report 2005*, Annex I.
- 19 Panel's Report, *supra* n. 1, para. 32.
- 20 Panel's Report, *supra* n. 1, at 2.
- 21 Panel's Report, *supra* n. 1, para. 45.
- 22 Panel's Report, *supra* n. 1, para. 45.
- 23 Wilkins, *supra* n. 7, at 287.
- 24 *UNDP Annual Report 2005*, "Global Partnership for Development," at 16.
- 25 *UNEP Annual Report 2005*, "UNEP in the Global Environment Facility," at 5.
- 26 Including the proposal to merge all environment-related funds including the GEF into a single fund: see "Towards the redesign of the UN Development Architecture", OECD Doc. DCD/DAC/RD(2005)17/RD6, 2 December 2005.
- 27 Panel's Report, *supra* n. 1, para. 38.
- 28 Panel's Report, *supra* n. 1, at 18–19. (See box on page 272).
- 29 E. Morgera and G. M. Duran "The UN 2005 World Summit, the Environment and the EU: Priorities, Promises and Prospects", *Review of European Community and International Environmental Law* 15:1, 2006, 11–22.
- 30 UN 2005 World Summit Outcome Document, *supra* n. 1, para. 169.
- 31 *Ibid.*, at 21.
- 32 *Ibid.*
- 33 WWF International Discussion Paper on International Environmental Governance, 2007.
- 34 Panel's Report, *supra* n. 1, at 5.
- 35 M. Ivanova, "Moving Forward by Looking Back: Learning from UNEP's History", in *Global Environmental Governance: Perspectives on the Current Debate*, 2007, at 26–47.
- 36 Wilkins, *supra* n. 7, at 293.
- 37 *Ibid.*, at 294.
- 38 Morgera and Duran, *supra* n. 29; WWF, *supra* n. 33.
- 39 M. Khor, Joint G-77-NAM letter sent to the UN Secretary-General, Third World Network, 28 March 2007.
- 40 The contribution by the UN is approximately US\$12 million (subject to approval by the General Assembly) over a US\$152 million budget for 2008–2009. UNEP/GC/24/9, 10 October 2006.
- 41 Panel's Report, *supra* n. 1, para. 39.
- 42 Panel's Report, *supra* n. 1, para. 41.
- 43 Panel's Report, *supra* n. 1, para. 39.
- 44 Wilkins, *supra* n. 7, at 293.
- 45 The EMG is a forum for improved inter-agency policy collaboration and coordination in the field of the environment that comprises 44 members from intergovernmental organisations, treaty secretariats and Bretton Woods institutions (www.unemg.org).
- 46 Panel's Report, *supra* n. 1, para. 39.
- 47 Panel's Report, *supra* n. 1, para. 44.
- 48 Centre of Concern "A Civil Society Response to the Report of the UN High-Level Panel on System-wide Coherence;" April 2007; at 13.
- 49 A/RES/61/16, 9 January 2007.
- 50 Panel's Report, *supra* n. 1, para. 39.
- 51 Report of the Secretary-General, *supra* n. 6, para. 14.
- 52 Agadir Conference President's summary, <http://www.matee.gov.ma/onue/index.html>.
- 53 See "Summary of the 24th Session of the UNEP Governing Council/Global Ministerial Environment Forum;" *IISD Earth Negotiations Bulletin*, February 2007.
- 54 UN General Assembly Press Releases, 17 April 2005.
- 55 See page 272 in this issue, however, for a discussion of the subsequent dismissal of the UNEO proposition by the Governing Council.
- 56 UN General Assembly Press Releases, 17 April 2005.
- 57 Report of the Secretary-General, *supra* n. 6, p. 3.



CBD

Access and Benefit Sharing in Focus: Meetings Held on Certificate of Origin, Indigenous Peoples Rights

by Elsa Tsioumani*

The international regime on access and benefit sharing (ABS), currently under negotiation under the auspices of the Convention on Biological Diversity (CBD), has opened a variety of issues, mostly new, which need to be resolved at all technical, legal and political levels, and which have attracted attention in many related fora. In this framework, the CBD has launched a group of technical experts on an internationally recognised certificate of origin/source/legal provenance, which met from 22–25 January 2007, while the UN Permanent Forum on Indigenous Issues (UNPFII) held an international expert group meeting on the CBD's international regime on ABS and indigenous peoples' human rights from 17–19 January.

Introduction

Negotiations on an international regime on ABS began as a result of the call by the World Summit on Sustainable Development (WSSD) to "negotiate, within the framework of the CBD, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilisation of genetic resources". The seventh Conference of the Parties (COP-7) to the CBD mandated the Convention's *Ad hoc* Open-ended Working Group on ABS to negotiate an international regime on ABS, and COP-8 requested it to complete its work at the earliest possible time before COP-10, to be held in 2010, under the co-chairmanship of Tim Hodges (Canada) and Fernando Casas (Colombia).

Major issues to be resolved in the context of an international ABS regime include the type of instrument, its scope, the mechanism to ensure sharing of benefits, and issues related to enforcement and compliance. For instance, Parties must decide whether the regime under negotiation will be legally binding or not, and whether it will consist of a new instrument, as the proposal to combine existing instruments to form an ABS regime is also on the negotiating table. Parties must also agree on whether the scope of any international regime will include derivatives, i.e. extracts of genetic resources or chemical compounds derived from them, as these are the substances most often used in commercial products likely to generate benefits. Addressing traditional knowledge in the regime is another issue, and the rights of indigenous and local communities need to be protected in that regard. Finally, the issue of disclosure requirements in patent applications when the subject matter incorporates genetic resources and/or tra-

ditional knowledge, at the interface between ABS and intellectual property rights law and currently under negotiation not only at the CBD but also at the World Intellectual Property Organisation (WIPO) and the Council on Trade-related Aspects of Intellectual Property Rights (TRIPS), relates to the operability and enforcement of any future regime. To that regard, a possible certificate of origin, source or legal provenance was suggested as a tool to provide evidence of compliance with ABS regulations.

CBD Expert Group on the Certificate of Origin/Source/Legal Provenance

The CBD group of technical experts was established by COP-7, in order to explore and elaborate possible options for the form, intent and functioning of an internationally recognised certificate of origin/source/legal provenance, and analyse its practicality, feasibility, costs and benefits.¹ The group, composed of 25 government-nominated experts from each geographic region as well as seven observers in accordance with the COP-7 decision, met from 22–25 January 2007, in Lima, Peru.²

Participating experts addressed the possible rationale, objectives and need for an internationally recognised certificate of origin/source/legal provenance; defined the potential characteristics and features of different options of such a certificate; analysed the distinctions between the options of such a certificate and the implications of each of the options for achieving the objectives of Articles 15 (Access to Genetic Resources) and 8(j) (traditional knowledge) of the CBD; and identified associated implementation challenges, including the practicality, feasibility, costs and benefits of the different options. Breaking into three small working groups, the group also developed models for what would be needed for such a certificate in a legally binding, voluntary and mixed system, with consideration of issues including: scope, feasibility, cost, information to be contained in the certificate, form, process, institutional measures, and consequences.

The outcome of the meeting is annexed to the meeting's report. Recognising that the basic role of the certificate is to provide evidence of compliance with national ABS regimes, the group agreed to refer to it as a certificate of compliance with national law.

With regard to the possible rationale, objectives and need for such a certificate, the group stressed that national legal systems alone are not sufficient to guarantee benefit sharing once genetic resources have left the provider country, and that the certificate, as part of a broader ABS regime, could be an important tool in that regard.

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The group identified several other objectives that a certificate could cover, including legal certainty, benefit-sharing and legal access facilitation, prevention of misappropriation, support of compliance with national law and mutually agreed terms, and protection of traditional knowledge, the achievement of which would depend on the specific characteristics of the model.

The group then identified potential features and characteristics of the certificate, as well as various options with respect to the obligations of users and providers of genetic resources, ranging from models based on voluntary instruments to mandatory ones and a combination of both. Participants agreed that a national certificate, with standard features to allow its international recognition, in combination with control points to be established in user countries, has the potential of meeting the goals of benefit sharing and compliance with ABS requirements in both user and provider countries. The scope of such a certificate could cover, in principle, all genetic resources in accordance with national law. However, it was considered that providers may establish general or specific exemptions, while the group acknowledged that plant genetic resources for food and agriculture fall within the scope of the International Treaty on Plant Genetic Resources for Food and Agriculture. The group also noted that further consideration may be needed to determine whether the certificate should be extended to traditional knowledge, because of the distinct implementation challenges of the issue; and whether the certificate should apply to genetic resources used for scientific research. In all the models presented, it was agreed that the certificate would serve to provide evidence of compliance with national ABS legislation, as may be required at specific checkpoints to be established in user countries.

Its content and format, the group noted, should facilitate international recognition of the national certificates and therefore contain the following minimum information: issuing national authority; details of the provider; a codified unique alpha numeric identifier; details of the rights holders of associated traditional knowledge, as appropriate; details of the user; subject matter (genetic resources and/or traditional knowledge) covered by the certificate; geographic location of the access activity; link to mutually agreed terms; uses permitted and restrictions of use; conditions of transfer to third parties; and date of issuance. A standardised, internationally recognised format for certificates was considered most appropriate.

The group also described a possible procedure for issuing the certificate, both in the provider and the user country, as well as at the international level: in the provider country, the issuance of the certificate would be triggered at the request of a user, while countries should be encouraged to streamline, rather than add to current internal mechanisms for access. In the user country, identified checkpoints were registration points for commercial applications, and intellectual property rights offices, but opin-

ions varied on the requirements for reporting at checkpoints. At the international level, a registry containing electronic copies of the certificate or the unique identifier of the certificate could serve as a clearing house mechanism. It was noted that harmonisation of processes in both provider and user countries related to the issuing and monitoring of certificates may enhance the efficiency and legal certainty of the entire system. The consequences in case of infringement will vary depending on the nature of the procedure.

With regard to implementation challenges, the group noted that there will be some implementation costs, particularly in the setting up of national authorities, in capacity building and in the maintenance of the proposed international registry. However, the international certificate could balance additional costs by lowering the transaction costs and providing more flexibility, and avoiding the costs resulting from uncoordinated national regimes.

UNPFII Expert Group Meeting on the CBD's International Regime on ABS and Indigenous Peoples' Human Rights

The meeting on the international regime on ABS and indigenous peoples' human rights was recommended by the fifth session of the UNPFII and authorised by the December 2006 resumed session of the Economic and Social Council. The meeting was held in New York, from 17–19 January, with the participation of six UNPFII members, seven invited experts from the UNPFII geo-cultural regions, and a number of observers from UN departments and programmes, intergovernmental and non-governmental organisations and Member States. The certificate of origin/source/legal provenance was among the main issues examined, while the meeting also addressed indigenous peoples' participation in decision making, human rights law and instruments applicable to traditional knowledge, and the role of customary law in the protection of traditional knowledge and development of regimes on ABS.³

Participants emphasised that an international regime on ABS, whether legally binding or not, should conform to internationally recognised human rights laws, including indigenous peoples' collective rights. Furthermore, the concept of free, prior and informed consent should be included, not only as a methodology, but also as a principle, in addition to international human rights standards. Indigenous experts also expressed the view that an analysis of relevant international law and State practices have confirmed indigenous peoples' right to own, use, control and manage their lands, territories and natural resources.

With regard to the ongoing CBD negotiations, experts stressed that the current negotiation format produces many challenges for indigenous peoples because of lack of funding and lack of information due to language obstacles. There is also an expectation within the CBD framework that indigenous peoples will speak with one voice and hold



A Saami family around 1900

Courtesy: wikipedia

one specific position, which is very difficult as indigenous peoples represent a diversity of regions and positions. This issue was discussed at length, with some participants noting that this situation often leads to a loss of diversity among indigenous peoples and in the long run is less effective among the greater number of participants, and others suggesting it is important to speak with one voice because having too many voices and positions can sometimes undermine the strength of negotiations.

An expert provided a brief overview of customary laws relating to the preservation, transmission, maintenance and development of traditional knowledge. These include the local systems of laws, norms, taboos and regulations that have been devised to keep social order and maintain continuity of cultural practices. It was noted that traditional knowledge can exist only in a particular place in a particular community, related to particular circumstances of the environment and livelihoods. Therefore, issues of preservation, maintenance and development of traditional knowledge are issues of human rights including rights to land and the right to self-determination. As traditional knowledge is by definition local and even place-specific, but has now become a global issue, it is very difficult to reach a shared understanding about traditional knowledge, the degree of its salience and the dangers and benefits of becoming uniform, standardised and commercialised. According to the group, accepting and respecting the traditional customary laws and practices of indigenous peoples seems to be a way of reaching a shared understanding of the concepts of traditional knowledge.

With regard to a certificate of origin/source/legal provenance, participants expressed the concern that a possible separation between genetic resources and associated traditional knowledge would break the essential link between the physical and the intangible resource, and potentially exclude traditional knowledge from the certificate. Therefore, the meeting concluded, the integral link between genetic resources and associated knowledge must be maintained in the certificate, in order to protect the rights of indigenous peoples and to ensure their share in any benefits. For the same reason, indigenous peoples and their communities who are the rights holders over genetic resources and associated traditional knowledge need to be identified. The group also stressed that community-controlled registers of biological resources and associated traditional knowledge, and community protocols on ABS could be important tools to complement such a certificate.

The expert group meeting further concluded that international human rights law affirms indigenous peoples' human rights, including cultural rights and rights to lands, waters, territories and natural resources, pertaining to genetic resources and traditional knowledge, and that an international regime on ABS cannot be in violation of these rights. Consequently CBD Parties are legally obliged to guarantee that any international regime recognises and respects these rights. Specifically, the group stated that peoples hold sovereign rights to natural resources within their territories and the CBD Parties are bound to respect these rights, despite language on state sovereignty and

references to domestic legislation contained within the CBD.

With regard to the ongoing negotiations on ABS, the group concluded that the lack of adequate resources for indigenous peoples to engage in effective participation in the process was an obstacle to effective outcomes for indigenous peoples; emphasised the need to further enhance indigenous peoples' participatory rights in CBD meetings; and concluded that CBD Parties have to respect indigenous peoples' customary legal systems in their deliberations.

The meeting made a number of general and specific recommendations. The group, *inter alia*, urged CBD Parties to recognise, respect and protect the rights of indigenous peoples in all aspects of the regime, and take into account and complement the work of other organisations, such as the work of WIPO in relation to the intellectual property aspects of ABS and the protection of traditional knowledge; recognised that *in situ* conservation, including ABS, when implemented at the community level, will provide an opportunity for indigenous peoples to choose whether or not to commercialise their traditional knowledge and genetic resources; invited the UNPFII to transmit the meeting's report to the CBD Executive Secretary; invited indigenous peoples to compile case studies about local and national experiences relevant to the proposed International Regime on ABS and *sui generis* protection of traditional knowledge and make them available to the CBD Executive Secretary; and invited the UNPFII to prepare a legal analysis on States, peoples and sovereignty and their relationship, scope and application, to assist CBD Parties.

Specific recommendations addressed the issues of effective participation, coordination, capacity building, and others. The meeting encouraged indigenous peoples' organisations, including the International Indigenous Forum on Biodiversity, to establish an informal, open-ended indigenous expert group on ABS and Article 8(j) prior to the fifth meeting of the Working Group on ABS, to analyse, review and provide input directly into the Working Groups on 8(j) and on ABS, and to provide advice directly to the Working Group on ABS, as a useful mechanism to increase cooperation and coordination between both Working Groups. It also urged the CBD, in line with UN reform measures, to apply the human rights approach to development; and urged both the Secretariat of the UNPFII and the CBD to establish a database of indigenous experts who can assist indigenous peoples in capacity building concerning the environment, the CBD, and specific areas such as the protection of traditional knowledge and ABS.

Notes

1 Decision VIII/4 C, available at: <http://www.biodiv.org/decisions/default.aspx?m=COP-08&id=11016&lg=0>.

2 On the basis of the official report of the meeting (UNEP/CBD/WG-ABS/5/2), available at: <http://www.biodiv.org/doc/meetings/abs/abswg-05/official/abswg-05-02-en.doc>.

3 On the basis of the official report of the meeting (E/C.19/2007), available at: http://www.un.org/esa/socdev/unpfii/documents/workshop_CBDABS_final_report_en.doc. Other documents are available at: <http://www.un.org/esa/socdev/unpfii/en/workshopCBDABS.html>.



Cartagena Protocol

Working Group Discusses Options for an Instrument on Liability and Redress

by Elsa Tsioumani*

The third meeting of the Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety was held from 19–23 February 2007, in Montreal, Canada.¹ The Working Group focused its deliberations on a working draft prepared by its Co-Chairs René Lefeber (the Netherlands) and Jimena Nieto (Colombia) synthesising proposed operational texts addressing: channelling of liability, limitations of liability, mechanisms for financial security, settlement of claims, standing/right to bring claims, non-Parties, complementary capacity-building measures, and choice of instrument. The meeting concluded the information-gathering stage of the group's work, finalising the analysis of the options and elements of a regime on liability and redress. Having produced a structure synthesising proposed options and elements, and

(LMOs) that may have an adverse effect on biodiversity, taking into account human health, with a specific focus on transboundary movements. The Protocol creates an advance informed agreement procedure, whereby an exporter wishing to export certain categories of LMOs to a country for the first time must notify the Party of import in advance and provide certain information relating to the LMO. The Party of import then has the opportunity to examine the information provided and may decide to accept or reject the import, or attach conditions to it on the basis of a risk assessment. The Protocol incorporates mechanisms for risk assessment and risk management, as well as the precautionary approach; establishes a Biosafety Clearing-House to facilitate information exchange; and contains provisions on capacity building and financial resources. It entered into force on 11 September 2003, and currently has 140 Parties. However, the main producers and exporters of LMOs have not ratified it.

Article 27 of the Protocol requires the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP) to adopt, at its first meeting, a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from trans-

boundary movements of LMOs. The provision further notes that the COP/MOP "shall endeavour to complete this process within four years." COP/MOP-4 in 2008 marks the end of the deadline.

Accordingly, COP/MOP-1 established an Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress to carry out the process pursuant to Article 27 of the Protocol, with the mandate to: review information relating to liability and redress for damage resulting from transboundary movements of LMOs; analyse general issues relating to the potential and/or actual damage scenarios of concern; and elaborate options for elements of rules and procedures on liability and redress.²

At its first meeting (May 2005), participants heard presentations on scientific analysis and risk assessment, state



L-R: Co-Chairs Rene Lefeber, the Netherlands; and Jimena Nieto, Colombia with Ahmed Djoghlaif, CBD Executive Secretary
Courtesy: IISD

providing the necessary background for the formulation of national and regional positions, the meeting has set the groundwork for negotiations to begin at the fourth session of the Working Group, to be held in October 2007. The fourth and fifth sessions will be critical, if the Working Group is to fulfil its mandate and conclude its work in time for the fourth meeting of the Parties to the Protocol, to be held in May 2008.

Background

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (CBD) addresses the safe transfer, handling and use of living modified organisms

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responsibility and international liability, and expanded options, approaches and issues for further consideration in elaborating international rules and procedures on liability and redress. At its second meeting (February 2006), the Working Group considered submissions of proposed operational texts and views on approaches, options and issues pertaining to liability and redress, as synthesised in a Co-Chairs' working draft, focusing particularly on scope of damage, damage and causation (sections I to III of the working draft). The group further developed an indicative list of criteria for the assessment of the effectiveness of any rules and procedures referred to under Article 27 of the Protocol, on the understanding that it had not been negotiated and was non-exhaustive. It also requested submission of further views on channelling of liability, limitations of liability, mechanisms for financial security, settlement of claims, standing/right to bring claims, non-Parties, complementary capacity-building measures, and choice of instrument (sections IV to XI of the working draft), which the Co-Chairs would synthesise for consideration at the third meeting of the Working Group.

The COP/MOP, at its third meeting (March 2006), decided that the Working Group would hold three further meetings before COP/MOP-4, in order for it to complete its work on time.³

Review of Information Relating to Liability and Redress

The Working Group reviewed a number of documents prepared by the Secretariat on recent developments in international law relating to liability and redress, including on: the status of international environment-related third party liability instruments,⁴ experience of other international instruments and forums as regards damage suffered in areas beyond national jurisdiction,⁵ CBD documents relating to the application of tools for valuation of biodiversity and biodiversity resources and functions,⁶ and financial security to cover liability resulting from transboundary movements of LMOs.⁷ The group also heard presentations on: tools for the valuation of biodiversity and biodiversity resources and functions, by a representative of the CBD Secretariat; financial security to cover liability resulting from transboundary movements of LMOs, by Christopher Bryce, Marsh Ltd.; and the private international law analysis of cross-border environmental damage, by Christopher Bernasconi, Hague Conference on Private International Law.

Elaboration of Options for Elements of Rules and Procedures: a Brief Overview of Discussions

The group focused its deliberations on the above-mentioned synthesis (prepared by the Co-Chairs). It provided a basis for a rich discussion, in the form of proposed operational texts on approaches, options and issues addressing: channelling of liability, role of Parties of import and export and standard of liability; liability limitations; mechanisms of financial security; settlement of claims; standing/right to bring claims; non-Parties; complementary capacity-building measures, and choice of instrument.⁸

Discussion on possible approaches to channelling of liability focused on existing options: state responsibility (for internationally wrongful acts); state liability (for acts not prohibited by international law); civil liability; and administrative approaches.

Co-Chair Lefeber drew attention to Resolution 61/36 of the UN General Assembly and the Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities,⁹ in particular Principle 7 on development of specific international regimes,¹⁰ and suggested that this resolution guide the group's work. The Working Group agreed that there was no need for special rules on state responsibility, explicitly noting however that the rules being developed were without prejudice to the rules of general international law with respect to state responsibility. A number of participants suggested that primary liability needed to be with the operator, which, as reminded by Co-Chair Lefeber, was the approach taken in principle 4 of Resolution 61/36.¹¹ Some expressed interest in combining primary liability of the operator with residual state liability, while others highlighted civil liability of the operator. Co-Chair Lefeber asked the group to consider reserving civil liability for cases of traditional damage, if it were decided to cover such damage in the rules and procedures under development, while using an administrative approach in cases of environmental damage and damage to biodiversity. The option of primary state responsibility, removed from the working draft at the second meeting of the Working Group, was re-introduced following a submission by Ethiopia on the subject and because of the absence of its representative during the second meeting.

The item on liability limitation covered both financial and time limits to liability. As noted by Co-Chair Lefeber, financial limits are usually connected to strict liability regimes, while time limits are common in most jurisdictions. Discussion focused on time limits, with the EU suggesting introducing absolute and relative time limits: the shorter relative time limit would be connected to the time that the claimant knew or ought to have known of the damage and the person responsible for it, while the longer absolute time limit should be connected to the incident causing the damage or to the end of it, in the case of a continuous event.

Under the item of mechanism of financial security, the Working Group addressed the issues of coverage of liability as a primary compensation scheme, and supplementary collective compensation arrangements, which would ensure that victims are compensated for the damage suffered in cases of absence of coverage. Participants discussed the standard of liability, focusing on the two main options of fault-based and strict liability, as well as on exemptions to strict liability. Participants also addressed the two main options for channelling liability: based on a causal link; or to certain persons, including the developer, the producer, the notifier, the exporter, the importer, the carrier and/or the supplier. Finally, participants discussed the options of compulsory or voluntary financial security, namely insurance.

Co-Chair Lefeber explained that, while provisions for primary responsibility of the operator would be in accord-

ance with the polluter-pays principle, the objective of supplementary collective compensation arrangements would be to ensure that victims are compensated and the environment is restored, especially in cases where: insurance is not compulsory and the operator goes bankrupt; exemptions apply; or the person causing the damage cannot be identified. Discussion focused on the options for a fund financed by contributions from the biotechnology industry to be made either in advance or after the occurrence of the damage.

Regarding the issue of settlement of claims, discussion focused on four options identified, namely: inter-state procedures; civil procedures; administrative procedures; and a special tribunal. The EC suggested that civil procedures should be provided at the domestic level and private international law rules should apply as appropriate, and said that the Permanent Court of Arbitration and its optional rules for arbitration of disputes relating to natural resources and/or the environment could be used in special cases where a large number of victims are affected.

With regard to the issue of standing/right to bring claims, Co-Chair Lefeber suggested further consideration to determine those who would be entitled to bring claims, particularly in relation to damage to the environment and to biodiversity. Discussion on the item involved mainly the distinction between inter-state and civil procedures: for instance, the EC proposed a combination of civil and administrative approaches, with the affected persons bringing claims under civil and administrative law, competent authorities acting on behalf of the environment, and civil society having the right to request the authorities to take action; Malaysia quoted the provisions of the Aarhus Convention; while India supported inter-state procedures and emphasised civil society's role in civil litigation.

With regard to the issue of non-Parties, Co-Chair Lefeber reminded participants that it is not possible to impose obligation on non-Parties. Participants discussed how the Biosafety Protocol rules could apply to non-Parties, with some pointing to bilateral arrangements and others highlighting application of domestic legislation implementing the Protocol.

The item of complementary capacity-building measures could relate to either measures adopted under Article 22 of the Biosafety Protocol or to specific complementary measures based on national needs and priorities. Following a proposal by Greenpeace International, participants agreed to request the Secretariat to make available through the Biosafety Clearing-House information on national rules and procedures on liability and redress for damage resulting from the transboundary movement of LMOs, reports of judgments addressing that damage, and relevant international rules and procedures. The Secretariat could then maintain a database of legislation, relevant case law and incidents of contamination and liability or potential liability, and make it available on an ongoing basis.

As expected, the issue of choice of instrument resulted in heated debates and revealed the divergence of views between those who supported a legally binding or a non-binding instrument. The EU proposed a two-stage approach, whereby the COP/MOP would adopt a non-

binding instrument, would evaluate its effects and then consider the development of a legally binding instrument. On the other hand, developing countries and Norway called for a binding instrument, while Canada and Japan favoured the flexibility of a non-binding one. Furthermore, in considering this item, the Working Group addressed a Co-Chairs' text of a blueprint for a COP/MOP decision, attempting to incorporate all discussed elements without prejudicing any future approaches. The blueprint was commended by several participants.

Decision and Outcome

In preparation for the fourth meeting of the Working Group, the Secretariat was requested to gather and make available information on recent developments in international law relating to liability and redress, including the status of international environment-related liability instruments; and supplementary collective compensation arrangements in international environment-related liability instruments.

Parties, other governments, relevant international organisations and stakeholders were invited to submit further views, preferably in the form of proposals for operational text, for a working draft to be produced and used at the Working Group's fourth meeting. Finally, as a result of a suggestion by Greenpeace International the Secretariat was requested to make available through the Biosafety Clearing-House any information submitted to it, on existing national rules and procedures in the field of liability and redress for damage resulting from the transboundary movement of LMOs, reports of judgements addressing that damage, and relevant international rules and procedures.

Annexed to the report of the meeting are the blueprint for a proposed COP/MOP decision (annex I) and a revised synthesis of proposed operational texts (annex II).

The blueprint contains optional components of a decision, as well as a matrix setting out elements for a binding or non-binding annex to a COP/MOP decision on liability and redress. The optional components of a decision include: preambular paragraphs; and operative paragraphs on the adoption of international rules and procedures on liability and redress, institutional arrangements, complementary capacity-building measures, provisional arrangements, and review of the decision. The matrix contains columns on different forms of liability (state responsibility, state liability, civil liability and administrative approaches), cross-referenced with sections on scope, damage, primary compensation scheme, supplementary compensation scheme, and settlement of claims. It is noted that the blueprint does not prejudice the outcome of the discussion on the choice of instrument; and that it covers all approaches and options as set out in the sections of the synthesis, including with respect to private international law.

The synthesis contains eight sections: Possible Approaches to Liability and Redress (section I); Scope (section II); Damage (section III); Primary Compensation Scheme (section IV); Supplementary Compensation Scheme (section V); Settlement of Claims (section VI); Complementary Capacity Building Measures (section

VII); and Choice of Instrument (section VIII). Each section contains different options for the overall structure of a regime on liability, as well as operational text.

Section I on possible approaches to liability and redress includes sub-sections on:

- state responsibility (for internationally wrongful acts, including breach of obligations of the Protocol), with several options for operational text;
- state liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol), with options on primary and no State liability, as well as residual State liability in combination with primary liability of the operator;
- civil liability (harmonisation of rules and procedures), with operational text noting that civil liability is appropriate for traditional damage, i.e. damage to persons, goods and economic interests; and
- administrative approaches based on allocation of costs of response and restoration measures.

Section II on scope includes sub-sections on functional scope, limitation in time, limitation to the authorisation at the time of the import of the LMO, determination of the point of the import and export of the LMO and non-Parties. Each sub-section includes several options for operational text.

Section III on damage includes sub-sections on definition of damage, damage to conservation and sustainable use of biological diversity or its components, valuation of damage to conservation of biological diversity/environment, special measures in case of damage to centres of origin and centres of genetic diversity to be determined, valuation of damage to sustainable use of biological diversity, human health, socio-economic damage and traditional damage and causation. Each sub-section includes several options for operational text.

Section IV on the primary compensation scheme includes sub-sections with several options for operational text on:

- possible factors to determine the standard of liability and the identification of the liable person, including the type of damage, places where damage occurs, degree of risk involved in a specific type of LMO as identified in risk assessment, unexpected adverse effects, and operational control of the LMO;
- standard and channelling of liability, addressing options on fault-based liability, strict liability, primary state liability, civil liability and administrative approaches;
- exemptions to or mitigation of strict liability;
- provision of interim relief;
- recourse against third party by the person who is liable on the basis of strict liability;
- joint and several liability or apportionment of liability;
- limitation of liability; and
- coverage of liability.

Section V on the supplementary compensation scheme explains that such a scheme would provide additional tiers

of liability in situations where the primary liable person cannot be identified, the primary liable person escapes liability on the basis of a defence, a time limit has expired; a financial limit has been reached, financial securities of the primary liable person are not sufficient to cover liabilities or the provision of interim relief is required. Sub-sections with options for operational text address residual state liability, and supplementary collective compensation arrangements.

Section VI on settlement of claims includes options for operational text, under sub-sections on inter-state procedures (including settlement of disputes under CBD Article 27); civil procedures, including jurisdiction of courts or arbitral tribunals, determination of the applicable law, and recognition and enforcement of judgments or arbitral awards; administrative procedures; special tribunal, e.g. the Permanent Court of Arbitration and its optional rules for arbitration of disputes relating to natural resources and/or the environment; and standing/right to bring claims.

Finally, Section VII includes texts on complementary capacity-building measures, while Section VIII addresses the choice of instrument, including options for one or more legally binding instruments; one or more non-binding instruments; a two-stage approach (initially to develop one or more non-binding instruments, evaluate their effects and then consider to develop one or more legally binding instruments); a mixed approach (combination of legally binding and non-binding instruments); and no instrument.

Notes

1 This report is based on the official report of the meeting (UNEP/CBD/BS/WG-L&R/3/3), available at: <http://www.biodiv.org/doc/meetings/bs/bswglr-03/official/bswglr-03-03-en.pdf> as well as the *Earth Negotiations Bulletin* Vol. 9 No. 370, available at: <http://www.iisd.ca/download/pdf/enb09370e.pdf>.

2 Decision BS-I/8.

3 Decision BS-III/12.

4 UNEP/CBD/BS/WG-L&R/3/INF/2.

5 UNEP/CBD/BS/WG-L&R/3/INF/3.

6 UNEP/CBD/BS/WG-L&R/3/INF/4.

7 UNEP/CBD/BS/WG-L&R/3/INF/5.

8 UNEP/CBD/BS/WG-L&R/3/2.

9 See page 272, the Principles are included in the Selected Documents section of this issue on page 357.

10 The text of resolution 61/36 is available at: <http://www.un.org/Depts/dhl/resguide/r61.htm>. Principle 7 reads: 1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements. 2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

11 Principle 4 reads: 1. Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control. 2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3. 3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation. 4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level. 5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.



CSD

CSD-15 Concludes with No Final Outcome Adopted

by Elsa Tsioumani*

The fifteenth session of the UN Commission on Sustainable Development (CSD-15) was held from 30 April–11 May 2007, at the UN Headquarters, in New York.¹ It focused on four thematic areas: energy for sustainable development, industrial development, air pollution and atmosphere, and climate change. The meeting included regional perspectives and interactive discussions with Major Groups on the above thematic areas; a high-level segment, held from 6–11 May, with sessions on “Turning commitments into action: working together in partnership”, roundtables on the thematic issues, and ministerial dialogues with UN agencies and Major Groups; negotiations on a main outcome document; as well as a Partnerships Fair, Learning Center and many side events.

Negotiations on a main outcome document began on 3 May, on the basis of a draft text prepared by CSD-15 Chair Abdullah bin Hamad Al-Attiyah (Qatar). The Chair’s draft contained a preamble and sections on the four thematic areas, as well as a section on inter-linkages and cross-cutting issues. The intention of negotiators was to identify policy decisions on practical measures and options to expedite the implementation of commitments on the above thematic areas. However, despite extensive discussions in formal and informal open and closed meetings, a number of issues in the text with regard to energy and climate change remained unresolved. By the end of the last day of the meeting, in search for a solution, Chair Al-Attiyah presented a compromise document to be adopted as a package. Following consultations, the Group of 77 and China, the USA, Canada and Mexico accepted the compromise document, but the EU and Switzerland rejected it on the basis that it did not address the challenges in the thematic areas, meet world expectations or add value. Consequently, CSD-15 closed with no adopted outcome document and a Chair’s Summary of the meeting would be issued the following week.²

With regard to energy, main points of disagreement during the negotiations included: an EU proposal on time-bound targets for a significant increase in the share of renewable energy sources, energy efficiency and access; another EU suggestion on a review mechanism or arrangement for energy for sustainable development; and text on nuclear energy. These issues remained unresolved. Delegates also disagreed on the respective roles for fossil fuels and renewable energy sources, as well as the inclusion of nuclear power in the energy mix.

With regard to air pollution and atmosphere, the main contentious issue concerned pollution from aviation and maritime sources, with the EU suggesting that relevant

measures should be taken not only through the International Maritime Organisation (IMO) and the International Civil Aviation Organisation (ICAO) but also through other relevant international frameworks, and supporting the establishment of voluntary guidelines for the aviation and maritime sectors. The issue remained unresolved.

With regard to climate change, lengthy discussions were held on a number of issues, including post-2012 commitments, the findings of the Intergovernmental Panel on Climate Change, use of market-based mechanisms, and carbon capture and storage technology. These issues were agreed upon, but references to the principle of common but differentiated responsibilities, and technical and financial assistance to developing countries remained unresolved.

The Chair’s compromise text, presented during the closing plenary, included 34 paragraphs under five sections, — on each of the thematic areas, as well as on inter-linkages and cross-cutting issues.

On energy, the compromise text noted that fossil fuels “will continue to play an important role in the energy sup-

Ending CSD-15 without consensus

Beginning after interpreters had finished their work for the day, the deliberations on the final report recessed several times for consultations.

Speaking in the name of 27 States, Germany stated that they had nothing against the draft except its failure to address key issues, its repetition of previous statements, its lack of innovation and failure to promote action. Mexico agreed that the document was not sufficient, but would support the document. Canada welcomed the document as “a good summary”, (praise to the Chair) but not enough. The US said in essence, “Thank you very much, it’s a good text, but serious implementation is still needed.” Switzerland felt the document had no added value and in some cases slid back from previous positions. It also felt that adoption of this paper would weaken the CSD on this issue.

The draft decision of the CSD, although not adopted, will be published as the Chairman’s Summary of CSD-15. (WEB)

ply in the decades to come”. It referred to targets on increasing access to energy, energy efficiency and the share of renewable energy, but in the context of recognising the roles of voluntary targets, and making greater use of them, “as appropriate”. There was no mention of time-bound targets, or any reference to a review mechanism or arrangement, nor to nuclear power.

On industrial development, the compromise text emphasised the central role industrial development plays in poverty alleviation and the achievement of internationally agreed development goals. It further called for, as appropriate: national policy frameworks for industrial development and diversification, private sector investment

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and enhanced domestic environmental governance; and promoting sustainable patterns of consumption and production by all countries with developed countries taking the lead.

On air pollution and atmosphere, the compromise text contained a paragraph on promoting the establishment of

Preparing CSD 16

In CSD-16's first meeting, the Commission was called on to elect its Chair and Bureau. Procedurally, it was the African Group's turn to propose the chair. Their proposal of the environment minister from Zimbabwe was politically controversial because of Zimbabwe's record in relevant issues. The European Union requested a secret ballot for this reason. The election results: 26 in favour, 21 opposed and three abstentions. Afterwards, the EU, Canada, Australia and New Zealand, as well as Switzerland expressed the hope that this decision would not negatively impact Africa's role, nor the work or credibility of CSD.

Pakistan, as Chair of the Group of 77 plus China, asked that more time be given to larger groups in the procedural planning for CSD-16. In the same meeting, however, both Pakistan and the US asked that CSD-16 have only 10 days for its deliberations (5–16 May 2008), in which it will review, monitor and follow-up the implementation of CSD-13 decisions on water, sanitation and their inter-linkages (rural development, land, drought and desertification). (WEB)

country and regional air quality standards and norms, taking into account World Health Organisation guidelines, as appropriate, and no reference to addressing aviation and maritime pollution through the IMO and ICAO, or other relevant international frameworks.

ICJ

Pulpmills Dispute: Provisional Measures Not Justified

On 23 January 2007, the International Court of Justice (ICJ) gave its decision on the request for the indication of provisional measures submitted by Uruguay in the case concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*).

In its Order, the Court found, by 14 votes to one, that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

Introduction

On 4 May 2006, Argentina filed in the Registry of the Court an Application instituting proceedings against Uruguay concerning alleged violations by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by the two States in 1975. (For the background to this case, environmental considerations, and an analysis of the Court's Order, see *Environmental Policy and Law*, Vol. 36 (2006) No. 5, at page 203).

Argentina charged that Uruguay had unilaterally authorised the construction of two pulp mills on the River

On climate change, the compromise text characterised climate change as a "global sustainable development challenge" and called for urgent attention and further action by the international community, in accordance with the UN Framework Convention on Climate Change (UNFCCC). It also identified social and economic development and poverty eradication as the overriding priorities for developing countries. It urged states to take actions to, *inter alia*: meet commitments and obligations under the UNFCCC in accordance with all UNFCCC principles; continue to support developing countries including through technical and financial assistance; and recognise and support efforts taken by developing countries to reduce their greenhouse gas emissions.

The inter-linkages and cross-cutting issues section called for: an integrated approach to the four thematic issues; addressing the three pillars of sustainable development in a balanced way; increasing access to finance for developing countries to implement the Johannesburg Plan of Implementation, including increased official development assistance; simplifying the rules and reporting procedures for multilateral funding mechanisms; and mainstreaming gender issues.

Notes

1 This note is based on *Earth Negotiations Bulletin* vol. 5 no. 254, available at: <http://www.iisd.ca/vol05/enb05254e.html>

2 As of May 15 (publisher's deadline), the Chair's Summary was not yet available.



Uruguay without complying with the obligatory prior notification and consultation procedure. Argentina maintained that these mills jeopardised conservation of the environment of the river and areas affected by it.

Argentina founded the jurisdiction of its claim on Article 60, paragraph 1, of the 1975 Statute, which provides that any dispute concerning the interpretation or application of the Statute, which cannot be settled by direct negotiations, may be submitted by either party to the Court.

A first judicial outcome was reached on 13 July 2006. The Court found, by 14 votes to one, that the circumstances as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.

On 29 November 2006, Uruguay submitted its own request to the Court for the indication of provisional measures on the grounds that, since 20 November 2006, organised groups of Argentine citizens had blockaded a vital international bridge over the Uruguay River, that this action was causing it enormous economic damage and that Argentina had taken no steps to put an end to the blockade. Uruguay also requested the Court to order Argentina

to take “all reasonable and appropriate steps...to prevent or end the interruption or transit” between the two countries; and to abstain from any measure that might “aggravate, extend or make more difficult the settlement of this dispute” and to abstain from “any other measure, that might prejudice the rights of Uruguay in dispute before the Court”.

Decision

The Court noted that, at the public hearings held from 18–19 December 2006, Argentina had challenged the jurisdiction of the Court to indicate the provisional measures requested by Uruguay.

It argued, *inter alia*, that those measures had “no link with the Statute of the River Uruguay, the only international instrument serving as a basis for the Court’s jurisdiction in the case, nor with Argentina’s Application by which the case was brought before the Court.”

According to Argentina, the real purpose of Uruguay’s request was the removal of the roadblocks, and that none of the rights potentially affected by these hindrances (the right to freedom of transport and to freedom of commerce between the two States) were governed by the Statute of the River Uruguay.

Uruguay maintained that the blocking of international roads and bridges was a matter “directly, intimately and indissociably related to the subject-matter of the case before the Court” and that the Court “most certainly had jurisdiction” in this dispute.

The Court noted, that in order to indicate measures it had to satisfy itself that *prima facie* a basis existed on which its jurisdiction might be founded, whether the request was made by the applicant (Argentina) or by the respondent (Uruguay) in the proceedings, on the merits of the case. It recalled that, in its Order of 13 July 2006, it concluded that it had such *prima facie* jurisdiction.

The Court recalled that its power to indicate provisional measures had as its object to preserve the respective rights of each party to the proceedings pending the final decision, providing that an urgent necessity existed to prevent irreparable prejudice to the disputed rights.

The Court then considered the first provisional measures requested by Uruguay related to the roadblocks – those which Uruguay contended were aimed at compelling a halt to the construction of the Botnia plant. The Court noted that “notwithstanding the blockades, the construction of the plant had progressed significantly since the Summer of 2006 and that work continued”. It stated that it was not convinced “that the blockades risk prejudicing irreparably the rights which Uruguay claims from the 1975 Statute” and added that Uruguay had not shown that, were there such a risk, it would be imminent. The Court therefore found that the circumstances of the case “were not such as to require the indication of the first provisional measure requested by Uruguay”.

Concerning the other two provisional measures sought by Uruguay, the Court recalled that, although it had on several occasions in past cases indicated provisional measures directing the parties “not to take any actions which could aggravate or extend the dispute or render its settle-

ment more difficult”, in such cases it had always indicated other provisional measures as well.

In conclusion, the Court did not find that there was an imminent risk of irreparable prejudice to the rights of Uruguay in the dispute caused by the blockades linking the two States. It therefore considered that the blockades themselves did not justify the indication of the last two provisional measures requested by Uruguay, in the absence of the conditions for the Court to indicate the first provisional measure.

The Court renewed its appeal to the Parties made in its order of 13 July 2006, “to fulfil their obligations under

Spain Facilitates Dialogue

In a bid to unlock the bitter legal and political battle over the US\$1.2bn pulp mills, talks were sponsored in Madrid by King Juan Carlos from 18–19 April 2007.

Following the meeting, representatives of both countries signed the Declaration of Madrid, which summarises the conflict and commits both sides to act with an open agenda spirit and no pre-conditions.

The Madrid Declaration basically states that both sides are willing to reach a final agreement, with Uruguay possibly admitting it did not comply with all the 1975 shared management agreement steps, and Argentina considering that perhaps it is too late for relocation. Both sides also agreed that none of the information from the open and frank dialogue could be used in the pending demands before the International Court of Justice or in the Mercosur Disputes tribunal.

The four detailed points of the Declaration refer to:

- the Botnia-Orion project including its localisation and other relevant questions;
- circulation on routes and bridges linking both countries;
- the enforcement of the River Uruguay Statute and the environmental protection of the River Uruguay; and
- the promotion of sustainable development in its areas of influence.

Before signing the Declaration, both sides contacted their Presidents, with the support of Ambassador Yanez Barnuevo (Spain’s Ambassador to the United Nations) who drafted and helped with the wording of the very political and diplomatic statement, which also includes provisions for regular technical meetings.

The dialogue process will evolve at two levels, the participation of technical delegations that will advance in the different areas identified, and when needed “with the presence and conduction” of staff with political responsibilities.

The next meeting, at technical level, is scheduled for late May 2007, probably in New York. Both sides said that they were optimistic that an agreement could ultimately be achieved.

In a statement following the Madrid meeting, the Brazilian government expressed “satisfaction of the results of the meeting”, the first time that Brazil has publicly made an official statement on the almost two-year-long dispute. It stated it was pleased with “the reestablishment of direct dialogue between both countries in an atmosphere of mutual respect, sincerely and cordially, in the understanding that this step significantly contributes to the strengthening of Mercosur and South American integration”.

Observers were surprised at Brazil’s passive attitude during the months’ long dispute and its implicit siding with Argentina by preventing Uruguay on several occasions from taking the case to Mercosur.

Uruguay had wanted Mercosur to intervene and put an end to the pickets of environmentalists and Argentine residents from Gualaquachu, the town across from where the plant is under construction, thus preventing the free flow of people and goods as stated in Mercosur’s founding charter. Brazil contended that the dispute was a bilateral issue between Argentina and Uruguay and thus outside of the Mercosur agenda.

international law...to implement in good faith the consultation and cooperation procedures provided for by the 1975 Statute [and] to refrain from any actions which might render more difficult the resolution of the present dispute”. It noted that this decision left unaffected the right of Uruguay to submit in the future a fresh request for the indication of provisional measures under Article 75, paragraph 3, of the Rules of Court, based on new facts. (MJ)