

OTHER INTERNATIONAL DEVELOPMENTS

Elizabeth Haub Prize

2007 Prizes for Environmental Law

Inaugurating the new partnership between Stockholm University and the International Council of Environmental Law, family, friends and colleagues came together in the Spökslottet (a former residence, now housing Sweden's third largest repository of classical art) to receive Dr Françoise Burhenne-Guilmin and Dr David Freestone as the 2007 laureates of the Elizabeth Haub Prize for Environmental Law. Set amidst an impressive backdrop, the ceremony proceeded as follows:

Introductory Statements

Prof. Gustaf Lindencrona opened with the following remarks:

"In the capacity of the Acting President of the International Jury for the Elizabeth Haub Prize for Environmental Law and former Vice-Chancellor of Stockholm University, I would like to welcome you to this ceremony, which is held for the first time at Stockholm University and in this beautiful and historical building. I hope that you will find the surroundings fit for this important occasion. The paintings which look down on you during the ceremony are part of the Stockholm University collection of ancient art, which in Stockholm is second in importance only to that of the National Museum.

As you may know, this very distinguished Prize has been awarded since 1974 jointly by the Université Libre de Bruxelles (ULB) and the International Council of Environmental Law (ICEL). The transfer of the Prize to Stockholm, which took place in February this year after an Agreement between Stockholm University and ICEL, is hoped to be the starting point for an era of close cooperation between these two environmentally renowned organisations.

As has been the tradition, the ceremony of each year is to award the Prize to the laureate of the previous year. The International Jury decided last year to award the Prize to two prominent environmental lawyers: Dr Françoise Burhenne-Guilmin (Belgium) and Dr David Freestone (United Kingdom). We are very pleased to have them both here today.

Before giving the floor to Prof. Kåre Bremer, present Vice-Chancellor of Stockholm University, I would like to inform you that the new International Jury had its meeting this morning and reached a decision. To keep you in suspense I will inform you of that decision at the end of this ceremony. I now invite Vice-Chancellor Kåre Bremer to take the floor."

After a round of applause, Vice-Chancellor Bremer gave the following address:

"Madame Haub, Dr Burhenne, distinguished guests, ladies and gentlemen, it is my pleasure to welcome you to Stockholm University and this year's ceremony for awarding the Elizabeth Haub Prize for Environmental Law. I am delighted that Stockholm University now has been trusted with hosting this prestigious prize. The choice of Stockholm University as a partner of the International Council of Environmental Law for the administration of the Prize has not been incidental. Stockholm University has an international reputation for environment-related research and education programmes and is thus a logical choice for being the home of this renowned prize.

Advanced and comprehensive research projects on various environmental issues have been carried out at different institutions of the University for more than four decades. A move towards the harmonisation of such research took place in the early 1990s. The increased consciousness about the need for integrated and multidisciplinary environmental research led to the establishment of a Centre for Natural Resources and Environmental Research in 1990. This Centre, which was the first one of its kind in Sweden, brought together a number of scholars from different disciplines in all four faculties of the University. The common interest of these scholars was environmental protection. The idea of addressing environmental issues from the perspective not only of natural sciences, but also history, geography, psychology, philosophy, literature, law, sociology and so forth resulted in the development of many innovative trans-disciplinary initiatives and the publication of a number of ground-breaking and inter-nationally hailed studies.

The successful work of the Centre for Natural Resources and Environmental Research and its successor, the Centre for Trans-disciplinary Environmental Research, has led to the establishment of the Stockholm Resilience Centre in January 2007. This Centre, with a number of world-known scientists, has the ambition of becoming a world-leading trans-disciplinary research centre that advances the understanding of complex social-ecological systems and generates new and elaborated insights and means for the development of management and governance practices.

Stockholm University has played a prominent role in the promotion of environmental protection

both at the regional and global level. In this context, the work of the late Bert Bolin, Prof. of Meteorology, who presided over the first Intergovernmental Panel on Climate Change, should be singled out. The important report of this Panel paved the way for the adoption of the UN Framework Convention on Climate Change in 1992. At the regional level, the Stockholm Marine Research Centre with its Askö laboratory has been one of the main research institutes providing necessary scientific data for the regulation of the protection of the marine environment in the Baltic Sea region.

The Faculty of Law and its education and research is of course of special relevance to the Elizabeth Haub Prize. The Faculty has a proud record of being one of the very first in Europe to offer a course on international environmental law, already in 1988. This course has been given in English annually since then and has a high reputation among law students from practically all European Community countries that have participated in exchange programmes. The Faculty has also hosted several important global conferences on environmental law including the one in 2002 on the Stockholm Declaration and the Law of Marine Environment, and the more recent one in 2006 on Environmental Law and Justice.

Given this background, I believe hosting the Elizabeth Haub Prize in Environmental Law is a very welcome addition to the already advanced environmental engagement of Stockholm University. We look forward to a close and long cooperation with the International Council for Environmental Law in administering this important prize, and I thank all who have contributed to the establishment of the cooperation.”

Following further applause, Prof. Lindencrona invited Henri Smets to the podium to deliver the following remarks on the history of the Prize:

“As early as 1968, Elizabeth Haub, whose main responsibilities were in the management of retail activities in Germany, became worried about the degradation of the environment from industrial as well as commercial activities. She developed a special interest in and concern for the lack of support towards the development of legal tools in this field, and decided to create the Karl-Schmitz-Scholl-Fonds (KSSF) for environmental law and policy to commemorate the 100th anniversary of the birth of her father, Karl Schmitz Scholl. KSSF’s main purpose was and still is to support projects fostering environmental law at national and international levels.

A few years later when environment law was still in its infancy, KSSF decided to support the advancement of this sector by sponsoring an environmental law award to be created by the International Council of Environmental Law (ICEL) in association with a university. This idea was realised in 1973 when the Elizabeth Haub Prize for Environmental Law was created, following an agreement between ICEL and the ULB to administer the Prize, create a Jury, call for the nomination of experts in environmental law

on the basis of their ‘exceptional achievements’ in the development and evolution of environmental law, and select prize winners on a yearly basis. The hallmark of the Prize is that it is not restricted to academic achievements, but also requires practical achievements in the field.

The jury, comprising by a Chair, a high-ranking University official, three Profs of the ULB and three representatives of ICEL, met in Brussels for 34 years and succeeded in selecting a balanced representation of environmental lawyers from all parts of the world. The first jury, in which the late Alexandre Kiss participated, selected the first winners in 1974.

Having been selected as a winner of the Haub Prize in its early days, I had the chance of meeting Elizabeth Haub before her death in 1977 and subsequently to participate for a few years in the Jury. My



The International Jury L-R Bottom: Bo Kjéllen, Henri Smets; Top: Peter Sand, Jonas Ebbesson, Said Mahmoudi, Patrick Széll

Courtesy: Stockholm University

experience is that it is not a pleasant task because one has to select only one or two recipients among many worthwhile candidates.

There are now over 44 Haub Prize winners. The list is very interesting to review because it provides, in a disorderly fashion, a list of many significant contributors to the development of environmental law. Those who would like to study the history of the prize should read the speeches of the Prize winners published each year in *Environmental Policy and Law (EPL)*, the periodical created over 30 years ago and still managed by Wolfgang Burhenne.

After the death of Elizabeth Haub, her daughter-in-law Helga Otto Haub took several significant initiatives. In 1997, she created the American and Canadian Elizabeth Haub Foundations, and supported the establishment of the Elizabeth Haub Award for Environmental Diplomacy. This Award is administered through an agreement between the Pace University School of Law in New York and ICEL. The first awardees were selected in 1999. Helga and Erivan Haub were also instrumental in developing the concept of a prize

for 'environmental law and diplomacy in the Islamic world', the creation of which is still being discussed.

The Haub family was kind enough to organise gatherings of all Elizabeth Haub Prize winners. The first was in 1997 in Wiesbaden and another took place in 2006 in Murnau (Bavaria). Such meetings were extraordinary for the laureates and the happy few who were invited to attend.

The cooperation with the Free University of Brussels came to an end last year and a new agreement was signed with Stockholm University. Swedish professors replaced Belgian professors and they now have the duty, together with ICEL, to maintain the high tradition of the prize.

In the name of all participants, I wish to express my most sincere thanks to the Haub family for their support and achievements in the area of environmental law. I would like to point out that few people in the business profession, especially in the retail sector, have had such a high sense of their social responsibility as demonstrated by the Haub family.

I wish also to thank Stockholm University for offering such a prestigious location for awarding the Haub Prize. Those who love Brussels will find here old paintings from Belgium and even from Brussels, which happens to be the city where I was born and educated. I am sure that the Elizabeth Haub Prize will find itself at home in the new setting offered by Stockholm University."

Presentation of Certificates and Medals

The laureates were then invited to the podium by Vice-Chancellor Bremer who read the certificates conferring the Prize upon Dr Françoise Burhenne-Guilmin and Dr David Freestone:

"The Jury's decision reflects Dr Burhenne-Guilmin's exceptional accomplishments in the field of environmental law. In reaching its decision, the Jury has noted that in the course of over 40 years dedicated service to the World Conservation Union, Dr Burhenne-Guilmin was instrumental in directing its Environmental Law Centre, in developing multilateral environmental agreements such as the Convention on Biological Diversity, and in promoting the global advancement of environmental law through a series of publications, technical assistance and professional training for lawyers from many countries."

"The Jury's decision reflects Dr Freestone's exceptional accomplishments in the field of environmental law. In reaching its decision, the Jury has noted his significant contributions during a long career as an academic, as a practitioner and as an international civil servant. Of particular importance has been his outstanding role in drafting the law relating to specially protected areas and wildlife, and his pioneering work in elucidating the content of the Precautionary Principle as an environmental legal principle."

Upon commendation of the certificates, Dr Wolfgang E. Burhenne, in his capacity as Executive Governor of the

International Council of Environmental Law, bestowed the laureates with their gold medals. Helga Haub, in her role as Chair of the Karl-Schmitz-Scholl-Fonds and Elizabeth Haub Foundations then handed each laureate a cash prize to be used toward furthering their work in environmental law.

Remarks from Dr Wolfgang E. Burhenne

After vigorous applause, the following personal remarks were delivered:

"For more than 20 years, it has been a custom for the Executive Governor of ICEL to make a short address to the Laureate after bestowing the gold medal. Sometimes it is very easy for me to do so, but sometimes it is a little more difficult if I have not had many personal contacts with the awardees. Nevertheless, this protects no-one, as we have such an intimate network upon which I can always rely!

This knowledge may sometimes be too intimate, as is the case today with Françoise, who was first my assistant, then became my colleague, and has been my wife for...hmm...let us say, a number of years. Therefore, I have handed the task of speaking about Françoise over to Peter Sand. Now, I can concentrate on David!

David, we were both involved in the preparation of the Cartagena Convention – what is better referred to as the "older" Cartagena Convention or the Caribbean Regional Seas Convention. And, we were also both very interested in the Specially Protected Areas and Wildlife Protocol to this Convention. It is during this time that I learned about an outstanding legal drafter from the UK working out of Antigua. This was David!

Today, we always talk about protecting or conserving endangered species, but David achieved something that no other protected areas protocol has since repeated. The protocol mandates preventing species from becoming endangered or threatened. This, at the time and still to this day is a real novelty. By saying this I mean the precautionary principle that the current administration in the United States does not like!

When you ask about David, everyone always tells you that his heart is still in the Caribbean! Somebody told me jokingly that, "David is everyone's best friend as soon as they learn about his seaside villa in Antigua." And added: "Having stayed there, he's still my best friend."

David succeeded Peter Sand at the World Bank. In spite of this, as a member of the Prize jury, Peter remained very neutral having never stayed with him in the Caribbean! Now, David – who earned the nickname "the Professor" while at the World Bank – will soon be leaving after almost eight years. At the Bank, he will be remembered for bridging the divide between the non-legal and legal staff. He even taught the people that it can be fun to work with lawyers!

I hope that the work of ICEL and the Elizabeth Haub Foundations can also benefit from your 'teachings' when you are retired!"

After many good laughs and a round of applause, Dr Peter Sand made the following comments:

“Rector magnificus, mina damer och herrar, kära vänner, det är en stor ära för mig att idag få tala i denna utsökta omgivning, och det är ett speciellt nöje att få säga några ord om vår framstående pristagare, Dr Françoise Burhenne-Guilmin.

Som ni vet, fanns det skeptiker när Françoise första gången sökte arbete vid Centrum för Miljö rätt i Bonn, för länge sedan. Många sa: „Hon är så söt, hon kan aldrig bli en bra miljö-jurist.“

But let me continue in English. The story goes that some 40 years ago when our distinguished laureate, Dr Françoise Burhenne-Guilmin first applied for a job with IUCN, some people were very sceptical. In fact,



Courtesy: Stockholm University

they said: ‘She is so pretty, she’ll never make a good lawyer!’ Well, Françoise has proven them all wrong, of course.

So it gives me great pleasure today to say a few words about a most remarkable environmental lawyer – who is not only far prettier than the rest of this peculiar crowd, but who has made a truly outstanding contribution to the development of international environmental law in our time.

Right after her graduation from the Faculty of Law in Brussels, Françoise became the first full-time lawyer working for IUCN – as Secretary to its newly-established Commission on Legislation since 1966; IUCN Legal Officer since 1970; and Head of the IUCN Environmental Law Centre in Bonn since 1973 (where she met, and promptly married, Wolfgang Burhenne).

Under her direction, the Bonn library gradually evolved as a global centre of excellence. Her pioneering efforts in the application of new computer technologies for the processing of environmental legislation culminated in the establishment – jointly with UNEP and FAO – of the common ECOLEX database, which now provides on-line access, not only to international treaties, national laws and court decisions, but also to a wide cross-section of secondary literature in the field of environmental law.

Moreover, the Bonn Centre directed by Françoise has provided valuable technical assistance to a growing number of developing countries for the drafting of new environmental legislation. Last, but not least, it has become a multinational training centre for young lawyers from different countries, many of whom Françoise has thus ‘launched’ on a professional career in this field.

At the same time, she became directly involved in the drafting of several international agreements for which IUCN provided initial secretarial services. Françoise could tell you memorable insider stories from the Pentagon (in whose long corridors the Endangered Species Treaty, CITES, was born in 1973), and from innumerable preparatory meetings for the Migratory Species Convention, the Biodiversity Convention, the amendments to the Ramsar Convention, and the African Regional Nature Conservation Convention.

Some – though regrettably not all – of this rich experience has found its way into her publications, which count among the indispensable source materials of international environmental law, by someone who was ‘present at the creation’. Together with her husband Wolfgang Burhenne, Françoise has received a number of prizes for their joint achievements, including the 1991 UNEP Sasakawa Prize, the 1997 Environmental Law Institute Award, and the 2005 Award of the Center for International Environmental Law.

It is only fitting therefore – and high time indeed – that she now receives the prestigious Elizabeth Haub Prize, as a token of our appreciation and as her legal colleagues’ way of saying: ‘Françoise, wir lieben Dich!’”

Conclusion of the Ceremony

After more applause, Prof. Lindencrona thanked Dr Burhenne and Dr Sand for their wonderful remarks and asked Dr Burhenne-Guilmin to come to the podium to deliver her paper (see page 40). Following more applause, Prof. Lindencrona thanked Dr Burhenne-Guilmin and invited Dr Freestone to take the podium and deliver his paper (see page 44). Prof. Lindencrona then thanked the laureates and all those present for a magnificent ceremony. Before closing, he announced that although it was not easy to choose from the eminent candidates proposed for the 2008 Prize, the International Jury unanimously selected Prof. Laurence Boisson de Chazournes as the winner of the 2008 Elizabeth Haub Prize for Environmental Law. The 2007 ceremony was officially closed and all participants were invited to the reception afterwards. (ATL) 

Hotspots in Biodiversity Law

by Françoise Burhenne-Guilmin*

“In the beginning was nature. Ever since life appeared on the Earth more than two thousand million years ago, evolution has generated hundreds of millions of species of micro-organisms, flora and, much later, fauna. As geo-logical eras went by and climate changed, plants and animals had to evolve to adapt themselves to new ecological conditions. Major catastrophes occurred, resulting in mass extinctions, but each time evolution was able to continue because enough species had been spared. The new catastrophe, which is starting and is entirely caused by human action, will most probably bring about the disappearance within a few decades of several million species if nothing is done now to stop it. It will be completely without precedent in the history of the Earth because of its suddenness on the scale of evolution, and because it will affect the planet as a whole. Its consequences cannot be predicted.”

It is with these words that Cyrille de Klemm started the speech he made when receiving the E. Haub Prize in 1989 in Brussels. It was a speech in which he advocated new governance approaches to stem the erosion of our world’s natural assets. These approaches included the adoption of a global convention, which the IUCN Environmental Law Programme had been spearheading for several years, and to which he contributed a great deal.

What de Klemm spoke about – the sum of living things interacting within ecosystems – is the foundation upon which human civilisations have been built, and the foundation upon which their future sustainable development depends. And yet, this sum is something too often taken for granted as an inexhaustible gift of Mother Nature, rather than one of the greatest governance challenges of our times.

The values involved were then already well known: ethical, economic, social, cultural. The “ecosystem” services provided were then and still are often less visible – until their sources collapse. And discovering and learning from nature was and still is a continuous process: but if Nature’s library is impaired before we have read further into it, many potential benefits are bound to disappear unnoticed.

Why did the IUCN Law Programme advocate a global treaty on species and ecosystem conservation, at a time when modern environmental law had flourished for two decades, was already recognised as a legal discipline *per se*, and indeed had evolved at a pace unprecedented in the history of law? It had developed a set of far-reaching principles, from the PPP to the PP (Polluter Pays Principle to the Precautionary Principle), and national environmental legislation – in particular regarding all kinds of pollution – had flourished in the developed world and was on the agenda of developing nations and aid agencies. The trans-boundary nature of environmental problems had made it

clear that a vast number of goals could only be achieved through interstate cooperation. And so a surprising number of environmental agreements had been adopted. Regional and sub-regional conventions had done well in several parts of the world. The global level was, however, rarely addressed: indeed, at the time, the legitimacy of action at the global level was only recognised for a few, specific, environmental problems, and the need for such action was more easily demonstrable in the pollution field.

As a result, in the realm of species and ecosystem conservation, only four global accords were in place at the end of the 1980s: Ramsar (for the conservation of wetlands), CITES (to control international trade in endangered species), World Heritage (to protect the most prestigious natural areas of the world), and the Migratory Species Convention (to set rules for facilitating their migration).

On the marine side, however, a very different global tool had been adopted after a decade of negotiation: the Law of the Sea Convention. It was the first to consider an entire environmental sector (and 71% of the Earth) as requiring global rules, mostly of a jurisdictional nature – establishing who has the right to do “what where”. But it also provided for obligations regarding the “how to do” concerning the preservation of the marine environment, and marine resources conservation and use.

The extension of the legitimacy of “global treatment” to all species and ecosystems was nevertheless by no means self-evident. And acceptance by States that the rights deriving from the Principle of State Sovereignty over Natural Resources carried obligations *vis-à-vis* their own resources – not only for the wellbeing of their citizens, but also for the global common good, was a difficult pill to swallow. And yet, slowly but surely, the recognition of the legitimacy of a worldwide approach prevailed.

At the heart of this new approach was a new term: “biological diversity”. Coined in the early 1980s by scientists to group species, genetic and ecosystem diversity, the concept facilitated this recognition. As de Klemm put it, “it essentially provides a unifying principle which encompasses all genes, species, habitats and ecosystems on earth, thus covering everything from a wild plant genus to the high seas and Antarctica”. It is a convenient shorthand denoting all components of the living world, and also revealing the intricate interdependence between them.

The Convention on Biological Diversity (the CBD) was adopted in May 1992. It is in force in 191 countries. Based on an all-embracing concept, it provides a frame of reference for global action with regard to conservation, sustainable use, sharing of benefits, and processes and activities which threaten biological diversity.

Taken together, the CBD and the other global and regional accords which concern any or all of these issues constitute the backbone of international biodiversity law and governance in this field. It thus includes those accords

* Senior Legal Counsel, IUCN Environmental Law Centre. Haub Prize acceptance speech.

which address major drivers of biodiversity loss – climate change, desertification, air, water and ocean pollution. Viewed from this perspective, biodiversity law is not only a “sector” of environmental law, but provides a thread through it as a whole.

Can we rest on our laurels? Having a rather formidable cluster of international commitments, obligations and guidelines, specific to a region or specific issues, topped by an all-embracing framework, surely we cannot complain of a lack of legal tools to tackle the conservation of biological diversity. We can also no longer complain that biodiversity is the poor relation of environmental concerns: summit after summit has hammered the point that conservation of biological resources is a prerequisite for development, as well as one of the three pillars of sustainable development.

And yet ... The Millennium Ecosystem Assessment of 2005 was sobering then and a follow-up assessment would probably be even more sobering now. Its first finding indicates that “changes in important components of biological diversity were more rapid in the last 50 years than at any other time of human history...” Projections under various scenarios indicate acceleration, or at best continuation of these rates. The main culprits are ecosystem degradation, invasive alien species, nutrient loading, and anthropogenic climate change. The only consoling conclusion is that things would have been much worse without the action taken so far to conserve biodiversity and promote its sustainable use...

There are many reasons for this *constat de carence*. Let us review a few hotspots.

Hotspot No. 1 is that there are areas of the international legal framework in this field which still cause great concern. Two of them in particular are:

a) The high seas, with a regime, under the Law of the Sea Convention, which leaves its living resources more open to abuse than any other in existence. There are historical reasons for this legal situation, but at this point in time, also a dire need to adapt the regime to present needs. From a biodiversity point of view, there are three major issues at stake: the sustainable use of its living resources, access to and benefit sharing from its genetic resources, and marine protected areas. David Freestone will tell you more on this and on possible solutions.

b) The Access and Benefit Sharing (ABS) regime, the cornerstone of the third objective of the CBD, concerns the fair and equitable sharing of benefits resulting from the use of genetic resources. This was crucial to the participation of developing countries in the negotiation and adoption of the CBD. A highly political subject, its object is to redress a situation whereby the rich reservoir of genetic resources

(available mostly in the South) is tapped by business (mostly located in the North) to develop financially highly rewarding biotechnological products such as pharmaceuticals (often patented) without any return to those providing them. The system on which developing countries insisted in the negotiations to achieve this goal – namely a bilateral one, rather than a multilateral mechanism which could have been articulated in the Convention – confirmed their sovereign rights to control access to genetic resources. It also required benefit sharing for any *post facto* use of the



Red-billed Quelea (*Quelea quelea*) flock at waterhole

Courtesy: Wikipedia

genetic information these resources contain for the purpose of biotechnology. But it left provider countries hostage to the adoption of legislation in user countries to require the sharing of benefits. At the core of the problem: the lack of requirement to disclose the source and to provide proof of the legality of access in patent applications. The problem is complicated by the fact that the use of genetic information is often accompanied by the use of knowledge about its potential use from indigenous peoples or local communities husbanding the resources, whether or not they legally control access to the genetic material itself. How can access to this knowledge be regulated, and benefit sharing with those providing it organised? Discussions of the implementation of the CBD ABS provisions have been taking place ever since the convention came into force. It took years to recognise that an internationally agreed regime is the way to go. The outcome of the discussion of such a regime appears more promising now than ever – but in no way certain. Sixteen years after the convention was adopted, Parties are still discussing whether the regime should be binding, or not, or partly binding and partly not. Meanwhile, national legislation has been adopted by a number of provider countries, but very few by user countries. Only Denmark and Norway, so far, require disclosure of the origin of genetic material in their patent legislation. ➔

Meanwhile also, access to genetic resources for food and agriculture and benefit sharing resulting therefrom, which the CBD in theory covers, was recognised as a special case, unfit for the CBD ABS bilateral approach. This resulted in the negotiation of a separate treaty (the International Treaty on Plant Genetic Resources), under the auspices of FAO, which takes a substantially different – namely multilateral – approach to benefit sharing.

The origin of **Hotspot No. 2** is caused by the way international environmental treaty law developed. Biodiversity law is only one manifestation of this. For the optimists, it appears that we are the victims of our own success: the sheer number of biodiversity-relevant international agreements in force is impressive; over 200, of which over 30 are global. For the pessimists, we are the victims of the “development led by catastrophes” phenomenon, leading to fragmentation and thus lack of efficiency. It is of course true that each multilateral treaty, whether global or only trilateral, constitutes an institutional separate sovereign entity, directed exclusively by the States Parties to it. The burden for states to actively participate in the overall system is high (stated at 230 meeting days a year for the three Rio Conventions alone), and utterly impossible for most of the LDCs. Similar observations can be made in relation to international institutions and programmes active in the field. A number (UNEP, CSD, GEF) have environmental conservation, including biodiversity, as their sole mission. Others have mandates which include key biodiversity issues (FAO and UNESCO, for instance, along with virtually all other UN specialised agencies). Still others, with mandates in other fields, such as the WTO, have – as rightly called for – started to consider the environmental (including biodiversity) implications of their action. The relationship between the two types of structure – MEAs and global institutions – also leads to frictions: the adoption of MEAs changes the possible role of international organisations in fields they hitherto covered – often reducing it drastically. Short of a complete re-structuring, which our international governance and legal system is ill-equipped to operate without an overall re-negotiation (God forbid!), orchestration seems the only practical answer. “Synergies” has been the magic word to work towards concerted implementation. Yes, progress has been made – with MOUs between the CBD and the other four global conventions, and with the establishment of a Liaison Group for the three Rio Conventions. But, as the global climate change crisis unfolds, and has become one of the top drivers of biodiversity loss, the closest links possible are needed. A well functioning institutional ecosystem is what we are after, and it seems that we have not reached this goal yet.

And **Hotspot No. 3** is surely the most persistent and troubling: the implementation deficit. This brings us to the national front line.

Most of the treaties we are talking about are not self-executing. The most modern ones are even less so than the earlier ones: they create obligations of result, leaving a lot of flexibility about the means to be used to achieve the required result. But these obligations are also the subjects about which the Parties continuously develop guidance,

through COP decisions. The CBD is no exception. It has generated a treasurehouse of policy guidance for its implementation: providing a common understanding of the ecosystem approach, of sustainable use, and of other key concepts underpinning the Convention. It has also developed a series of programmes on sectoral and cross-sectoral issues and spawned a protocol on GMOs. For Parties to keep pace with implementation requires political will, sufficient capacity, and financial resources – all things in short supply. It also requires solid legislation to underpin national implementation in a long-lasting way. This foundation is still incomplete, particularly but not only in developing nations where still too often money is spent on small or large implementation projects without paying sufficient attention (if any) to building the legal infrastructure to sustain their aftermath.

There is of course already a vast *acquis* in the field of national legislation. Its corner stone remains the command and control approach, based on the police power of the State to regulate activities and penalise infringements. But, over time, this approach has had to be flanked (or oiled) by an array of complementary techniques. Enabling NGOs to challenge administrative decisions affecting the environment – because trees have no standing, as a famous Haub Prize laureate put it long ago – is an early example; the use of impact assessment techniques before decisions are taken is another. More recently, the granting of procedural rights – to permit informed public participation in decision making and access to justice to enforce it – has been hailed as a key legal tool. Critical throughout has been the use of incentives measures.

And new thinking emerges, inventing or re-inventing legal techniques, often of a non-coercive nature – contractual or purely voluntary – to help the system work. The trend is to decentralise resource management; the trend is to partner with non-state actors – from business to indigenous peoples – to assist or supplement state conservation action. The trend is to ensure that conservation not only does not hurt the poor, but contributes to poverty reduction. The trend is to seek new ways to fund conservation, and to use market mechanisms to do so. And this is by no means an exhaustive list. And while these trends are valid both in developing and developed states, it goes without saying that the attention is on the developing world, where the fight against poverty is most visibly dependent on the conservation of biological resources.

Let me illustrate trends in three areas:

1. In the traditional conservation sector: As geographically defined areas which are designated and regulated to achieve conservation objectives, protected areas (PAs) are a classic conservation tool. But their objectives, role, and system of governance have evolved significantly. The concept has been enlarged and diversified to cover a variety of management goals providing a continuum from “no use” to “sustainable use”. The need for PA “systems”, connected by biodiversity corridors, is another innovation. With over 100,000 of them in the world today, PAs are one of the Earth’s most significant land- and sea-use designations. Another crucial development is the diversification of their governance system, no longer, by far,

the exclusive province of governments. Co-management arrangements with local communities or NGOs are becoming frequent. The role of PAs owned, created and managed by non-governmental actors – Community Conserved Areas, as well as Private Protected Areas – is increasing significantly. All these developments create a need for a new generation of national PA legislation. This is why the IUCN ELC has embarked on preparing Guidelines to assist legal drafters.

2. In the field of resource management: In Senegal, as in a number of countries in West Africa, the use of “conventions locales” for natural resource management is spreading in the wake of decentralisation. These “administrative contracts” are negotiated by the central administration and the local communities and populations. They are approved by decision of the local communities concerned, and countersigned by representatives of the central administration, which controls the legality of the text, and becomes party to it as well. The result is an agreed detailed management scheme for a resource or an ecosystem. An example is the local convention for the sustainable management of the resources of the Djiffa forest, which is a part of the transition zone of the Biosphere reserve of the Saloum Delta. The convention – which is 134 articles long – starts with an exposition of the national legal situation within which it operates. It then:

- creates an institutional mechanism;
- zones the forest into five parts;
- addresses five areas (forestry, pastoralism, hunting, water resources and agriculture), and provides detailed rules, “do’s and don’ts”, for each.

This is a telling example of “empowerment” of local communities in the management of natural resources so much called for today. In Africa, it is also a way to try to reconcile goals of post-colonial legislation with customary practices – rather than have them clash. In short, to blend the best of both.

3. In the funding field: Since 1996, the Costa Rica Forest Law has enabled payments to be made by the State to private landowners for the provision of four types of ecological services (carbon sequestration, watershed protection, biodiversity conservation and provision of scenic beauty). The government earmarked a fuel tax to fund the scheme and created a programme management agency. Each year, the agency selects areas, calls for applications from landowners, and signs contracts with them which last 20 years. Since 1997, 500,000 ha of private land have participated in the scheme for protection of natural forests or reforestation. The scheme worked well and attracted additional, significant external funding, including a GEF project.

This is one of several hundred Payment for Ecosystem Services (PES) schemes now in place around the world,

a technique which presently receives enormous attention, at local levels as well as global. At the global level, the Kyoto Protocol Clean Development Mechanism enables payment for carbon sequestration from reforestation and afforestation. But nowadays many schemes for securing carbon sequestration exist outside the Kyoto mechanism, and also to secure other ecosystem services. They take a variety of forms:

- public payment schemes for private landowners – such as the Costa Rica example;
- formal markets with open trading between buyers and sellers, either under a regulatory cap (such as the carbon market of the Kyoto Protocol), or voluntarily (such as emission credits in the US); and finally
- self-organised private deals, where private companies or organisations compensate landowners for changing land management practices to fulfil a specific service which the buyer wishes or needs to maintain. This is the case for Perrier Vittel, which has concluded long-term contracts with farmers in the Rhine-Meuse watershed providing compensation for adopting less intensive pasture-based farming, and reforesting sensitive filtration zones.

Neither the concept of ecosystem services nor payments to maintain them is new. The very first publication of the IUCN Law Programme in 1970 was on conservation easements, one of the earliest forms of PES. What is new is that ecosystem services are being more systematically identified, valued and monitored; that the technique of payments is being used on an increasingly wide scale; and also that it increasingly uses market mechanisms and involves the private sector. The hope is not only to capture additional sources of funding for conservation, but also increase flexibility and efficiency in implementing conservation goals, which often converge over sectors – especially biodiversity/climate change.

And the hopes are vast, and catch the imagination: “Carbon, water and biodiversity are emerging as the three main environmental market forces this century” says the managing director of New Forest, a firm headquartered in Sydney, which develops projects in all three areas to yield saleable credits. Only one of them, in Malaysia, involves the protection of 34,000 ha of orangutan and leopard habitats for 50 years. It has so far generated 1.36 million of biodiversity credits for sale by emission markets, and 21,500 credits have been sold at US\$ 10 each...

PES are by no means uncontroversial. There is even an on-going discussion about what constitutes a PES. The broader the definition, the more difficult it is to distinguish them from other forms of funding for conservation. Thus the following criteria have been advanced: a voluntary



Summer field in Belgium (Hamois) Courtesy: Wikipedia

transaction, in which a well defined environmental service (or a form of land use likely to secure that service) is bought by at least one buyer, from a minimum of one provider, and is conditional upon the continuation of the provisions of the service by the provider. In addition, the payment must cause the benefit to occur where it would not have otherwise. This last characteristic is most important, and at the same time the most difficult to determine: what is the baseline? It is also the only way to determine a healthy relationship between PES and existing national legislation requirements. There are broader definitions, but in all cases, the approach implies that ecosystem services have (not only but also) an economic value which can be internalised in economic policy and the market system.

By no means uncontroversial also because of potential pitfalls: eroding the duty to care for natural resources and manage them sustainably; rewarding bad management while not rewarding good management practices – either mandated by legislation or voluntary; insufficiently taking into consideration the consequences of PES schemes on the rural poor – in many countries without tenure rights, to name only three.

Two things are clear: First, the PES approach is not a panacea; and is only one of an array of means to pursue environmental goals. Second, PES, to have a safe future, must be able to rely on clear national legislation

(in particular defining their baseline). They must also be anchored in well defined legal and institutional frameworks themselves. This is even more the case for global schemes. The discussions now surrounding the creation of mechanisms to Reduce Emissions from Deforestation and Degradation (REDD), possibly to become part of the post-Kyoto arrangements, illustrates this point.

The conclusions of all this are not easy, and a mixture of optimism and pessimism is unavoidable.

Biological diversity is far from secure, and sustainability still a faraway goal. Especially because new crises happen and loom all the time. I read that the present financial clouds and resulting credit crunch resulted in reducing the clean-energy projects around the world by almost 25% in the third quarter alone. I also read that the EU 20/20/20 pledges of March 2007 are in jeopardy. Insecurity looms everywhere.

And yet, much has been achieved in the past twenty years. Most importantly, our field continues to be vibrant, and explores new ground all the time. That goes for conservation science, ethics, economics, and also for law.

Let us continue, and try to prove wrong the remark, attributed to Abba Eban, that “Man will only act wisely when he has exhausted all other possibilities”. Instead, let us rally to the call of the day: “Yes we can!”



Modern Principles of High Seas Governance – The Legal Underpinnings –

by David Freestone*

The High Seas – or maritime areas beyond national jurisdiction – cover nearly 50% of the surface of Planet Earth. Despite the fact that the comprehensive legal regime developed by the 1982 Law of the Sea Convention (UNCLOS) has been with us for more than a quarter of a century and has been in force for some 15 years, it has not protected the high seas from unparalleled impacts from new human activities, such as bottom trawling on seamount ecosystems, and from the increased intensity of existing activities, such as huge increases in maritime transportation, pollution from waste and traditional fishing techniques. Nor has the legal framework that the UNCLOS provides been able to keep pace with the need to regulate either the exploitation of valuable new resources that have been discovered in high seas areas – be they highly vulnerable deep ocean fish species, ocean thermal vents with accompanying life forms that can live in temperatures as hot as 300–600°C, or cold seeps – or proposals for geo-engineering activities such as ocean fertilisation.¹ Under the UNCLOS, coastal states have jurisdiction over

living and non-living resources out to 200 nautical miles from their coastal baselines and over continental shelf resources out to the geological limit of their continental shelf. Beyond that point, the UNCLOS envisages the International Seabed Authority having jurisdiction, but only over the non-living resources of the seabed. Hence, there is a lacuna for deep-sea or seabed living resources and for activities unrelated to seabed mining.²

A number of sectoral activities in the high seas are governed by existing treaty regimes – such as the 1972 London Convention and its 1996 Protocol on ocean dumping, and by a network – albeit by no means a comprehensive network – of species and regional fisheries treaties and arrangements as well as by some of the regional seas conventions. Nevertheless international concern has been growing at the lack of an adequate comprehensive framework for high seas governance. While the international community is beginning to respond, progress has been slow. In 2004 on the recommendation of the UN Informal Consultative Process on the Oceans and the Law of the Sea (UNICPOLOS) the UN General Assembly agreed to establish an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. This Working Group held its first

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meeting in 2006, and its second from 28 April–2 May 2008. A number of important proposals were discussed at these meetings including a European Union proposal for a new Implementing Agreement to develop a more specific framework to address, *inter alia*, conservation and sustainable use of marine biodiversity beyond national jurisdiction. It is envisaged that such an implementing agreement or agreements could supplement the 1994 and 1995 implementing agreements which elaborate and modernise the 1982 Convention with respect to seabed mining, and highly migratory and straddling fish stocks respectively. In the context of these discussions the proposal also emerged that as the international community has already established and agreed to a number of basic principles governing the use and exploitation of the high seas, it would be a constructive contribution to the dialogue to enumerate these principles more explicitly – whether as a free standing declaration (perhaps by the UNGA) or as a part of another international agreement or arrangement. The issue of applicable modern principles had been discussed and elaborated upon at an International Union for Conservation of Nature (IUCN) workshop³ and further explored by a number of international expert groups,⁴ hence the IUCN Global Marine Programme decided to help clarify these existing principles and in September 2008 issued a document: “10 Principles of High Seas Governance” for public review and comment.

At the 2008 IUCN 4th World Conservation Congress in Barcelona on October 7, IUCN President Valli Moosa of South Africa chaired a plenary session presenting the IUCN “10 Principles of High Seas Governance”. I was asked to present those principles at that plenary and what follows is my attempt to provide the legal underpinnings for those principles. It should be stressed that these are not new principles – as I seek to demonstrate below, all of them are derived from existing regional or global instruments accepted by consensus. However they have never been collected together before in this way and they all require much more rigorous implementation than they are currently receiving.

Principle 1. Conditional Freedom of the Seas

Article 87 of UNCLOS explicitly recognises six “freedoms” of the high seas, namely:

- a) Freedom of navigation
- b) Freedom of overflight
- c) Freedom to lay submarine cables/pipelines
- d) Freedom to construct artificial islands/installations
- e) Freedom of fishing
- f) Freedom of scientific research.

What is often forgotten however is that these are not absolute rights but are subject to a number of limitations and corresponding duties upon which their legal exercise is pre-conditioned. Unfortunately these duties and conditions tend to get forgotten. An object lesson perhaps is freedom of fishing. Under Article 116 of UNCLOS, all states have the right for their nationals to engage in fishing on the high seas, subject to three conditions:

- (a) their treaty obligations

- (b) the rights and duties, ...[and] interests of coastal states ...
- (c) the provisions of this section.

So this is by no means an unfettered and absolute right. It is subject to all the treaty obligations that the flag state may have contracted by its membership of global and regional treaty regimes including regional and species fisheries conservation and management treaties. It is subject to the whole slew of rights and duties that it may owe to, or be due as, a coastal state (b) and finally the provisions of Articles 116–120 (*i.e.*, section 2 of Part VII of the Convention). These duties, briefly summarised, include obligations to take measures for their own nationals for the conservation of the living resources of the high seas (Article 117); to cooperate with other states in conservation and management of those resources (Article 118) and to base those measures on the best scientific evidence available, environmental and economic factors and “generally recommended international minimum standards” (Article 119). So, although the 1982 Convention talks of freedom of fishing, it is worth remembering that this is a conditional freedom. Similar conditions moderate the exercise of the other freedoms and one can, and should, therefore talk about conditional high seas freedoms, rather than absolute rights.

Principle 2. Protection and Preservation of the Marine Environment

In relation to the marine environment the 1982 Convention introduced, in its Article 192, a major new principle – an unprecedented, unqualified and robust obligation on all states to “protect and preserve the marine environment”. It also contains more specific obligations to protect and preserve rare or fragile species and ecosystems in all parts of the marine environment, as well as the habitat of depleted, threatened or endangered species and other forms of marine life.⁵ Article 192 however is a general obligation that extends further than simply the avoidance of deliberate and/or obvious damage, so as to include active measures to maintain or improve the present condition of the marine environment,⁶ as well as to cooperate to this end.⁷ So, the general obligations of Article 192 *et al.* reflect both the responsibility to conserve marine ecosystems as well as to prevent marine pollution.

A host of regional seas agreements give substance to the duty to protect and preserve the marine environment contained in Articles 192 and 194(5). For example, the 1959 Antarctic Treaty was updated in 1991 through a Protocol on Environment Protection which established a comprehensive environmental regime including pollution controls, impact assessment requirements, as well as area and species conservation measures. In the north-east Atlantic, the Oslo and Paris Conventions of 1972 dealing with land-based pollution and dumping were entirely updated and a new more comprehensive treaty adopted in 1992, the Convention for the Protection of the Marine Environment of the North-East Atlantic; and the 1976 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its protocols were revised

in 1995 also to enable more comprehensive conservation measures reflecting this duty in the 1982 Convention.

Principle 3. International Cooperation

The principle that members of the international community have a duty of international cooperation is well established in general international law. In the famous 1970 UNGA Declaration of Principles of International Law that is generally accepted as being declaratory of customary international law, the General Assembly declared that:

*All states have the duty to cooperate with one another ... in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress ...*⁸

Various international instruments governing environment and natural resource conservation also include an obligation to cooperate. An example already referred to above in relation to the high seas is Article 117 which provides that “All states have the duty to take or co-operate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”. Of much wider application is Principle 7 of the 1992 Rio Declaration adopted at the UN Conference on Environment and Development (UNCED) which obliges states to “cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem”. And of course Rio Principle 27 which requires that “States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this



Pacific Ocean

Courtesy: Wikipedia

Declaration and in the further development of international law in the field of sustainable development”.

Principle 4. Science-based Approach to Management

As we have seen above, the 1982 Convention mandates a science-based approach to management in that its Article 119 requires states to base their fisheries conservation and management measures on “the best scientific evidence available” as well as environmental and economic factors and “generally recommended international minimum

standards”. These same obligations are reflected in the 1995 UN Fish Stocks Agreement (UNFSA) which requires that, when adopting measures to ensure the long-term sustainability of straddling and highly migratory fish stocks, coastal states and states fishing on the high seas shall “ensure that such measures are based on the best scientific evidence available and designed to maintain or restore stocks at levels capable of maximum sustainable yield”.⁹ In fact the precautionary methodology in the UNFSA that is set out in Article 6 and Schedule II and discussed below, requires that scientific reference points are established for target species “derived from an agreed scientific procedure” to constrain harvesting within safe biological limits. Many contemporary fisheries and natural resource management agreements – such as the 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)¹⁰ and the NEAFC¹¹ – have incorporated these approaches.

Principle 5. The Precautionary Approach

The widespread acceptance of the precautionary principle or approach is one of the most important and distinctive developments in international law relating to the environment and the management of natural resources.¹² In November 1990, the UN Secretary General expressly recognised the “considerable significance” of the precautionary principle for future approaches to marine environmental protection and resource conservation.¹³ Since then it has featured in virtually all international environmental treaties and policy declarations, most notably those relating to the marine environment and resources.¹⁴ Agenda 21 mandates “new approaches to marine and coastal area management ... that are integrated in content and precautionary and anticipatory in ambit”.¹⁵ Principle 15 of the UNCED Rio Declaration provides that:

*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*¹⁶

Precaution is a key strategy of the 1995 UN FSA. Article 6 requires that, to protect marine living resources as well as preserve the marine environment, the precautionary approach shall be applied widely to conservation, management and exploitation measures. It requires caution when information is uncertain, unreliable or inadequate, and the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.¹⁷ Annex II of the Agreement sets out guidelines for the application of this approach in relation to the conservation and management of relevant fish stocks. This is the first time that an operational precautionary methodology for fisheries management has been set out in a treaty, but it has been widely incorporated since into the practice of many natural resource management regimes.¹⁸ Precaution is also a key component of the practice of the 1972 London Convention and is expressly

included in its 1996 Protocol. Indeed the 1996 London Protocol operationalises the precautionary approach for this one sector by prohibiting the dumping of wastes at sea other than those specifically permitted, and these are subject to detailed impact assessment requirements. This complements but is more specific than the definition of precaution adopted in paragraph 10 of the preamble to the Convention on Biological Diversity which provides that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat.

Principle 6. Ecosystem Approach

Perhaps the first legal instrument in modern times to espouse an ecosystem approach is the 1980 CCA-MLR. As Kiss and Shelton point out “it considers the interrelationship between all species and their particular physical environment” and its coverage is “uniquely based on a biological boundary”, namely waters south of the Atlantic convergence.¹⁹ The ecosystem approach to natural resource management begins to be reflected in legal and policy instruments after the adoption by the UN General Assembly of the World Charter for Nature in 1982.²⁰ This called on states to protect representative ecosystems but also mandated that ecosystems and species exploited by mankind should be managed so as not to endanger co-existing ecosystems and species. By 1992 it is possible to see this approach reflected in both Agenda 21 and the Convention on Biological Diversity. From a marine perspective it is most obviously incorporated in the UNFSA, which together with the precautionary approach (above) also requires that its parties assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks. Once such assessment has taken place, member states shall “adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened” (Article 5(d) and (e)). A number of regional and species fisheries agreements now reflect this approach.²¹

At the 2001 Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem, organised by FAO and the Government of Iceland, states recognised in the final Declaration that sustainable fisheries management incorporating ecosystem considerations entails taking into account the impacts of fisheries on the marine ecosystem and the impacts of the marine ecosystem on fisheries. They also recognised the clear need to introduce immediately effective management plans with incentives that encourage responsible fisheries and sustainable use of marine ecosystems, including mechanisms for reducing excessive fishing efforts to sustainable levels and declared that the prevention of adverse effects of non-fisheries activities on the marine ecosystems and fisheries requires action by relevant authorities and other stakeholders.²²

Principle 7. Sustainable and Equitable Use

Just as the UNFSA illustrates the way that international law has responded to the challenges of the modern age by recognising new principles and concepts such as precaution, other international legal instruments now increasingly recognise the new paradigm of “sustainable use” or “sustainable development”. First brought into the international arena by the 1987 Brundtland Commission on Environment and Development,²³ sustainable development has been hailed as a basic paradigm for the 21st century. Sustainable development, as defined by the Brundtland Commission is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. It thus reinforces the equitable notion of fairness or equity in relation to the needs of present and future generations as balanced by environmental limits and goals. The principle was included as Principle 4 of the 1992 Rio Declaration, and permeates other principles, Agenda 21 and numerous other instruments. In 1997 it was considered by the International Court of Justice in the *Gabcikovo-Nagymaros Case* between Hungary and Slovakia. Although the famous separate opinion of Judge Christopher Weeramantry, that sustainable development was a principle of customary international law, was not endorsed by the majority of the Court, it did however recognise the “need to reconcile economic development with protection of the environment ... aptly expressed in the concept of sustainable development”.²⁴ A commitment to sustainable use can now be found in a raft of international instruments, including those relating to ocean use such as the 1995 UN FSA,²⁵ the 1995 FAO Code of Conduct for Responsible Fisheries and 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.²⁶

Sustainable use of fisheries is also included in the commitments of the world community in the 2002 Johannesburg World Summit on Sustainable Development Plan of Implementation. A well publicised aspect of this is the disproportionate overcapitalisation and use of state subsidies in the fisheries sector which decreases the ability of developing countries, as new entrants, to benefit from fisheries (intra-generational equity) and diminishes future options for sustainable fisheries (inter-generational equity).²⁷

Principle 8. Public Availability of Information

Principle 10 of the Rio Declaration recognises that “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level ... States shall facilitate and encourage public awareness and participation by making information widely available”. These hortatory provisions have been given important legal substance by the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.²⁸ While Aarhus is a convention concluded under the auspices of the UN Economic Commission for Europe (ECE), it highly unusual in that it is open for accession by any other UN Member state, even if not an ECE member, with approval of the Meeting of the Parties.²⁹ While Aarhus is more directly relevant

to national environmental decision making, nevertheless it does represent the “gold standard” for the implementation of the aspirations of Rio Principle 21, and many of the European nations that are party to other international agreements concerning the high seas – such as the 1972 London Convention and its 1996 Protocol as well as Regional Fishery Management Organisations (RFMOs) – are also party to Aarhus.

In this connection it is particularly worth recalling that in May 2005 in Almaty, Kazakhstan, at their second meeting, the parties to the Aarhus Convention adopted a decision (II/4) expressly “Promoting the Application of the Principles of the Aarhus Convention in International Forums”.³⁰ Decision II/4 elaborates guidelines (the Almaty Guidelines) that declare that access to information and public participation in environmental matters are “fundamental elements of good governance at all levels and essential for sustainability”.³¹ Aarhus parties are mandated, *inter alia*, to “encourage international forums to develop and make available to the public a clear and transparent set of policies and procedures on access to environmental information”.³² The tenets of this principle lead directly to the following one.

Principle 9. Transparent and Open Decision-making Processes

Transparency and openness in the conduct of the work of international and intergovernmental processes is now becoming the norm. Treaty-based organisations such as the International Maritime Organization (IMO) and the meetings of the Conference of the Parties to multilateral conventions such as the CBD, while acknowledging that states are the primary players, do accord access to other non-state parties. Background papers and secretariat papers are commonly distributed to state and non-state participants. Despite the fact that the biological resources of the high seas could be regarded as a common good, this is not the case, or has not in the past been the case, for high seas fisheries management bodies. It is the UNFSA Article 12 which for the first time introduces an obligation on its state parties to provide for “transparency in the decision-making process and other activities or subregional and regional fisheries management organizations and arrangements”. Article 12(2), which has already been adopted by some fisheries bodies and may be regarded as minimum international practice, specifically provides that:

Representatives from other international organizations and representatives from non-governmental organizations concerned with straddling fish stocks and highly migratory fish stocks shall be afforded the opportunity to take part in meetings of subregional and regional fisheries management organizations and arrangements as observers or otherwise, as appropriate, in accordance with the procedures of the organization or arrangement concerned. Such procedures shall not be unduly restrictive in this respect. Such intergovernmental organizations and non-governmental organizations shall have timely access to the records of such organizations and

*arrangements, subject to the procedural rules on access to them.*³³

Principle 10. Responsibility of States as Stewards of the Global Marine Environment

Principle 21 of the 1972 Stockholm Declaration provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

These rights and obligations are repeated virtually verbatim in Rio Principle 2. For our purposes a simpler statement of a principle, derived directly from these words and applicable to the high seas and which would be widely regarded as a principle of customary international law, would read as follows:

States ... have the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment ... of areas beyond the limits of national jurisdiction.

This concept of responsibility reflects a proactive obligation that would support a number of proposals that have been put forward for a form of stewardship role in protecting the resources of areas beyond national jurisdiction.³⁴ It is that same concept of responsibility that the drafters seem to be trying to capture in the 1995 FAO Code of Conduct for Responsible Fisheries. That, and similar provisions of the UNFSA and the 1993 FAO Compliance Agreement, require flag states to supervise properly the activities of their fishing vessels when on the high seas. And yet the continued major threats of illegal, unregulated and unreported (IUU) fishing demonstrate that flag states are simply not exercising this sort of control. Responsibility in this sense involves an obligation on states not merely to regulate vessels flying their flag operating on the high seas – and many states seem unable to manage that – but also their nationals, captains, crews, owners and investors – all those in the value chain of activities that do, or might, cause harm to the environment in areas beyond national jurisdiction. The FAO has already begun to develop principles for audits of Flag State Responsibility.

It is paradoxical that in looking for the articulation of this wider concept of responsibility in an existing treaty, the best example perhaps is to be found in Article VI of the 1979 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Celestial Bodies. It reads:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring

that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.

It must be admitted that the Moon Treaty has not commanded a large number of parties,³⁵ but it would be tragic if we were left with the impression that the international community is more concerned with the Moon than with our own Blue Planet.

This presentation has sought to demonstrate that the 10 Principles of High Seas Governance promulgated by IUCN are not newly coined; all have been generally accepted by the international community in a range of global and regional instruments. They are already widely applied on land and to various marine sectoral activities; but not yet uniformly applied to the high seas. Some represent established international law; others agreed international minimum standards. All however require much more rigorous implementation as the first steps in the development of a robust and appropriate system of international governance for the high seas.

Notes

- 1 See Rayfuse, R., Lawrence, M. and Gjerde, K. (2008). "Ocean Fertilisation and Climate Change: the Need to Regulate Emerging High Seas Uses". *International Journal of Marine and Coastal Law (IJMCL)* 23: 297–326.
- 2 Gjerde, K., Dotinga, H., Hart, S., Molenaar, E.J., Rayfuse, R. and Warner, R. (2008). *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*. Gland, Switzerland: IUCN. http://cmsdata.iucn.org/downloads/iucn_marine_paper_1_2.pdf.
- 3 Rayfuse, R., Freestone, D., Gjerde, K. and Vanderzwaag, D. (2007). Co-Chairs' Report of Workshop on High Seas Governance for the 21st Century, New York City, 17–19 October 2007. The Co-chairs' Report is at: http://cmsdata.iucn.org/downloads/iucn_workshop_co_chairs_summary_new_iucn_format.pdf. See also Freestone, D. (2008). "Principles Applicable to Modern Oceans Governance". *International Journal of Marine and Coastal Law*, 23: 385–392.
- 4 See Cicin-Sain, B. and Freestone, D. (2008). *Report from the Strategic Planning Workshop on Global Ocean Issues in Marine Areas beyond National Jurisdiction in the Context of Climate Change*, Nice, France, January 23–25, 2008. Available online at: <http://www.globaloceans.org/globalconferences/2008/pdf/High-Seas-PB-April9.pdf>. Also Balgos, M., Snyder, C., Cicin-Sain, B., Freestone, D. and Tompkins, C. (2009). *Executive Summary on the Workshop on Governance of Marine Areas beyond National Jurisdiction: Management Issues and Policy Options*, November 3–5, 2008, Singapore.
- 5 Article 194(5).
- 6 Nordquist, M. (Ed.-in-Chief), Rosenne, S. and Yankov, B. (Eds). (1990). *The 1982 Law of the Sea Convention: A Commentary, Vol. IV*, 40. Dordrecht: Martinus Nijhoff.
- 7 Article 197 UNCLOS. See principle 3 below.
- 8 UNGA Resolution 2625 (XXV), October 24, 1970. Adopted without a vote.
- 9 Article 5 UNFSA.
- 10 Adopted 20 May 1980, entered into force 7 April 1982, (1980) 19 *ILM* 837.
- 11 Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (18 November 1980, entered into force 17 March 1982) 1285 *UNTS* 129.
- 12 And a particular interest of mine, see e.g., Freestone, D. (1991). "The Precautionary Principle". In: Churchill, R. and Freestone, D. (Eds). *International Law and Global Climate Change*, pp.21–40; Freestone, D. and Hey, E. (1996). *The Precautionary Principle in International Law: the Challenge of Implementation*; Freestone, D. (1999). "Implementing Precaution Cautiously: The Precautionary Approach in the 1995 Straddling Stocks Agreement". In: Hey, E. (Ed.). *Developments in International Fisheries Law*, pp.287–325; Freestone, D. (2000). "Caution or Precaution: 'A rose by any other name...?'" In: "Symposium on the Southern

- Bluefin Tuna cases", in *Yearbook of International Environmental Law* 1999, 12: 25–32.
- 13 1990 Report of the UN Sec. Gen. on the Law of the Sea, UN Doc. A/45/721, 19 November 1990, p.20, para. 60.
- 14 Examples of such post-Rio documents include: 1993 Ministerial Declaration on the Protection of the Black Sea see *Environmental Policy and Law* 23: 235–236; UN Framework Convention on Climate Change, *ILM* 31: 848 (1992); Convention on Biological Diversity, *ILM* 31: 818 (1992); 1992 Helsinki Convention on the Protection of the Baltic Sea Area, *YBIEL* 3(1992) and in *IJMCL* 8: 215(1993), with commentary by Ehlers, P., at 191; 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and Lakes, *ILM* 31: 1312 (1992); the 1992 Maastricht Treaty on European Union, *ILM* 31: 247 (1992); *ILM* 32: 1693 (1993); the 1992 Paris Convention on the Protection of the Marine Environment of the North-East Atlantic, *IJMCL*, 8: 50–76(1993); and of course the 1995 UN Fish Stocks Agreement.
- 15 Agenda 21, para. 17.1.
- 16 For the documents adopted at UNCED see UN Doc. A/Conf.151/26 (vols 1–V), August 12, 1992.
- 17 Article 6(2).
- 18 Such as CCAMLR, above, and the 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, for text and commentary see Dunlap, W.V. (1995). *IJMCL* 10: 114.
- 19 Kiss, A. and Shelton, D. (2004). *International Environmental Law*. 3rd Edition, p.645.
- 20 UNGA Resolution 37/7, supported by 111 states (18 abstaining). See also Burhenne, W. and Irwin, W. (1983). *The World Charter for Nature: a Background Paper*. Berlin: E. Schmidt; International Council of Environmental Law. (1986). *Commentary on the World Charter for Nature*. Bonn: IUCN Environmental Law Centre.
- 21 The South East Atlantic Fisheries Organisation (SEAFO) was established by the convention signed in Windhoek, Namibia, 20 April 2001, (2002) *ILM* 41: 257: it is the first general fisheries convention to have been negotiated after the 1995 UNFSA and to reflect its requirements. Similarly, the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) was established by the Convention and opened for signature in Honolulu, 5 September 2000, (2001) *ILM* 40: 277. The Convention was the first regional tuna fisheries agreement to be adopted after the conclusion of the 1995 UNFSA, and it also reflects its requirements.
- 22 The Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem was held in Reykjavik, Iceland, from 1–4 October 2001. The Conference adopted the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem, <http://www.fao.org/docrep/005/Y2198T/y2198t01.htm>.
- 23 Brundtland, G.H. (Ed.). (1987). *Our Common Future*.
- 24 [1997] ICJ Reports 78 at para. 140.
- 25 Article 5(a). States that are party to the Agreement are for example obliged to "(a) Adopt conservation and management measures to ensure long-term sustainability and promote the objective of their optimum utilization".
- 26 In relation to fisheries the UN Fish Stocks Agreement, the FAO Code of Conduct on Responsible Fisheries, as well as the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem, ftp://ftp.fao.org/fi/DOCUMENT/reykjavik/y2198t00_dec.pdf.
- 27 FAO/World Bank. (2008). *The Sunken Billions: The Economic Justification for Fisheries Reform*. This study shows that the difference between the potential and actual net economic benefits from marine fisheries is in the order of US\$ 50 billion per year – equivalent to more than half the value of the global seafood trade.
- 28 Signed 25 June 1998, entered into force 30 October 2001. It has some 41 state parties and the EC. The EC has already started to reflect Aarhus principles in Community law, notably through Directive 2000/60/EC, Water Framework Directive.
- 29 Under the provisions of Article 19(3).
- 30 ECE/MP.PP/2005/2/Add.5 (20 June 2005).
- 31 Para 11. Note that the guidelines define "Environmental information" to include the state of the elements of the environment, including "biological diversity and its components".
- 32 Para. 19.
- 33 Note also the Almaty Guidelines that provide that "Participation of the public concerned in the meetings of international forums... in matters related to the environment should be allowed at all relevant stages of the decision-making process, unless there is a reasonable basis to exclude such participation ..." (para. 29).
- 34 Sand, P.H. (2004). "Sovereignty Bounded: Public Trusteeship for Common Pool Resources?" *Global Environmental Politics*, 4: 47–71; Rayfuse, R. and Warner, R. (2008). "Securing a Sustainable Future for the Oceans beyond National Jurisdiction". *IJMCL* 23: 399–422.
- 35 As of the end of 2008, 13 states had ratified and a further four had only signed the Moon Treaty. There is a similar provision relating to responsibility of states regarding seabed activities in Article 139 of UNCLOS.



Alexandre Kiss Memorial

European Environmental Leaders Gather in Budapest

A special event organised by the European Council of Environmental Law (Conseil européen du Droit de l'Environnement, CEDE) honouring the outstanding accomplishments of the late Alexandre Kiss took place in his home town of Budapest (Hungary). As one of the founders and its President until his death, CEDE brought numerous friends and colleagues together to reflect on his contribution to environmental and human rights law. In commemoration, the following opening remarks were made:

János Martonyi*

Ladies and Gentlemen, dear Colleagues, dear Friends,

I know that you will excuse me for addressing you as "Friends". The reason for this is very simple: the person who brought this small "family circle" together was a friend of all of us present here.

Let me start with my personal memories. When I was a young student, I often heard my father mention the name of a person for whom he had great respect – a famous Hungarian-born scholar living in France, which at that time was for us a remote country – and whose friendship he was very proud of. Alexandre Kiss, indeed Kiss Sándor was also well known by my sister, so the name was a very frequently quoted one in the family. It was only decades after, in an entirely different historic situation, that I first met Alex or Sándor in person. My country needed his help in the now famous Gabcikovo-Nagymaros dispute, that I had to handle in my new capacity as State Secretary in the Ministry of Foreign Affairs and Sándor immediately offered his unique professional skills. That was how we started to work together and I was amazed not only by his intellect and knowledge, but also by his commitment and dedication.

But who was, first and foremost, Prof. Alexandre Kiss or Kiss Sándor?

He was referred to as the best known French international lawyer abroad...that is in the world outside of France. This is no doubt true and was amply demonstrated by dozens of books, hundreds of articles, ground-breaking academic work, a unique contribution to the elaboration of new principles of international law such as the common concern for humanity, the common heritage of mankind, the rights of future generations (intergenerational justice), all the concepts that are now routinely used even in political discourse. He was a scholar, a teacher, a mentor, a very able professional lawyer, a man of inspiration and at the same time a successful activist in the best sense of the term. He participated, initiated, presided over the work of a large number of international organisations, the list of which would be too long to quote. He was a man of foresight, who was always ahead of the conventional

thinking of his time and always anticipated the major global developments.

Yes, Alex was certainly the most well known French international lawyer, but allow me to tell you that here in this country we also believe that he was one of the most talented Hungarians of the 20th century. I hope you do not take it as boasting when I add that this is certainly not a small thing in the light of the achievements of talented Hungarians in the 20th century. Unfortunately, we are much less ambitious in the 21th century.

He left his country at the worst time, in other words at the right time. He immediately got in contact with the activities of Hungarian political emigration and did not need another ten years or more – as many of his contemporaries in France and elsewhere did – to understand the true nature of communism. In other words, he did not need to become a communist, to be able to turn into an anti-communist of principle at a later stage. This clear moral stance brought him in contact with some other persons of foresight for instance Hélène Carrère d'Encausse, somebody who anticipated the implosion of the Soviet Empire well before it actually happened.

Hungary lost Kiss, Sándor and many other talented Hungarians because of the curves of history. The question is sometimes asked what would have happened if all these persons had stayed in Hungary, what could the country have achieved with all these people? The pessimistic and realistic answer to the question is not much. If all these people had remained where they were born, many of them would have been put in prison, again many of them would have been silenced, or perhaps most of them would only have become passive and could not have unfolded their unique intellectual gifts.

What was, however, a loss for the country was certainly a benefit for the world.

And the best known French international lawyer found the way to bring huge benefits to his native country as well. In the Gabcikovo-Nagymaros case he worked with very special dedication. I believe he sensed that the case was more than just a simple international legal dispute, it was something that involved two fundamental principles, indeed, two symbols, both being the fundamentals of his academic and political thinking. One was the protection of the environment, the rights of future generations, and the other was democracy. The Gabcikovo-Nagymaros dam was for most Hungarians the symbol of the complete neglect of, and contempt for, public opinion by an autocratic dictatorship. That was what made Sándor a dedicated fighter in the case, that was why he deployed all his theoretical and professional skills and drafted amazingly high quality memorials for the Hague Court of International Justice.

We, in this country now feel the need for persons like him more strongly than ever before. But it is not only

* Prof. and former Hungarian Foreign Minister.

Hungary, but also Europe and the whole world that needs personalities of his intellectual and moral standing. Speaking about Europe, it also has to be underlined that he was a fervent believer in the European integration process, in fact, in the genuine reunification of our continent.

On the global level we now need persons of the same foresight and anticipation. We definitely need much more and better global governance, and also much more global rule making, otherwise it will be impossible to rethink, to review and “refondre” the capitalism which we certainly should have done earlier, well before the financial crisis exploded. Now it can no longer be disputed that the global financial system needs more efficient regulation and control in order to avoid future and even deeper financial and economic crisis. It is now becoming more and more clear that environment, human rights and the global financial and economic system cannot be addressed separately, all these areas are intrinsically interlinked by the universal values upon which global, European and national rule making should be based.

We need persons of foresight like Alex. We need such lighthouses – the light which benefits everybody, even those who did not contribute to the costs of the lighthouse itself. That is the nature of public goods that are now apparently scarce all over the world.

Alexandre Kiss, Kiss Sándor was such a lighthouse. We only have to see and recognise the light he was spreading and to benefit from it. I understand this is the primary objective of this conference and I am, together with many Hungarians, very grateful to the organisers. I wish you a very successful conference.

Tullio Treves**

Alexandre Charles Kiss (Alex, to his friends) was a multi-faceted personality: a gentleman, a warm friend, a legal humanist. His life and work can be seen as a bridge between Hungary and France, between Mittel-Europa and Western Europe. They can also be seen as those of a man open to the world, especially to the United States and Japan, but also Latin America and Africa.

Alex was a full-fledged international lawyer. He was the pupil of Mme Suzanne Bastid, a domineering figure in the panorama of international law scholars in the mid-twentieth century. His thesis, written under her supervision, was published as a book under the title *L’abus de droit* in 1951 and is still quoted as the most important writing on the subject. His other main contribution to general international law was the monumental *Répertoire de la pratique française de droit international* (1961–72).

** Prof. at the University of Milan, Judge of the International Tribunal for the Law of the Sea, and President of the European Council for Environmental Law.

The amount of work compressed in it is extraordinary: similar *Repertoires* or *Digests* are the result of the work of teams, while Alex did it alone.

He was attentive to the developments of technology and devoted some essays to space law at the beginning of its development. He co-edited a book on satellite broadcasting with Abraham Chayes and others in 1973.

Especially, he played a central role in the development of those aspects of international law that are relevant to the life of individuals. His love of nature and the experience



Prof. Alexandre Kiss in CEDE Conference

Courtesy: IUCN

of his life of exile, of seeking a new fatherland while not forgetting his original one, pushed him towards human rights and environmental law.

His contribution to the law of human rights as well as to that of the environment was two-fold – that of the individual scholar and that of the organiser of research. The tutelage of Mme Bastid was decisive for the shaping of Alex Kiss the individual scholar, while his working experience at the CNRS – that formidable French institution that has permitted scholars outside the University system to conduct world class research in the most diverse fields, including the humanities and law – shaped his qualities as an organiser of research. These qualities were innate in his attitude towards others: always open to listen, always ready to consider new ideas, always giving the same attention and importance to the ideas of young or unknown scholars as to well established professors.

As environmental law is our main focus, I will briefly focus on Kiss’s contribution to the law of human rights. It includes one short general treatise published in French in 1991 and co-authored by another world class specialist, Tom Buergenthal, now Judge at the ICJ. It also includes a number of shorter essays always to the point.

As an organiser of culture and research, one must recall the role of Alex Kiss in the *Institut des droits de l’homme*. He was the Secretary-General of that Institute from 1980–1991. On his watch Strasbourg became the

venue for teaching and scholarly research on human rights, appropriately growing side by side with the European Court and the Council of Europe.

Coming now to environmental law, in this field also, the contribution of Alex Kiss, which spans more than three decades, has been that of the scholar and of the organiser. It has also been (perhaps even more than in the field of human rights) that of the apostle. Moreover, on the basis of his recognised qualities, which made him known as the “father” of international environmental law, he played a very relevant role as a practitioner.

As an international lawyer by formation, Kiss was immediately attracted by the international legal dimension of environmental law. He was nevertheless very attentive also to developments of domestic environmental law. This was due in part to his inexhaustible curiosity for legal and social phenomena. It was also due to his view that domestic and international environmental law are not separate – they are a continuum, as environmental law concepts and techniques migrate from the domestic to the international arena, domestic concepts sometimes contributing to the development of international ones, and international concepts contributing to the shaping of domestic environmental law.

As early as 1975, Kiss published a general book on international environmental law. It was published in Spanish under the title *Los principios generales del derecho del medio ambiente*. It was the printed version of a course he had taught in the framework of the famous *Cursos del Instituto Francisco de Vitoria* of the University of Valladolid where so many great masters of international law presented their views – often opening new vistas to young Spanish students and scholars in the darkness of the Franco era.

The 1975 Spanish book became the basis of another publication, in English this time: this was the *Survey of current developments of international environmental law* published in Gland, Switzerland in 1976 by the *Union internationale pour la conservation de la nature* (or IUCN), under a characteristic dark green cover. The same format was later followed by Kiss in a French publication, *Droit international de l’environnement (La documentation française, 1992)*.

The Spanish and the English language books of 1975 and 1976 gave international environmental law its scholarly structure, its format for the years to come. Most of the current one-volume treatises of international environmental law, such as those by Birnie and Boyle, by Sands, by Juste Ruiz, follow similar structures and touch on the same subjects. The 1975 and 1976 volumes were the works through which a generation of scholars, including the present writer, were made aware that environmental concerns had to do with a lot more than pollution. We realised that a new full-fledged discipline was there, based on concerns vital for the development of humankind. It was a branch of international law – Kiss did not care very much for the now fashionable discussions about “self contained regimes”. It had special characteristics including a number of general principles whose classification in the usual categories of the sources of international law Alex did not care to

make. He was much more interested in the substance of the subject, as well as in the institutions that could help in giving practical applicability to the rules.

Alex produced a number of general treatises on international environmental law, all of them follow-ups, in light of the evolution of the subject, to the seminal works of 1975 and 1976. Suffice it to quote in French *Droit international de l’Environnement*, published in 1989, with a second edition in 2000 and a third, co-authored by Jean-Pierre Beurrier published in 2004; and in English *International Environmental Law* (editions in 1991 and 1994); *Manual of European Environmental Law* (editions in 1993 and 1997); and the *Guide to International Environmental Law*, his last book, published in 2007, a few months after he passed away. The last three books – covering more than 15 years of scholarly work – are co-authored by Dinah Shelton, a great scholar in her own right who combines, from an American perspective, the same interests of Alex Kiss: general international law, human rights law and environmental law. The combination of their talent has contributed works to the scholarly world that are solid points of reference for understanding the most complex problems. The latest, the 2007 *Guide*, has a different purpose: that of guiding domestic environmental lawyers, and even more so international and domestic lawyers in general, especially practitioners and judges, through the processes, achievements and mysteries of international environmental law. In its apparent simplicity this book is a gem to be treasured. Each sentence deserves admiration and reflection.

Particular mention is required for his 1982 Hague Lectures, entitled “*La notion du patrimoine commun de l’humanité*”. 1982 was the year in which the UN Law of the Sea Convention was adopted. In it the principle of the common heritage of mankind was proclaimed and applied to mineral resources beyond the limits of national jurisdiction. This incarnation of the concept was far more limited than that which its initial proponent, Arvid Pardo, had hoped for, and nobody suspected that the future would bring future dilutions. Alex Kiss does not hesitate to go beyond the recently approved convention. He puts the common heritage concept in a broad perspective including Antarctica, radio-electric frequencies, outer space, cultural heritage, natural heritage and the environment, the ozone layer, climate, and genetic heritage, apart from the international seabed area. He gives an all-encompassing legal view of these phenomena taken from a moral-political point of departure. In his view, the concept of the common heritage “*a un contenu égalitaire ...il tend à atténuer une des contradictions fondamentales du droit international, celle qui oppose l’égalité formelle des Etats à leur inégalité dans la réalité, non seulement en affirmant le droit de chacun de participer aux bénéfices, mais en améliorant les moyens des non favorisés d’y parvenir*” (p. 239).

Alex was an idealist and a realist at the same time. He knew very well what was possible in today’s world, what States could accept and what they could not. At the same time he believed that ideals can melt mountains and conquer hearts. His study of the common heritage is an

eloquent witness to this. With Cartesian logic he proceeds to the building of a legal theory based on ideals, being perfectly aware that Realpolitik was not in a position to follow. This emerges clearly in the dedication he wrote on the copy of his lectures he gave to the present writer, a then young scholar and friend who at the time happened to be involved in the Law of the Sea negotiations and had often exposed his sceptical views to Alex. Alex wrote “Ceux qui croient au ciel et ceux qui n’y croient pas...”. Alex believed in heaven and made a heaven of ideals for us to believe in, whatever our appreciation of what is possible and what is not.

In environmental law the wisdom, culture and commonsense of Alex was many times resorted to for practical purposes. I will not mention his participation in the Hungarian team in the dispute at the Hague against Slovakia on the Gabčíkovo-Nagymaros project. The report of Mr



Prof. Alexandre Kiss

Szabo deals with this crowning moment of Alex’s career as a practitioner. Suffice it for me to recall how he enjoyed this experience, how he saw in it a reparation of the old bruises in his relationship with his mother country that had recently restored his right to citizenship; and how he was happy to transmit all he learned in it to friends and especially to the new generations. I remember with emotion the wonderful lecture he gave, during his involvement in the case, to my class at the University of Milano.

Alex’s practical activities were much broader than the Gabčíkovo case. He was a consultant to numerous international organisations and governments, often in conjunction with other friends and colleagues, in particular his great friend Wolfgang Burhenne whose organisational talents and political savvy often helped in making recourse to Alex necessary.

It would be impossible to go into the details of the accomplishments of Alex Kiss as an organiser of culture

in the field of international environmental law. His presence, often in important positions, has been constant in many prestigious groups and associations. His support has strengthened the development of new branches of international environmental law, as the present speaker experienced when he involved Alex (who, as always, was happy to be involved) in a pioneering study of the international environmental law of mountain areas.

What I am duty-bound to do is to recall the role of Alex Kiss in the European Council of Environmental Law (CEDE). I had the honour to be involved from a very early stage of the CEDE that perhaps was, of all his initiatives, the dearest to his heart. Even though I had at the time not made any particular contribution to environmental law, Alex thought I could contribute in the future and trusted me! More than 30 years later, I also had the honour to be nominated by him to the members of the CEDE as his successor.

The CEDE was established in 1974 by a group of scholars of environmental law, including Wolfgang Burhenne, Heinhard Steiger, Michel Despax and of course Alexandre Kiss who was its President from the beginning and up to his passing away 33 years later. The Council was run for about 15 years with the support of the Fund for Environmental Studies in Bonn and, after a time in which it enjoyed no funding, was resurrected in 1995 with the support of the Regional Government of Madeira. It is a non-profit scholarly association that aims at having as components scholars (government officials might be invited for information purposes) from all the member States of the European Community.

The approach adopted was – from the beginning – at the same time practical and scholarly. Kiss was happy when discussions on questions of principle arose. He was however also keen to develop ideas in written form that could serve practical purposes, in particular on questions undergoing discussion within the European Community, the Council of Europe and the United Nations including UNEP. These were the “resolutions” of the CEDE, more than 40 documents in the drafting of which Kiss and we, his colleagues, spent many hours in distilling the best sentence or the best translation. It is difficult to assess which were the direct influences of the CEDE resolutions on texts adopted at the official level. There is no doubt that it served as a forum to develop new ideas and to focus on new subjects.

*Apart from the resolutions, a number of scholarly publications have been the product, or the by-product of CEDE’s activities. Perhaps the most interesting and successful was the book edited by Kiss together with Jean Pierre Beurier and Said Mahmoudi entitled *New Technologies and the Law of the Marine Environment* (Kluwer, 2000). This book sets out contributions at the Conference organised by the CEDE at the Madeira pavilion of the 1998 Lisbon Expo, as an expression of gratitude to the Government of Madeira for its support of the CEDE. Among the many interesting contributions, it must be recalled that in this book are set out some of the very early studies on hydrothermal vents and on the legal regime of genetic resources of the sea beyond the limits of national*

jurisdiction, a subject that now, a decade later, is widely discussed at the UN and elsewhere.

The CEDE is again undergoing financial difficulties. While it is hoped that they will be overcome, the members, and the present writer, as the successor of Alex in the presidency, feel the duty to continue this enterprise, perhaps in other forms.

The idea of holding the conference in honour of Alex to which the above paper was originally read arose among the members of the CEDE during the sad days following his passing away. We thought that – even though the CEDE meetings are held at the seat of the Council in Funchal, Madeira – it would be appropriate if we moved to Alex's mother country to honour him and make visible to an audience composed of his compatriots what

an enormous impact his thoughts and actions have had all over the world. We are grateful to the CEDE member for Hungary (whom Alex chose for his extraordinary ability to find talent and human qualities) Prof. Gyula Bándi and to the political and academic authorities in Budapest for helping this idea to become a reality.

Participants included Marcel Szabó, Pázmány Péter Catholic University; Gyula Bándi, Pázmány Péter Catholic University; Dinah Shelton, George Washington University Law School; Ellen Hey, Erasmus University; Said Mahmoudi, Stockholm University; Stephen Stec, Central European University; and Peter Kovács, Hungarian Constitutional Court. Each of these experts presented papers reflecting on the work of Alexandre Kiss throughout his life. These presentations will be printed in future issues of *EPL*. 

Alexandre Charles Kiss, as I Knew Him

by Péter Kovács*

I first heard about Alex from my professors of international law. When I got a scholarship to the Centre Européen Universitaire of Nancy in order to study European law, they advised me to ask him for an appointment. At that time, he was the Secretary General of the International Institute of Human Rights of Strasbourg. At the end of our meeting when, by the way, I realised how profoundly he had preserved his attachment to his country of origin and his mother tongue, he suggested that I should submit an application for the 1984 summer session of the Institute. Following his proposal, I applied for the session and got a grant from the Institute to cover my costs.

What interesting company I met there! The young American scholar, Dinah Shelton, who introduced me in French to the jurisprudence of the Interamerican Court of Human Rights. The Director of Studies was a young Romanian assistant Prof. Adrian Nastase, and there was also a Polish researcher, Roman Wieruszewski.

The Institute was still located at the Quai Lezay-Marnésia, in the building of a former monastery, and Alex often mentioned – although he truly loved life on earth – that his faith and that of his collaborators in the importance of their work was as deep as the spirit of the building inspired.

Despite this spiritual heritage, it was a tradition to organise receptions in the courtyard. Alex told me that I must not miss the occasion because all those people present would in time be diplomats, ministers, professors – “They will be your colleagues”. I took this to be mere politeness and encouragement. I deeply doubted that, coming from the other side of the Iron Curtain, I would have the same chance to succeed as the other participants in the session.

Today, life has proved how right he was. The former young Romanian Director of Studies who helped me when I was preparing for the exams of the Institute diploma, first became Minister of Foreign Affairs of his country, later President of the House of Representatives and still later Prime Minister (even if Adrian Nastase's career is overshadowed by accusations of corruption). Roman Wieruszewski's name figures at the bottom of the so-called Mazowiecki reports on atrocities committed in the former Yugoslavia by Milosevic and his consorts. Some years ago, he was the vice-Chair of the UN Human Rights Committee.

Alex delivered a lecture on the restrictions and limitations of human rights. It was well structured and interesting so that both lawyers and non-lawyers could follow it: the former could understand the legal problems, and the latter could see the political realities conflicting with legal considerations. He was a fair and impartial examiner, but still he was very happy when he was able to present me with my diploma, because I was the first Hungarian to receive one.

Alex invited me to act as Director of Studies at the Institute in 1989 and he proposed also that I teach an introductory course for beginners in Human Rights law. I was 30 years old and this was my first invitation to teach abroad. Alex was still Secretary General of the Institute and in this capacity, he put a special emphasis on enlarging the network of teaching staff – not only in the pedagogical sense but also as a community of friends. The regular weekly dinners with professors and special guests were very important for him in order to assess the impressions of colleagues, to plan the next or later sessions or to decide on the theme of a joint research project. This does not mean however that his dinners were boring professional intercourses – on the contrary, they were happy

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and friendly meetings where stories and jokes alternated with shop talk.

He was very open to the social problems of the participants of the session as well. Although the financial background of the Institute was limited, and the procedure to get a scholarship was complicated with imperative deadlines, Alex always pondered his decisions and examined carefully each individual application. I was witness to his careful decision making when we had to decide on admissions for the famous diploma exam.

Alex was open to cooperation with the whole world: as he told me once, it would be very difficult to find a country where he had not been invited to teach. His bibliography is impressively long especially in environmental matters where he soon became someone who couldn't be ignored. However a single invitation was enough for him to come readily to Miskolc in order to contribute to a joint research project on the history of international law, where he analysed the 19th century diplomatic manoeuvring around Crete: when analysing history, he put emphasis on open or hidden similarities with today's international protectorates and other forms of special status.

We Hungarians in this solemn festive hall are very proud to have known Alex. Likewise, he was very proud of all the Hungarian diploma holders who are in important posts today: on the staff of the Council of Europe and other international organisations, or in the European Parliament, as a Deputy. He considered that the Institute exam should be a difficult one (it was and certainly it is the same today)

in order to help open doors later on in life. One of his early young colleagues, András Baka, became the first Hungarian judge in the European Court of Human Rights.

His relationship with his country of origin was never broken. When he organised the Santa Clara external sessions in Budapest, or the environmental study and research programme with professor Bándy here at the Péter Pázmány Catholic University, he also had in mind that in this way he could contribute to the renewal of Hungary and the neighbouring countries. He donated books to Miskolc University Library and he was working on a DVD-multimedia interview about international environmental law with my young colleagues but fate decided otherwise.

I heard several times how proud he was of his title "External member of the Hungarian Academy of Science" and of the fact that he was invited to act in the Hungarian team of the Gabčíkovo/Nagymaros Dam project dispute before the International Court of Justice or in the assessment team of the so-called Tisza-river cyanide pollution case. It meant him a lot to him that his country of origin (whose citizenship he never lost and whose passport he acquired in the 1990s) trusted him and relied on him in important matters.

Alex probably got everything that an international lawyer can expect. I am honoured that I knew him and could work with him. I am a lucky man.

Thank you, Alex.



IFLOS

Arctic – Climate Change, Conflicts and Cooperation –

by Thilo Neumann*

The foreseeable exhaustion of the finite fossil fuel deposits drew stakeholders' attention to remote offshore deposits in the Arctic, which could not be exploited efficiently prior to the current increase in commodity prices. By now all States bordering the Arctic Ocean have carried out scientific expeditions to determine the seaward limit of their continental shelves in order to define their claim to the exclusive right to exploitation of its natural resources.¹ It remains to be seen if the established legal framework suffices to protect the sensitive arctic environment against the consequences of oil production, mineral extraction and increased shipping in the region, or if there is a need for a new separate comprehensive international regime for the Arctic.² Recognising this development, the sixth annual Symposium of the International Foundation for the Law of the Sea (IFLOS) focused on the impact of climate change on the arctic environment, the identification

of possible international disputes, and opportunities for cooperation in the region. One hundred and twenty-two scholars and practitioners from almost 40 countries participated in the Symposium, which was held in cooperation with the Bucerius Law School, the Law of the Sea and Maritime Law Institute of the University of Hamburg, and the German Federal Maritime and Hydrographic Agency on the premises of the International Tribunal for the Law of the Sea (ITLOS) in Hamburg on 27 September 2008.

In his welcome address, Prof. Dr Rüdiger Wolfrum (Judge and former President of ITLOS) called the audience's attention to the importance of the continuous academic exchange between the attending scientists and judges in light of the impact of the consequences of climate change on the reading of several aspects of the United Nations Convention for the Law of the Sea (UNCLOS). Subsequently, Prof. Dr Doris König (Chair of the IFLOS Board of Directors) reminded the audience that the debate is no longer limited to expert and diplomatic circles.

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Rather, due to the growing media coverage of the topic, both the Russian expedition planting their flag on the seabed under the North Pole as well as the Ilulissat Declaration³ have triggered a critical public debate.

The first presentation of the morning session by Dr Volker Rachold, International Arctic Science Committee, dealt with the consequences of a changing arctic cryosphere for the global and regional environment. He underlined that the annual loss of sea ice will have a strong negative impact on the complex arctic food chain, shoreline erosion control and the indigenous population, whose traditional way of life is highly dependent on the presence of pack ice. At the same time, Rachold lowered expectations on the opening of new year-round navigational passages. Although the rapid reduction of arctic sea ice has outstripped all forecasts, navigation in the region will be limited to the summer season for the time being due to the constant extent of the annual winter sea ice.

Prof. Dr Diethard Mager, German Federal Ministry for Economics and Technology, expounded on Rachold's presentation. He analysed the high commodity prices caused by limited extraction, processing and transport capacities, and outlined the present and future raw material potential of the Arctic as well as the involvement of German energy companies in their exploration and exploitation. Mager highlighted the main challenges companies are facing in this region, *i.e.*, the long distances between production sites and industry customers, the lack of infrastructure, the changes of permafrost conditions and the uncertainties of territorial claims. He concluded by pointing out that it is impossible to predict if climate change will allow easier access to arctic hydrocarbons and mineral resources.

Dr Aldo Chircop, Marine and Environmental Law Institute, Dalhousie Law School, Halifax, Canada, outlined the legal issues of maritime transportation in the Arctic. Chircop predicted an increase in seasonal domestic and trans-polar shipping, tourism and fishing activities in the Arctic Ocean and focused on the obstacles to arctic navigation, *i.e.*, poor weather, reduced visibility, ice movement and the lack of infrastructure, such as ports, navigation aids, search and rescue, salvage and places of refuge. He argued that the international legal framework is insufficient to protect the fragile coastal and marine environment in the Arctic, because the relevant treaties do not apply to the full range of vessels navigating the region or to navigation in ice-free waters. Since the arctic coastal States unanimously object to the idea of a new regional treaty for the Arctic, the answer for future governance of shipping in the Arctic according to Chircop could be a convergence of IMO standards, Arctic Council-facilitated bilateral and multilateral arrangements, and national regulatory regimes under UNCLOS, Art. 234.

Dr Agustin Blanco-Bazán, Legal Affairs, IMO, picked up where Chircop left off and focused his speech on the exclusive mandate of the IMO to adopt international

rules on safety of navigation and prevention of marine pollution. Bearing in mind that the main IMO safety and antipollution treaties do not meet the unique risks implied in arctic navigation, the IMO adopted the recommendatory Guidelines for Ships Operating in Arctic Ice-Covered Waters (IMO-Guidelines) to amend the customary legal framework. Recognising pack ice as the main hazard to arctic navigation, the IMO-Guidelines recommend the classification of ships in polar classes, rules on the equipment of ships and special crew training. Blanco-Bazán went on to analyse the interplay of non-discriminatory laws and regulations for ice-covered areas adopted and enforced by coastal States under Art. 234 of UNCLOS and international shipping rules adopted by IMO. He argued



Siberian rivers such as the Ob can bring dissolved methane into the Arctic Ocean, and hasten melting of clathrates and submarine permafrost by transporting heat energy from warm southern latitudes

Courtesy: Wikipedia

that the former should neither contradict nor overlap the shipping rules and standards contained in IMO treaties.

During the subsequent lively discussion, Daniel Hosseus, German Shipowners' Association, complained that most forecasts of the future economic use of arctic passages are simply based on geographical distances. He argued that if other economic and geographical factors, such as the shallow and dangerous arctic waters, the absence of important harbours along the passages, and the Russian transit-fee structure were taken into account, a voyage through the Arctic Ocean would not offer an economic advantage over traditional sea routes.⁴

The first presentation of the afternoon session by Dr Christian Reichert, German Federal Institute for Geosciences and Natural Resources, dealt with the determination of the outer limits of the continental shelf and the role of the Commission for the Limits of the Outer Continental Shelf (CLCS). He reviewed the coastal States' right to claim an extended continental shelf seaward of 200 nautical miles from the shore according to Art. 76 of UNCLOS and focused on the difficulties applicants have to overcome. Not only are the relevant rules of UNCLOS based on an idealised and simplified morphology of the seabed which is not commensurate with actual conditions

but the States' burden of proof is further exacerbated by the complex terminology and the different methods of delimitation. Thus especially less developed countries are forced to rely on the CLCS to provide scientific and technical advice during the preparation of their submission. Reichert reviewed the controversial Russian submission to the CLCS. The crucial question is whether Russia has succeeded in producing evidence that the submarine features included in the submission qualify as submarine elevations that constitute natural components of the continental margin.⁵ Reichert presented different analyses which indicate that these features are submarine ridges and part of the seabed floor and hence neither part of the North American nor the Eurasian continental shelf. But he had to admit that the acquisition of reliable data was very difficult and expensive in the arctic region.

Dr Vladimir Golitsyn, an ITLOS judge, gave a legal comment on Reichert's presentation. He emphasised that the term "claim" with regard to the rights of coastal States to the continental shelf is not correct and should be avoided, because a State's title to an extended continental shelf as the natural continuation of its territory constitutes an inherent right. Golitsyn went on to expose some of the shortcomings of UNCLOS dealing with the States' submissions to the CLCS. There neither exists a procedure in the case that a coastal State acquires new scientific data to back up its submission after the CLCS has given a negative recommendation, nor does it provide for a mandatory procedure if the CLCS treats the same submarine feature unequally with respect to the submission of two adjacent States. Golitsyn concluded by asking for easier coastal States' access to the reasoning of the CLCS in reaching its conclusions on a particular application, in order to allow other States to determine how their submissions will be treated in the light of the established and developing practice of the CLCS.

Dr Dolliver Nelson, an ITLOS judge, examined the dispute-settlement mechanisms which apply to conflicting outer continental shelf claims. He underlined the importance of the coastal States' entitlement to submit a joint submission to the CLCS; an instrument with the potential to reduce the CLCS' workload, to encourage scientific dialogue and a common understanding between the States concerned, and to pre-empt international disputes. Nelson emphasised the absence of legal consequences a State faced if it established outer limits of its continental shelf contrary to the recommendations of the CLCS in cases where no other State is directly affected. To compensate for this shortcoming, he recommended the authorisation of third-party States to protect the area as the common heritage of mankind. But at present the preservation of the Area does not yet constitute an obligation *erga omnes*, compliance with which could be demanded by the international community.

Dr Oran R. Young, Donald Bren School of Environmental Science and Management, University of California, Santa Barbara, argued that the circle of legitimate stakeholders regarding issues of arctic governance is no longer limited to the arctic States. The future participation of new and different players like environmental NGOs, business

and sub-national governments in arctic governance is essential.⁶ He went on by addressing the question whether the international community of States should adopt a new legal regime for the Arctic Ocean.⁷ Young underlined the advantages of informal agreements over legally binding instruments and accentuated that the most pressing challenges are driven by external factors, which could not be met with a regional legal framework.⁸ Hence, he considers it the responsibility of the Arctic Council to promote arctic issues within global decision processes.

Dr Alf Håkon Hoel, University of Tromsø, Norway, asked if it was not possible to counter threats to the ecosystem and potential conflicts between the adjacent States by promoting the further development and effective implementation of the existing comprehensive legal system for the Arctic based on UNCLOS, as well as regional and international treaties dealing with resource management, (marine) environmental protection and economic activities, rather than by negotiating new treaties. Perceiving the former as the key factor to successful confrontation of climate change and the sustainable use of natural resources, he considers it the Arctic Council's responsibility to promote the development of strategic plans and guidelines and to build a common understanding among the stakeholders.

The symposium proceedings will be published in a special issue of the *International Journal of Marine and Coastal Law* in spring 2009. Information on the annual Symposia of IFLOS is available at www.iflos.org.

Notes

1 Russia became the first State to propose outer limits of its continental shelf in the Arctic Ocean to the Commission for the Limits of the Outer Continental Shelf (CLCS) on 20 December 2001, followed by Norway on 27 November 2006. The deadlines for the other arctic States expire in 2013 (Denmark) and 2014 (Canada). The time limit for the USA will be set as soon as it becomes a State party to UNCLOS. Prompt US accession to UNCLOS, to protect and advance US interests, is one of the objectives laid down in the Presidential Directive of 9 January 2009. The directive is available at <http://www.whitehouse.gov>.

2 For an overview of the current state of affairs see La Fayette, L.A. de, 2008, "Oceans Governance in the Arctic", *The International Journal of Marine and Coastal Law* 23: 531–566; and Potts, T. and Schofield, C.H., 2008, "Current Legal Developments: the Arctic", *International Journal of Marine and Coastal Law* 23: 151–176.

3 For a short analysis of the declaration see Winkelmann, I., 2008, "Fixed Rules of Play for Dividing Up the Arctic Ocean", *SWP Comments* 18 (July), available at <http://www.swpberlin.org>.

4 Cf. Griffiths, F., 2005, "New Illusions of a Northwest Passage", in: Nordquist, M.H., Moore, J.N. and Skaridov, A.S., (Eds), *International Energy Policy, the Arctic and the Law of the Sea*, Martinus Nijhoff, Leiden, pp. 303–319, at 309 ff.

5 The Russian as well as the other arctic States' efforts, if successful, could lead to the functional nationalisation of most of the Arctic Ocean seabed, excluding all other interested States from the exploitation of the unexplored resources. See Macnab, R., Neto, P. and van de Poll, R., 2001, "Cooperative Preparations for Determining the Outer Limit of the Juridical Continental Shelf in the Arctic Ocean", *IBRU Boundary and Security Bulletin* 9: 86–96. For an in-depth analysis of this study and a different view on the interpretation of UNCLOS Art. 76, para. 6 see Proelß, A. and Müller, T., 2008, "The Legal Regime of the Arctic Ocean", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 68: 651–688.

6 On 20 November 2008, the European Union adopted a Communication on the European Union and the Arctic Region as a first step towards an EU Arctic Policy. The Communication is available at <http://eur-lex.europa.eu>.

7 Cf. Koivurova, T., 2008, "Alternatives for an Arctic Treaty – Evaluation and a New Proposal", *Review of European Community and International Environmental Law* 17: 14–26.

8 For a review of the opportunities and drawbacks of an arctic environmental protection treaty see Nowlan, L., 2001, *Arctic Legal Regime for Environmental Protection*, IUCN Environmental Policy and Law Paper No. 44, at 58–60, available at <http://www.ppl.nl>.

IUCN / WCC-4

At the Crossroads of Conservation

Long considered one of the largest and most influential forums for developing policies and programmes to address conservation and sustainable development issues, the 4th World Conservation Congress (WCC-4)¹ of the International Union for Conservation of Nature (IUCN) gathered an unprecedented 8,000 participants together in the city of Barcelona from 5–14 October. The first five days of the Congress featured the Conservation Forum, at which over 800 short events were presented to increase dialogue amongst specialists from the conservation community, governments, UN organisations, NGOs, academia and the private sector. Thereafter the IUCN Members' Assembly² adopted IUCN's four-year work programme, elected its officers, and adopted 136 member-submitted resolutions and recommendations. Over 1,000 member organisations attended the meeting whose theme was "a diverse and sustainable world".

During the opening ceremony, IUCN's President Valli Moosa outlined the urgency with which the world needs to act to make the transition to sustainability saying, "Conservation needs to be everyone's business and put at the heart of all sectors of society". Princess Maha Chakri Sirindhorn of Thailand had the honour of passing the Congress baton from Bangkok where the event was held in 2004 on to Spanish Prince Felipe of Asturias, who then welcomed delegations from 177 countries to Barcelona and urged all in attendance to "Work for Hope". Spanish Environment Minister Elena Espinosa said that "Conservation of nature must be the policy itself." IUCN Director General, Julia Marton-Lefèvre, asked for "a mass movement for nature". As the keynote speaker of the ceremony, Nobel Laureate Muhammad Yunus, Director of the Grameen Bank which delivers diverse services to the world's poorest people, gave a moving address about creating and being part of self-sustaining movements. He appealed for "social business" to be at the heart of a "circular economy".

The Forum

Media mogul and entrepreneur-philanthropist Ted Turner officially opened the Forum and added further impetus and meaning to the work of IUCN saying: "We need a renaissance, like the one we had after the Dark Ages. We have communications. We have knowledge." He added, "without changes in the next 50 years, we will be burning in hot hell".

The Forum was a very busy and synergistic event. Participants attended expert panels, presentations, workshops, roundtable discussions, training courses, and art, film and music exhibitions. IUCN organised these events through a series of "journeys" on focused disciplines. For example, the Law and Governance Journey alone included over 40 events covering climate, energy, forests, genetic resources, marine, rights and principles, soils, trade,

water, and regions. Many members used the opportunity to showcase new initiatives and to make public commitments on environmental and conservation action.

New initiatives created at WCC-4:

- Climate change mitigation and adaptation (The MacArthur Foundation, US\$50 million);
- Worldwide biodiversity (The Mohammad Bin Zayed Species Conservation Fund, €25 million);
- A five-year extension of the Sustainability Fellows Programme (The Alcoa Foundation, US\$9 million);
- Renewal of national support for IUCN's programme 2009–2012 (France, €7 million);
- Phase Two of the Water and Nature Initiative to improve river basin management (Multiple donors);
- Connect2Earth, a social platform network to engage youth (Nokia, WWF and IUCN);
- Improved women's access to electricity and reduced dependence on biofuels (ENERGIA and IUCN);
- Integration of biodiversity issues into their development policy (Francophone governments);
- Protection of 80 million new hectares (Russia);
- Commitment to stop clearing old-growth forest areas (Sumatran provinces);
- With Google, IUCN launched an interactive map of marine protected areas;
- long-term streaming system to connect anyone, anywhere, to a coral reef in Belize (National Geographic and the UN Foundation);
- IUCN created the International Association of Wildlife Magazines to coordinate conservation campaigns;
- Announcement: zero net deforestation by 2020 (Government of Paraguay);
- Summit at Manado, Sulawesi to launch the Coral Triangle Initiative for coral reefs (regional heads of state);
- Globally relevant sustainable tourism criteria (UN Foundation, the Rainforest Alliance, UNEP and the UN World Tourism Organization).

Members' Assembly

Preparatory work for the Members' Assembly, both in the early days of the Forum and in the respective Committees, began well in advance of the actual sessions.³

Julia Marton-Lefèvre presented her report⁴ on the work of IUCN since 2004 in Bangkok. She cited the unique relationship between members, Commissions and the Secretariat to respond to increasing demand for the organisation's competencies, as well as the ability of IUCN to provide credible and trusted knowledge, and to convene and build partnership for actions, the global-to-local and local-to-global reach of its activities, and its influence on standards and practices.

Addressing implementation of the 80 Resolutions and 38 Recommendations from Bangkok, the Director General went on to outline a status report⁵ and acknowledged that a number had been completed, many were ongoing and more were in the initiation phase. Some delegates, upon reviewing the list, were of a different opinion, citing the need for greater involvement of members in tracking and implementing resolutions.

Over the intersessional period, IUCN used a strategy based on knowledge and empowerment, for the delivery of

the 2005–2008 Programme. It has focused on governance and increasing decision makers' level of attention to the lack of progress toward achieving sustainable development. IUCN's new "meta-project" approach has resulted in collaboration across the Union on large-scale initiatives including Livelihoods for Landscapes, Mangroves for the Future, Conservation for Poverty Reduction and the Water and Nature Initiative.

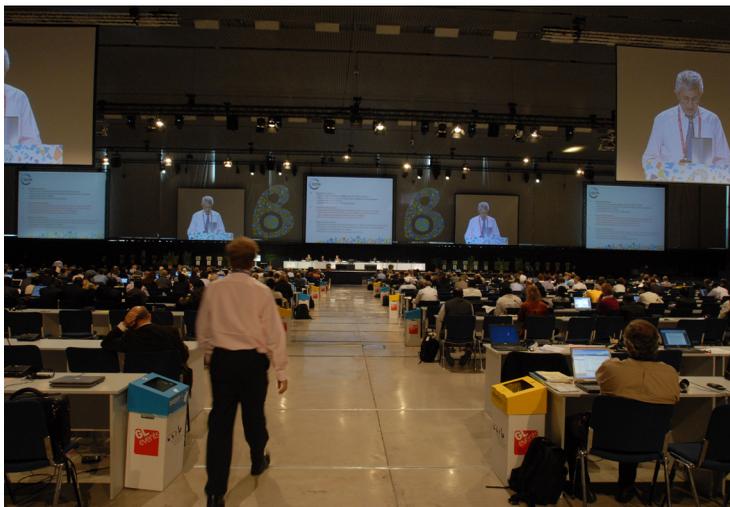
The new IUCN Programme 2009–2012⁶ "Shaping a sustainable future" was a focal point of the Assembly. Following the most extensive consultation process ever, the Union's *One Programme* framework integrates planning, implementing, monitoring and evaluating the work undertaken by the Commissions and the Secretariat on behalf of its members. With biodiversity conservation at the core of its work, IUCN has devised a thematic approach in four key areas⁷ to enhance the engagement of members and contribution to internationally agreed targets to reduce the rate of biodiversity loss and to apply an environmental perspective to achieving sustainable development goals.

IUCN's six Commissions⁸ reported on their intersessional work⁹ under the *One Programme* concept.¹⁰ Aside from the Species Survival Commission (SSC) and the World Commission on Protected Areas (WCPA), where there is a high overlap between IUCN members and Commission members, most IUCN members are not actively involved in the work of Commissions. Considering the integral role of the Commissions in furthering the organisation's work, increased communication must take place for an effective flow of information across present structures to fulfil the Union's potential.

The Commissions also proposed their draft mandates. The Mandate of the Commission on Environmental Law (CEL) as proposed presented the following priorities:

- Strengthen Specialist Groups to advance and implement the IUCN Programme;
- Recognise collaborating centres of environmental law;
- Support the IUCN Academy of Environmental Law;
- Provide technical assistance (through all components of IUCN) for adoption of national or local legislation and policy;
- Promote "good governance" and the rule of law by working with governments, UN institutions and other stakeholders;
- Support the Judiciary to strengthen its capacity to enforce and develop the rule of law;
- Promote synergies among MEAs;
- Strengthen legal foundations of conventions by working with IUCN Commissions;
- Promote and enhance international legal instruments;
- Encourage work within the regions;
- Investigate and recognise new needs;
- Promote links between IUCN Programmes by developing new programmes with members in order to serve membership better.

Other formal business taken by the Assembly included amendments to the Statutes and Rules of Procedure, reports from Regional Committees, and the debate and adoption of resolutions and recommendations. Owing to the number of proposals, the President made an initial effort



A view of the Members' Assembly

Courtesy: IUCN/Group J. Muntaner

to bundle motions for consideration by the plenary. When this caused confusion, each motion was tabled and voted on separately, enabling more effective discussion and interaction, but increasing strain to a very tight schedule. Ultimately, delegates approved a total of 136 resolutions and recommendations,¹¹ including the following resolutions with environmental policy and/or legal aspects:

- 4.030: Promoting transparency to achieve sustainable fisheries;
- 4.031: Achieving conservation of marine biodiversity in areas beyond national jurisdictions;
- 4.034: IUCN's engagement on Antarctica and the Southern Ocean;
- 4.033: Arctic legal regime for conservation;
- 4.045: Accelerating progress to establish marine protected areas and creating marine protected area networks;
- 4.052: Implementing the UN Declaration on the Rights of Indigenous Peoples;
- 4.056: Rights-based approaches to conservation;
- 4.063: The new water culture – integrated water resources management;
- 4.064: Integrated coastal management in the Mediterranean – the Barcelona Convention;
- 4.065: Freshwater biodiversity conservation, protected areas, and management of transboundary waters;
- 4.066: Improving the governance of the Mediterranean Sea;
- 4.070: Sustainable mountain development;
- 4.071: Forest fire recovery and national park protection;
- 4.076: Biodiversity conservation and climate change mitigation and adaptation in national policies and strategies;
- 4.077: Climate Change and Human Rights; ➤

- 4.081: Equitable access to energy;
- 4.085: Establishing the 1% Earth Profits Fund and Sustaining Government Conservation Finance;
- 4.091: Strategic environmental assessment of public policies, plans and programmes as an instrument for conserving biodiversity;
- 4.092: Maintenance of ECOLEX: the gateway to environmental law;
- 4.093: Legal aspects of the sustainable use of soils;
- 4.095: African Convention on the Conservation of Nature and Natural Resources;
- 4.096: The International Academy of Environmental Law;
- 4.097: Liability and compensations for environmental crimes during armed conflicts;
- 4.100: Military activities detrimental to the environment;
- 4.101: International Covenant on Environment and Development.

Additionally, the Assembly adopted the following resolutions on internal matters:

- 4.001: Strengthening the links between IUCN Members, Commissions and Secretariat;
- 4.002: Coordination of the IUCN Programme;
- 4.003: Strengthening IUCN's Regional and National Committees;



Back: Wolfgang Burhenne embraces the newly elected President Ashok Khosla
Front: Director General Julia Marton-Lefèvre and outgoing President Valli Moosa

Courtesy: Russell Mittermeier

- 4.005: Mainstreaming gender equity and equality within the Union;
- 4.007: Changing IUCN's Statutory Regions;
- 4.008: Including local and regional government authorities in the Union;
- 4.009: Transparency of the IUCN Council;
- 4.010: Implementation of Congress Resolutions;
- 4.013: Sustainable use and accountability;
- 4.039: Cross-Commission collaboration on sustainable use of biological resources.

The Assembly adopted a number of essential amendments, including general changes to the Rules of Procedure

concerning the election of Commission Chairs. More critically, they amended Rules 49 and 52, to require members to have at least five co-sponsors when submitting a motion prior to the Assembly, and at least ten co-sponsors when submitting a motion at the Assembly. An amendment to the Statutes formally rescinded a 1990 Assembly decision which changed the standard name of IUCN from "The International Union for Conservation of Nature" to "IUCN – the World Conservation Union". Following the new resolution, IUCN's official name is now "The International Union for Conservation of Nature and Natural Resources". Other amendments broadened the territorial scope restriction on National and Regional Committees, which formerly required National and Regional Committees "to implement the Programme of IUCN within their State or Region". The 2008 decision deleted the last five words.

Operationally, the Assembly approved the new 2009–2012 Programme, as well as mandates for the six Commissions,¹² a report of the Programme Committee, and the Financial Report 2004–2008.

The Assembly also elected the Union's officers.¹³ Ashok Khosla was elected as President. In his acceptance speech,¹⁴ he committed that in the coming years, IUCN will (i) "assume responsibility for the mission to protect the biosphere with particular focus on the conservation of biodiversity in all its manifestations"; (ii) build on its

excellent initiative to analyse the economics and distributive issues of conserving or not conserving biodiversity and establish a World Commission to investigate the deeper implications of "Green Carbon" options; (iii) bring "clarity into the basis for establishing appropriate relationships between IUCN and business"; (iv) create a better balance between the three pillars of biodiversity; and (v) act as a facilitator between all parts of the Union, the Council, the Members, the Commissions and the Secretariat.

Kurt Ramin was elected (unopposed) as Treasurer; Sheila Abed was elected (unopposed) to her second term as Chair of CEL; Keith Wheeler was elected chair of CEC; Nikita Lopoukhine of WCPA; Piet Wit of CEM; Aroha Mead of CEESP; and Simon Stuart of SSC.

The Harold Jefferson Coolidge Medal for outstanding contributions to conservation of nature and natural resources was awarded to Robert Goodland, former Environmental Advisor to the World Bank. The John C. Phillips Memorial Medal (awarded since 1963) was given to José Aristeo Sarukhán Kermez, former Dean of the National University of Mexico. IUCN also bestowed Honorary Membership upon Larry Hamilton, Professor Emeritus of Natural Resources at Cornell University and an active member of WCPA. Additionally, former CEL Chair and IUCN Legal Advisor, Parvez Hassan received the Wolfgang E. Burhenne Award for his outstanding contributions to the field of environmental law.

At the end of the Assembly, delegates heard final words from the outgoing President, the acceptance speech of the

new President outlining his priorities, overall impressions and words of wisdom from one of IUCN's oldest and dearest leaders, and words of hope and determination from one of IUCN's youngest leaders.¹⁵

Closing, the Director General reflected on the wonderful and busy days of the Congress, thanked all of the sponsors, and acknowledged concerns she had heard over previous days as to how and where IUCN can improve the relationship between its Secretariat, Commissions and Members. Referring to the "triple helix" of IUCN she said the following:

I am determined that, by working together, we can and will enhance Secretariat services to Members and involve all parts of the IUCN world in carrying out our mission. Each of us has an important role to play...:

1. *I will take your resolutions seriously and keep you informed of progress.*
2. *I have asked all regional and thematic directors to engage members as a top priority.*
3. *We will continue to value the contributions received from the Commission membership.*
4. *I will continue to seek creative and diverse sources of funding for our work.*

As IUCN enters its seventh decade facing organisational and environmental challenges, the Union must transform itself, and seek to change the way in which the conservation community engages the rest of the world. The 4th World Conservation Congress offered a glimpse into the future role of conservation at the heart of global

discourse. Now, the most difficult task is to use this momentum efficiently and effectively to alter contemporary perceptions of the value of nature. (ATL)

Notes

1 To access the official website of the Congress go to: http://www.iucn.org/congress_08/.

2 All official documentation for the Members' Assembly is posted online at: http://www.iucn.org/congress_08/assembly/ under Related Documents.

3 Prior to Barcelona the Resolutions Working Group (RWG) had been tasked to vet over 150 submitted motions. A number of member organisations complained that the RWG had misinterpreted the eligibility criteria for motions, excluding some major amendments to key IUCN documents and some valid motions. The Resolutions Committee worked long hours to resolve the issues, eventually tabling the particular motions.

4 Published as Congress Paper CGR/2008/8.

5 Published in Annex 2 of Congress Paper CGR/2008/8 rev.

6 The full text of the IUCN Programme 2009–2012 is available online at: http://cmsdata.iucn.org/downloads/iucn_programme_2009_2012_dfc.pdf.

7 Changing the climate forecast, naturally energising the future, managing ecosystems for human wellbeing, and greening the world economy.

8 The six Commissions of IUCN are: Education and Communication (CEC), Ecosystem Management (CEM), Environmental, Economic and Social Policy (CEESP), Environmental Law (CEL), Protected Areas (WCPA) and Species Survival (SSC).

9 The work of Commissions is reported annually in the Progress and Assessment Reports available at http://cms.iucn.org/about/work/global_programme/index.cfm.

10 A summary of the Review is published in Annex 3 of CGR/2008/8.

11 The final texts of resolutions and recommendations can be accessed online at: http://www.iucn.org/congress_08/assembly/policy/.

12 Available online at www.iucn.org.

13 The full results of the ballot process are online at: http://cmsdata.iucn.org/downloads/elections_2008.pdf.

14 The full text of President Ashok Khosla's acceptance speech is published online at: http://cmsdata.iucn.org/downloads/ak_acceptance_speech_to_iucn.pdf.

15 Text of these speeches available from icel@intlpol.org.



IRENA

Renewable Energy Agency Established

The culmination of an initiative of the Governments of Germany, Denmark and Spain, 122 national delegations and two national observer countries and 40 observer organisations met in January 2009 in Bonn, Germany to finalise the establishment of a new international agency, to be known as the International Renewable Energy Agency (IRENA). The meeting was chaired by Heidemarie Wieczorek-Zeul (Germany), Chair, and vice-Chairs Don Miguel Sebastián (Spain) and Hans-Jørgen Koch (Denmark).¹

Although established using UN Rules, and frequently referring to UN Principles, IRENA is not at present a UN initiative, but its Council is specifically authorised "to conclude agreements on behalf of the Agency establishing appropriate relations with the United Nations and any other organisations whose work is related to that of the Agency". Primary support for the initiative came overwhelmingly from Europe and Africa, with 43 European countries, and 40 African represented at the conference, and a total of 39 other countries represented by national delegations. Eighty percent of the 75 countries that formally signed the IRENA Statutes (adopted at the conference) were from Europe or Africa.

The statute creating IRENA describes the Agency as "inspired by [the negotiators'] firm belief in the vast opportunities offered by renewable energy for addressing and gradually alleviating problems of energy security and volatile energy prices", and focused on the desire "to promote the widespread and increased adoption and use of renewable energy with a view to sustainable development". It specifically notes other key objectives of the new agency: (i) to reduce greenhouse gases, (ii) stimulate sustainable economic growth, (iii) create employment, and (iv) provide decentralised access to energy and expand the range of energy access. It espouses a specific shared "belief in the vast opportunities offered by renewable energy for addressing and gradually alleviating problems of energy security and volatile energy prices" and seeks to promote coordination and cooperation among its member countries in promoting this belief.²

The Statute of IRENA, adopted in this meeting, represents an intentional decision of the parties not to adopt a new international convention or treaty. It is more appropriately seen as a multilateral partnership among countries, "based on the principle of the equality of all

its Members and shall pay due respect to the sovereign rights and competencies of its Members in performing its activities".³ As such, it allows Member governments, when acting through its Assembly, to control the admission of other countries as new Members. Financially, it has followed the rule of other international agencies, calling for its Members to bear the costs of operation through "mandatory contributions of [IRENA] Members, which are based on the scale of assessments of the United Nations, as determined by the Assembly", as well as voluntary contributions and other sources.



In addition to its primary goal of promoting widespread and sustainable use of renewable energy,⁴ the Agency is also committed to integration of other environmental objectives, including promotion of:

*the contribution of renewable energy to environmental preservation, through limiting pressure on natural resources and reducing deforestation, particularly tropical deforestation, desertification and biodiversity loss; to climate protection; to economic growth and social cohesion including poverty alleviation and sustainable development; to access to and security of energy supply; to regional development and to inter-generational responsibility.*⁵

IRENA's basic operating framework is generally similar to that of most international conventions and UN statutory bodies, calling for an Assembly (annual meeting of delegates of all Members), Council (smaller body which handles oversight, subject to ratification by the Assembly) and Secretariat. Its Statutes contain a few provisions that are of special legal interest, however.

One such unusual choice of the negotiators has been to create a new concept of consensus, which is applicable to the meetings of IRENA's Assembly. In general, when used procedurally, the term "consensus" means "over no objection". A decision is adopted by consensus when all countries agree. Hence, international agencies and bodies that are mandated to operate by consensus may be prevented from acting by the objection of a single member. When an international instrument is designed to act even in the absence of consensus, countries may be less willing to ratify that instrument, knowing that a decision may be adopted over their objection, creating potentially

a limit on their national sovereignty. Rather than clearly stating that decisions may be adopted without consensus, however, IRENA's negotiators have instead stated that the IRENA Assembly will be considered to act "by consensus" unless at least two members have formally objected to the decision.⁶ In essence, each country that becomes a Member of the Assembly risks the possibility that it will be a lone objector and therefore forced to accept the decision that they oppose as a "consensus" decision. Given that the primary work of the Assembly will be focused on directing the activities of the Agency, there will probably be few decisions that could actually affect national sovereignty, however, the intentional decision to erode the consensus concept may be indicative of a trend in international decision making.⁷

IRENA will enter into force when ratified by 25 countries. Given the current number of EU countries and associate countries, coupled with the large number of African countries (sometimes able to ratify such an instrument more quickly), it is anticipated that this milestone will be achieved relatively quickly.

Next steps for IRENA involve "tooling" the agency for operation. This will include selecting a host country for the secretariat and other international preparatory actions, described as:

*the necessary preliminary steps in order to ensure the early presence, profile and influence of the Agency in the international renewables field; and... the necessary activities in order to ensure the effective preliminary implementation of the objectives of the Statute.*⁸

Both Austria and the United Arab Emirates have offered to be the seat of the Agency's Secretariat. Austria also offered to host the first meeting of the preparatory body, this spring. Egypt has offered to host the second, tentatively set for June. (TRY)

Notes

1 These three are the chairs that signed the final Report of the Conference. Other chairs and vice-chairs were listed in the meeting Agenda, for various parts of the meeting.

2 Conference Report, Conference on the Establishment of the International Renewable Energy Agency, available online at http://www.irena.org/downloads/Founconf/IRENA_FC_conference_report_26_01_2009.pdf. Quoted material from preambular provisions.

3 Statutes Article II. Unless otherwise stated all quotations from this point are from the Statutes of IRENA, which are reproduced as Annex 9 of the Conference Report.

4 In Article III, the Statutes include hydropower; as well as bioenergy; geothermal energy; ocean energy, including *inter alia* tidal, wave and ocean thermal energy; solar energy; and wind energy within its definition of "renewable energy".

5 Article II.

6 Article IX.F and H, and elsewhere.

7 Similar proposals put forward by the same countries have been made in discussions of revising the operations of the FAO Conference and other bodies. See, *Independent External Evaluation of FAO*, found at <http://www.fao.org/pbe/pbee/en/219/index.html> at pages 175–194. If a country's objection is overridden in this way, the country's only recourse will be either to accept the decision or withdraw from IRENA, as there is no provision for the filing of reservations in instruments which operate by "consensus". IRENA, by redefining consensus, has allowed itself to follow this practice, even though its "consensus" provisions could theoretically result in a type of sovereignty infringement that is normally avoided through the use of a formal "reservation" process.

8 Resolution on Establishing a Preparatory Commission for the International Renewable Energy Agency (IRENA), accessible as Annex 11 of the Conference Report.